

THE CONVICTED CHILD SEX OFFENDER NEARBY: DOES PRIVATE NUISANCE PROVIDE A REMEDY FOR NEIGHBORS?

Henry L. Stephens, Jr.*

I. INTRODUCTION

"Since English law began its development in a landed society, it was natural that its primary purpose was the protection of real property."¹ The law of nuisance and the law of trespass were developed to complement each other; while trespass provided security against direct invasions of possession, nuisance provided protection against indirect injuries to land or its use and enjoyment.² In early cases, the formulation of the tort presupposed that the plaintiff was entitled to absolute protection from activities deemed to be nuisances, without regard to the social utility of the defendant's conduct.³

However, by 1960, Kentucky courts recognized that the utility and reasonableness of the defendant's conduct were vital considerations in determining whether a nuisance was deemed to exist. In *Louisville Refining Company vs. Mudd*, 339 S.W.2d 181 (Ky. 1960), Kentucky's highest court ruled that:

[w]hat would be a substantial interference with the enjoyment of life in a residential area might very well be perfectly normal and inescapable in an industrial section. The problem becomes one of measuring what is normal and what is abnormal interference with life in an industrial area . . . Though negligence upon part of defendant need not be proved, whether defendant was doing as much as reasonably was possible in the way of careful operation becomes the measure of whether there has been substantial interference with plaintiff's enjoyment of life.⁴

* Former Dean and Professor of Law, NKU Salmon P. Chase College of Law. The author wishes to thank Eli Krafte-Jacobs, a 2016 graduate of Salmon P. Chase College of Law, and Brenden J. Sullivan, a 2017 graduate of Salmon P. Chase College of Law, for their invaluable research and editing assistance.

1. R. Makowski, *Torts: The Nature of Nuisance*, 33 MARQ. L. REV. 240, 240 (1950).

2. *Id.* at 241.

3. *Id.* at 242 ("The presence or absence of a nuisance therefore is not measured by its cause, but by its effect. It is a condition and not a type of conduct. A nuisance is an interference with the use and enjoyment of another's land; if there is substantial interference an actual nuisance results without regard to the type of conduct causing the annoyance.").

4. *Louisville Ref. Co. v. Mudd*, 339 S.W.2d 181, 185-86 (Ky. 1960) (quoting *Jedneak v. Minneapolis Gen. Elec. Co.*, 4 N.W.2d 326, 328-329 (Minn. 1942)); *see also*, John S. Palmore,

Referencing the balancing test employed by the original Restatement of Torts,⁵ the *Mudd* holding explained as follows:

Without fully subscribing to the serpentine approach of the Restatement of the Law of Torts (Ch. 40, paragraphs 822–831), we accept the proposition that the existence of a nuisance must be ascertained on the basis of two broad factors, neither of which may in any case be the sole test to the exclusion of the other: (1) the reasonableness of the defendant's use of his property, and (2) the gravity of harm to the complainant. Both are to be considered in the light of all the circumstances of the case, including the lawful nature and location of the defendant's business, the manner of its operation, and such importance to the community as it may have; the kind, volume, time and duration of the particular annoyance; the respective situations of the parties; and the character (including applicable zoning) of the locality. The extreme limits are therefore, on the one hand, the reasonable use causing unreasonable damage and, on the other hand, the unreasonable (or negligent) use causing damage that is more unnecessary than severe.⁶

The Kentucky General Assembly codified Kentucky's law of nuisance in 1991.⁷ Citing Kentucky statutory law,⁸ the United States District Court for the Eastern District of Kentucky stated in *Fletcher v. Tenneco, Inc.*⁹ that "Kentucky's codification of the common law of nuisance frames the inquiry concerning the gravity of harm as a determination of whether a defendant's use of its property

Kentucky's New Nuisance Statute, 7(1) J. MIN. L.& POL'Y 1, 2 (1991-1992) [hereinafter "Palmore"] (citing and discussing *Mudd*, 339 S.W.2d 181 (Ky. 1960)).

5. RESTATEMENT OF TORTS § 826 Nuisance (1934).

6. *Mudd*, 339 S.W.2d at 186-87. The Kentucky court accepted, without further analysis, the ALI's determination that a nuisance exists *vel non*, only after balancing the offending conduct against its utility. See Jeff L. Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 IOWA L. REV. 775,782 (1986) [hereinafter "Lewin"] ("The ALI, however, failed to explain why the initial question of whether a nuisance exists or not should depend upon the outcome of the balancing test with the problem of inappropriate injunctions had already been dealt with through the balancing test in the chapter on Injunctions. Nevertheless, Dean Prosser confirms that the existence of a nuisance depends upon balancing the relative positions of plaintiff and defendant.").

7. KY. REV. STAT. ANN. § 411.500 (West 2016) ("It is the intent of the General Assembly to restate and codify in KRS 411.500 to 411.570 the common law of nuisance as existing in the Commonwealth on May 24, 1991.").

8. KY. REV. STAT. ANN. § 411.550(2) (West 2016).

9. *Fletcher v. Tenneco, Inc.*, 816 F. Supp. 1186 (E.D. Ky. 1993), op. withdrawn, 1993 U.S. Dist. LEXIS 3054 (E.D. Ky. Feb. 22, 1993).

would ‘substantially annoy or interfere with the use and enjoyment of property by a person of ordinary health and normal sensitivities.’”¹⁰

While it is axiomatic that the tort of nuisance protects property and its use and enjoyment, the affected property owner may also have a claim for personal injuries, including claims for fear, distress, or even PTSD, causally related to the nuisance.¹¹ Kentucky law makes clear that while such claims may be joined in a nuisance action, they must be pled and proved using traditional tort theories such as negligence or intentional tort.¹²

This article explores whether the law of nuisance, as it has evolved over the centuries, is yet flexible enough to provide a remedy to homeowners who see their property use and property values diminished by neighboring activity that may have remained largely hidden until the 21st century: the neighbor nearby becomes a convicted sex offender, is put on the public sex offender registry, and everyone knows it, and is talking about it.

Not surprisingly, as of this writing, there are no reported cases analyzing the applicability of the law of private nuisance to remedy such harms.¹³ Accordingly, cases where the law of nuisance has been held applicable will be analyzed and applied by analogy to determine if this venerable tort provides a remedy for this increasingly prevalent problem. Cases from various jurisdictions will be analyzed to determine if the harms identified as nuisances in such cases would also be so categorized under Kentucky’s legislatively codified nuisance scheme. Throughout the article, such cases will be compared to the Restatement of Torts to determine whether jurisdictions that adhere to a strict Restatement formulation of the law of nuisance would reach a contrary result. Finally, in the event that the substantive law supports a justiciable case for private nuisance, the article explores the legal underpinning and practicality of the various remedies available. The article concludes by asserting that while the facts

10. *Tenneco, Inc.*, 816 F. Supp. at 1189 (citing Ky. REV. STAT. § 411.550(2) (2006)).

11. See *infra* text accompanying notes 23-24.

12. See Palmore, *supra* note 4, at 5, stating:

KRS 411.560 (3) specifically prohibits any reward “for annoyance, discomfort, sickness, emotional distress, or similar claims.” It further provides that if a claim for personal injury or damage is asserted in the same proceeding, it must be resolved on the basis of applicable principles independently of whether a nuisance is found to exist. (citations omitted). This is in keeping with the fundamental premise that the gravamen of a nuisance is damage to property rather than persons. Otherwise, the factors that are required for consideration in determining the existence of nuisance would be largely inappropriate.

13. See *infra* text accompanying notes 113-119.

asserted herein to allegedly justify recovery under the law of nuisance are novel, existing case law supports extending the law to protect property owners suffering diminution in value and loss of use of their property attributable to its proximity to a convicted sex offender.

**II. How Do NEIGHBORS BECOME AWARE OF THE NEIGHBORING SEX OFFENDER?
COMMUNITY NOTIFICATION PROCEDURES FOR
CONVICTED SEX OFFENDERS – A BRIEF OVERVIEW**

Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act in 1994.¹⁴ The Act mandated that all states enact programs requiring those offenders convicted of a criminal offense against a minor or a sexually violent offense to register a current address with state or local authorities.¹⁵ It also defined the length of required registration based upon previous number of convictions, the nature of the offense, and the characterization of the offender as a sexual predator.¹⁶

“Community notification laws are relatively recent legislative enactments that followed state statutes requiring convicted sex offenders to register with the state upon release from incarceration.”¹⁷ As many as 47 states now require sex offenders to register with local authorities.¹⁸ As mandated by the federal statutes, Kentucky statutorily required certain sexual offenders to register with local law enforcement officers upon their release from imprisonment.¹⁹ As with most other states, the Kentucky law required that offenders must include their name, local address, fingerprint, and photograph with the information to be updated at least every two years.²⁰ While Kentucky complied with the Wetterling Act’s minimum registration period of ten years, thereby meeting the minimum standards required by the federal Act,²¹ Kentucky went further, as did

14. 42 U.S.C. § 14071 (2000) (repealed 2006).

15. *Id.* §14071(a)(1)(A).

16. *Id.* § 14071(b)(6)(A) (discussed in detail in Alicia A. Sterrett, *The Case for Kentucky Sex Offenders: Residency Restrictions and Their Constitutional Validity*, 96 Ky. L.J. 119, 120 (2007-2008) [hereinafter, “Sterrett”]).

17. Chrisandrea L. Turner, Note, *Convicted Sex Offenders v. Our Children: Whose Interests Deserve the Greater Protection?*, 86 Ky. L. J. 477, 479 (1997-1998).

18. *Id.*

19. Ky. REV. STAT. ANN. §17.510 (West 2016).

20. Ky. REV. STAT. ANN. §§ 17.510(3)-(4) (West 2016).

21. Megan’s Law; Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended, Att’y Gen. Order No. 2196–98, 64 Fed. Reg. 572, 576 (Jan. 5, 1999).

a number of states,²² by increasing the registration period from 10 to 20 years, and by imposing residency restrictions that bar convicted sex offenders from living within 1,000 feet of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility.²³

Accordingly, in this age of instant communication, it is no longer the case that notifications arrive surreptitiously in the mail or simply by word-of-mouth. What with Facebook, Instagram, Twitter, LinkedIn and whatever will come next, notification is instant, widely publicized, and will be the source of consternation and gossip in the neighborhood. To emphasize, everyone will know everyone.

III. THE PROBLEM FOR NEIGHBORS

Assume for the sake of discussion that you are a hard-working, college-educated professional who has scrimped and saved to purchase your “dream home” in a nice secure neighborhood in order to provide the best environment you can afford for your family. You find the ideal home in an upscale neighborhood and purchase it for \$450,000. Several years after you move in, a couple moves into the neighborhood; they seem nice enough, keep their property well-manicured and generally mind their own business.

Coming home from work one evening, you see three police squad cars in their driveway. You are thinking perhaps a home invasion robbery, vandalism, or perhaps at worst, a charge of embezzlement from one of their employers. Needless to say, the neighborhood is abuzz. You are advised that he was immediately terminated from his employment. The next morning when you drop your child off at daycare, you are shocked to see photographs of this neighbor posted on their bulletin board, complete with name and address with the notation “charged as a sex offender – child pornography-under age 3.” The information is now in the community. Shortly thereafter, the neighbor pleads guilty, is given a fine, lengthy probation and registration on the Kentucky Sex Offender Registry for no less than 20 years.

Several weeks later, you decide to have a family cookout for friends with games for the children. Several of your invited friends call to regretfully express concern over their children playing outdoors close to a convicted sex offender. You have the same experience with friends several weeks later when their children are invited to your child’s birthday party. In fact, a number of your friends have said that they have concerns about their children being at your house under any circumstances. Your children have inquired why their friends

22. Sterrett, *supra* note 16, at 123.

23. Ky. REV. STAT. ANN. §17.545 (West 2016).

won't come to their house. Distraught and anxious, your sleep is disturbed by the current situation and you begin to worry whether you will have difficulty selling your home given its proximity to the offender. The first thing you do is to "Google" the problem. You discover research studies that have shown that an affected property owner may suffer a diminution in value of anywhere between 9% and 20% when the property is ultimately sold.²⁴ Panicking, you seek legal advice.

