Nova Law Review Full Issue
ARTICLES AND SURVEYS

IDENTITY: SOCIETAL AND LEGAL RAMIFICATIONS WITH SPECIAL FOCUS ON TRANSSEXUALS
DR. NANCIE PALMER
CHARLENE L. SMITH
TOVA VERCHOW
JENNIFER DALE

GETTING YOUR CASE INTO FEDERAL COURT: A COMPREHENSIVE GUIDE TO DIVERSITY JURISDICTION IN THE ELEVENTH CIRCUIT

SUSAN D. LANDRUM

NOTES AND COMMENTS

WHY THE ELEVENTH CIRCUIT GOT IT WRONG: HISTORICAL CELL SITE LOCATION INFORMATION IS NOT CONSIDERED A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT

STEPHANIE CARLTON

THE USE OF RESTRAINT AND SECLUSION ON DISABLED STUDENTS IS A VIOLATION OF THEIR PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS

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# Nova Law Review

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## Articles and Surveys

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- Dr. Nancie Palmer
- Charlene L. Smith
- Tova Verchow
- Jennifer Dale


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**Getting Your Case into Federal Court: A Comprehensive Guide to Diversity Jurisdiction in the Eleventh Circuit**

- Susan D. Landrum


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## Notes and Comments

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- Stephanie Carlton

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- Jennifer Noud
IDENTITY: SOCIETAL AND LEGAL RAMIFICATIONS WITH SPECIAL FOCUS ON TRANSSEXUALS

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* Dr. Nancie “Nan” Palmer has a rich background of over forty-three years experience in public social service, child welfare, and mental health where she developed a specialty in clinical practice with child and adult survivors of trauma and currently animal assisted therapy. Nan is a tenured full Professor of Social Work at Washburn University, Department of Social Work. She has served as Department Chair twice and was one of the initiating faculty in creating a dual MSW/JD degree between the Department of Social Work and School of Law at Washburn University. Dr. Palmer was on the teaching faculty at the National Victims Assistance Academy for many years. Dr. Palmer has published in numerous journals of law on issues such as human trafficking, water as a human right, and sexual orientation and gender identity. Nan extends her deepest appreciation and gratitude for the enduring and enriching collaborative relationship over twenty years with Charlene Smith, Professor of Law at Nova Southeastern University, Shepard Broad Law Center and former Professor of Law at Washburn University School of Law.

* Professor Charlene L. Smith has an extensive background in the human rights area. She is the Executive Director of the Inter-American Center for Human Rights, which is located at Nova Southeastern University, Shepard Broad Law Center. The Inter-American Center for Human Rights is a response to the profound need in South Florida for an organization that is committed to furthering the civil and human rights of our diverse communities and people. Located at the crossroads of Latin America, the Caribbean, and the United States, as well as the hub of unique Haitian, Cuban, and other émigré communities, South Florida provides a compelling location to integrate human rights with domestic civil rights and community action. The Center provides law students with the opportunity to connect with other human rights organizations, write amicus briefs, and work for those representing human rights clients. While Professor Smith was at Washburn University School of Law, she and Dr. Palmer frequently partnered to organize symposiums on human rights. Their collaboration has continued even though they are now at different universities.

* Tova Verchow, J.D. Candidate, 2015, wrote most of the legal portions of this Article. Tova is in the top five percent of her class and is a Senior Associate on Nova Law Review. She was also a teaching assistant and is a member of the Family Law Society and Jewish Law Students Association. Prior to law school, she graduated summa cum laude from Ramapo College of New Jersey.

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“Human beings are an amalgam of identities—race and economic status, etc., etc. We [do not] live our lives as demographics or as political statements. We simply live.”

I. INTRODUCTION

The law is stuck on binary or categorical approaches. One is either this or that—heterosexual or homosexual; male or female; black or white; and the list can go on and on. This article posits that this approach should not be the way in which we categorize people’s personhood. To give the best example of why the law should rid itself of the binary approach we purposely focus on transsexuals. They offer the best opportunity to experience how the law so often punishes them because they do not fit into one category. While the United States is slowly accepting gay and lesbian requests for justice, that particular happenstance does not solve the problem for transsexuals. Such a transformation for gays and lesbians can take place because it is obvious that if you are gay or a lesbian, then you are not a heterosexual, which allows the law to keep the binary approach. In order to fully understand intersections of identity and the binary approach to law, it is necessary to first look at how classifications are brought about in the social, psychological, and biological world. To bring life to these heady subjects, this Article shares with the reader actual stories of people who have to exist in a world enamored with categories. Lastly, this Article explores how the
law approaches transsexual identity. It will be apparent that we should jettison the various identity categories and treat everyone as persons.

II. DEFINITIONS

Since this Article, unlike most articles, will not focus on a single category of people, it is necessary to provide the reader with the vocabulary that will be used. Transsexual or transgender includes many variations. Various politically motivated groups use the word transsexuals as an organizing function so that the public will have a label to refer to a group of people advocating for their rights. That group, however, may have a contingent of the following: Male-to-Female ("MTF"). These folks are born with male genitalia but prefer to be considered female. Within that group are those who have gone through gender reassignment surgery ("GRS"). Of course, there is also Female-to-Male ("FTM") for the women who identify as men. There are also people who are transvestites, who dress in the manner of the opposite gender from what they are. Included in this group are drag kings and drag queens. One of the main points to remember is that gender identity, birth sex, and sexual orientation are different. Because these variations exist on a sliding scale, there are those

10. See infra Part VI.
11. See infra Part XI. Making a person identify themselves has pitfalls in that it makes a person classify themselves. Jody Lyneé Madeira, Comment, Law as a Reflection of Her/His-Story: Current Institutional Perceptions of, and Possibilities for, Protecting Transsexuals’ Interests in Legal Determinations of Sex, 5 U. PA. J. CONST. L. 128, 165 (2002). The authors are not suggesting that anyone has to identify himself or herself, only to say that they are a person. See infra Part VI. Thus, gender or sexual orientation is not the question asked. See infra Part VI. Also, some say that allowing transsexuals to decide would undermine the law’s consistency. Madeira, supra note 11, at 171. Such observations seem to be based on when a person could decide. Id. It is not necessary to pinpoint when the person who is self-identifying makes the decision. See id. at 172. Subjectively, the person should have the power to decide. Contra id. at 171. Yes, it is true judges would, at first, need training in this area. See id. at 172–73.
12. Laura E. Kuper et al., Exploring the Diversity of Gender and Sexual Orientation Identities in an Online Sample of Transgender Individuals, 49 J. SEX RES. 244, 244 (2012).
14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
20. Madeira, supra note 11, at 171; see also JAMIE M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION
who would prefer to adopt a name that is more inclusive of everyone.\textsuperscript{21} For instance, QUILTBAG—an acronym that stands for “Queer/Questioning, Undecided, Lesbian, Transgender/Transsexual, Bisexual, Allied/Asexual, Gay/Genderqueer”—has been suggested.\textsuperscript{22} “It is meant to be a more inclusive term than [Gay-Lesbian-Bisexual-Transgender/Lesbian-Gay-Bisexual-Transsexual (“GLBT/LGBT”)] and to be more pronounceable—and memorable—than some of the other variations or extensions on the GLBT/LGBT abbreviation.”\textsuperscript{23} In one study, it was found that the younger generation prefers not to put their identity in any category.\textsuperscript{24} They instead champion the idea of identity being fluid and contextual.\textsuperscript{25} This group also challenges “the assumption that their sexual orientation is a core feature of their sense of self.”\textsuperscript{26}

The authors, however, will be using the term transsexuals as the generic term, but with the caution that all of the above folks should be included.\textsuperscript{27} Indeed, the Article will show that in many instances—depending where you are on the scale of gender identity and sexual orientation—the law may be particularly tricky.\textsuperscript{28}

III. SOCIETY’S TREATMENT OF IDENTITY

While race classification has received considerable discussion and legal attention for decades, sex and gender classification systems have only recently become the subject of litigation.\textsuperscript{29} As such, the traditional approach has been one of adopting a binary sex classification system instead of one that would deconstruct such a limited means of addressing human rights and privileges.\textsuperscript{30} Of particular concern are people who are transsexual, who are

\textsuperscript{19}\textsuperscript{21.} See Kuper et al., supra note 12, at 248.
\textsuperscript{23.} \textit{Id.}
\textsuperscript{24.} Kuper et al., supra note 12, at 250; \textit{Grant et al., supra} note 20, at 25. Twenty-nine percent of the respondents said they were something else other than just male or female. \textit{Grant et al., supra} note 20, at 25. Also, the younger respondents identified as gender non-conforming. \textit{Id.}
\textsuperscript{25.} Kuper et al., supra note 12, at 250.
\textsuperscript{26.} \textit{Id.}
\textsuperscript{27.} See \textit{infra} Part III.
\textsuperscript{28.} \textit{See supra} Part II.
\textsuperscript{29.} \textit{See Greenberg, supra} note 2, at 919.
\textsuperscript{30.} \textit{Id.} at 919–20.
forced to live in a rather twilight zone of factors that create a formidable chasm even with some gays, lesbians and bi-sexuals who "fear that inclusion of transgendered individuals may result in . . . rejection of legislation that would protect GLBs from sexual orientation discrimination."31 Given the pervasive oppression and discrimination that has threaded its way through decades, the "manner in which a person's sex[ual] [orientation] is defined has . . . significant legal consequences."32 Therein lies the compelling need to re-examine the issues and infuse hope in addressing urgent human needs.33

"Transsexuals pose a dilemma in the law both in their pre-operative and post-operative states. . . . Remedying this situation requires far-reaching changes in social perceptions and understanding[]."34 The complexities challenge legal scholars and practitioners to move beyond looking at the issue through a traditional lens to one that provides a greater view of the human landscape in everyday expression.35 Our humanness compels us to do this if all of us are to reach our full potential as human beings. Reaching full potential inherently means that social equality and justice are infused throughout the lifespan of every person. In so doing, the legal system should consider the broader lens to inform.36

"Critics of bipolar categories have called for their restructuring in the hope[] of creating more inclusive categories that reflect people's true identities."37 Yet, the very use of categories continues to perpetuate a hierarchy of power that controls the allocation, or lack thereof, of rights and privileges.38 In contrast, Labman posits that "far-reaching changes in social perceptions and understandings" are needed, and further that "[t]he law has the ability to both mirror and construct social norms."39 In essence, sex becomes a fluid concept which "dissolves and simply [a] relationship[] remain[s]."40

31. Id. at 920–21.
32. Id. at 928.
33. See id.
35. See id. at 66–67.
36. See id. at 67, 72.
37. Rachel Haynes, Book Note, Bisexual Jurisprudence: A Tripolar Approach to Law and Society, 5 MICH. J. GENDER & L. 229, 229 (1999) (reviewing RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW (1996)). Others such as Ruth Colker champion the concept of hybrid, which is used to describe people who lie between bipolar legal categories. Id.
38. See id. at 231. Colker’s belief was that without categories there would be anarchy. Id. at 238.
39. Labman, supra note 34, at 66.
40. Id. at 72.
A.  **Reconceptualizing the Issues From a Humanistic Point of View**

Relationship. It is the central life force that connects us as human beings. Margaret S. Mahler, a world-renowned child psychoanalyst, introduced scholars of human behavior to the concept of a second birth. That is, the emergence of a “psychological being possessing selfhood and separate identity.” Therein is a journey of navigating life, incorporating both a sense of oneness or attachment to others as well as sense of self or who we are as individuals. Beyond the legal arguments regarding the biology of sex and gender lie more substantial reasons for the need to look at the importance of relationships as the lynchpin of addressing the issues, rather than simply creating categories of race, sex, and gender. In order to examine this vast and complex realm of humanness, it is helpful to have a workable framework that helps one to make sense out of this complexity.