IV. THE LAWYER'S ANALYSIS

A. *Is the Defendant's Conduct Cognizable Under the Law of Private Nuisance in Kentucky?*

After meeting with the client, and ascertaining that he appears deeply distressed, the lawyer prepares to analyze whether the law of private nuisance in Kentucky might afford a remedy. She focuses on *Mudd*'s requirement that the existence of a nuisance must be ascertained on the basis of two broad factors, neither of which may in any case be the sole test to the exclusion of the other: (1) the reasonableness of the defendant's use of his property, and (2) the gravity of harm to the complainant.²⁵

Focusing on the first factor, the reasonableness of the defendant's use of his property, she is immediately faced with an ambiguity.²⁶ The only "use" defendant is making of his property is his living there.²⁷ While the conduct that resulted in him being placed on the Sex Offender Registry may (or may not) have occurred at his residence, whether it did or not, your client was unaware of any offending activity until such time as public authorities notified the community as they are required to do.²⁸ So, counsel questions whether the *harm* suffered by her client is the putative defendant's child pornography activity itself, or is it rather the legalized societal stigma placed upon the defendant by the judicial system after the offending conduct has occurred and been adjudicated? Counsel's research discloses that no reported cases have addressed the issue. Therefore, as a case of first impression, her presentation of the case must rest upon the hollow blocks of analogy, rather than the poured

24. See *infra* text accompanying notes 115-120.

25. *Mudd*, 339 S.W.2d at 186.

26. Is the offensive "act" of the defendant his child pornography viewing activities or, alternatively, his having been listed on the sex offender registry?

27. Nevertheless, it is his continued "use" of his property in this matter that arguably has caused plaintiff's property to be diminished in value thereby.

28. See *supra* notes 17-23.

concrete of *stare decisis*. She starts her research broadly, hoping to find clues to narrow the scope of analysis.

According to the Restatement (Second) of Torts “the conduct necessary to make the actor liable for either a public or a private nuisance may consist of (a) an act; or (b) a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the interference with the public interest or the invasion of the private interest . . . ”²⁹ The Comments to the Restatement attempt to elucidate the type of “act” undertaken by the defendant that may give rise to liability in Nuisance:

In the ordinary case, [nuisance liability] arises because one person’s acts set in motion a force or chain of events resulting in the invasion. The acts may be a direct and immediate cause of the invasion, as in the case where the noise from the actor’s operation of a riveting machine is the thing complained of, or they may be an indirect cause of the invasion, as in the case where the offensive smells from a garbage pile or other physical condition created by the actor are the thing complained of. So far as the actor’s liability is concerned, it is immaterial whether he does the acts solely in the pursuit of his own interests or whether he is acting for another, gratuitously, under contract or as the other’s servant or agent. It is enough that his acts are a legal cause of the invasion.³⁰

While the Restatement text and comments appear encouraging, as one commentator has opined, “[i]n general, merely living somewhere is not sufficient conduct to constitute a nuisance. Additionally, basing a nuisance claim on a person’s status (such as race or gender) would generally be unsuccessful.”³¹ Moreover, as Professor John Copeland Nagle explained in his well-reasoned article:

[v]irtually anything could constitute a nuisance because virtually anything could interfere with somebody’s use and enjoyment of her land. The reported cases alone contain claims that a church, a group home for those suffering from a contagious disease, and the mere presence of an unmarried couple or an African-American family are viewed as a nuisance through the eyes of some neighbors. It is also conceivable that someone would regard the proximity of Republicans

29. RESTatement (SECOND) OF TORTS § 824 (1979).

30. *Id.* cmt. b (emphasis added).

31. Suzanna Hartzell-Baird, *When Sex Doesn’t Sell: Mitigating the Damaging Effect of Megan’s Law on Property Values*, 35 REAL EST. L.J. 353, 383-84 n. 155 (2006) [hereinafter, “Hartzell-Baird”].

or Democrats, gays or fundamentalists, or Mets fans or Yankees fans,³² as a nuisance. This is not what nuisance law is about.

"However, due to the current stigma of dangerousness attached to nearby sex offenders, [a] court may distinguish the situation of a sex offender living in a residential neighborhood, particularly around young children, from most claims based on the mere presence of a person of a certain status in a neighborhood."³³

Additionally, should it really matter if neighbors were unaware of the defendant's illegal conduct until such time as authorities brought it to their attention? They are harmed at the point in time when they know of the defendant's activity. By analogy to personal injury medical malpractice actions, most states provide a statute of repose for a plaintiff, requiring that the action be commenced within a specified period of time after the plaintiff knows, or has reason to know, that he has been injured at the hands of a medical professional.³⁴ In addition, there is no question but what it is the defendant's conduct that has created the harm, and that harm has occurred when plaintiff becomes aware of the danger associated with the neighbor's status, which the law has conferred upon him because of his prior action.³⁵ So counsel is unconcerned with the issue of whether the defendant's conduct directly or

32. John C. Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 275 (2001) [hereinafter "Nagle"].

33. Hartzell-Baird, *supra* note 31, at 383-84 n. 155. On an unrelated, but often discussed issue, the author opines that:

[a]nother issue that has not been addressed by the courts is whether homeowners could prevent sex offenders from moving into their neighborhood through the use of state nuisance laws (citations omitted). The argument has two components: (1) The nearby sex offender is a nuisance because he/she endangers the comfort, repose, health, or safety of others, and (2) The nearby sex offender is a nuisance due to the diminution in property values that results from his/her presence. If a sex offender does qualify as a nuisance, the homeowner would be able to either seek money damages... or enjoin the offender from moving into the neighborhood

Id. at 382.

One author has attempted to analogize restrictive covenants precluding sex offenders from purchasing homes in planned communities to Jim Crow laws and red line restrictions. This completely misses the point. Such antiquated, discriminatory provisions sought to exclude persons purely because of their status, rather than voluntary actions on their part that resulted in harm to others. Such laws, to use Professor Nagle's examples, *supra*, are akin to seeking to exclude Republicans, Mets fans or supporters of Donald Trump. Residency restrictions seeking to preclude convicted sex offenders from moving into the neighborhood are not based upon one's status as a person, but rather one's status as a societal offender, having thus so been adjudicated. In short, Jim Crow laws and residency restrictions sought to exclude people because of who they are, not what they did. See generally Asmara M. Tekle, *Safe: Restricted Covenants and the Mixed Wave of the Sex Offender Legislation*, 62 SMU L. Rev. 1817 (2009) [hereinafter "Tekle"].

34. See, e.g., KY. REV. STAT. ANN. §413.140(2) (West 2016).

35. See *supra* text accompanying note 33.

indirectly caused the harm to the plaintiff. But for the defendant's conduct, no harm would've occurred. Thus, the defendant's continued use of his property as a residence is the offending use, brought about solely by his own conduct.³⁶

Counsel feels confident concerning *Mudd's* second requirement, the gravity of the harm to the plaintiff.³⁷ In twenty-first century society, convicted sex offenders are universally loathed and represent modern-day America's least desirable neighbors all.³⁸ Moreover, while it can be argued that many persons listed on sex offender registries pose little or no risk to society and that the types of offenses justifying inclusion on sex offender registries are overly broad, even the sex offender apologist community has to admit the child sexual predators pose the greatest risk of recidivism, and therefore the greatest danger to society.³⁹

But *Mudd* cautions that, consistent with the approach of the Restatement, both the gravity of the harm to the plaintiff and the reasonableness of the defendant's use of his property must be analyzed in light of all the circumstances of the case, to determine whether a nuisance exists in law in the first place.⁴⁰ Among the circumstances *Mudd* mandates for consideration by the court are whether the defendant's use of his property is lawful, how long it has been ongoing, and its importance to the community.⁴¹

Analysis of these factors virtually mirrors the analysis undertaken previously herein concerning the defendant's "use of his property."⁴² So, while the defendant's "use of his property" is "lawful," in the sense that there are no statutes or regulations prohibiting his living where he does, the "activity" which produces the nuisance claim in the instant case was clearly so unlawful and potentially dangerous as to cause Kentucky, and the vast majority of states, to

36. See *infra* text accompanying note 195.

37. *Mudd*, 339 S.W.2d 181 at 185-86.

38. Lior Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1887 (2006).

39. Robert F. Worth, *Exiling Sex Offenders from Town: Questions about Legality and Effectiveness*, N.Y. TIMES, Oct. 3, 2005, at B1, available at: <http://query.nytimes.com/gst/fullpage.html?res=9C01E3D81030F930A35753C1A9639C8B63&pagewanted=all> (reporting that pedophiles "have recidivism rates of more than 50%"); see also Tekle, *supra* note 30 at 1825 (confirming "that sex offender covenants should be struck down under the common law unless they are narrowly tailored to focus on the most dangerous convicted sex offenders, a determination based on original offense or future risk of dangerousness.") (emphasis added).

40. See *supra* text accompanying note 7.

41. See *supra* text accompanying note 7.

42. See *supra* text accompanying note 33.

require that neighbors be warned of his presence!⁴³ If his residency and occupancy in the neighborhood pose no problem, why notify neighbors at all? Moreover, even the least restrictive states require that the offender remain on the sex offender registry for five years, and 13 states require that the offender stay on the registry for life.⁴⁴ As such, because it was defendant's perverted and unlawful acts which set in motion the chain of events giving rise to the instant action, it would be stunning for a court to rule that defendant's continued use of his property for a residence does not give rise to a nuisance, notwithstanding the fact that it was his actions, and solely his actions, that at least "indirectly" caused the harms alleged by plaintiff.⁴⁵ Accordingly, given that plaintiff's nuisance claim must proceed under and be sustained by Kentucky's nuisance statute,⁴⁶ and given that the factors enumerated in KRS 411.550(1) virtually mirror *Mudd's* factors for consideration,⁴⁷ counsel is comfortable that any argument concerning the legitimacy of defendant's use of his property can be overcome.⁴⁸

Further, an additional factor KRS 411.550 mandates for consideration in determining the reasonableness of defendant's use of his property is "the kind, volume and duration of the annoyance or interference with the use and enjoyment of claimant's property"⁴⁹ In the context of the convicted sex offender living next door, this factor takes on enhanced importance. In the case of nuisances, the offending activity may either be permanent, in the sense that it is not capable of being eliminated or abated at a reasonable cost,⁵⁰ or temporary (it is capable of being eliminated or abated at a reasonable cost).⁵¹ Whether it is classified as temporary or permanent, the nuisance-like "activity" associated with the sex offender next door creates harms that exist in the mind and therefore exist 24/7. Even in the case of a belching smoke stack or a hog

43. See *supra* note 16 and accompanying text.

44. Jane Shim, *Listed for Life*, SLATE (Aug. 13 2014 6:44 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/sex_offender_registry_laws_by_state_mapped.html. Kentucky requires that convicted sex offenders remain listed on the sex offender registry for 20 years. See *supra* notes 17-23 and accompanying text.

45. See *supra* text accompanying note 25.

46. See Palmore, *supra* note 4, at 5.

47. See Palmore, *supra* note 4, at 3-4.

48. See *supra* text accompanying notes 26-33.

49. Ky. REV. STAT. ANN. § 411.550(1)(e) (West 2016).

50. Ky. REV. STAT. ANN. § 411.530(1)(b) (West 2016). An additional factor in determining the permanency of a nuisance is whether it is "relatively enduring and not likely to be abated voluntarily or by court order." *Id.*

51. Ky. REV. STAT. § 411.540(1) (West 2016) ("Any nuisance that is not permanent by this definition is a temporary nuisance.").

farm, offended neighbors may enjoy periods of respite when, at least momentarily, they feel free of the offending activity. The same cannot be said for the convicted sex offender next door. The mind conceives that he is there, behind closed doors, lurking to reoffend at his whim.

Professor Nagel has explored what he categorizes as “fear” cases extensively and he references cases where the offending activity was the production of fear in several categories. The category that appears to most closely fit the facts of the instant case is the one he denominates “facilities for those perceived as dangerous.”⁵² As Professor Nagel explains:

Several cases decided in the late nineteenth and early twentieth centuries held that a facility for those who had a contagious disease constituted a nuisance when located in a residential neighborhood. A more recent Arkansas decision held that a halfway house for prisoners that was located in a residential neighborhood constituted a nuisance. And an Arizona case held that a church that served meals to indigent transients could be a nuisance. The harms in each instance resulted from the fears of those living nearby. These fears prompted concerns about residents’ physical health or safety. They led to worries about potential damage to property. They also reduced property values because others were less willing to locate in the neighborhood. The fact that scientists questioned the possibility of any of these harms actually occurring did not deter courts from accepting such fears as sufficient for purposes of nuisance law. As one court explained, “The question is, not whether the fear is founded in science, but whether it exists; not whether it is imaginary, but whether it is real”⁵³

While it is certainly the case that society is more tolerant of the housing needs of the disabled and the physically ill in the present day,⁵⁴ this fact serves to question the continuing vitality of “fear” cases concerning housing for the disabled or physically ill; nevertheless, real, substantiated fear may still give rise to a nuisance claim. The Restatement even uses such an example as an illustration of the principle that “fears and other mental reactions common to

52. See Nagle, *supra* note 32, at 291-93.

53. Nagle, *supra* note 32, at 291-93 (citations omitted).

54. *Id.* Professor Nagle references *City of Edmunds v. Oxford House, Inc.*, 514 U.S. 725 (1995), which held a city’s refusal to allow a group home for recovering alcoholics and drug addicts violated the Federal Fair Housing Act.

the community are to be taken into account, even though they may be without scientific foundation or other support in fact.”⁵⁵

However, in the case of the convicted child sex offender nearby, given the 50% rate of recidivism of such individuals, neighbors’ fears that the offender may reoffend are real and have support in the scientific community.⁵⁶ Nevertheless, “[t]he mere awareness of the activity, any improper temptation produced by the activity, and reduced property values are not sufficient to establish a nuisance.”⁵⁷ However, to the extent that the offending activity interferes with plaintiff’s use and enjoyment of his property, *and also* diminishes the value of his property, the nuisance claim may be justiciable.⁵⁸

The final factor of KRS § 411.550 requires in consideration of whether the defendant’s use of this property constitutes a nuisance is “[t]he character of the area in which the defendant’s property is located, including, but not limited to, all applicable statutes, laws or regulations.”⁵⁹ Without question, in the hypothetical herein presented, there are no “applicable statutes, laws or regulations” which serve to prevent the defendant from residing where he does. However, with respect to the “character of the area in which the defendant’s property is located” from the standpoint of the harms to be inflicted upon adjoining neighbors by his presence (fear of children being molested, fear of diminution of property values, etc.) it is hard to conceive that the “character of [any] area in which the defendant’s property is located” would be “appropriate” for the location of the convicted child sex offender. However, it must be remembered that the tort of nuisance, to be judicially sustained, must cause damage to *property*.⁶⁰ It is conceivable that the character of some economically depressed neighborhoods may be such that the expert testimony needed to establish a diminution in value⁶¹ may not be obtainable.⁶² As discussed in more

55. RESTATEMENT (SECOND) TORTS § 821(F) cmt. f (1979) (mentioning neighbors’ fear of a leprosy sanatorium and contagion spread thereby, may give rise to a nuisance claim, notwithstanding that the possibility of contagion is highly remote); *see also* Nagle, *supra* note 32, at n. 154.

56. Tekle, *supra* note 33, at 1823-1825.

57. Nagle, *supra* note 32, at 295.

58. Nagle, *supra* note 32, at 294.

59. Ky. REV. STAT. § 411.550(1)(g) (West 2016); Ky. REV. STAT. § 411.550(1)(f) (West 2016) also requires consideration of “the respective situations of the defendant and claimant[.]” However, this factor may have applicability in other circumstances, such as where the defendant is a business entity, but it is inapplicable under the facts of the hypothetical being discussed herein. The fact scenario assumes that the defendant and claimant are neighbors in a relatively “high-end” neighborhood and thus are on a relatively equal economic footing.

60. Makowski, *supra* note 1, at 242.

61. *See* Donaway v. Rohm and Haas Co., Louisville Plant, No. 3:06CV-575-H, 2013 WL 3872228 (W.D. Ky. July 24, 2013) (granting defendant’s motion for summary judgment because plaintiff failed to meet her evidentiary burden by failing to provide a competent expert opinion that the

detail herein, several studies have shown significant diminution in the value of neighboring homes, particularly in higher-priced neighborhoods.⁶³

B. Is the Defendant's Conduct Cognizable Under the Restatement's Formulation of The Law of Private Nuisance?

In the course of analyzing the elements required to establish the tort of nuisance according to the approach of the Restatement, while counsel is comfortable that her *Mudd* analysis will be sufficient to establish that her clients are proper plaintiffs, in the sense that they are fee holding possessors of land, and that they have suffered significant harm,⁶⁴ she is concerned whether her client's claims would be justiciable under the Restatement's formulation of the tort in light of its formulation of the elements for liability in Section 822.⁶⁵

The Restatement (Second) provides that “[o]ne is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another’s interest in the private use and enjoyment of land, and the invasion is either (a), intentional and unreasonable, or (b), unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.”⁶⁶

1. With Respect to the Restatement of Torts Section 822, are the Convicted Sex Offender’s Acts with Respect to Harms Inflicted Upon Adjoining Property “Intentional and Unreasonable”?

The Restatement (Second) of Torts states that in order for defendant’s conduct to be “intentional and unreasonable” the defendant actor must act for the purpose of causing it, or know that it is resulting or is substantially certain to result from his conduct.⁶⁷ Applying this standard to the facts of the instant case

purported nuisance diminished the market value of plaintiff’s property); *see also* Apple Hill Farms Development, LLP v. Price, 816 N.W.2d 914 (Wi. Ct. App. 2012) (holding that a real estate agent’s opinion regarding reduction in property value was sufficient evidence to establish the same).

62. For instance, in neighborhoods where homes range in value, say, between \$40,000 and \$50,000, a diminution in the value of the property attributable to the presence of a nearby sex offender may be so minuscule as to make the instigation of a nuisance suit economically impracticable, or, alternatively, the character of the neighborhood is such, and the intrinsic value of the properties therein is such, that it is difficult, if not impossible, for an expert appraiser to ascertain a defensible diminution in value.

63. *See, e.g., supra* text accompanying notes 28-33.

64. *See* Palmore, *supra* note 4, at 11.

65. *See* RESTATEMENT (SECOND) OF TORTS § 822 (1979).

66. RESTATEMENT (SECOND) OF TORTS § 822 (1979).

67. RESTATEMENT (SECOND) OF TORTS § 825 (1979).

presents a distinct challenge. First, as with any case where it is necessary to prove the subjective intent of an adverse party, adducing the necessary proof will be virtually impossible unless it comes from the mouth of the defendant himself, or witnesses which are hostile to him. In the present case, the likelihood that the defendant's household residents would come forth to "rat him out" is slim to none. Second, the comments to section 825 confirm the difficulty of adducing proof of intention because:

[i]t is the knowledge that the actor has *at the time he acts, or fails to act*, that determines whether the invasion resulting from his conduct is intentional or unintentional. It is not enough to make an invasion intentional that the actor realizes or should realize that his conduct involves a serious risk or likelihood of causing the invasion. *He must either act for the purpose of causing it or know that it is resulting or is substantially certain to result from his conduct.*⁶⁸

Counsel thus concludes that while this putative defendant's conduct is clearly "unreasonable," she realizes that it can hardly be said that the defendant either procured, produced viewed or distributed child pornography "for the purpose of causing" damage to adjoining property and property owners.⁶⁹ The only thing this defendant clearly intended to do was to gratify himself with child pornography, however perverted and unreasonable. If deposed, he will certainly say that he intended no one to be harmed by his actions, and absent contrary proof from persons who either viewed his activity or whom he told about his activity, establishing by preponderance of the evidence that the defendant acted for the purpose of causing the harm to neighbors appears to be a practical impossibility.⁷⁰

Similarly, establishing that the defendant was "substantially certain" that harm to neighbors would result from his child pornography-related conduct is equally problematic. As previously discussed,⁷¹ the harm to the neighbors occurs when they become aware of his illegal conduct through notifications mandated by the various community notification statutes applicable in all

68. RESTATEMENT (SECOND) OF TORTS § 825 cmt. c (1979) (emphasis added).

69. Faced with the possible dual motives of self-gratification on the one hand, versus causing damage to neighboring properties on the other, one has to assume that the motive of self-gratification preponderates as there are conceivably numerous methods to damage a neighbor's property which would not involve the self-destructive aspects of child pornography viewing!

70. One can only imagine the hostility and unwillingness of such witnesses to come forward, knowing that the first question on cross-examination is likely to be as follows: "so, you knew about this illegal, perverted activity on the part of the defendant and told no one?"

71. See Nagle, *supra* note 32, at 291-95.

jurisdictions.⁷² Obviously, if the defendant thought his actions would ever become public, such possible public disclosure should have served to deter him in the first place.⁷³ Thus, to establish the "substantial certainty" criterion, one would first have to establish that he was "substantially certain" that his actions would become public, and "substantially certain" that his actions, with their resultant publicity, would have deleterious effects upon neighboring properties.⁷⁴ The defendant will, of course, testify that he never believed his child pornography activities would become public, and while proof to the contrary may exist, identifying and adducing such proof through normal civil discovery processes would appear difficult at best.⁷⁵ Accordingly, counsel concludes that if her cause of action is to be judicially cognizable under the Restatement, she will have to categorize the defendant's actions under Section 822 (b), i.e., unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.⁷⁶

2. With Respect to the Restatement of Torts Section 822, are the Convicted Sex Offender's Acts Unintentional, or May Such Acts Constitute Abnormally Dangerous Conditions or Activities?

At the outset, the Restatement cautions that:

[r]eckless misconduct differs from intentional wrongdoing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm that results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless.⁷⁷

In her analysis of this requirement, counsel concludes that from the provable facts, she can adduce evidence from which the fact-finder could find, by preponderance thereof, that the convicted sex offender acted recklessly.⁷⁸ First,

72. See *supra* notes 17-20.

73. Assuming that the putative defendant is a rational person, one can assume that he desired to prevent public disclosure of his child pornography viewing activities because he conducted them in private in his own home.

74. See *supra* notes 69-74 and accompanying text.

75. See *supra* note 70 and accompanying text.

76. RESTATEMENT (SECOND) OF TORTS § 822(b) (1979).

77. RESTATEMENT (SECOND) OF TORTS § 500 cmt. f (1979).

78. RESTATEMENT (SECOND) OF TORTS § 500 cmt. f (1979) (To emphasize, "[i]t is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless.").

his child pornography activities were surreptitious.⁷⁹ Consequently, it can be inferred that he knew they were wrong; as such, he desired to keep such activity secret.⁸⁰ Charged with knowledge of the criminality of such actions, he is also thus charged with knowledge that the state viewed his actions as sufficiently harmful and deleterious as to impose its highest penalty, criminality, upon such actions.⁸¹ Because the defendant could proffer a virtual dearth of proof to show that he did *not* realize, nor *should have been able to realize*, that a strong probability of harm would result, counsel feels confident that any such proof would not preponderate over plaintiff's proof of recklessness.⁸² Moreover, such proof may be so weak as to cause the court to conclude that reasonable minds could not differ as to the issue of recklessness and thus direct a verdict for plaintiff on this issue.⁸³

3. With Respect to Restatement of Torts Section 824, did the Defendant's Child Pornography-Related Conduct Constitute an "Act" Which Would Support a Claim for Private Nuisance?

Continuing with her analysis of whether the defendant-child pornographer's conduct would support a claim for private nuisance under the Restatement, counsel encounters Section 824, which provides:

[t]he conduct necessary to make the actor liable for either a public or a private nuisance may consist of (a) an act; or (b) a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the interference with the public interest or the invasion of the private interest.⁸⁴

While, at first blush, it seems axiomatic that the defendant's child pornography activities would constitute an "act," counsel revisits the nagging question that

79. See *supra* notes 69-74 and accompanying text.

80. See *supra* notes 69-74 and accompanying text.

81. Atkins v. Parker, 472 U.S. 115, 130 (1985) (citing North Laramie Land Co. Hoffman, 268 U.S. 276, 283 (1925)) ("all citizens are presumptively charged with knowledge of the law").