One effective approach is use of the biopsychosocial model. The biopsychosocial model was introduced in the 1950s by Roy Grinker, a neurologist and psychiatrist, who coined the term. However, this model is “associated indelibly with the name of George Engel, the internist, psychiatrist, and psychoanalyst” who “preached the indissoluble nature of mind-body links.” “Engel championed his ideas . . . [in part] to reverse the dehumanization of medicine and disempowerment of patients.” The model presented the philosophical view that “material lesions, life experiences, and current social situation[s] all matter in the presentation of illness.” The elegant, powerful, and versatile nature of this model is such that other professions—including social work—adopted the framework to address the

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42. Id. at 15–16.
43. Id. at 15. Mahler’s work remains a cornerstone of child development theory. See id. at 15, 19. Kaplan was an understudy of Mahler. See id. at 11.
44. Kaplan, supra note 41, at 16–17.
45. See Labman, supra note 34, at 66; Haynes, supra note 37, at 230.
46. See Haynes, supra note 37, at 230.
51. Shorter, supra note 47, at 2.
complex issues of person-in-environment.\textsuperscript{52} Social work has a long-standing history in social reform and social justice, valuing the worth and dignity of every human being, the importance of human relationships, and empowerment.\textsuperscript{53}

B. \textit{Attachment: The Essence of Humanness}

“Attachment theory is indispensable for understanding” the biopsychosocial interplay between person and environment.\textsuperscript{54} The theory was developed by psychiatrist John Bowlby through his work with the World Health Organization concerning health implications of homelessness in children.\textsuperscript{55} He concluded that the crucial element in mental health is predicated on a “\textit{warm, intimate, and continuous} relationship with a caregiver.”\textsuperscript{56} Human biology fosters this crucial need.\textsuperscript{57} Paul MacLean, a pioneer in the study of the human brain, contends that biology of attachment “goes back 180 million years [ago], originating with the earliest mammals” and even nesting birds.\textsuperscript{58} Indeed, we are biologically wired for connection.\textsuperscript{59} For example, when an infant is in distress, the child emits a particular cry that brings caregiver protection, safety, and nurturing.\textsuperscript{60}

The biological need for attachment crosses all geography and cultures.\textsuperscript{61} Central to attachment is the need for a consistent and secure base.\textsuperscript{62} “The importance of having a secure base cannot be overstated. As

\begin{footnotes}
\begin{enumerate}
\item[52.] See Tina Maschi & Robert Youdin, \textit{SOCIAL WORKER AS RESEARCHER: INTEGRATING RESEARCH WITH ADVOCACY} 3 (2010).
\item[53.] See id. at 11. Social worker Jane Addams, most famously associated with Hull House in Chicago, won the Nobel Peace Prize in 1931. \textit{Id.} at 6, 12, 25. Hull House was an innovative settlement house that was developed in the slums of poor migrant people in the late 1880s. \textit{Id.} at 9, 25. Leymah Gbowee—also a social worker, founder, and president of the Monrovia-based Gbowee Peace Foundation, Africa, Liberia—was selected Nobel Peace Prize winner in 2011 for her work on behalf of advancing women’s rights, conflict resolution, and working with ex-soldiers and victims of gender-based violence. See \textit{Gender, War & Peacebuilding Study Guide}, U.S. INST. OF PEACE 1, 10, http://www.usip.org/sites/default/files/files/NPECSG12.pdf.
\item[55.] \textit{Id.} at 36.
\item[56.] \textit{Id.}
\item[57.] \textit{See id.} at 36–37.
\item[58.] \textit{Id.} at 37; see also PAUL D. MACLEAN, \textit{THE TRIUNE BRAIN IN EVOLUTION: ROLE IN PALEOCEREBRAL FUNCTIONS} 8–9 (1990); M. Alan Kazlev, \textit{The Triune Brain}, KHEPER, http://www.kheper.net/topics/intelligence/MacLean.htm (last modified Oct. 19, 2003).
\item[59.] ALLEN, \textit{supra} note 54, at 36–37.
\item[60.] \textit{Id.} at 36.
\item[61.] \textit{See id.} at 38.
\item[62.] \textit{Id.} at 37.
\end{enumerate}
\end{footnotes}
Bowlby says, our survival as a species has depended on it. A secure base is required in order for a human being to develop both individually and socially. Without this consistent secure base, infants and children have tremendous challenges in normal psychological social development. In fact, attachment is critical to self-regulation, or the ability to manage one’s physiology. Witness the child in distress who runs to mother or proximate caregiver. Recall human reaction to catastrophic events, such as natural disaster, terrorist attacks, and the like. The most compelling need in these instances is to connect with loved ones, friends, or people who represent safety. Connection and proximity have a calming effect both psychologically and physically. Through attachment, comes interaction with the mother or primary caregiver and others in the social environment. This interaction has often been referred to as mirroring. Heinz Kohut’s original studies illuminated this concept. If this interaction is positive over time, then a sense of self or self-cohesion develops. “Over time, these [positive interactions] lead to the child’s capacity to feel pride and take pleasure in his or her accomplishments—to feel a sense of competence and efficacy.” When interaction is inconsistent, violent, rejecting, and destructive, the sense of self is compromised. As a result, children “become arrested in their development of an internal sense of confidence and competence. . . . [H]e mistrusts and disrespects his own internal signals and states; he doubts his own self-worth and competence.”

63. Id.
64. ALLEN, supra note 54, at 37–38.
65. Id. at 36, 38.
66. See id. at 36, 46.
67. See id. at 46.
68. See id. at 37, 47.
69. ALLEN, supra note 54, at 37. In coping with any traumatic event, safety is critical. Id. at 47. Even inanimate objects can provide a measure of protection and safety. Id. “This phenomenon of bonding to places [is referred to as] site attachment.” Id.
70. Id. at 36.
71. ALLEN, supra note 54, at 36.
74. See Wexler, supra note 72, at 130, 137.
75. Id. at 130.
76. See id.
77. Id. Children then often mirror in adulthood the very traits they experienced from negative interactions in their growing years. See id. “While insisting [the] men [and women] take full responsibility for their . . . behavior,” Wexler and others have used
Our need for attachment continues throughout our lifetime. 78 Interestingly, the “methods that enable one human being to enslave another are remarkably consistent.” 79 A universal method used to control human beings is the destruction of attachments and isolation. 80 “The destruction of attachments requires not only the isolation of the victim from others, but also the destruction of her internal images of connection to others.” 81 Thus, our biology of attachment is in play throughout the life span. 82 Attachment and social connection provide a nurturing stream of affirmation and belonging. 83 The fact that perpetrators of power universally use isolation as a weapon of control speaks to our continuing vulnerability as human beings. 84 Fostering attachment and affirmation is the phenomenon of mirroring and witnessing. 85 These two interpersonal interactions are essential to the formation of self-identity and to a sense of one’s place in the family, the community, the culture, and indeed, the larger social environment. 86 Consider the following:

C. Who Am I? The Personal and Social-Cultural Self

“Western societies, in which most of this theorizing and research has been carried out, can be characterized as cultural contexts with a strong emphasis on personal identities and individual achievements.” 87 Contributing to identity development is “a substantial body of research reporting on phenomena that illustrate the powerful impact of people’s social self-psychological principles in working with clients who have battered their family members. Wexler, supra note 72, at 140. Treatment programs such as Domestic Violence 2000 and Foundations for Violence-Free Living integrate these concepts. Id. That is not to say that all children experiencing deficient parenting will become abusive or neglectful. See id. at 131. The journey to positive adulthood is that much more arduous. See id. at 130.

78. See ALLEN, supra note 54, at 43–44.
79. JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR 76 (1997). “The accounts of hostages, political prisoners, and survivors of concentrations camps” as well as survivors of domestic violence “from every corner of the globe have an uncanny sameness.” Id. at 76–77.
80. Id. at 77.
81. Id. at 80. “Inevitably, in the absence of any other point of view, the victim will come to see the world through the eyes of the perpetrator.” Id. at 81.
82. See ALLEN, supra note 54, at 43–44.
83. Id. at 44.
84. See HERMAN, supra note 79, at 80–81.
86. See id. at 46–47.
identities on their perceptions, emotions, and behavior.” 88 Biology—with its compelling forces for our need of attachment—moves us into the psychological and social arenas, which are also essential elements of human development. 89 Biology of attachment is but one powerful factor in human development. 90 In addition to the universal need for attachment, the last thirty years of research indicate that human beings have “a strong biosocial preparedness for emotion expression and emotional communication in infancy.” 91 Herein, the phenomena of witnessing and mirroring come into play. 92

1. Witnessing: Observing and Affirmation

“This Witness: [O]bserver . . . watcher . . . provid[ing] or furnish[ing] . . . confirm[ing], corroborat[ing] . . . behold[ing].” 93 The concept of witnessing flows from both outside—e.g. an eyewitness providing testimony—to being watched. 94 In both directions, powerful forces emerge that shape the self. 95 Survivors of domestic violence, oppression, political imprisonment, and torture “describe being forced to stand by helplessly while witnessing atrocities committed against people they love.” 96 Witnessing can take on a different hue in the struggle for survival. 97 The death camps of the Holocaust offer such a perspective. 98 In the midst of terror, deprivation, and violence—direct or indirect—the need to have others know of such human experiences is paramount. 99 Why? “Terror dissolves the self into silence, but its aftermath . . . . Horror arises and in its presence men and women are seized

88. Id. at 163.
89. See ALLEN, supra note 54, at 46, 50.
90. See Devor, supra note 85, at 42.
92. Id. at 1188.
94. Devor, supra note 85, at 46.
95. Id.
96. HERMAN, supra note 79, at 83.
98. See id.
99. See id. at 33.
by an involuntary outburst of feeling which is very much like a scream . . . . And in this crude cry the will to bear witness is born . . . .”

Yet another view incorporates witnessing as essential to a sense of self. “The effectiveness of witnesses, in part, derives from the fact that they are not like oneself and can look at us from outside of our categories of self-definition.” Devor argues that when another person provides “appraisals which conform to one’s own sense of self, it leaves one with a feeling of having been accurately seen by others who can be assumed to be impartial.” Devor believes that this is a critical issue for people who are transsexual. In all of these instances, the threading element is the presence of, or being present with, other human beings.

2. Mirroring: Reflection of Self-Identity

Mirror: Reflection, reproduction, representation; the concept of mirroring is an inextricable facet of human development. The validation and affirmation of human expression in infancy enables the developing child to develop a sense of cohesion within the self and self-expression. In the process of attachment and calming, affirming the presence of others’ regard for, and sacredness of one’s humanness and that of others is manifested. Mirroring may also be regarded as “seeing oneself in the eyes of others like oneself.” From a psychosocial perspective, infants are sensitive to face-to-face affective communication and “are, to a large extent, dependent on their parent’s affect-regulative interactions as a means of emotional self-

100. Id. at 33. The compelling desire for those in a life and death struggle is to bear witness. Id. To tell the world. DES PRES, supra note 97, at 33. Des Pres accounts that [i]t took months and months of preparation, cutting down the suicides, insisting that survival even in such a place is not without value. Their purpose—strong enough to lift the spirit from truly inhuman depths—was to destroy the camp and allow at least one man or woman to escape and bear the tale.

Id. at 32–33.

101. Devor, supra note 85, at 46.
102. Id. Devor makes the distinction between witnessing and mirroring. Id. The former is critical in that the “[w]itness[] can be presumed to have some distance and therefore . . . objectivity.” Id. at 46. That is, validation is from someone not like oneself. Id.

103. Devor, supra note 85, at 46.
104. See id.
105. See id. at 46–47.
106. THE AMERICAN CENTURY THESAURUS, supra note 93, at 253.
107. See Devor, supra note 85, at 46; Gergely & Watson, supra note 91, at 1186–88.

109. Id. at 1188.
110. Devor, supra note 85, at 46.
regulation.”

Thus, requisite to human development over the life span is a continual need of attachment or sense of belonging, the influence of significant others in providing feedback and affirmation, and the presence of a safe supportive environment in which to grow in self-understanding and expression. “Each of us are social beings and as such we live in a sea of other humans with whom we interact during most of the waking hours of our lives.”

These concepts are powerfully illustrated in the lives of people who are transgender, gay, lesbian, bisexual, and intersex. There is, inherently, an immense role that society and the legal system plays in the struggle for their survival, struggle to be oneself, and have a valued place in the human sea.