82. Presumably, the defendant knew his activities were illegal; otherwise why conduct them in secret? Moreover, one can only imagine the reaction of rational factfinders to the defendant's argument that in viewing child pornography, he did not realize, nor from the facts should not have been able to realize, that "harm" would occur. But for "harm" occurring, why criminalize his conduct at all?

83. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986) ("[T]he standard for issuance of a directed verdict under Fed. R. Civ. P. 50(a) . . . [i]s that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed.") (citations omitted).

84. RESTATEMENT (SECOND) OF TORTS § 824 (1979).

has troubled her from the beginning. Namely, she cannot establish that the defendant acted with the intention of harming neighbors.⁸⁵ He acted for the purpose of self-gratification, pure and simple.

Nevertheless, revisiting her earlier analysis of Section 824 because it may inform a claim under Kentucky law, she is comforted by the comments to that Section, which confirm that whether the defendant is acting on his own for whatever purpose, it is enough that his actions are the legal cause of the invasion.⁸⁶ Accordingly, she concludes that Section 824 will pose no impediment to her making the case for private nuisance in a jurisdiction that adheres to the Restatement's formulation of the tort.⁸⁷

4. Counsel's Conclusions Concerning the Viability of Her Claim Under the Restatement's Formulation of Private Nuisance

Having concluded that she will not be able to sustain her client's claims by establishing that the defendant's conduct was "intentional," as that term is defined in the Restatement,⁸⁸ she analyzes the Restatement's remaining requirements for a private nuisance claim under the Restatement's "unintentional and unreasonable" standard.⁸⁹ Noting that the remaining Restatement elements for liability deal only with intentional invasions, counsel concludes that she must start adducing proof showing that while the defendant's conduct was unintentional, it was unreasonable. Liability should be imposed upon the defendant because his actions have caused significant harms to "normal" neighbors whose use and enjoyment of their property has been harmed and whose property values have been thereby diminished.⁹⁰

However, counsel is mindful that her establishing a substantial and unreasonable interference with the use and enjoyment of her client's property is only half the battle. She also must prove a diminution in the value of such property.⁹¹ What proof must she adduce? Are expert witnesses required to proffer such proof? How is diminution in value to be established?

85. See *supra* text accompanying notes 68-71.

86. RESTATEMENT (SECOND) OF TORTS § 824 cmt. b (1979).

87. See *supra* text accompanying notes 85-87.

88. See *supra* text accompanying notes 69-74.

89. RESTATEMENT (SECOND) OF TORTS §§ 825-831 (1979).

90. See *id.* §§ 821F, 822(b)..

91. See *supra* text accompanying notes 1-12.

C. Are Plaintiff's Fears of Diminished Property Values Attributable to the Proximity of a Convicted Child Sex Offender "Real"?

1. Perception or Statistically Provable Reality?

It is one thing to fear the actions of a convicted child predator nearby.⁹² It is quite another to then make the leap to claim, and be able to prove, that one's property has been diminished in value thereby. Counsel seeks to determine whether there is any anecdotal evidence of diminution in property value, or better yet, statistical evidence thereof. Conducting some web-based research, she finds a blog-post by a homeowner who voices complaints virtually identical to her clients.

The homeowner, having actually experienced attempting to sell his own home, writes as follows:

As a homeowner trying to sell my home with a registered sex offender right next door, I can say this is financially devastating. I live in an area with excellent schools and my home is geared for beginning families, 3 bedrooms, expensive play system in yard, etc. Already, we have lost 3 sales in 3 months in an area where most homes sell within 2 weeks. Unfortunately, we purchased a new home and moved in anticipation of selling our old home quickly only to find that our neighbor's son is a registered offender. He is 27 and has always lived at home and isn't going anywhere. We even asked them to have him move temporarily and they refused. We are now faced with a 250,000 home that is essentially worthless which is financially devastating to us. I understand the idea behind the register for sex offenders but at what cost to innocent neighbors? We are honest, law abiding citizens who are being unfairly punished for another person's crime.⁹³

Thus, "[a]necdotal evidence suggests that individuals are extremely averse to living in close proximity to convicted criminals and that they have put the information obtained from the offender registries to use."⁹⁴

92. See *supra* text accompanying notes 23-24.

93. Jonathan J. Miller, *Reader's Angst About Sex Offenders, NAR Stats Delayed Closing Dates*, MILLER SAMUEL, INC. (July 17, 2006), www.millersamuel.com/?s=sex&type%5B%=post.

94. Leigh L. Linden & Jonah Rockoff, *There Goes the Neighborhood? Estimates of the Impact of Crime Risk on Property Value from Megan's Law*, NATIONAL BUREAU OF ECONOMIC RESEARCH, WORKING PAPER 12253, NBER WORKING PAPER SERIES 3 (May 2006), <http://www.nber.org/papers/w12253.pdf> [hereinafter, "Linden & Rockoff"]. (For instance, in 2002, Wisconsin required sellers to disclose whether a sex offender lived nearby, only if asked. New Jersey, however, allows lower-risk offenders to be disclosed only after the closing and conveyance of title of the subject property.); see also Susan Yeh, *Revealing the Rapist Next Door: Property Impacts of a Sex Offender Registry*,

Counsel's search of the available literature discloses that in certain cases, neighbors have risen up and "encouraged" convicted sex offenders in their neighborhood to relocate.⁹⁵ The notion that a convicted sex offender nearby may pose a cloud on a neighbor's property is reflected in reports of sellers questioning whether they must disclose the convicted sex offender's proximity to potential buyers.⁹⁶ Additionally, "a small but growing number of state and local governments have passed laws that would prevent sex offenders from living almost anywhere within their borders."⁹⁷ Are these homeowners' concerns, like those of counsel's client, borne out by any statistical evidence?

2. The Statistics

In 2003, several professors at Wright State University in Dayton, Ohio published their findings concerning the effects of sex offender proximity to housing values.⁹⁸ Following Congress's passing of Megan's Law in 1996, and states enacting its counterparts, the Wright State professors examined single-family house transactions that occurred during 2000 in Montgomery County, Ohio to determine the effect on the selling price of such properties, given their proximity to registered sex offenders' residences.⁹⁹ The authors, recognizing that presence of an offender may motivate owners to accept a low offer to consummate a speedy sale, adapted their model to capture that effect.¹⁰⁰ The results of their findings are stunning: Houses located within 0.1 mile of an offender sold for 17.4 % less, on average, than similar houses located farther

44 INT'L. REV. L. & ECON. 42, 60 n. 9 (2015) [hereinafter, "Yeh"] ("For example, in 2002, Wisconsin required sellers to disclose whether a sex offender lives nearby if asked. Meanwhile, New Jersey allows disclosure of lower-risk offenders only after a deal has been closed.").

95. Linden & Rockoff, *supra* note 94, at 3 (citing Randal Bell, *The Impact of Megan's Law on Real Estate Values*, VALUATION INSIGHTS & PERSPECTIVE, 39-42 (1998)).

96. Linden & Rockoff, *supra* note 94, at 3 (citing Robert J. Bruss, *Must Land Seller Disclose Sex Offender Lives Next Door?*, REALTYTRAC, May 3, 2006, www.realtytrac.com).

97. Linden & Rockoff, *supra* note 94, at 3 (citing Julia Reischel, *The New Fad Cities Can't Seem to Resist – Keeping Sex Offenders Out of Every Nook and Cranny*, NEW TIMES BROWARD-PALM BEACH, Nov. 30, 2006); *More New Jersey Communities Creating 'Pedophile – Free' Zones*, NEWSDAY, July 24, 2005, www.newsday.com; Robert F. Worth, *Exiling Sex Offenders from Town*, N.Y. TIMES, Oct. 3, 2005.

98. See generally James E. Larsen et al., *The Effect of Proximity to a Sex Offender's Residence on Single-Family House Selling Price*, 71(3) THE APPRAISAL JOURNAL (July 2003), https://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=106942413.

99. *Id.*

100. *Id.* The authors note, "[i]n order to estimate the actual selling price effect of proximity to an offender, both price and marketing time should be investigated because, from the seller's perspective, extra time on the market lowers the present value of the selling price. Unfortunately, the transaction set used in this study does not include reliable 'time on the market' information. Because marketing time is not included in the model used in this study, the selling price effect discovered may *understate* the effective selling price effect." (emphasis added).

away. For less dangerous offenders, the significant effect extends to 0.2 mile from the offender's residence, and the effect is smaller.¹⁰¹ Their study reaches the sobering conclusion "that a monetary burden must be borne by house sellers in close proximity to a registered sex offender's residence."¹⁰² Their findings have been cited without criticism, even among authors in the sex offender apologist community.¹⁰³

The 2003 findings of the Wright State professors were confirmed in 2006.¹⁰⁴ The authors of the 2006 study, Linden and Rockoff, combined data from the housing market in Mecklenburg County, North Carolina (Charlotte area), with data from the North Carolina Sex Offender Registry. They estimated how individuals value living in close proximity to a convicted sex offender.¹⁰⁵ The authors concluded that the value of houses within a one-tenth mile around a sex offender's home fall by 4 percent on average (about \$5,500) but that houses next to an offender sell for about 12 percent less.¹⁰⁶ However, when using the Wright State researchers' methodology, Linden and Rockoff concluded that those living in closest proximity to a convicted sex offender could expect diminutions in value of up to 19%!¹⁰⁷ Buttressing the Wright State finding that the presence of sex offenders poses a monetary burden on nearby house sellers,¹⁰⁸ Linden and Rockoff aggregated those effects across all homes affected and all offenders, finding that the presence of sex offenders depresses property values throughout Mecklenburg County by about \$60,000,000.¹⁰⁹

Most recently, one study sought to evaluate how prospective homebuyers are likely to respond to perceived crime risks about sex offenders in the neighborhood.¹¹⁰ Unlike the prior studies, the author sought to evaluate the effect of the duration of the sex offender's stay in his community after

101. *Id.*

102. *Id.* (To add insult to injury, the convicted sex offender's property is likely the only property in the neighborhood to NOT suffer a diminution in value because his is the only property unburdened by the presence of a convicted sex offender!)

103. See, e.g., Michael P. Griffin & Desiree A. West, Note, *The Lowest of the Low? Addressing the Disparity between Community View, Public Policy and Treatment Effectiveness for Sex Offenders*, 30 LAW & PSYCHOL. REV. 143, 157 (2006).

104. See generally Linden & Rockoff, *supra* note 94.

105. *Id.* Linden & Rockoff used the exact location of sex offenders to exploit variation in the threat of crime within small homogeneous groupings of homes, and used the timing of the sex offenders' arrivals to control for baseline property values in the area.

106. *Id.* at 3-4.

107. *Id.* at 2.