3. Identity Formation

“Although societal awareness of the existence of lesbian and gay people has increased dramatically over the past decade or so, most lesbians and gay men still grow up within a context of pervasive environmental and internalized homophobia and expectation to be heterosexual.”

Likewise, while biological considerations are significant, “all people live within social environments which give meanings to the realities of their bodies and psyches,” including people who are transgender and intersex.

Interestingly, the study of identity remains primarily of interest to those most affected by discrimination and oppression and “little interest to members of the dominant group.” While there are different issues regarding ethnicity and racial identity with those of differing sexual orientation and gender expression, there is nonetheless agreement that one’s identity is critical to psychological functioning as an individual and a person-in-environment.

111. Gergely & Watson, supra note 91, at 1188.
112. See ALLEN, supra note 54, at 36–38, 43; Devor, supra note 85, at 46; Gergely & Watson, supra note 91, at 1188–89.
113. Devor, supra note 85, at 46.
115. See Devor, supra note 85, at 46–47.
117. Devor, supra note 85, at 42.
118. Id. at 42, 47.
120. Id.
It is not within the scope of this article to compare and contrast all of the various models of identity development. Each person is special and unique, as is one’s life journey and circumstance. Thus, no one model can apply to all individuals in the same manner. However, there is some consistency in using a stage model to explain a highly complex process. Frequently referenced among models of identity development was the stage model developed by Vivienne C. Cass in 1979. The model has been revised and conceptually reworked by various researchers throughout the years. In reviewing the history of sexual minority identity formation, McCarn and Fassinger postulate that Coleman included another dimension that focused on the “force of social pressure at different stages of the coming out process.” Further, according to McCarn and Fassinger, the concept of identity development was again modified by Troiden, who “noted the critical importance of a supportive lesbian [or] gay environment in facilitating self-definition and self-acceptance within the context of social stigma.” Devor proposes a fourteen-stage model of transsexual identity formation in order to more faithfully address needs and processes of transsexed people. However, there are limitations with all of these models and research studies attempting to understand the very complex and myriad process of coming-out. “More research is needed for inclusion of racially, ethnically, culturally, and economically diverse samples.”

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121. See id. at 501–03.
123. See id. at 219–20. Cass intended the model to apply to both men and women. Id. at 220. The model includes such dimensions as one’s cognitions—thoughts and beliefs—and affective and behavioral features into a six-stage process. Id. at 221. Stage one features identity confusion and questioning. Id. at 222. This stage may be accompanied by anxiety and discomfort. See Cass, supra note 122, at 223. Other stages include identity comparison, which often evokes feelings of isolation and alienation. Id. at 225. Final stages include acceptance of oneself and eventually pride. Id. at 231, 233.
125. McCarn & Fassinger, supra note 114, at 510; see also Coleman, supra note 124, at 31.
127. Devor, supra note 85, at 42.
129. Id.
C. Intersectionality: Human Beings, the Struggle for Self, Society, and the Legal System

An emerging concept in the study of human behavior, particularly from a perspective of social justice, is that of intersectionality, which "underscores the complex nature of cultural and personal identities and human experiences that cannot be [divided] simply by one dimension of inequality or difference—either race or gender or sexual orientation or ability."\(^{130}\) The sense of identity—who one is and one’s place with other human beings—is a central theme among scholars of race, ethnicity, sexual orientation and gender, and gender expression.\(^{131}\) It is the driving force of human expression to be authentically oneself.\(^{132}\) If the struggle to become the authentic self takes place in a social environment that is fraught with messages and practices of oppression, destruction, and life threats, then the consequences to countless human beings is devastating.\(^{133}\) Such conditions are much like the forces prisoners of domestic violence and war experience.\(^{134}\) To be sure, such forces are often invisible, yet just as damaging to self and life.\(^{135}\)

It is at this intersection of person-and-environment that courts must emerge as vigilantes and protectors of human life and expression.\(^{136}\) As Labman so aptly observed, "[t]he law has the ability to both mirror and construct social norms."\(^{137}\) When society is inhumane and oppressive, the courts must move from a place of continuing to reflect on oppression to a place of constructing social norms such that all human beings may become their authentic selves. The need for belonging, for attachment to meaningful human relationships without terror or fear of annihilation, the creating of safe and affirming environments, and regarding of the sanctity of our humanness should be the mission of the legal system.

IV. SUMMARY

"Contemporary adolescents are coming of age in a world that is considerably more multicultural than the world in which their parents and

130. Yvette Murphy et al., Incorporating Intersectionality in Social Work Practice, Research, Policy, and Education 42 (2009).
131. See Mosher, supra note 128, at 164; Phinney, supra note 119, at 499.
132. See Allen, supra note 54, at 128.
133. See id. at 137–42; Phinney, supra note 119, at 499, 511.
134. See Allen, supra note 54, at 137–42; Herman, supra note 79, at 51–52.
135. See Allen, supra note 54, at 127–28, 137–42.
136. See Labman, supra note 34, at 66.
137. Id.
grandparents grew up.” The presence of the Internet and global communication has sped up globalization at an unprecedented pace. For the youth of today, developing a cultural identity is much more inclusive and complex. As a consequence, growing up is at a time of more pronounced openness and diversity. This is no less true for people who are exploring or experiencing an identity that is fluid and affirming of the authentic self. To categorize or to make distinctions is to impose a hierarchy of power and perpetuate oppression. Whether binary or a range of categories—no matter how humane—the intension is in and of itself creating barriers to the flow of human development. The world is moving and changing at a speed unlike any other in time. There is a moral imperative for the courts to respond to the inevitable growing flexibility and fluidity of human expression and authenticity.

V. PERSONAL STORIES: SERAFIMA METZ AND KRYSTA CASCIO

In order to avoid talking about people who deserve legal recognition in the abstract, their stories will be told. Since self-identity is key to finding out how society and the law in particular treat any person, the first portion of this Part will examine how each person self-identified. These stories are a product of reaching out to the transsexual community and asking for volunteers to tell their stories. Those transcripts and recordings will become part of a project at Shepard Broad Law Center to archive stories of the Lesbian, Gay, Bisexual, Transsexual, Intersex (“LGBTI”) community entitled: The Harris L. Kimball Memorial Digital Archive of Lesbian, Gay, Bisexual, Transgender, and Queer Florida Legal Oral History.

139. Id.
140. Id.
141. Id. at 191.
142. See infra Part V.A–B.
143. See Interview with Krysta Cascio, in Fort Lauderdale, Fla., 1 (Apr. 8, 2013) (on file with Nova Southeastern University, Shepard Broad Law Center Library); Interview with Serafima Metz, in Fort Lauderdale, Fla., 1 (Apr. 1, 2013) (on file with Nova Southeastern University, Shepard Broad Law Center Library).
144. See Interview with Krysta Cascio, supra note 143, at 1; Interview with Serafima Metz, supra note 143, at 1.
A. Identity

Serafima Metz said that even though she was born a male, that over the process of both mental and physical development, she now considers herself female.\textsuperscript{145} She found it problematic when it came to the law because she has observed that while she considers herself a female, the law might come to a different opinion.\textsuperscript{146} Serafima was quite willing to accept labels when it came to identity.\textsuperscript{147} She observed that when labeled as transgendered, she embraced it.\textsuperscript{148}

Krysta Cascio had a different approach.\textsuperscript{149} First, she said she did not like labels.\textsuperscript{150} However, when pressed, she now considers herself as a “pansexual, intersex, post-op trans-woman.”\textsuperscript{151} Interestingly, Krysta also said that she liked the definition of pansexual, which she understands as meaning gender blind.\textsuperscript{152} She noted that pansexual is different from being bi-sexual, which means you are equally attracted to men and women.\textsuperscript{153} But, bi-sexual leaves out, according to Krysta, all the trans-men, trans-women, and those who considered themselves two-spirited.\textsuperscript{154} Thus, according to Krysta, gender is not binary.\textsuperscript{155} Rather she sees it as a “huge scale of gray, and . . . you can fall in love with anyone on that scale of gray.”\textsuperscript{156} Krysta adds that she is blind to race, religion or disability.\textsuperscript{157} “[I]f I meet somebody and I connect with them and we click and then [that is] all that should matter. The rest is irrelevant.”\textsuperscript{158}

\textsuperscript{145.} Interview with Serafima Metz, supra note 143, at 1; see also GRANT ET AL., supra note 20, at 24. The National Transgender Discrimination Survey has extensive information about transgendered people. GRANT ET AL., supra note 20, at 20–32.
\textsuperscript{146.} Interview with Serafima Metz, supra note 143, at 1.
\textsuperscript{147.} Id.
\textsuperscript{148.} Id. Seventy-five percent of respondents identified themselves as transgendered. GRANT ET AL., supra note 20, at 24. Interesting that forty-seven percent of that number identified as MTF, while only twenty-eight percent identified as FTM. Id.
\textsuperscript{149.} See Interview with Krysta Cascio, supra note 143, at 1.
\textsuperscript{150.} Id.
\textsuperscript{151.} Id.
\textsuperscript{152.} Id. at 16.
\textsuperscript{153.} Id.
\textsuperscript{154.} Interview with Krysta Cascio, supra note 143, at 16. “Gender identity and expression are complex and layered characteristics, with almost as many variations as there are individuals.” GRANT ET AL., supra note 20, at 24.
\textsuperscript{155.} Interview with Krysta Cascio, supra note 143, at 16.
\textsuperscript{156.} Id. Of those surveyed, fourteen percent identified themselves as gender non-conforming. GRANT ET AL., supra note 20, at 24.
\textsuperscript{157.} Interview with Krysta Cascio, supra note 143, at 16.
\textsuperscript{158.} Id.
B. Growing Up

Serafima’s redefined identity began at an early age. According to her, when she was “very young [she did not] fit in with the rest of the males” when she was at school. The other boys teased her constantly. She considered herself different. She really had no role models and it was not until she was nineteen years old that she even met another transgendered person. At that time, she realized that “it was actually quite acceptable thing to do at . . . my own moral code.” She knew she had the genitalia of a boy, but her identity was nebulous. While she felt contrary to her body, she was happy with her life being a woman.

Krysta had some of the same experiences. When she was about four or five years old she said she recalls not falling into the gender binary. She remembers dressing up as Wonder Woman every day. She would come home and watch Linda Carter spin around and become Wonder Woman. So, Krysta would spin around hoping that she would become a woman.

Krysta’s growing up phase differed from Serafima’s. First, Krysta went to a Christian school that only had six students in class. Since the class was so small, the students really did not divide into gender specific roles. For instance, to play football, they all joined in. It was not until she started going through puberty that she realized something was not quite right. While she devoted her spare time to science fiction, reading comic
books, and becoming a gaming geek, she suddenly also developed breasts. She thought she was a mutant. She hid the factor, never revealing it to anybody. She made sure she did not do anything that would show that she had breasts. This meant she stopped swimming and wore heavy jackets to school. Given that she lived in Miami, she was the target of ridicule because of her apparel. She described herself as an outcast. Even though she was an outcast, she had both girlfriends and boyfriends. She had no name for her orientation.

When Serafima was in high school, she began wearing women’s clothing now and then. Her take on it was that punk shows were popular at the time, so she was just following that style. In fact, she went to many punk shows and always wore dresses, and it made her feel good. Additionally, Serafima had a very supporting family. While she found it difficult to fully come out to them, she felt they were enlightened and liberal and “really put the effort to try and understand” what she was confiding in them. Regardless of their support, Serafima attempted suicide when she was eighteen. Her parents encouraged her to go to a treatment center because she was suffering from major depression. When she got out, she went back to the university she was attending, but again, she was so depressed, she tried to commit suicide again. As a result, she went to another treatment center, which was a three-month program for patients who

177. Id.
178. Interview with Krysta Cascio, supra note 143, at 1.
179. Id.
180. Id. at 1–2.
181. Id. at 2.
182. Id.
183. Interview with Krysta Cascio, supra note 143, at 2.
184. Id.
185. Id.
186. Interview with Serafima Metz, supra note 143, at 3.
187. Id.
188. Id.
189. Id.
190. Id.
191. Email from Charlene Smith, Law Professor, Nova Southeastern Univ., to Krysta Cascio (Apr. 12, 2013) (on file with Charlene Smith); see also Debra Cassens Weiss, Report: ‘Staggering’ Rate of Attempted Suicides by Transgenders Highlights Injustices, ABA J. (Feb. 4, 2011, 2:29 PM), http://www.abajournal.com/mobile/article/staggering_rate_of_attempted_suicides_by_transgenders_highlights_injustices. Forty-one percent of those who responded to a survey said they had attempted suicide in comparison to a 1.6% of the general population. Weiss, supra note 191.
192. Email from Charlene Smith, Law Professor, Nova Southeastern Univ., to Krysta Cascio, supra note 191.
193. Id.
had been diagnosed with mental illness. She was also there for substance abuse. After she got out, she lived with her parents for a short amount of time and eventually went to live in a house that was established for queer and trans people. It was the first time she had ever interacted with trans or queer people. As Serafima put it, “I began to feel comfortable questioning and exploring my gender identity.” She started her transition with hormones, and as her body started changing, she began wearing women’s clothing all the time.

C. Relationships

Serafima considers herself a lesbian and is in a committed relationship with another woman. She rejects the idea that she is bisexual. She said she was always attracted to women and that has remained the same throughout her life.

Krysta noted that relationships are tough for trans folks. If somebody was with a person before the transition, it’s rough. For instance, Krysta knew a couple that had been together for fifteen years but, right after the surgery, the wife left. The hormonal treatment is also a factor. Because the person seeking to become the opposite gender has many emotional changes, the partner cannot handle the ups and downs. Then, after the change is completed, finding a partner who is understanding is almost impossible. According to Krysta, when you are trying to find someone, you go stealth, and it becomes very awkward to tell the new person. Additionally, the newly trans person tends to fall for the wrong person.

194. Id.
195. Id.
196. Id.
197. Email from Charlene Smith, Law Professor, Nova Southeastern Univ., to Krysta Cascio, supra note 191.
198. Id.
199. Interview with Serafima Metz, supra note 143, at 3–4.
200. Id. at 4.
201. Id.
202. Id.
203. Interview with Krysta Cascio, supra note 143, at 18.
204. Id.
205. Id. at 19.
206. Id.
207. See id.
208. Interview with Krysta Cascio, supra note 143, at 19.
209. Id.
210. Id.
D. **Legal and Societal Difficulties**

Before getting her name changed, Serafima applied to the university where she is currently a student.\(^{211}\) To get the university to change her first name was an uphill struggle.\(^{212}\) Her problem was that she would be on the teacher’s roster with a male name.\(^{213}\) She encountered a massive amount of bureaucracy to get her name on all the university’s collection of her data corrected.\(^{214}\) However, while the university changed her name, they still have her listed as a male.\(^{215}\) She was able to change her driver’s license by getting a letter from her doctor.\(^{216}\) However, that was a very difficult task.\(^{217}\) Serafima found very little information on how to go about this process.\(^{218}\) The people who work at the Department of Motor Vehicles were not helpful.\(^{219}\) Her experience with Social Security was even more stressful.\(^{220}\) They eventually informed her that until her birth certificate was changed, they would not change the name on her Social Security card.\(^{221}\) Naturally, that has made getting jobs very difficult for Serafima.\(^{222}\) If it were not for True Group,\(^{223}\) she would not have known the steps to take.\(^{224}\) They provided all the forms she needed.\(^{225}\) The process was not cheap; it cost Serafima over four hundred dollars in court costs to complete as many documents as she had.\(^{226}\) She estimates that it takes about three to four months to complete the process, because many of the items required her to appear in court.\(^{227}\)

\(^{211}\) Interview with Serafima Metz, *supra* note 143, at 5.
\(^{212}\) See id.
\(^{213}\) Id.
\(^{214}\) Id. She notes that the university is huge, so that might explain some part of it. Id.
\(^{215}\) Interview with Serafima Metz, *supra* note 143, at 5.
\(^{216}\) Id.
\(^{217}\) See id.
\(^{218}\) Id.
\(^{219}\) See id.
\(^{220}\) See Interview with Serafima Metz, *supra* note 143, at 5–6.
\(^{221}\) Id.
\(^{222}\) Id. at 6.
\(^{223}\) This Miami based group provides information on their website on how to go about changing your name/gender on legal documents.
\(^{224}\) Interview with Serafima Metz, *supra* note 143, at 6; *Legal Name & Gender Marker Change, supra* note 223.
\(^{225}\) Interview with Serafima Metz, *supra* note 143, at 6–7; *Legal Name & Gender Marker Change, supra* note 223.
\(^{226}\) Interview with Serafima Metz, *supra* note 143, at 7.
\(^{227}\) Id.
Krysta’s experience regarding the law mirrors much of what Serafima explained.228 For instance, she said she spent a “whole day waiting at the wrong courthouse.”229 This happened because when she searched online, it gave the information that she could go to any courthouse within the county.230 She said that she mostly ran in circles because she did not have a clue as to what to do.231 Anybody she asked who had been through the experience had outdated information.232 “[T]he name change alone was seven months of legal crap and fighting.”233 The whole process is different in every county.234 Krysta thoughtfully documented her experience, and then put up a website to help others.235

Further, Krysta’s situation was different from other trans.236 Because she had Crohn’s disease, it was more complicated.237 For instance, because she needs Medicare assistance, Medicare gets information from Social Security, which gets its information from her birth certificate.238 She needed to change her gender on official documents—including her birth certificate—because when she went to the pharmacy to get her medicine, if they did not see the correct gender, they would not give her the medicine she needed.239 That differs from many trans folks because if they get their driver’s license changed, then a private insurer will accept that as being the proof they need for gender identification.240 Unfortunately, in Florida, you must have the surgery before you can change your birth certificate.241

VI. THE LAW AND HOW TRANS RIGHTS ARE LARGELY IGNORED

There are many rights and privileges afforded to U.S. citizens who fit into the legal dichotomy of either male or female.242 Individuals who identify with the biological sex he or she was born into, take for granted certain rights and protections. Unfortunately, the law creates distinct

228. See Interview with Krysta Cascio, supra note 143, at 8–9; Interview with Serafima Metz, supra note 143 at 5–7.
229. Interview with Krysta Cascio, supra note 143, at 8.
230. Id.
231. Id.
232. See id.
233. Id. at 7.
234. Interview with Krysta Cascio, supra note 143, at 7.
235. Id.
236. See id. at 3–5.
237. See id.
238. Id. at 8–9.
239. Interview with Krysta Cascio, supra note 143, at 8–9.
240. Id.
241. Id. at 9.
242. See infra Part VII.
categories of male and female, rendering individuals who do not fit into this binary sex classification outside the scope of certain laws. 243

The narrow binary sex classification system fails to take into consideration the difference between sex and gender. 244 The language and scope of the law makes the unfortunate and detrimental assumption that the biological sex a person is born with will match the gender they identify with. 245 There is a compelling need to reshape the law to incorporate individuals whose sex does not match their gender, because for trans people it is not as simple as penis equals male, and vagina equals female. 246 The trans community faces a great battle in their fight to gain equality and reshape the law to address the human rights and privileges currently denied to them. 247

America is not always at the forefront of human rights, and is actually lagging behind other countries with respect to reaching equality for transgender people. Laws and policies followed in other countries would eliminate many of the issues discussed in this article. 248 For example, Argentina recently passed a gender-identity law, which enables people to change their name and sex on official documents without judicial or medical approval. 249 The Netherlands has also taken an illustrative step toward equality by removing the surgery requirement to changing the gender marker on official documents. 250 As this Article illustrates, America still has a long way to go in achieving equality and providing human rights to every person, irrespective of sexual orientation or gender identity.

243. See infra Part VII. As Serafima Metz recognized, even though she personally identifies as a female, the law will not necessarily agree. Interview with Serafima Metz, supra note 143, at 1; see also supra Part V.A. Krysta Cascio also disagrees with the binary sex classification of the law, rejecting the black and white view of gender, believing instead in a huge scale of gray. Interview with Krysta Cascio, supra note 143, at 16; see also supra Part V.A.

244. See supra Part III.

245. See infra Part VII.

246. See infra Part VII. Serafima and Krysta were both born male, but from a very young age knew that the biological sex they were born into did not fit with the gender they identified with. Interview with Krysta Cascio, supra note 143, at 1–2; Interview with Serafima Metz, supra note 143, at 1–2.


Within the lesbian, gay, and bisexual (“LGB”) community, the fight to eliminate sexual orientation discrimination in areas such as marriage, raising children, and employment is ongoing and slowly moving in a positive direction. However, gender identity and sexual orientation are different, and the binary approach to the law creates even bigger hurdles for trans people in reaching equality. The myriad of issues faced by trans people begins with their legal identity, and includes much of the discrimination experienced by the LGB community. Thus, although LGBT is often grouped together, the trans community faces legal issues distinct from LGBs, relating to gender identity rather than sexual orientation.

This portion of the Article focuses on some of the major issues faced by transsexuals resulting from the law’s categorical approach of defining sex. These topics include: States’ varying approaches for defining legal sex, processes of amending birth certificates and driver’s licenses, protections provided by state and federal anti-discrimination statutes, access to healthcare, the right to marry, and the right to raise children.

VII. LEGAL IDENTITY

The protections, rights, and benefits denied to the transgender community stem from the lack of recognition of their self-identified name and sex. Trans people face legal obstacles at all stages and facets of their life and “the ability to live fully in their post-transition name and sex can be vitally important to their safety, gender transition, and family security.” As discussed in this Article, the legal identity of a transsexual affects the protections afforded to them under state and federal anti-discrimination statutes, the right to marry, and the right to raise children, to name just a few. Further, the basic need of a trans person’s recognition of the legal sex he or she identifies with is essential to his or her access to appropriate

251. See Sideways, supra note 247.
253. Sideways, supra note 247; see also The Netherlands: Victory for Transgender Rights, supra note 248.
254. See Sideways, supra note 247.
255. See infra Parts VII–X.
256. Id.
257. Janson Wu & Kylar W. Broadus, Recognition of Name and Sex, in TRANSGENDER FAMILY LAW: A GUIDE TO EFFECTIVE ADVOCACY 16, 16 (Jennifer L. Levi & Elizabeth E. Monnin-Browder eds., 2012).
258. Id.
259. See infra Parts VII–X.
public accommodations, such as prisons, shelters, and restrooms. The first step in achieving equality is to legally recognize a transsexual’s gender identity by providing simple legal mechanisms under which a transsexual may change his or her name, amend his or her birth certificate, driver’s license, and any other official documents.

A. How the States Define Legal Sex

An individual’s sex is defined by his or her physical attributes, including sexual and reproductive anatomy, hormones, and chromosomes, as well as his or her gender identity, which is the individual’s actual or perceived gender. Generally, a person’s biological sex and gender identity “line up, making the shorthand use of one’s birth genitalia to identify sex unproblematic. Particularly for transsexual and intersexed persons, gender identity and the physical characteristics of sex in some way[s] conflict.” When there is a conflict, the states vary on the approach taken in determining the legal sex of a transgendered person.


261. The Netherlands: Victory for Transgender Rights, supra note 248; see also Warren, supra note 248. This can be achieved by following the approach taken by countries like Argentina, which allow transgender people to change their names and amend official documents without having to go through painful and intensive surgery or obtaining judicial approval. The Netherlands: Victory for Transgender Rights, supra note 248. Serafima’s experience provides an example of the complicated and expensive process that transsexuals go through when attempting to amend official documents. See supra Part V. She was unable to change her driver’s license without a letter from her doctor, and Social Security would not change her Social Security card until her birth certificate was changed. See supra Part V.D. After about three to four months, and over four hundred dollars in court costs and multiple court appearances, she was able to amend her birth certificate and obtain congruent documents. See supra Part V.D.


263. Id. (alteration in original). Intersexed individuals are born with “a reproductive or sexual anatomy that [does not] seem to fit the typical definitions of female or male. For example, a person might be born appearing to be female on the outside, but having mostly male-typical anatomy on the inside.” What Is Intersex?, INTERSEX SOC’Y OF N. AM., http://www.isna.org/faq/what_is_intersex (last visited Aug. 25, 2015).