108. See *supra* text accompanying notes 98-103.

109. Linden & Rockoff, *supra* note 94, at 30.

110. See generally Yeh, *supra* note 94.

conviction, as it may relate to the perception of prospective buyers.¹¹¹ The author, Professor Susan Yeh, concluded that:

the majority of registered offenders are relatively transient. The median duration of addresses listed in the registry was only 0.45 years. In general, sex offenders tend to live into worse neighborhoods with higher poverty levels and lower property values *I find that homebuyers do not respond to the majority of offender locations announced in the registry.* Over the years in the data, transient addresses are more likely to be observed in richer neighborhoods, while more stable addresses are more likely in poorer neighborhoods¹¹²

Analyzing this finding, counsel for plaintiff has perhaps found the answer to the question, which has been nagging her from the beginning: why are there no reported cases raising a private nuisance claim against an adjacent sex offender? If most sex offenders are indeed transient and more likely to be found in poorer neighborhoods, it stands to reason that the diminution of property values in an economically depressed neighborhood may be so minuscule as to render incalculable the actual diminution in value caused by the presence of a sex offender.¹¹³

In addition, even if a competent appraiser could establish a diminution in value, the litigation costs associated with obtaining a damage award for a small sum might well swamp the monetary value of any recovery obtained.¹¹⁴ It thus stands to reason that hers may be a case of first impression. However, in the case she is pursuing for her clients, assuming their home is worth approximately \$450,000, the diminution in value could be anywhere between 4% and 20%, i.e., \$18,000 to \$90,000.¹¹⁵ The convicted sex offender against whom her clients are seeking recovery has means, is reasonably well-to-do, has a stable home life and has now resided in the neighborhood in his half-million-dollar home for six years—three years before his offense and subsequent listing on the sex offender registry, and three years thereafter. Thus, Professor Yeh's conclusions demonstrate the validity of the concerns of counsel's clients. Professor Yeh's analysis, along with data from the 2003 and 2006 studies, is encouraging,

111. *Id.*

112. Yeh, *supra* note 94, at 43 (internal citations omitted) (emphasis added).

113. For example, if all homes in an economically depressed area sell between \$15,000 – \$25,000 of each other, the sales price differences might be ascribed to the condition of the properties themselves, the general vitality of the real estate market in the area, or a myriad of other factors unrelated to a convicted sex offender's presence.

114. If, for instance, a plaintiff could establish that he suffered a 20% diminution in his property's value, which was \$50,000, litigation costs and attorney fees would likely consume the likely recovery of \$10,000.

115. See *supra* text accompanying notes 98-103.

assuming that counsel can adduce the testimony necessary to support such conclusions.¹¹⁶

However, as Linden and Rockoff point out, all of the studies fall short in one important facet: “like all such studies, we only can observe prices for houses that sell.”¹¹⁷ Nevertheless, a competent expert appraiser’s opinion on the *likely* diminution in the value of homes adjacent to a convicted sex offender should be able to withstand a *Daubert* challenge.¹¹⁸ But the appraiser must employ an accepted methodology, and his conclusions must be rationally based upon the information logically deduced from the application of that methodology.¹¹⁹ Thus, what is the appropriate methodology such appraiser needs to employ?

“It is intuitive that larger discounts would be associated with the proximity of a house to a more dangerous offender compared to [the] proximity to a less dangerous offender.”¹²⁰ However, at least one study asserts that the type of community notification system employed in the locality where the offender resides influences this intuitive conclusion.¹²¹ The more passive the notification system, the lesser is the impact on adjoining properties.¹²² Conversely, the more active the notification system, the greater is the effect on adjoining properties.¹²³

Kentucky’s community notification system is “active” in the sense that public access to sex offender registries and community sex offender blogs makes notification of one’s sex offender status almost instantaneous.¹²⁴ Therefore, it is imperative that a prospective appraiser take cognizance of

116. See *supra* notes 98,103.

117. Linden & Rockoff, *supra* note 94, at 14.

118. See generally *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (establishing a four-part test to determine the reliability of expert testimony. Such factors include ascertaining whether the theory or technique in question (1) is scientifically valid and can properly be applied to the facts at issue; (2) can be (or has been) tested; (3) has been subjected to peer-review and publication; and (4) has attracted wide-spread acceptance within a relevant scientific community. In the case of a particular scientific technique, a court should also consider the theory or technique’s known or potential error rate. The Court emphasized that the inquiry is a flexible one, with the focus being upon principles and methodology, not conclusions generated.) *Id.* at 593-97.

119. See *id.* at 593-97.

120. Larsen et al., *supra* note 98

121. *Id.*

122. *Id.*

123. *Id.*

124. Ky. REV. STAT. ANN. § 17.510 West 2016); see *supra* text accompanying notes 16-23.

Kentucky's notification system when attempting to deduce an appraised value for a home adjacent to a convicted sex offender.¹²⁵

So, how does a competent appraiser assess the "price effect" of a convicted sex offender's presence in the neighborhood? In valuing a single-family house, many appraisers place heavy reliance on the sales comparison approach.¹²⁶ Appraisal experts counsel that:

[t]his practice can be maintained if the price effect due to offender proximity is identical for the subject property and each comparable property. If this is not the case, appraisers must modify their methodology to accurately estimate value using the sales comparison approach. The potential effect of proximity to an offender must be calculated for the subject property, as well as the effect included in the transaction price for each comparable. Then, each comparable sale price should be adjusted to account for the difference in offender price effects between the subject and the comparable.¹²⁷

D. Counsel's Summary Conclusions with Respect to the Substantive Law of Nuisance

Thus, her client's private nuisance claim attributable to a convicted child sex offender's presence is a case of first impression in Kentucky, and perhaps nationally. But counsel is convinced that the venerable tort of nuisance is still viable and flexible enough to withstand a motion for summary judgment, or a motion for directed verdict, enabling counsel to have her case adjudicated by a finder of fact.¹²⁸

First, using the relatively simplistic *Mudd* analysis, counsel is quite comfortable that she can establish the unreasonableness of the defendant's use

125. See *supra* notes 121-125 and accompanying text.

126. See Larsen, *supra* note 98. As should be obvious to the reader now, lay opinion testimony concerning diminution in the value of the property at issue is meaningless. Plaintiff must provide a competent expert opinion that the purported nuisance reduces the market value of plaintiff's property. See, e.g., *Donaway v. Rohm and Haas Co., Louisville Plant*, No. 3:06CV-575-H, 2013 WL 3872228, at *3 (W.D. Ky. July 24, 2013).

127. See Larsen, *supra* note 98.

128. See *Steelvest v. Scansteel*, 807 S.W.2d 476, 483 (Ky. 1991) (ruling that summary judgment is improper unless it would be "impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant."); see also *id.* at 482-83 ("[T]rial judges are to refrain from weighing evidence at the summary judgment stage; that they are to review the record after discovery has been completed to determine whether the trier of fact could find a verdict for the non-moving party."). As to the standard for the issuance of a directed verdict, see *supra* note 83.

of his property, as well as the gravity of the harm to her clients, by a preponderance of the evidence.¹²⁹

Second, using the Restatement's formulation of the tort, counsel is satisfied that she can adduce proof sufficient to satisfy the "preponderance of the evidence" test.¹³⁰ First, the defendant committed an act that, while unintentional with respect to harms to plaintiffs' properties, was nevertheless one that he realized, or from the facts should have realized.¹³¹ Second, there was a strong probability that harm would result, even though he hoped his conduct would prove harmless.¹³² Finally, the act was clearly reckless and was the indirect cause of the invasion plaintiffs have suffered.¹³³

Counsel concludes that an expert appraiser, armed with the statistical support for a substantial diminution in the value of her client's property,¹³⁴ and using a methodology that is both logical and capable of being replicated, will be able to withstand a *Daubert* challenge.¹³⁵ Accordingly, the fact-finder can use the appraiser's testimony to determine a proper measure of damages.¹³⁶

As a consequence, counsel concludes that the facts of the instant case are sufficiently provable to establish the commission of the tort of nuisance under either Kentucky's simplistic approach (*Mudd*, as incorporated into Kentucky's codification of the law of nuisance),¹³⁷ or the Restatement's more formulaic approach.¹³⁸ Satisfied that the case can "make" under the substantive law, counsel moves on to her analysis of the remedy she should seek from the court.

129. See also, *Donaway v. Rohm and Haas Co., Louisville Plant*, No. 3:06CV-575-H, 2013 WL 3872228, at *1-2 (W.D. Ky. July 24, 2013) (confirming the analysis employed in *Mudd*, 339 S.W.2d 181 (Ky. 1960)).

130. See *id.*

131. RESTATEMENT (SECOND) OF TORTS § 824(a) (1979).

132. *Id.* § 825.

133. *Id.* § 822 cmt. b.

134. See *supra* text accompanying notes 98-109.

135. See *supra* text accompanying notes 119-120 (discussing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and the four-part test for valid expert testimony).

136. See *supra* text accompanying notes 119-120.

137. See *supra* text accompanying notes 4-7.

138. Ky. Rev. Stat. Ann. § 411.550(1) (West 2016); see *supra* notes 42-44 and text accompanying text.

V. THE REMEDY

Mindful that the Kentucky courts have adopted the Restatement factors to determine the existence, *vel non*, of a nuisance tort,¹³⁹ counsel notes that Kentucky's codification of its common law of nuisance seems entirely devoted to establishing the remedy of damages, mentioning the remedy of injunctive relief but once.¹⁴⁰ But counsel notes that the "savings clause" attendant to Kentucky's codification of nuisance law, Ky. Rev. Stat. § 411.570, provides that the damage remedy detailed in the codification is not to be construed to repeal any statutes or common law relating to nuisance. Rather, it is to be construed as ancillary and supplementary to any other rights or remedies available for personal or property damage.¹⁴¹ Counsel is fully cognizant that the remedy her clients want is for the convicted sex offender to move out of the neighborhood.¹⁴² The only remedy that would *directly* force this outcome is an injunction.¹⁴³ She explores the law of injunctions to determine whether this remedy is realistically attainable.

A. Is An Injunction Realistically Attainable?

Looking to the Restatement of Torts (Second) for guidance, counsel determines that:

[t]he ALI's approach to the law of nuisance as set forth in the *Restatement (Second) of Torts* may be summarized as follows: (1) a nontrespassory invasion that causes substantial damages will result in nuisance liability if it is 'intentional and unreasonable'; (2) conduct is 'unreasonable' if 'the gravity of the harm outweighs the utility of the actor's conduct'; (3) conduct is also 'unreasonable' if 'the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation,' but only if 'the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.'¹⁴⁴

Using this approach,

139. See *supra* notes 4-8 and accompanying text; see also Ky. REV. STAT. ANN. §§ 411.500-411.570 (West 2016).

140. Ky. REV. STAT. ANN. § 411.570 (West 2016).

141. *Id.*

142. The defendant relocating would immediately solve all of the attorney's client's concerns.

143. Only after the issuance of an injunction would the Court issue an order directing the defendant to move.

144. Lewin, *supra* note 6, at 784 (citations omitted). The issue of whether the financial burden of compensating for the injuries the defendant has caused would make the continuation of his conduct "not feasible," is inapplicable here, because the state has already determined conduct giving rise to his conviction and subsequent listing on the sex offender registry is illegal.

a court will issue an injunction if the harms imposed by the nuisance on the plaintiff and others in the community outweigh the costs an injunction would impose on the defendant and others in the community; if this balance weighs against the plaintiff, he will at least be entitled to damages in compensation for severe harms.¹⁴⁵

As it relates to the appropriateness of the remedy, the issue of the defendant's "conduct" again becomes problematic. The conduct that resulted in his conviction, which further resulted in his being listed on the sex offender registry, has presumably ended.¹⁴⁶

Thus, the only "conduct" presently engaged in by the defendant is his occupancy of his residence. Would a court require one who, having been convicted and punished, and who presumably has paid, or is paying his debt to society, relocate? A court would likely view this remedy distastefully because the imposition of this remedy in a neighborhood with high property values will simply mean that persons of lesser means, and perhaps lesser access to the courts, will be afflicted by the same harm presently being remedied.¹⁴⁷ It's hard to conceive that any court would relish taking a rich person's problem and making it a poor person's burden.

Moreover, it is axiomatic that an injunction, an equitable—and thereby extraordinary—remedy, has traditionally been reserved for those cases requiring immediate judicial intervention to prevent harms that cannot be fully compensated by money damages.¹⁴⁸ While counsel is comfortable that the Kentucky Rules of Civil Procedure permit the issuance of injunctions directing the defendant to undertake an act (such as moving),¹⁴⁹ she is mindful that venerable Kentucky law holds that:

[i]njunctive relief, in common with most other equitable weapons, though perhaps to a greater degree, has great potency for harm when

145. Lewin, *supra* note 6, at 785.

146. Because the convicted sex offender's child pornography viewing activities and his computer-use are electronically monitored, it is safe to assume that he has ceased such activity, lest his incarceration ensue.

147. Assuming that the value of the plaintiff's property is relatively small, the "diminution in value" award is likely to be similarly paltry. As such, the plaintiff might have difficulty locating a lawyer who is willing to take such a case on a contingency basis, and that potential plaintiff might be without the means to pay the lawyer on an hourly basis.