A minority of jurisdictions have found gender identity to be determinative, or at least an essential factor, to defining legal sex. The gender identity approach to defining legal sex is urged because, if followed by all states, it would not only provide consistency to the law, but also would reflect the current medical and psychological understanding of sex, and most importantly, would respect an individual’s autonomy.

As a normative matter, this framework of autonomy-preserving guarantees—including the rights to privacy, freedom of expression, and bodily integrity—creates constitutional space for an as-of-yet-unarticulated right, the right to self-determination of sexual identity. . . . Such an approach would attempt not only to reclaim a rights-protecting view of the Constitution but also envisions a world free of our current investment in policing a boundary between—or among—the sexes.

1. The Biological Test to Defining Legal Sex

Unfortunately, a majority of states, such as Ohio, Texas, and Florida, follow the approach that sex is immutable and fixed at birth. These states use a rigid biological test to define legal sex, refusing to depart from the narrow black and white view of sex and gender. For instance, in Ohio, the court refused to issue an order finding a post-operative MTF transsexual to be female for legal purposes. The court found that a person’s sex is determined at birth and denied the transsexual’s request to amend her birth certificate. The holding rested solely on biological characteristics stating that “[t]here was no evidence that [the] applicant at birth had any physical characteristics other than those of a male and he was thus correctly designated Boy on his birth certificate. There also was no laboratory documentation that the applicant had other than male chromosomes.”

265. Littleton, 9 S.W.3d at 231; see also Corbett v. Corbett, [1971] P. 83 at 104 (Eng.); Flynn, supra note 262, at 33.
266. M.T., 355 A.2d at 209.
267. See Flynn, supra note 262, at 33–35.
268. Id. at 34.
269. See Paisley Currah, Gender Pluralisms Under the Transgender Umbrella, in TRANSGENDER RIGHTS 3, 17 (Paisley Currah et al. eds., 2006).
271. Id.
272. Id. at 832.
273. Id.
Further, in *Littleton v. Prange*, the legal question addressed by the Court of Appeals of Texas was: “[C]an a physician change the gender of a person with a scalpel, drugs, and counseling, or is a person’s gender immutably fixed by our Creator at birth?” The litigant was born male but identified as female from the time she was three or four years old. After receiving the appropriate treatments and undergoing complete sex reassignment surgery (“SRS”), she became a *true* MTF transsexual. In reaching its conclusion on her legal sex, the court focused solely on the biological and sexual reproductive organs of the transsexual litigant. The court held Christie to be a male, stating that even though “[s]ome physicians would consider Christie [to be] female; . . . [h]er female anatomy . . . is all man made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied.”

2. Dual Test of Anatomy & Gender

The legal system, as well as society, needs to recognize that the question of whether someone is a male or a female is not as simple as whether that person has a pair of XX or XY chromosomes and the genitalia he or she was born with. The Superior Court of New Jersey understands this critical realization and the essential role of gender identity in determining sex. Unlike the essentialist approach, the Superior Court of New Jersey recognized the complexities of sex and took into consideration factors other than mere biology. The court determined that a MTF post-operative transsexual was considered to be legally female. Despite recognition of jurisdictions following the essentialist approach to sex, this court found that:

The evidence and authority which we have examined . . . show[s] that a person’s sex or sexuality embraces an individual’s gender, that is, one’s self-image, the deep psychological or emotional sense of sexual identity and character. Indeed, it has been

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274. 9 S.W.3d 223 (Tex. App. 1999).
275. *Id.* at 224.
276. *Id.*
277. *Id.* at 225.
278. See *id.* at 230–31.
279. *Littleton*, 9 S.W.3d at 231.
280. *Id.* at 233 (Lopez, J., dissenting).
282. See *id.*; *Flynn*, supra note 262, at 33.
283. *M.T.*, 355 A.2d at 211.
observed that the psychological sex of an individual, while not serviceable for all purposes, is practical, realistic, and humane.284

Although the decision in M.T. v. J.T.285 was favorable and the court’s recognition of the importance of gender identify is noteworthy, the court engaged in a body-parts checklist approach.286 The reasoning of the court contained a detailed discussion of the expert testimony of a doctor pertaining to J.T.’s post-operative genitalia including its cosmetic appearance, whether it “could function as any female vagina,” and also whether she is capable of “traditional penile/vaginal intercourse.”287 This hypersexualization of a trans person’s post-operative sexual anatomy falls short of the approach that should govern defining legal sex—that of gender identity.288 While it is true that the New Jersey court found gender identity significant, the court’s conclusion reveals an unnecessary emphasis of sexual anatomy focused on finding that the “transsexual’s gender and genitalia are no longer discordant; they have been harmonized through medical treatment.”289

B. Legal Name Changes

Often the first step that a transsexual takes in obtaining legal recognition of his or her true self is a legal name change because “a name change sends an important message to the world, a message solidified and made official with a court’s approval.”290 All states have statutes addressing the process for changing a person’s name, with varying procedural requirements.291 Some states also allow common law changes, which take effect by simply using the new name.292 Almost all state statutes governing legal name change contain requirements designed to prevent an individual from changing his or her name for fraudulent purposes.293 Therefore, a transsexual who wishes to change his or her name to reflect his or her true identity should not be denied the right to do so. Unfortunately, some state courts continue to make what should be a simple process more difficult and

286. See id. at 206; Flynn, supra note 262, at 37.
287. M.T., 355 A.2d at 206.
288. Id. at 206–07.
289. Id. at 211.
291. E.g., Fla. STAT. § 68.07 (2013).
292. HOWELL, supra note 290, at 17; see also, e.g., Wisconsin v. Hansford, 580 N.W.2d 171, 173 (Wis. 1998).
293. See, e.g., Fla. STAT. § 68.07(3)(j).
burdensome for transsexuals by requiring medical documents or doctors’ notes providing the reason for the name change.294

C. Birth Certificate Amendments

One way in which transsexuals attempt to obtain equal rights and protections of the law that conform to their self-identity, is through a birth certificate amendment.295 Most jurisdictions in the United States have regulations, statutes, or policies governing birth certificate amendment procedures to change a person’s sex designation.296 While almost all of these jurisdictions have straightforward procedures for making an amendment to fix a mistake or change a person’s name, the policies governing a transsexual’s ability to amend the sex designation on his or her birth certificate are unpredictable, expensive, and unnecessarily intrusive.297 State policies vary on the ability to change the sex designation on a birth certificate and the procedural requirements for doing so.298 States that do permit such a change on a person’s birth certificate may issue an amended or a new birth certificate, requiring proof of either complete SRS or just necessary medical treatments, and the state may or may not require a court order for changing the birth certificate.299

Some states confine the ability to change a person’s sex designation to circumstances where there was a mistake in the declaration on the birth certificate of either boy or girl, as determined at the time of birth.300 For example, the Ohio Probate Court held that an individual who was born male, who is now a post-operative female, could not amend her birth certificate.301 The court interpreted Ohio’s birth certificate statute as “strictly a correction

295. E.g., CAL. HEALTH & SAFETY CODE § 103425 (West 2014).
297. Id.
299. Id.
301. Id.
type statute,” permitting a change only when an error was made in the designation of sex at the time of birth.\(^{302}\)

Tennessee actually goes as far as statutorily prohibiting a birth certificate amendment to reflect a transsexual’s self-identified sex, even post-SRS.\(^{303}\) Similarly, Idaho has a general statute permitting birth certificate amendments; but the Idaho Office of Vital Statistics shows that Idaho does not permit birth certificate amendments for post-operative transsexuals.\(^{304}\)

States, such as Ohio, Tennessee, and Idaho, that do not permit an amendment to the sex designation on birth certificates, follow the approach that a “person’s sex is determined at birth by an anatomical examination by the birth attendant” and restrict such amendments—absent a showing of error or inaccuracy—at the time of recording the gender.\(^{305}\) What these states fail to recognize is the importance of a transsexual’s internal sense of gender identity. Transsexuals often feel “incongruencies of assigned birth sex, physical body, and gender identity.”\(^{306}\) In essence, the sex designation on their birth certificate, as recorded at the time of their birth, is inaccurate.\(^{307}\) Preventing a person from obtaining congruent identity documents reflecting the appropriate sex, inhibits that person from living as his or her authentic self and from receiving equal rights and protections under the law.\(^{308}\)

Forty-seven states, the District of Columbia, and New York City allow sex designation amendments or changes to a person’s birth certificate.\(^{309}\) Almost all of these birth certificate amendment policies require proof that the applicant has undergone SRS,\(^{310}\) and many states require a

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302. \textit{Id.} at 831.
303. \textsc{Tenn. Code Ann.} § 68-3-203(d) (2014) (stating “[t]he sex of an individual [will] not be changed on the original certificate of birth as a result of sex change surgery”).
307. \textit{See id.}
308. Wu & Broadus, supra note 257, at 16–17; Wenstrom, supra note 296, at 132–33. \textit{But see In re Declaratory Relief for Ladrach}, 513 N.E.2d at 832.
court order as a prerequisite to amending a birth certificate.\textsuperscript{311} Although the
majority of states require complete SRS,\textsuperscript{312} other states do not specify the
extent of surgery that is required.\textsuperscript{313} The particular surgical requirements
outlined by states are critical because the treatment and surgery that transsexuals undergo “range from relatively minor cosmetic procedures, such as facial hair removal or breast augmentation for [MTF] patients, to complete genital reconstructive surgery . . . for patients of both sexes.”\textsuperscript{314} There are
many reasons why a transsexual would decide not to undergo complete
SRS.\textsuperscript{315} For instance, there may be health risks associated with surgery, the
transsexual may not be able to afford surgery, and “others simply object to
the idea that the only way to belong to a particular gender is to have anatomy
that conforms to that gender.”\textsuperscript{316}

Furthermore, current understandings of transgender health indicate
the personalized and unique process of gender transition.\textsuperscript{317} A statutory
requirement of SRS—as a pre-requisite to amending the sex designation on
one’s birth certificate—is incongruent with transgender health and is unduly
intrusive.\textsuperscript{318} The more appropriate birth amendment policy that should be
followed by states is one that only requires proof that the transsexual has
completed the treatments necessary for his or her personal transition.\textsuperscript{319}

Virginia was the first state that allowed birth certificate amendments
to a trans person’s proper gender without requiring sex-reassignment
surgery.\textsuperscript{320} Prior to 2002, Virginia’s requirements conformed with the
majority of the states, requiring complete genital reconstructive surgery to
amend birth certificates.\textsuperscript{321} However, Lambda Legal educated the Virginia
Office of Vital Records on the various treatments that trans people undergo
during their transition, and Virginia has changed its amendment requirement
from complete SRS to necessary gender transition treatments.\textsuperscript{322}

\begin{thebibliography}{99}
\bibitem{311} \textit{E.g.}, COLO. REV. STAT. § 25-2-115.
\bibitem{312} \textit{E.g.}, MASS. GEN. LAWS ch. 46, § 13(e) (2014); \textit{see also Changing Birth
Certificate Sex Designations: State-by-State Guidelines, supra note 298.}
\bibitem{313} Changing Birth Certificate Sex Designations: State-by-State Guidelines, supra note 298.
\bibitem{314} Audrey C. Stirnitzke, Note, Transsexuality, Marriage, and the Myth of
True Sex, 53 ARIZ. L. REV. 285, 288 (2011); \textit{see also COLO. CODE REGS. § 1006-1-9.3, .6.}
\bibitem{315} Stirnitzke, \textit{supra} note 314, at 288.
\bibitem{316} \textit{Id.}
\bibitem{317} Wenstrom, \textit{supra} note 296, at 132–33.
\bibitem{318} \textit{Id.} 132–34.
\bibitem{319} \textit{Id.} at 133–34; \textit{see also} 12 VA. ADMIN. CODE § 5-550-320 (2014).
\bibitem{320} 12 VA. ADMIN. CODE § 5-550-320; Wenstrom, \textit{supra} note 296, at 142.
\textit{But see Changing Birth Certificate Sex Designations: State-by-State Guidelines, supra note 298.}
\bibitem{321} See Wenstrom, \textit{supra} note 296, at 142.
\bibitem{322} \textit{Id.}
\end{thebibliography}
D. Driver’s License Amendments

Each state also has its own policies and regulations for changing name and sex designation on driver’s licenses. In order to change one’s name on a driver’s license, all that is generally required is the court order documenting the name change. However, in order to change the sex designation on a driver’s license, the state may require proof from a physician or psychologist certifying the change of sex.

States should follow Virginia’s lead and become educated about transsexual health and the various procedures that transsexuals choose to undergo other than SRS. In moving towards equality, legislatures need to understand the critical need of transsexuals to live authentic lives in their self-identified gender and realize that extensive surgical requirements create a painful, expensive, life-changing, and potentially unnecessary barrier for a transsexual to obtain congruent documents reflecting their true identity. Countries outside of the United States, such as Argentina and the Netherlands, have acknowledged this need, as evidenced by the recent legislation enabling transsexuals to change the sex on official documents without prior judicial or medical approval. A transsexual woman from Buenos Aires, Argentina, expressed her feelings after taking advantage of Argentina’s new gender-identity law, stating that “[it is] important to have the freedom to decide by myself and not have anyone deciding it instead of me. . . . [N]o one is authorized to say who I am, but me.”

Transsexuals should have access to more efficient methods for amending their name and sex designation on official documents. It is time for the states to remove the barriers that are preventing the people in our

324. E.g., ARK. CODE ANN. § 27-16-506(b).
325. Change of Sex or Gender on a DMV Photo Document, supra note 323.
326. See 12 VA. ADMIN. CODE § 5-550-320 (2014); Wenstrom, supra note 296, at 142.
330. Obtaining congruent documents is critically important for transsexuals in reaching equality and recognition of their true identity. See supra Part V.A–D. Inconsistent documents can make getting jobs difficult, and for Krysta, any inconsistency on her official documents meant that she would not receive medicine from the pharmacy to treat her Crohn’s disease. See supra Part V.A–D.
country from being who they are, in order for our nation to move closer to achieving equality for all.331

E. Public Accommodations

Could you imagine if a stressful part of your day was dealing with public bathroom accommodations you are permitted to use? A decision to use a public restroom, something that is a seemingly mindless decision to most, is often “one of the most difficult and stressful parts of a transgender person’s day.”332 Particularly for trans people who may be in the early stages of their transition, utilizing the restroom that corresponds to their gender identity has a potential to create “difficulty, anxiety, and even safety risks.”333 There are numerous examples of transgender individuals being arrested, fined, or charged for using the restroom of his or her self-identified gender.334

Many cities and counties have public accommodation nondiscrimination ordinances, some of which include gender identity or expression.335 However, most of these ordinances do not address the use of public restrooms, locker rooms, or showers.336 The ordinances that do address the use of public restrooms, locker rooms, or showers generally state that the nondiscrimination ordinance does not apply to discrimination on the basis of sex or gender in these facilities.337 Only a select few provide express protection for transitioned transsexuals against discrimination in the use of public restrooms.338

Furthermore, institutions with sex segregation policies, in organizing their accommodation programs, create great difficulty for trans people.339 For example, U.S. prisons that place people in a facility based on their birth

333. Id.
335. E.g., L.A., CAL., MUNICIPAL CODE § 49.70 (2014).
336. See, e.g., Id.
337. E.g., Broward County, Fla., Code of Ordinances ch. 16 1/2, art. II, § 34.1 (2014).
sex can pose great danger for a trans person.340 A transgendered woman, who was born as a man but looks and identifies as a woman, is subject to high rates of extreme physical and sexual abuse from other inmates.341 Under the Eighth Amendment to the U.S. Constitution, prisons are required to provide for inmate’s safety.342 “A prison official’s deliberate indifference to a substantial risk of serious harm ... violates the Eighth Amendment.”343 Often the abuse is so great that the transgendered inmate is placed in solitary confinement or is segregated for their protection.344

Fortunately, the Prison Rape Elimination Act345 (“PREA”) was enacted in 2003 in response to the high rate of sexual abuse in prisons, particularly against homosexual, transgender, and gender nonconforming individuals.346 The PREA mandates a screening process in federal prisons in determining whether to assign a trans person to a federal facility with male or female inmates.347 The U.S. Department of Justice issued final regulations to implement PREA in May 2012, and will hopefully prove to be effective in remedying the difficulties faced by the trans population in prison.348 The PREA is a positive step towards providing transgenders—as well as other at-risk groups—necessary protection, and demonstrates an understanding that the decision of where to assign a transgender person cannot be based solely on birth sex.349 Chelsea Manning, an army soldier previously known as Bradley Manning, announced that she was a female living in the wrong body after she was convicted for leaking classified documents.350 Chelsea will be sent to an all male prison and made a statement that, “[g]iven the way that I feel and have felt since childhood, I want to begin hormone therapy as soon

340. BASSICHIS, supra note 260, at 17–18.
341. Id.
342. Farmer v. Brennan, 511 U.S. 825, 832 (1994); see also U.S. CONST. amend. VIII.
343. Farmer, 511 U.S. at 828.
344. See id. at 830; BASSICHIS, supra note 260, at 22–23.
347. 28 C.F.R. § 115.42(a), (c) (2013).
348. LGBT People and the Prison Rape Elimination Act, supra note 346.
349. See 28 C.F.R. § 115.42(c); LGBT People and the Prison Rape Elimination Act, supra note 346.
While in prison, she is prepared to take her plea for receiving gender reassignment treatment to court. While in prison, she is prepared to take her plea for receiving gender reassignment treatment to court.  

Similar sex segregation issues exist with the placement of trans individuals in homeless shelters. The majority of homeless shelters and other social service shelters house people according to his or her birth sex. These policies often lead to harassment and assault against the transgender person by others housed in the facility. The potential harassment and violence results in trans people avoiding homeless shelters. Homeless shelters in a minority of jurisdictions, including San Francisco, Boston, Washington, D.C., and New York City, have policies permitting transgender people to be housed according to their self-identified gender. Homeless shelters are in place to assist those in need; consequently, sex segregation policies that have the effect of transgender individuals avoiding such facilities clearly should be changed.

Every person deserves equal access to appropriate public accommodations, such as restrooms, prisons, and homeless shelters, without fear of harassment or physical violence. No person should be afraid to use the restroom of their self-identified gender, and sex segregation policies should be changed in prisons and homeless shelters in order to prevent the harassment or violence that results when a transgender person is placed with his or her birth sex rather than his or her self-identified gender.

VIII. STATE/LOCAL & FEDERAL ANTI-DISCRIMINATION STATUTES

Transsexuals experience severe discrimination and are in dire need of legislative protection in areas such as: healthcare, employment, education, housing, public accommodations, law enforcement, and in many other areas. In order to reach equality and provide transsexuals with the same

351. Id.
353. Spade, supra note 339, at 752–53.
354. Id. at 753.
355. Id.
356. Id.
357. Id. at 736.
358. See Spade, supra note 339, at 752–53.
359. See Jerner, supra note 306, at 9; Spade, supra note 339, at 753; Gabbatt, supra note 350.
360. CURRAH & MINTER, supra note 331, at 16.
rights and privileges as any other citizen, legislators and policymakers must
remedy these injustices through trans-protective legislation.361

Many states have laws prohibiting discrimination on the basis of sex
and sexual orientation; however, these laws do not provide protection for the
trans community.362 Where society has failed and remains close-minded to
those who are perceived as not normal, the law must step up and provide
protection.363 Unfortunately, for trans people, where society has failed, so
too has the law.364

A. Anti-Discrimination Laws at the State Level

Activists continue to fight for equal civil rights protections, and the
greatest impact and progress has been at the local and state level.365 “By
adding or amending definitions of sex, gender, or even sexual orientation, or
by adding a new category, usually gender identity, legislation can make it
clear to the courts that nondiscrimination laws should and do include gender
nonconforming people.”366 In 1993, Minnesota became the first state to
enact a statute prohibiting discrimination against trans people by defining
sexual orientation to include “having or being perceived as having . . . a self-
image or identity not traditionally associated with one’s biological maleness
or femaleness.”367 Luckily, other states followed suit, and in the years that
followed, states such as California, Georgia, Illinois, Iowa, Michigan,
Missouri, and Vermont began introducing non-discrimination laws for trans
people.368

States that have extended anti-discrimination protection to
transsexuals have done so in a number of ways.369 Some states have
explicitly included gender identity as protected under anti-discrimination

361. Id.
362. See, e.g., N.Y. EXEC. LAW § 292(10), (11), (27) (consol. 2014); N.Y.
EXEC. LAW § 296(1)(a)–(b), (2)(a) (banning discrimination based on sexual orientation in
employment, housing, and public accommodations, but gender identity is not protected); 2009
Md. Laws 540, 552–53, 558–59 (prohibiting discrimination in employment, housing, and
public accommodations on the basis of sexual orientation).
363. See CURRAH & MINTER, supra note 331, at 16.
365. CURRAH & MINTER, supra note 331, at 15.
367. MINN. STAT. § 363A.03(44) (2013); see also CURRAH & MINTER, supra
note 331, at 15.
368. CURRAH & MINTER, supra note 331, at 15.
369. Id. at 15–16; see, e.g., COLO. REV. STAT. § 24-34-301(7) (2014); N.J.
STAT. ANN. § 10:5-12 (West 2014).
statutes, other states prohibit discrimination based on sexual orientation and include gender identity or expression within the definition of sexual orientation, and a few states prohibit discrimination on the basis of sex, and include gender identity within the statutory definition of sex.

New Jersey’s Law Against Discrimination provides a good example of an ideal trans-inclusive anti-discrimination law. In New Jersey, “[a]ll persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of . . . gender identity or expression.” Further, transgender youth are protected in school from harassment, intimidation or bullying based on gender identity.

States, such as Colorado, which have extended anti-discrimination protection to trans people through an expanded statutory definition of sexual orientation or sex is an improvement, but there is still room for misinterpretation. In order to prevent any ambiguity or misinterpretation, gender identity should be expressly placed alongside other protected categories. California has recognized this distinction, as evidenced by the recent amendment to its existing anti-discrimination law, which previously defined gender identity within the protected class of sexual orientation. The law was amended in 2012, distinctly making gender identity and gender expression their own protected classes. This decision was based on confusion that existed among employers and landlords about whether trans

370. See, e.g., N.J. STAT. ANN. § 10:5-12.c (The New Jersey Law Against Discrimination prohibits discrimination based on sexual orientation, gender identity, or expression in employment, housing, public accommodation, credit and business contracts).
371. See, e.g., COLO. REV. STAT. § 24-34-301(7).
373. See N.J. STAT. ANN. § 10:5-4.
374. Id. (emphasis added).
376. E.g., COLO. REV. STAT. § 24-34-301(7).
379. CAL. CIV. CODE § 51(b), (e)(5); see also Assemb. B. 887, 2011 Leg., Reg. Sess. (Cal. 2011).
people were protected under the law. The amendment removed any such confusion and strengthened the state’s anti-discrimination law.

Currently, sixteen states and the District of Columbia have laws prohibiting discrimination on the basis of gender identity or expression. The extent of protection within these laws vary, encompassing all or a few of categories including employment, public accommodations, housing, credit, and education. States should continue to strive to provide comprehensive protections for trans people in all aspects of life.

B. Healthcare

The trans community faces unfortunate health care discrimination by being denied equal access to health care services. Transsexuals face discrimination and hostility from medical professionals and insurance providers. Most private insurance plans deny coverage for transition-related treatment, and many state Medicaid and Medicare programs exclude such coverage as well.

States that participate in the Medicaid program receive grants from the federal government to assist state health care services in providing necessary medical services to qualified state residents. Although each state sets its own qualifying guidelines, “[t]he Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service . . . to an otherwise eligible beneficiary solely because of the


381. Rosenstein, supra note 380; see also Cal. Assemb. B. 887.


383. NAT’L CTR. FOR LESBIAN RIGHTS, supra note 382, at 3–4.


385. Id.


diagnosis, type of illness, or condition.” Additionally, private insurance plans have even denied coverage to trans people for medical needs unrelated to gender transition. For example, an insurance company might argue that a medical concern—such as liver damage—resulted from transition related hormone treatment.