148. *Geveden v. Commonwealth ex rel. Fletcher*, 142 S.W.3d 170, 171-72 (Ky. Ct. App. 2004) (citing *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky. Ct. App. 1978)) ("an injunction is an extraordinary remedy not to be granted unless the movant establishes both that without it, he is likely to suffer the immediate and irreparable abrogation of a concrete personal right and that grant of the injunction will not unduly prejudice either the public or the non-movant.").

149. Ky. R. Civ. Proc. 65.01 ("[a]n injunction may restrict or mandatorily direct the doing of an act.").

misapplied, and for this reason courts consider every application for its employment in the light of its consequences to both parties, and, to that end, [courts] consider the “balance of inconvenience,” frequently withholding the granting of an injunction when the benefit to the plaintiff will be small in comparison to the injury to the defendant.¹⁵⁰

Additionally, counsel is mindful that for a court to adjudicate the defendant’s conduct as a nuisance, it must be adjudicated solely on the basis of whether his conduct has inflicted *damage to property*. A court must adjudicate any claims for annoyance, inconvenience, mental distress, or other provable personal injuries as any other tort case resting upon theories of negligence, strict liability for ultra-hazardous activities, etc.¹⁵¹

However, counsel is cognizant that the reason her clients desire for an injunction is not to prevent further damage to the value of their real estate caused by the sex offender’s duration of the residence in the neighborhood. Rather, clients seek injunctive relief to enjoy their property on a daily basis without the fear and angst attributable to the presence of a sex offender in the neighborhood.¹⁵² In order to establish her client’s entitlement to an injunction to prevent these harms, she is concerned that her client’s testimony alone may be insufficient to establish what are essentially personal injuries, personal

150. *Bartman v. Shobe*, 353 S.W. 2d 550, 554 (Ky. 1962) (quoting 2 FRED F. LAWRENCE, A TREATISE ON THE SUBSTANTIVE LAW OF EQUITY JURISPRUDENCE § 1096 at 1179 (Albany: Matthew Bender & Co., 1929)).

151. See *Palmore*, *supra* note 4, at 6 (quoting *S. Ry. Co. v. Routh*, 170 S.W. 520 (Ky. 1914)). The *Routh* court held:

[w]hen it comes to measuring damages, the diminution in the value of the use of the property necessarily includes annoyance and discomfort, which directly affect the value of the use. It is not, therefore, proper to permit a recovery both for the diminution in the value of the use and for annoyance and discomfort, which necessarily enter into and constitute a part of the diminution of such value.

Roth, 170 S.W. at 521; accord *Gay v. Perry*, 265 S.W.437, 438 (Ky. 1924).

Consequently, Ky. Rev. Stat. § 411.560(3) (2006), included within Kentucky’s statutory codification of the law of Nuisance, prohibits any award “for annoyance, discomfort, sickness, emotional distress or similar claims.”

152. See text accompanying note 105, *supra*. While it is conceivable that a sex offender’s lengthy presence in a neighborhood may cause adjacent properties to decline in value simply because of the extended duration of his residence in the neighborhood, realistically, the “hit” property values may take is going to occur immediately upon the offender being listed on the sex offender registry. Moreover, trying to segregate the element of damages attributable to his initial listing on the registry from those elements of damages attributable to his extended stay in the neighborhood may be so problematic as to be speculative, and thus excluded from evidence pursuant to a timely *Daubert* motion.

injuries that are serious, immediate, and sufficiently ongoing to warrant the extraordinary remedy of injunction.¹⁵³

Thus, counsel concludes that because the defendant's acts for which he was convicted are likely not ongoing, she must look to remedies beyond an injunction.¹⁵⁴ While the injunction would immediately remedy her client's "fear and distress" issues, Kentucky law makes clear that any nuisance case seeking either injunction or damages to prevent a reoccurrence of such "fear and distress issues" must proceed independently of their nuisance claim.¹⁵⁵ Thus, an injunction forcing the defendant to move, standing alone, will be insufficient to remedy any existing monetary damage her clients have suffered from the date of the offender's listing on the sex offender registry to the time of trial.¹⁵⁶ Therefore, at the very least, an injunctive remedy would need to be coupled with a damage remedy.¹⁵⁷ Moreover, even if counsel miraculously clears all hurdles and at first blush appears entitled to an injunction, "[b]ecause the courts have never addressed this type of nuisance claim, it is unknown how they would rule. However, public policy considerations may also affect their decision."¹⁵⁸

Enjoining sex offenders from residing in certain neighborhoods raises constitutional questions¹⁵⁹ as well as policy issues concerning where to properly locate such displaced persons, including whether all sex offenders should be lumped together irrespective of the nature of their crimes.¹⁶⁰ Counsel therefore reasons that her chances of convincing a court to enjoin the convicted sex offender from living in the neighborhood are at best questionable and even if granted, would provide an incomplete remedy for "loss of value of use" damage that has already occurred. Thus, if the case is to proceed with the desired

153. While not bursting with vitality, Kentucky law nevertheless holds "a discomfort which is purely mental, unaccompanied by anything else, may not be alleviated by injunctive relief." *Dulaney v. Fitzgerald*, 13 S.W.2d 767 (Ky. 1929) (citing *Pearson & Son v. Bonnie*, 272 S.W.375 (Ky. 1925)).

154. See *supra* text accompanying note 143.

155. See, *Palmore, supra* note 4, at 5 (citing Ky. REV. STAT. § 411.560 (3)).

156. See *Palmore, supra* note 4, at 4 (citing Ky. REV. STAT. § 411.560(1)(a)). Clearly, plaintiffs have suffered diminution in the value of the use of their property during the period of time of the sex offender's occupancy of his residence in the neighborhood since the date of his listing on the sex offender registry.

157. See *Palmore, supra* note 4, at 4 (citing Ky. REV. STAT. § 411.560(1)(a)).

158. *Hartzell-Baird, supra* note 31, at 390.

159. *Id.* The author references Michael J. Duster, *Out Of Sight, Out Of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 71 (2005) (discussing current constitutional issues surrounding sex offender laws); see also *Nagle, supra* note 32 (noting that nuisance law may not prohibit that which the Constitution protects).

160. *Hartzell-Baird, supra* note 31, at 390.

remedy, at least in part, being damages, what is the proper measure of damages in such case?

B. To Determine the Proper Measure of Damages: Is the Nuisance From Which Plaintiffs Seek Relief Temporary or Permanent?

The resolution of this issue is critical to the determination of the proper measure of damages as Kentucky law mandates different measures dependent upon whether the classification of the alleged nuisance is temporary or permanent.¹⁶¹ In Kentucky, “[t]he allowable damages in a private nuisance suit are (1) for a *permanent nuisance*, the resulting *loss in market value of the claimant's property*, and (2) for a *temporary nuisance*, the resulting diminution in the *value of the use of the claimant's property* if it was occupied by the claimant or, if it was not so occupied, the resulting *diminution in its fair rental value* during the time the nuisance existed within the period of limitations.¹⁶²

Kentucky Law's distinction between temporary nuisances and permanent nuisances, while seemingly simple in definitional terms, poses a distinct challenge in the context of the present case. Kentucky's nuisance codification statute defines as permanent “any private nuisance that: (a) [c]annot be corrected or abated at reasonable expense to the owner; and (b) [i]s relatively enduring and *not likely to be abated voluntarily or by court order*.¹⁶³ For definitional simplicity, “[a]ny private nuisance that is not a permanent nuisance shall be a temporary nuisance.”¹⁶⁴ However, to aid in the interpretation of the temporary nuisance definition, Kentucky law goes on to provide that:

[a] temporary nuisance shall exist if and only if 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.¹⁶⁵

161. Ky. REV. STAT. ANN. § 411.560 (West 2016).

162. Palmore, *supra* note 4, at 4-5 (citing Ky. REV. STAT. § 411.560 (2006)) (“The measure of recoverable property damage thus set forth in KRS 411.560 accurately reflects long and well established case law as reflected by the opinions of Kentucky's highest court.”).

163. Ky. REV. STAT. ANN. § 411.530(1) (West 2016).

164. Ky. REV. STAT. ANN. § 411.540(1) (West 2016).

165. Ky. REV. STAT. ANN. § 411.540(2) (West 2016).

Thus, simply stated, Kentucky law provides for the remedy of money damages based upon diminution in market value for a permanent nuisance; and, diminution in the value of use or rental value (depending upon occupancy) for any nuisance that is not permanent.¹⁶⁶

1. Measuring and Proving Temporary Nuisance Damages

While counsel is comfortable that she can establish a diminution in the market value of clients' properties, Kentucky law makes clear that this measure of damages is applicable if, and only if, the nuisance is determined to be "permanent."¹⁶⁷ However, as this is a question of fact for the finder of fact, she realizes that she must adduce sufficient proof to justify award of damages measured by loss of value of use or rental value, in the event that the nuisance is determined to be "temporary."¹⁶⁸

Analyzing her client's claim under the "temporary nuisance" damages rubric, counsel is comfortable that she can establish that the defendant's use of his property causes unreasonable and substantial annoyance to her clients as well as interfering with their use and enjoyment thereof.¹⁶⁹ Recognizing that "[t]emporary injury to real property may produce several different measures of damage," counsel confronts this conundrum: is "loss of value of use" to be established by determining the rental value of the property lost during the continuation of the nuisance?¹⁷⁰ Or, is "loss of value of use" to be proven by resort to criteria less objective than rental value?¹⁷¹

With respect to "loss of value of use," Kentucky law makes it clear that any nuisance case seeking either injunction or damages to prevent a reoccurrence of such "fear and distress issues" must proceed independently of their nuisance claim.¹⁷² Nevertheless, from her client's standpoint, it is precisely the "fear and distress issues," and their resultant effects upon the property owners, and their friends and families, that has caused the value of the use of their properties to

166. *Id.*

167. Ky. REV. STAT. ANN. § 411.530(1) (West 2016).

168. *Merrick v. Diageo Ams. Supply, Inc.*, 5 F. Supp. 3d 865, 878 (W.D. Ky. 2014), *aff'd*, 805 F.3d 685 (6th Cir. 2015) (citing *Huffman v. U.S.*, 82 F.3d 703, 705 (6th Cir. 1996)).

169. *Merrick*, 5 F. Supp. 3d at 878.

170. RONALD W. EADES, KENTUCKY LAW OF DAMAGES § 33:3 REAL PROPERTY: USUAL MEASURE OF DAMAGES (Thomson-Reuters 2016).

171. *Id.*

172. See Ky. REV. STAT. ANN. § 411.560(3) (West 2016).

be diminished.¹⁷³ So, of what relevance, if any, is evidence of plaintiffs' "fear and distress issues" to plaintiffs' claim for damages for temporary nuisance?¹⁷⁴

In *Kentland-Elkhorn Coal Co. v. Charles* the Kentucky court touched upon this subject, stating as follows:

The instructions should not authorize any *recovery* for personal annoyance, discomfort or sickness of the plaintiffs, because there was no claim of damages for personal injury. On a nuisance suit, such as this, *while evidence of those elements is admissible as affecting the value of the use of the property, they are necessarily included in the damages for diminution in the value of the use and are not distinct elements of damage.*¹⁷⁵

Counsel concludes that the net effect of this holding is that her clients may offer testimony about their "fear and distress issues," but that the finder of fact is precluded from awarding damages therefore. As to the issue of valuing a loss of use of residential property, counsel notes that the U. S. District Court for the Western District of Kentucky, construing Kentucky law, formulated a logical and relatively simplistic method for valuing loss of use.¹⁷⁶ In *Brockman v. Barton Brands, Ltd.* the U.S. District Court for the Western District of Kentucky, construing Kentucky law, reasoned that:

Kentucky law requires that damages in a nuisance case be measured by a material reduction in fair market value or rental value. KRS § 411.560(1). Plaintiff must introduce a "tangible figure from which the value of the use can be deduced," otherwise the valuation is pure speculation. (citation omitted). *The likely purpose of this requirement is to impose an objective criteria(sic) upon an otherwise rather subjective tort.*¹⁷⁷

173. *Id.*

174. To say that Kentucky law on this point is not a paragon of clarity is to wax with hyperbolic understatement!

175. *Kentland-Elkhorn Coal Co. v. Charles*, 514 S.W.2d. 659, 664 (Ky. 1974) (emphasis added).