Many state Medicaid programs explicitly deny coverage for transition-related treatment; however, a few state courts have struck down such blanket exclusions. States that explicitly deny coverage for trans people justify these denials on the belief that such services are not medically necessary, or that such treatment is cosmetic. These justifications are unfounded because mental health professionals may deem gender transition treatment—which may include surgery, hormone therapy, or medication—to be medically necessary for a trans person. Therefore, the states that participate in the Medicaid program that deny necessary medical services to qualified state residents violate federal law.

For example, in Iowa, procedures for treating gender identity disorder are specifically excluded from Medicaid coverage. In Smith v. Rasmussen, the Eighth Circuit Court of Appeals upheld this blanket denial of transition related treatment under its Medicaid program. The court found the blanket prohibition on funding for sex reassignment surgery to be reasonable and consistent with the Medicaid Act due to the “evolving nature of the diagnosis and treatment of gender identity disorder and the disagreement regarding the efficacy of sex reassignment surgery.”

Fortunately, there are states that have struck down total trans-related treatment exclusions from coverage. In Doe v. Department of Public Welfare, the Supreme Court of Minnesota held that the “total exclusion of transsexual surgery from eligibility for [medical assistance payments was] . . .
In reaching this decision, the court discussed transsexualism generally and found that in certain cases, “[t]he only medical procedure known to be successful in treating . . . transsexualism is the radical sex conversion surgical procedure.” Therefore, a total exclusion of transsexual surgery from benefits under the medical assistance program is improper, and future determinations of the medical necessity of an applicant “must be considered individually, on a case-by-case basis.”

Removing exclusions for transition-related treatment is critical in providing the trans community with equal access to health care. “[C]ategorical exclusions are based on the false premise that the health care services that transgender people need are not medically necessary.” In reality, there are unfortunate consequences for trans people who are denied necessary health care and treatment. Lack of access to gender-transition medical care is linked with health consequences that include depression, anxiety, suicide, infections—such as HIV—and other health risks associated with seeking treatment on the black market.

A few other states have made progress and are taking steps in the direction of achieving the goal of equal access to healthcare. For example, in 2012, California became the first state to expressly “prohibit insurance discrimination against transgender people.” The California Department of Insurance issued guidelines and regulations that ensure equal health care insurance coverage to the trans community. Similarly, Colorado, Oregon, and Vermont have all issued bulletins prohibiting insurance discrimination based on gender identity or expression.

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401. Id. at 820.
402. Id. at 819.
403. Id. at 820.
404. See BAKER & CRAY, supra note 386, at 2.
405. Id. at 2.
406. Id. at 2.
408. BAKER & CRAY, supra note 386, at 3.
409. Id.
410. See CAL. HEALTH & SAFETY CODE § 1365.5(a)–(e) (West 2014).
411. DIV. OF INS., COLO. DEP’T OF REGULATORY AGENCIES, BULL. NO. B-4.49, INSURANCE UNFAIR PRACTICES ACT PROHIBITIONS ON DISCRIMINATION BASED UPON SEXUAL ORIENTATION (2013).
Although a few states have struck down blanket exclusions that discriminate against trans people, or have issued regulations against insurance discrimination based on gender, the majority of the nation has a long way to go in providing transsexuals with equal access to the health care services they need.

Private and public health insurance programs should not arbitrarily deny coverage to transsexuals for medically necessary treatment. The remaining majority of the states should model the legislative decisions of states—such as California—by removing blanket exclusions of transition-related treatment and enacting regulations prohibiting insurance discrimination against trans people.

C. Anti-Discrimination Laws and Protections at the Federal Level

Although progress has been slower at the federal level, there have been some positive changes and protections in certain areas of the law that have been extended to reach the transgender community. For example, in 2009 the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act was signed into federal law, expanding federal hate crime legislation to protect transgender people.

Further, Title IX of the Education Amendments—which protects people from sex discrimination in education programs—has been extended to protect transgender students through a settlement agreement. However, by far the most progress has been made in providing the trans community with much needed protection from employment discrimination.

413. DIV. OF INS., VT. DEP’T OF FIN. REGULATION, BULL. NO. 174, GUIDANCE REGARDING PROHIBITED DISCRIMINATION ON THE BASIS OF GENDER IDENTITY INCLUDING MEDICALLY NECESSARY GENDER DYSPHORIA SURGERY AND RELATED HEALTH CARE (2013).
414. BAKER & CRAY, supra note 386, at 3.
416. E.g., CAL. HEALTH & SAFETY CODE § 1365.5 (West 2014).
417. See BAKER & CRAY, supra note 386, at 3.
418. See, e.g., CAL. HEALTH & SAFETY CODE § 1365.5.
419. E.g., id.
421. Id. § 249(a)(2).
1. Employment—Title VII

Another major area of discrimination faced by the trans community is in employment. Trans people face discrimination in various circumstances concerning employment. A trans person may not be hired, may be fired if going through transition while employed, or may be fired if his or her transgender status is discovered.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin.” Originally, Title VII was interpreted to protect employees from sex discrimination and did not protect employment discrimination against trans employees. However, in Price Waterhouse v. Hopkins, the “Supreme Court [of the United States] concluded that gender stereotyping is sex discrimination under Title VII.” The Court held that, under Title VII, an employer may not discriminate against employees based on gender stereotypes, stating “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”

The Price Waterhouse decision:

[U]nlock[s] the shackles that tether personality, mannerisms, preferences, and tastes to a particular biological container. After Price Waterhouse, because a body is branded female does not mean that she performs as the charm school graduate, “walk[s] . . . femininely, talk[s] . . . femininely, dress[es] . . . femininely,” . . . [and] a body, branded male need not be aggressive or macho.

Although Price Waterhouse did not involve a trans individual, this case illustrates the catch 22 experienced by trans people in the workplace. A trans person who is just trying to be his or her self faces discrimination

425. Id.
426. Id.
429. 490 U.S. 228 (1989).
430. Amy D. Ronner, Let’s Get the “Trans” and “Sex” Out of It and Free Us All, 16 J. GENDER RACE & JUST. 859, 866 (2013); see also Price Waterhouse, 490 U.S. at 250–51.
432. Ronner, supra note 430, at 874 (quoting Price Waterhouse, 490 U.S. at 235).
433. Id. at 890; see also Price Waterhouse, 490 U.S. at 235, 251.
both pre-transition, for failing to conform to gender stereotypes, and post-transition for being a fraud.\textsuperscript{434}

Fortunately, after \textit{Price Waterhouse}, more cases continued to favorably interpret Title VII and provide protection for trans people in the workplace.\textsuperscript{435} In a recent ruling, the federal Equal Employment Opportunity Commission ("EEOC")—a federal agency authorized to enforce federal laws that prohibit workplace discrimination—held that transgender people are protected under Title VII’s sex discrimination provisions.\textsuperscript{436} Based on the rulings in federal court cases involving the interpretation of Title VII and transgender discrimination, the EEOC “conclude[d] that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination \textit{based on} . . . sex, and such discrimination therefore violates Title VII.”\textsuperscript{437}

Although these precedential rulings interpreting Title VII to provide protection for transgender people in the workplace are favorable, ultimately specific federal legislation embodying protection for transgender people is the most impactful.\textsuperscript{438} Luckily, the Employment Non-Discrimination Act ("ENDA"), which was introduced in Congress in June of 2009, was finally passed by the Senate on November 7, 2013.\textsuperscript{439} This “major civil rights legislation . . . protects lesbian, gay, bisexual, and for the first time ever, transgender Americans from discrimination in the workplace.”\textsuperscript{440}

ENDA extends federal employment discrimination protection currently provided under Title VII to sexual orientation and gender identity.\textsuperscript{441} The passage of this Act is a huge achievement and provides trans people equal rights and protection against discrimination in the workplace.\textsuperscript{442}

\begin{itemize}
\item \textsuperscript{434} See Ronner, supra note 430 at 890–92.
\item \textsuperscript{435} \textit{E.g.}, Smith v. City of Salem, 378 F.3d 566, 572–75 (6th Cir. 2004).
\item \textsuperscript{436} Macy, No. 0120120821, 2012 WL 1435995, at *11 (EEOC Apr. 20, 2012).
\item \textsuperscript{437} \textit{Id.; see also} Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011) (holding that Title VII prohibits gender stereotyping); \textit{Smith}, 378 F.3d at 574–75 (holding that discrimination based on sex encompasses gender discrimination); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (holding that the term \textit{sex} includes both the biological differences between males and females as well as gender).
\item \textsuperscript{439} Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (as passed by Senate, Nov. 7, 2013); \textit{see also} Fox, supra note 438.
\item \textsuperscript{440} Fox, supra note 438.
\item \textsuperscript{441} S. 815 § 4(a)(1).
\item \textsuperscript{442} \textit{See id.;} Fox, supra note 438.
\end{itemize}
IX. MARRIAGE

The recognition or authorization of a trans person’s marriage depends on three primary factors: (1) how that state defines the legal sex of trans individuals; (2) what the sex of the trans person’s partner is; and (3) what the state’s law is on same-sex marriage.443 The marriage of a trans person is further affected by the individual’s status as either post-transition or pre-transition.444

In the minority of states that have legalized same-sex marriage, a trans individual can marry—regardless of that state’s determination of his or her legal sex—because both same-sex and opposite-sex couples are afforded the right to marry.445 Whether a trans person is pre-transition or post-transition prior to entering into the marriage would have no effect, since the legal sex of the individual is not a determining factor in the legality of the marriage.446 Further, a marriage would not be invalidated if a trans individual went through a transition and had a legal sex change after the marriage.447 In 2003, Massachusetts became the first state to legalize same-sex marriage, effectively creating marriage equality for all couples, irrespective of sex.448 To date, same-sex marriage is legal in thirty-six states and the District of Columbia.449 While these states have recognized the importance of marriage equality for all-sex couples, the minority of the United States continues to prohibit same-sex marriage.450

The trans community faces great obstacles in the ability to marry in states that prohibit same-sex marriage.451 A trans person living in a state that

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444. Id.


446. Monnin-Browder, supra note 443, at 37–38.

447. Id.


450. See id.

prohibits same-sex marriage may face difficulty prior to entering into a marriage or, alternatively, his or her spouse or a third party may challenge the validity of an existing marriage. Additionally, Congress’ enactment of the Defense of Marriage Act (“DOMA”) creates issues for same-sex couples who are legally married.

A. DOMA’s Effect at the State Level

Due to Congress’ enactment of DOMA, each state, at its option, can choose to reject a legalized same-sex marriage from another state. DOMA states: “No [s]tate . . . of the United States . . . shall be required to give effect to any public act, record, or judicial proceeding of any other [s]tate . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other [s]tate . . . .” Essentially, section 2 of DOMA grants the states an exception to the Full Faith and Credit Clause by allowing a state to not recognize the legal same-sex marriage granted to a couple in another state.

To illustrate the impact of section 2, attorneys for the National Center for Lesbian Rights (“NCLR”), an advocacy organization for the LGBT community, has noted that “within the space of a day’s travel across state lines, the same two individuals may be legally married in one state, demoted to domestic partners in another, and treated as complete legal strangers in a third.”

Section 2 of DOMA will not affect a post-transition marriage between two individuals if they were determined to be opposite-sex spouses at the time of the marriage. DOMA only relates to interstate recognition of marriages between same-sex couples. Thus, once again, the state’s determination of a trans person’s legal sex for the purpose of marriage comes into effect in determining whether the couple is a same-sex or opposite-sex

454. Id.
455. Id.
459. 28 U.S.C. § 1738C.
If determined to be a same-sex couple, section 2 of DOMA will affect them by giving other states the power not to recognize the individuals as a legally married same-sex couple. Essentially, states that prohibit same-sex marriage do not have to give full faith and credit to a legally married same-sex couple from another state.