176. For an example of a more convoluted mechanism for valuing "loss of use" damages, see note 179, *infra*.

177. *Brockman v. Barton Brands, Ltd.*, No. 3:06CV-332-H, 2009 WL 4252914, at *4 (W.D. Ky. Nov. 25, 2009). Similarly, the courts of Tennessee have a relatively straightforward approach to this valuation conundrum. In *Dye v. Lipps*, No.E2008-00891-COA-R3-CV, 2009 WL 1138124 (Tenn. Ct. App. April 27, 2009), the Tennessee appellate court held:

Where the nuisance is temporary, damages to property affected by the nuisance are recurrent and may be recovered from time to time until the nuisance is abated. *The measure of such damages [is] the injury to the value of the use and enjoyment of the property, which may be measured to a large extent by the rental value of the property, and extent that rental value is diminished.* This measure of damages is applicable during the time the nuisance exists.

While loss of rental value can presumably be established by expert testimony,¹⁷⁸ establishing loss of value of use by less objective criteria can be problematic.¹⁷⁹

Accordingly, counsel concludes that if the nuisance is to be categorized as temporary, she must persuade the Kentucky court to resort to the more objective and easily proved measure of damages for loss of use utilized by the U.S District Court in *Brockman*, namely, loss of rental value.¹⁸⁰ Concluding that the damage calculation for loss of use/ rental value would likely generate a smaller damage award than would a calculation based upon diminution in market value, counsel returns to the issue of whether the nuisance is temporary, or, alternatively, permanent?¹⁸¹

2. Can a Nuisance Caused by a Convicted Sex Offender's Continued

Brockman, No. 3:06CV-332-H, 2009 WL 4252914, at *2 (citing *Clabo v. Great Am. Resorts, Inc.*, 121 S.W.3d. 668, 671 (Tenn. Ct. App. 2003)).

178. See *supra* text accompanying notes 100-111.

179. The problem of utilizing such less objective criteria is illustrated and explained by the Supreme Court of Connecticut in *Johnson v. Flammia*, 363 A.2d 1048 (Conn. 1975). In *Johnson*, the plaintiffs contracted with the defendant to install a swimming pool on their property. After the pool was installed, it buckled due to excessively wet and plaintiffs alleged that the defendant breached and negligently performed the contract. The jury's award in the plaintiffs' favor included damages for the plaintiffs' loss of use and enjoyment of their swimming pool. Nevertheless, the reviewing court held that the plaintiffs failed to prove the nature and extent of their loss of use and enjoyment of the pool. In so holding, the Court stated as follows:

The defendants are liable for such damages as the plaintiffs sustained as a result of their loss of use of the pool and an essential element of the plaintiffs' burden of proof is the value of the use of the pool . . . [t]he plaintiffs had the burden of proving the nature and extent of the loss of use.

Id. at 1054.

The Court went on to note that the plaintiffs did not present any evidence that would have allowed the jury: "(1) to approximate the number of days that the pool was unusable, (2) to approximate the extent of the actual or intended use made of the pool by the plaintiffs and their children when the pool was usable and (3) to establish a daily value use of the pool." *Id.* For this reason, the court set aside the award of damages attributable to loss of use of the pool. Utilizing the *Johnson* formulation to analyze the type of proof her clients would need to adduce to establish their entitlement damages in the present case, how does one approximate the number of days the client's property was "unusable" due to the presence of the convicted sex offender? Realistically, her clients have suffered harm every day since his presence in the neighborhood was discovered. Is it fair to limit plaintiffs' damages to those days when family and friends were invited and declined to visit out of fear of the convicted sex offender? Clearly, the facts of the present case do not lend themselves to proving these seemingly abstract and ephemeral elements.

180. *Brockman*, No. 3:06CV-332-H, 2009 WL 4252914, at *4.

181. For example, counsel concludes that her client's home, valued at \$450,000, could easily be rented for \$2000 a month. By the time of trial, the convicted sex offender will have been living in the neighborhood for 40 months, thus resulting in a *diminution in rental value* of \$80,000. On the other hand, counsel believes that a competent real estate appraiser, utilizing the methodology described herein, would result in a diminution in sale market value of nearly 20%, i.e. \$130,000 in damages. In addition, this is of paramount importance to counsel if she is to be compensated pursuant to a contingency fee contract!

Residence in the Neighborhood Ever Be Said to Be Temporary?

Recognizing that Kentucky nuisance law statutorily defines a “temporary nuisance” as any nuisance that is not a “permanent nuisance” she analyzes the facts and the law to determine whether she can make the case that the nuisance of which her clients complain is permanent.¹⁸² To do so, she must establish two elements: first, she must establish that the nuisance “cannot be corrected or abated at reasonable expense to the owner.”¹⁸³ Second, she must establish that such nuisance is relatively enduring and not *likely to be abated voluntarily or by court order.*¹⁸⁴

Turning to the first element, while clearly this nuisance can be “corrected or abated” by the defendant moving out of the neighborhood, *query* whether such can be accomplished “at a reasonable expense to owner.”¹⁸⁵ The defendant’s residence, like plaintiffs, is “high-end,” in good condition and is presumably marketable. In the event the defendant has sufficient equity in his residence to at least cover the down payment on a substitute residence, it can hardly be said that the cost of moving and procuring a substitute residence would be unreasonable. Under such circumstances, except for moving expense, it is entirely possible that the defendant could replicate his present circumstances at no additional cost.¹⁸⁶

On the other hand, the defendant is “underwater” with respect to his home loan, then the expense the defendant would incur in relocating could be deemed “unreasonable” because without sufficient funds to at least make a down payment on a new residence, the defendant is relegated to being a rental tenant.¹⁸⁷ In either case, counsel is comfortable that she will not have to worry about this element since, in all likelihood, defendant will offer abundant proof that such costs are “unreasonable,” as proof of such element will be critical to the defendant’s case in chief.¹⁸⁸

182. See *supra* text accompanying notes 143-145.

183. Ky. REV. STAT. ANN. § 411.530(1) (West 2016); see *supra* text accompanying note 174.

184. Ky. REV. STAT. ANN. § 411.530(2) (West 2016).

185. Ky. REV. STAT. ANN. § 411.530(1) (West 2016).

186. If, for example, defendant is able to sell his residence for more than the mortgage balance on the subject property, the excess may be used for relocating expenses.

187. Say, for example, the defendant’s residence is currently worth \$450,000, but the purchase price was \$575,000, and the defendant’s loan balance indebtedness is in excess of \$450,000.

188. See *supra* text accompanying notes 143-144.

Pivoting to the second element, establishing that such nuisance is “relatively enduring and not likely to be abated voluntarily or by court order,”¹⁸⁹ counsel is immediately confronted with a catch-22.¹⁹⁰ For purposes of damages, she wishes to have this nuisance categorized as “permanent,” but if the court enjoins the defendant from living in the neighborhood, the nuisance cannot be said to be permanent, since it will have been “abated . . . by court order.”¹⁹¹ Thus, whether the court is likely to enjoin the defendant from residing in the neighborhood is a determination that must be resolved by the court before the question of whether the nuisance is “temporary” or “permanent” can be resolved by the finder of fact, either a jury, or the court, sitting without a jury.¹⁹² Counsel consequently conceives that her case must be postured and presented in such a way that the court will have to express itself on the likelihood of an injunction issuing, the resolution of which will resolve the permanent nuisance/temporary nuisance conundrum.¹⁹³

Counsel concludes that after the filing of the complaint, receipt of the defendant’s answer, and perhaps a bit of discovery, she must move the court for the issuance of a temporary injunction seeking the defendant’s removal from the neighborhood. If she is successful, her clients will be pleased and the case can proceed to trial to recover “temporary nuisance” damages for harms her plaintiffs have endured up to the time of trial. On the other hand, if the petition for a temporary injunction is denied, then the court will have established that the defendant’s nuisance-like activity by continuing to reside in the neighborhood is “relatively enduring and not likely to be abated voluntarily or by court order,” thereby establishing that the nuisance is permanent, for which damages measured by diminution in market value may be awarded.¹⁹⁴

189. See Ky. Rev. Stat. Ann. § 411.530(1) (West 2016).

190. Oxford Dictionary defines a Catch-22 as “a dilemma or difficult circumstance from which there is no escape because of mutually conflicting or dependent conditions.” Oxford Living Dictionaries (Oxford University Press), <https://en.oxforddictionaries.com/definition/us/catch-22> (last visited Feb. 25, 2017).

191. Ky. Rev. Stat. Ann. § 411.530(1)(b) (West 2016).

192. *Id.*

193. See generally Ky. R. Civ. Proc. 65.04(1); see also Lexington Loose Leaf Tobacco Warehouse v. Coleman, 158 S.W.2d 633 (Ky. 1942). If, for instance, counsel moves the court, pretrial, for a temporary injunction pursuant to Ky. R. Civ. Proc. 65, the court will be forced to rule upon plaintiff’s entitlement to injunctive relief in granting or overruling this motion. If the court denies counsel’s petition for the issuance of a temporary injunction, it will be required to issue findings of fact and conclusions of law [see Ky. R. Civ. Proc. 65.04(5)], which will necessarily include a finding that plaintiff’s loss is not “irreparable,” since it may be compensated by money damages.

194. Ky. Rev. Stat. Ann. § 411.530(1)(b) (West 2016).

3. Might the Court Fashion a “Blended” Remedy, Such as “Private Condemnation” or “Compensated Nuisance”?

As Professor Lewin posits:

The past twenty-five years have witnessed an entirely new approach to nuisance law in which land use conflicts are analyzed in economic terms, with an emphasis on the goal of efficiency in resource allocation. The modern approach to nuisance law rejects the traditional emphasis on injunctive relief, asserting that this remedy often impedes the efficient resolution of land use conflicts. Monetary damage compensation, not injunctive relief, is the preferred remedy of most recent commentators. *One unusual feature of the modern approach to nuisance law is a proposal that plaintiffs should be able to purchase injunctions through the judicial process in cases in which they would otherwise be denied injunctive relief.*¹⁹⁵

Professor Lewin cites *Spur Industries, Inc. v. Del E. Webb Dev. Co.* as an example of this modern approach.¹⁹⁶ In *Spur*, the defendants were operating a concentrated animal feedlot operation for some years prior to Del Webb's purchase and development of neighboring properties for sale to residential users.¹⁹⁷ Because of odors and pestilence emanating from the feedlot operation, Del Webb sought to enjoin its operation through a nuisance suit, claiming that the operation was both a public and private nuisance.¹⁹⁸

While the Supreme Court of Arizona's ruling in the case is complicated by some procedural anomalies, *Spur*'s uniquely constructed remedy sought to accommodate the legitimate interests of the parties before the court (and the surrounding public) by granting the injunction against the operation of the feedlot, conditioned upon Del Webb indemnifying the owners of the feedlot for the losses they incur in complying with the injunction.¹⁹⁹ The Court reasoned:

[i]t does not equitable or legally follow, however, that Webb, being entitled to the injunction, is then free of any liability to Spur if Webb has in fact been the cause of the damage Spur has sustained. It does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the

195. See Lewin, *supra* note 6, at 775-76 (citations omitted) (emphasis added).

196. *Spur Industries, Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972) (*en banc*)

197. *Spur*, 494 P.2d, at 704.

198. *Id.* at 704-05.

199. Presumably because of the scope of Del Webb's operations, the parties to the suit were barred from obtaining an injunction, but the court ruled, notwithstanding, that non-party residents of adjacent Del Webb properties would be entitled to injunctive relief in the interest of equity and public convenience; *Spur*, 494 P.2d at 706-08; see Lewin, *supra* note 6, at 791-92.

area, to indemnify those who are forced to leave as a result. Having brought people to the nuisance to the foreseeable detriment of Spur, Webb must indemnify Spur for a reasonable amount of the cost of moving or shutting down.²⁰⁰

Accordingly, “the price to be paid by the plaintiff should equal the ‘damages’ caused to the defendant by the injunction.”²⁰¹ Remembering, however, that an injunction will not serve to compensate plaintiffs for harms they will have incurred up to the time of trial, counsel believes the more appropriate measure of damages pursuant to this “compensated injunction” rubric would permit a prevailing plaintiff to receive a credit for any damages to which he would have been entitled.²⁰² So the net price of the injunction would be the defendant’s abatement costs *minus* the amount of the defendant’s potential damage liability to the plaintiff.²⁰³

Spur is widely viewed as the only reported decision in which a court has compensated injunction to be the appropriate remedy in civil litigation.²⁰⁴ Nevertheless, as early as 1952, the highest court of Kentucky recognized the appropriateness of this remedy in the context of a boundary dispute.²⁰⁵ In *Faulkner v. Lloyd*, plaintiff sought an injunction requiring the defendant to move a building constructed on plaintiff’s property.²⁰⁶ Defendant pled the equitable defense of estoppel, claiming that plaintiff knew, or should have known, of his claimed entitlement to the property as the building was being constructed.²⁰⁷ Although the defense of equitable estoppel might have been sufficient to deny plaintiff’s claimed entitlement to injunctive relief, the court noted that “[t]his action is pending in equity, and the court under its broad powers is not bound by inflexible rules in balancing the rights of the parties.”²⁰⁸ Accordingly, the Court of Appeals reversed and remanded the case to the lower court, stating:

we think under the circumstances the Court should have ascertained by proof the reasonable value of the strip of land taken and required its conveyance to appellees upon their payment of the sum fixed.

200. *Spur*, 494 P.2d at 708.

201. Lewin, *supra* note 6, at 803 (citing Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L REV. 1089, 1092 (1972)).

202. See *supra* text accompanying note 153.

203. Lewin, *supra* note 6, at 804-05. Professor Lewin finds support for this position in Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); see, e.g., Lewin, *supra* note 6, at 741, n. 212.

204. Lewin, *supra* note 6, at 793, n.74 (citing 53 A.L.R.3D 873-874 (1973)).

205. *Faulkner v. Lloyd*, 253 S.W.2d 972, 974 (Ky. 1952).

206. *Id.*

207. *Id.* at 973.

208. *Faulkner*, 253 S.W.2d at 974.

After the value is ascertained, the appellees should be given the choice of paying the reasonable value and requiring a conveyance or of removing the improvements.²⁰⁹

Faulkner thus legitimizes for the Kentucky court the broad and creative powers of the court in the context of a case seeking injunctive relief where the harshness of the injunctive remedy may be mitigated by the payment of money damages, but at the option of the defendant.²¹⁰

Moreover, 10 years later, in *Bartman v. Shobe*, the Kentucky Court of Appeals confirmed the propriety of the *Faulkner* approach, terming it a “private condemnation”:

In equity the rule of reason has always reigned supreme. In every case where injunctive relief is denied because the plaintiff has an adequate remedy at law there is, in practical effect, a ‘*private condemnation*’ in that the law refuses to stop one party from invading another’s property rights and paying later.²¹¹

While obviously not factually on point with the case at bar, counsel concludes that the broad language of *Faulkner*, buttressed by the nod of approval from the Court a decade later in *Bartman*, should provide comfort to the trial court when she urges it to fashion a “compensated nuisance” remedy.²¹²

4. Resolving the Temporary/Permanent Conundrum by Resorting to the Remedy Preferred by The Defendant – Defendant’s Choice!

At first blush, it might appear axiomatic that the defendant would choose to have his continued residence in the neighborhood denominated a “temporary” nuisance, since the defined remedy, loss of use or rental value, would likely result in a smaller damage award when compared with the award that could be levied by the court measured by diminution of market value, given the “high-end” nature of the property at issue.²¹³ On the other hand, the defendant must take cognizance of fact that without all potential plaintiffs joined in the lawsuit, he potentially faces a multiplicity of lawsuits claiming remedies for the “temporary nuisance,” given that “[a] temporary nuisance, on the other hand, is like a continuing trespass, for which recovery can be had for so much of the

209. *Id.*

210. *Faulkner*, 253 S.W.2d at 974.

211. *Bartman*, *supra* note 153, at 554-55 (emphasis added).

212. See *supra* text accompanying notes 197-205.

213. *Palmore*, *supra* note 4, at 4-5.

damage as has accrued during the five-year period immediately preceding the filing of the action.”²¹⁴

So, defendant must realize that in addition to the plaintiff seeking recovery in the within action, the simple filing of the Complaint may bring forth additional plaintiffs seeking to be joined in the action.²¹⁵ And this is the case irrespective of whether the court awards temporary nuisance damages or permanent nuisance damages.²¹⁶ Moreover, in the event the plaintiff in the instant action is successful, plaintiffs who are not parties to the instant action, and who seek recovery from a later initiated action, may be able to convince the court to rely upon the facts found in the previous action through the offensive use of collateral estoppel.²¹⁷

Thus, the defendant must realize that if plaintiff’s claim of nuisance is sustained by the court, irrespective of whether the court denominates the nuisance is temporary or permanent, defendant faces a potentially devastating award of damages in either case.²¹⁸ So, at the margins, counsel for plaintiff arguably has no preference concerning how the court denominates the

214. Palmore, *supra* note 4, at 11 (citing Ky. REV. STAT. § 413.120).

215. See CR 20.01 (West 2016). Alternatively, counsel for plaintiffs may seek to have all potential parties joined in a class action under CR 23.02 (West 2016). A class action may be the most practical solution to the problem of multiple plaintiffs, as the liability issues in the case would need to be tried but once.

216. Counsel for the defendant sex offender is thus placed in the unenviable position of being on the horns of a dilemma: he can defend the instant action and hope that unnamed, yet potential plaintiffs will “lie in the weeds”; or, he can seek the joinder of all potential plaintiffs. The first option may afford his client a smaller damage award, but the client may be faced with a multiplicity of lawsuits. If he chooses the second option, the award of damages, either temporary or permanent, may be so exorbitant as to force the defendant to relocate in order to avoid a devastating damages award. Recognizing that the second option is the remedy her clients would ultimately prefer, counsel for plaintiff would be well advised to secure service upon all potential plaintiffs in the instant action in order to force this outcome.

217. As stated by the Kentucky Court Appeals in *England v. Laird*, No. 2007-CA-000772-MR, 2008 WL 399758 (Ky. Ct. App. Nov. 19, 2008):

The requirements for the offensive use of Collateral Estoppel are: (1) a final decision on the merits; (2) identity of issues; (3) issues actually litigated and determined; (4) a necessary issue; (5) a prior losing litigant; and (6) a full and fair opportunity to litigate. (Citations omitted). The general rule is that a judgment in a former action operates as an estoppel only as to matters which were necessarily involved and determined in the former action, and is not conclusive as to matters which were immaterial or unessential to the determination of the prior action or which were not necessary to uphold the judgment.

Id. at *2 (citing *Sedley v. City of West Buechel*, 461 S.W.2d 556, 556-58 (Ky. 1970)).

218. See *supra* text accompanying notes 215-220.

nuisance because the potential damage award for either permanent or temporary nuisance damages may be beyond the defendant's ability to pay same, thus forcing his move from the neighborhood, the remedy counsel's clients prefer.²¹⁹ So, in summary, while the defendant may have a "choice" concerning whether he argues for temporary or permanent nuisance damages, he is in a "no-win" situation as his choice is truly a Hobson's choice: unless the defendant is prepared to compensate plaintiffs with a damage award that could run into hundreds of thousands of dollars, he must relocate.²²⁰

VI. CONCLUSION

Antiquated though it may be, the venerable tort of Nuisance remains viable in the 21st century. Pursuant to Kentucky law, as well as the Restatement Second of Torts, it remains vital and flexible enough to remedy harms to property, the nature of which would have been inconceivable to courts merely a generation ago.²²¹ True, the harms to neighboring properties discussed in this article in large measure occur only because of the widespread saturation of publicity the government has chosen to employ to notify the public of the potential dangers posed by convicted sex offenders.²²² Thus, while competent counsel for the defendant sex offender will no doubt assert the defense of causation, the Kentucky courts have addressed this issue in a factually similar case.²²³

In *Allen v. Clemons*, a convicted sex offender brought suit against neighbors who erected a sign in his yard reading "Danger-Child Molester in the Community," seeking damages for outrageous conduct.²²⁴ Confirming the propriety of the lower court's dismissal of plaintiff's cause of action, Chief Judge Lester, writing for the court, opined as follows:

The pain and suffering endured by the Plaintiff, William Allen, is directly attributable to his own wrongdoing. It was he who has been convicted by a jury of his peers of abusing a female child. The pain and suffering he has and is enduring is the direct and proximate result of

219. *Id.*

220. Merriam-Webster Online Dictionary defines a "Hobson's Choice" as "a situation in which one is supposed to make a choice, but does not have a real choice because there is actually only one thing you can have or do." Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/Hobson's%20choice> (last visited Feb. 21, 2017).

221. See note 14, *supra*. Community notification laws first appeared in the United States in 1994.

222. *Id.*

223. *Mudd*, 339 S.W. 2d at 186-87. Counsel for defendant will no doubt posit the notion that it is the government's act of notification, rather than the defendant's offending activity, which has caused the alleged damage to plaintiffs' properties.

224. *Allen v. Clemons*, 920 S.W.2d 884, 885 (Ky. Ct. App. 1996).

his sexual perversions becoming public knowledge. Throughout the history of civilized man we have operated on the premise that you don't kill the messenger boy, which is what the Plaintiff herein wants to do. Accordingly, this Court finds that the damages sustained by William Allen, if any, are a direct and proximate result of his criminal conduct and not a result of the Defendant's actions.²²⁵

In *Allen*, the conduct engaged in by the defendant/neighbor, erecting a sign in the sex offender's yard, occurred in 1993, predating Kentucky's adoption of its community notification legislation.²²⁶ The General Assembly's subsequent adoption of Ky. Rev. Stat. §17.580 now criminalizes such conduct, and, consequently, the outcome in *Allen* would no doubt be different were the case to be brought in the present day.²²⁷ Nevertheless, Judge Lester's reasoning portends well of the predictive value concerning how the Kentucky courts may view a putative defendant's claim that it is community notification, rather than his initial actions, which give rise to plaintiff's claims of nuisance.²²⁸

Community notification is a direct and proximate result of the nuisance defendant's conduct, but for which, no nuisance claim would have arisen.²²⁹ In short, if you don't "shoot the messenger boy" when he is a private individual, *a fortiori*, one shouldn't "shoot the messenger boy" when he is the government. Only time will tell whether the courts are willing to give this new application of the law of nuisance the attention and remedy it deserves.

225. *Id.* at 887; see Chrisandrea L. Turner, Note, *Convicted Sex Offenders v. Our Children: Whose Interests Deserve the Greater Protection?*, 86 Ky. L.J. 477, 503 (1997-1998)) (citing *Allen*, 920 S.W.2d at 887).

226. *Allen*, 920 S.W.2d at 885.

227. Ky. REV. STAT. ANN. § 17.580(4) (West 2009) provides:

The following language shall be displayed on the Website: "UNDER KRS 525.070 AND 525.080, USE OF INFORMATION OBTAINED FROM THIS WEBSITE TO HARASS A PERSON IDENTIFIED ON THIS WEBSITE IS A CRIMINAL OFFENSE PUNISHABLE BY UP TO NINETY (90) DAYS IN THE COUNTY JAIL. MORE SEVERE CRIMINAL PENALTIES APPLY FOR MORE SEVERE CRIMES COMMITTED AGAINST A PERSON IDENTIFIED ON THIS WEBSITE."

228. *Allen*, 920 S.W.2d at 886.

229. But for community notification, the defendant's activities may have remained secret, and thereby incapable of deleteriously affecting the value of surrounding properties. Similarly, what is the motivation of anyone to bring a nuisance action unless and until one is aware of the offending activity? Like the adage concerning "the tree falling in the forest," who is harmed if no one has heard it?