**B. DOMA’s Effect at the Federal Level**

Section 3 of DOMA defined marriage for federal purposes as: “[A] legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” This definition of marriage prevents legal same-sex marriages from being recognized at a federal level, irrespective of the validity of that marriage at the state level.

In *United States v. Windsor*, the Supreme Court was presented with the question of “[w]hether [s]ection 3 of DOMA violates the Fifth Amendment’s guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their [s]tate.” In this case, Edie Windsor and Thea Spyer had a legally recognized marriage in the state of New York. Upon Spyer’s death, Windsor as sole beneficiary of Spyer’s estate was required to pay $365,053 in federal estate tax because “their marriage was not respected by the federal government.”

The Supreme Court found Section 3 of DOMA unconstitutional “as a deprivation of the [equal] liberty of . . . person[s] [that is] protected by the Fifth Amendment.” Under Section 3 of DOMA, the federal government was infringing on the authority of states to define and regulate marriage.

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460. Monnin-Browder *supra* note 443, at 36.
461. 28 U.S.C. § 1738C.
462. *Id.*
464. *See id.*
469. *Windsor*, No. 12-307, slip op. at 25; *see also* Defense of Marriage Act of 1996 § 3.
within their laws. The federal government’s restrictions of benefits to same-sex couples was “directed to a class of persons that the laws of New York, and . . . [eleven] other [s]tates, have sought to protect.” This decision had the effect of providing married same-sex couples—living in states where same-sex marriage was legal—over 1100 federal benefits that were previously denied to them through DOMA.

In a similar victory, California’s Proposition 8, which amended the California Constitution to prohibit same-sex marriage, was ruled unconstitutional by a district court and the Court of Appeals for the Ninth Circuit. The Supreme Court ruled that the proponents of Proposition 8 did not have standing to appeal the decision and sent the case back to the appeals court with instructions to dismiss the appeal. Although the Supreme Court allowed the lower court ruling that invalidated Proposition 8 to stand, its ruling was narrow, having the effect of striking down California’s Proposition 8, but dodging the substantive issues of the constitutionality of same-sex marriage.

Therefore, the Supreme Court has yet to reach a substantive conclusion about the constitutionality of prohibitions on same-sex marriage. Instead of sending the case back to the court of appeals, the Supreme Court should have used this appeal as an opportunity to rule on the constitutionality of prohibitions on same-sex marriage. Same-sex marriage prohibitions directly conflict with the legal conclusions and principles set forth in Loving v. Virginia. The Supreme Court struck down the Virginia law that prohibited marriages between people of different racial classes. The Court held the law unconstitutional, as violative of the Fourteenth Amendment, stating that “[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”

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470. Defense of Marriage Act of 1996 § 3; see also Windsor, No 12-307, slip op. at 18–19.
471. Windsor, No 12-307, slip op. at 16.
472. Windsor, No 12-307, slip op. at 23, 25; Marriage at the Supreme Court in 2013, supra note 468; see also 28 U.S.C. § 1738C (2012).
473. CAL. CONST. art. I, § 7.5.
476. See id.
477. See id.
479. Loving, 388 U.S. at 11–12.
480. Id. at 12.
movement, and the Lovings’ struggle to achieve marriage equality in 1967, is deeply connected to the fight for civil rights experienced by same-sex couples today. Just like the Supreme Court ruled in Loving, that “[t]he freedom to marry. . . . a person of another race resides with the individual,” so too should the Court conclude today, that the freedom to marry a person of the same-sex resides with the individual, and cannot be infringed by the State.

As Mildred Loving reflected on the impact of her case, she stated:

I am proud that Richard’s and my name is on a court case that can help reinforce the love, the commitment, the fairness, and the family that so many people, black or white, young or old, gay or straight seek in life. I support the freedom to marry for all.

. . . .

That’s what Loving, and loving, are all about.

C. States That Ban Same-Sex Marriage

In states that limit the right to marry to heterosexual couples, the states’ identification of a trans individual’s legal sex is the key-determining factor in a trans’ ability to marry. That determination leads into the question of whether the state perceives the proposed marriage to be between same-sex or different-sex individuals. As discussed above, in certain states a trans person can legally change his or her sex. Accordingly, what may have been perceived as a same-sex couple pre-transition, would be an opposite-sex couple post-transition and legal sex change. Nevertheless, there are states that do not recognize a trans individual’s changed sex for the purposes of marriage.

As discussed above, states vary in their determination of legal sex and the ability of trans people to change their legal sex to reflect their gender identity. States are further divided on their recognition of a trans person’s legal sex specifically for the purposes of marriage.

481. Id.; Bond, supra note 478.
482. Loving, 388 U.S. at 12.
483. Bond, supra note 478.
484. See Flynn, supra note 262, at 33.
485. Monnin-Browder, supra note 443, at 40.
486. See supra Part V.A–D.
487. See Monnin-Browder, supra note 443, at 40.
489. See supra text accompanying notes 262–68.
490. See Flynn, supra note 262, at 33–34.
There are two opposing standards utilized by courts in determining the validity of post-transition marriages: (1) the state finds sex as immutable and fixed at birth, refusing to acknowledge sex-reassignment surgery, psychological factors of gender identity, or birth certificate amendments for the purpose of marriage; or (2) the state acknowledges a change to a birth certificate and recognizes that legal sex change for the purpose of marriage.

For the purpose of marriage,

[different jurisdictions . . . can and have come to different conclusions about how to determine legal sex: most take the essentialist approach that sex is immutable and fixed at birth, while a small minority recognizes the complexities of sex and looks to a person’s gender identity as the primary determinant of legal sex.]

1. Biological Approach—Sex Is Immutable and Fixed at Birth

The issue of legal sex for the purpose of ascertaining the validity of a transsexual marriage was first analyzed in Corbett v. Corbett, a 1970 British case. The issue in this case was a determination of the true sex of April Ashley, a post-operative MTF transsexual, for the purpose of concluding whether the marriage she entered into with Arthur Corbett was valid. In assessing the legal sex of April, the court analyzed chromosomal factors, gonadal factors, genital factors, and psychological factors. However, the court failed to discuss the psychological factors for assessing April’s legal sex, and stated that the essential criteria must be biological. The court further stated that the “biological sexual constitution of an individual is fixed at birth—at the latest—and cannot be changed . . . by medical or surgical means.” Therefore, the court concluded that the marriage between April and Arthur was void, since April “is not a woman for the purposes of marriage.” The narrow biological test and principles set forth in Corbett have been followed by courts that have concluded that

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493. Flynn, supra note 262, at 33.
494. [1971] P. 83 (Eng.).
495. Id. at 83.
496. Id. at 84–85.
497. Id. at 100.
498. Id. at 106.
499. Corbett, P. 83 at 104.
500. Id. at 106.
sex is immutable, unchanged by psychological identity, SRS, or amended birth certificates.501

Courts that have followed the conclusions of Corbett, disregarding the critical psychological and social factors in determining a person’s sex, have both denied marriage licenses and invalidated existing marriages.502 As previously mentioned, the majority of the states allow sex designation amendments to an individual’s birth certificate upon proof of the transsexual’s completed SRS.503 Surprisingly, even an amended birth certificate, reflecting the transsexual’s true, self-identified sex, does not guarantee the security of a transsexual’s marriage, because courts have refused to recognize a transsexual’s post-transition sex for the purposes of marriage, notwithstanding the existence of an amended birth certificate.504

In In re Application for Marriage License for Nash,505 an Ohio appellate court denied a marriage license to a post-operative FTM transsexual with a female.506 Nash, the FTM transsexual, successfully amended his out-of-state birth certificate to reflect a change in sex from female to male after undergoing SRS.507 However, the Ohio court refused to give full faith and credit to his amended birth certificate, and denied the marriage license, stating that Ohio “has a clear public policy that authorizes and recognizes marriages only between members of the opposite sex.”508

The court would not interpret male in the state’s marriage statute, to include a FTM post-operative transsexual.509

Moreover, the complex issues and varied interpretations of legal sex for the purpose of marriage has had the effect of erasing marriages through court invalidation, and for all legal purposes, it is as if the marriage never existed.510 The invalidation of a marriage can have unfortunate consequences on the right to claim an inheritance when a spouse dies intestate.511 The Supreme Court of Kansas invalidated the marriage of J’Noel, a post-transition MTF transsexual, to a male, after the husband had died intestate.512

502. See Littleton, 9 S.W.3d at 231; Corbett, P.83 at 106.
506. Id. at *9.
507. Id. at *1.
508. Id. at *5.
509. Id. at *6.
511. See In re Estate of Gardiner, 42 P.3d 120, 123 (Kan. 2002).
512. Id. at 123, 137.
After his father died, the son challenged the validity of the marriage between his father and J’Noel because J’Noel was born a man.513

Like in *In re Application for Marriage License for Nash*, the Supreme Court of Kansas refused to give full faith and credit to J’Noel’s amended Wisconsin birth certificate for the purpose of upholding the marriage to her husband.514 However, in J’Noel’s case, it actually had the effect of invalidating the marriage between J’Noel and her deceased husband.515

The court concluded that J’Noel was not a woman within the meaning of Kansas’s marriage statute, and therefore affirmed the lower court’s ruling that their marriage was void.516 Consequently, the marriage between J’Noel and her deceased husband was erased; the son was named the sole heir, and inherited everything.517

Like the MTF transsexual widow in *In re Estate of Gardiner*,518 an MTF transsexual widow in Texas also became a legal stranger to her deceased husband through court invalidation of her marriage.519 In *Littleton v. Prange*,520 the court granted a motion for summary judgment, holding that Christie, an MTF post-transition transsexual, was legally a male and therefore the marriage between Christie and another male was invalid.521 Due to the court invalidating the marriage, Christie was unable to bring a claim under the wrongful death and survival statute because she was no longer considered the surviving spouse.522 The court held that Christie is a male even though she had successfully amended the name and sex on her birth certificate.523 “The trial court . . . granted the petition to amend the birth certificate” due to an affidavit presented by an “expert stating that Christie is a female.”524 As the dissent in the case correctly questioned:

How then can the majority conclude that Christie is a male? If Christie’s evidence that she was female was satisfactory enough for the trial court to issue an order to amend her original birth certificate to change both her name and her gender, why is it not

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513. *Id.* at 123.
516. *Id.*
517. *Id.* at 123, 137.
518. 42 P.3d 120 (Kan. 2002).
520. 9 S.W.3d 223 (Tex. App. 1999).
522. *Id.*
523. *Id.* at 231.
524. *Id.*
satisfactory enough to raise a genuine question of material fact on a motion for summary judgment?  

2. Biological and Psychological Approach

There is another line of cases that have moved away from the rigid biological test set forth in Corbett, applying an approach to defining legal sex for the purpose of marriage that incorporates the psychological, emotional, and social sense of an individual’s gender identity. These courts recognize the ability to change one’s sex and recognize that change of sex in upholding post-transition marriages.

In M.T., the Superior Court of New Jersey recognized the role that gender identity plays in determining sex. The court upheld the marriage of a post-operative MTF transsexual by ruling that she is legally female. In this case, the court rejects the notion that “sex is somehow irrevocably cast at the moment of birth” and found that the determination involves an analysis of several criteria. Notably, the court found that “a person’s sex or sexuality embraces an individual’s gender, . . . one’s self image, the deep psychological or emotional sense of sexual identity and character.”

Critical in the court’s determination was finding that there had been a harmonization between the trans-person’s gender identity and physiology through SRS. The court stated that she “has become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy. Consequently, plaintiff should be considered a member of the female sex for marital purposes.”

In a more recent case, the United States District Court for the District of Minnesota recognized the many components in determining an individual’s sex and upheld a post-transition marriage. Prior to

525. Littleton, 9 S.W.3d at 233 (Lopez, J., dissenting).
527. E.g., M.T., 355 A.2d at 211.
528. Id. at 209.
529. See id. at 211.
530. Id. at 209.
531. Id.
532. M.T., 355 A.2d at 211.
533. Id. Similarly, a trial court in California upheld a post-transition marriage, recognizing the transsexual as their post-operative sex. Flynn, supra note 262, at 36. The California court based its ruling on a California statute which permits an individual to receive a new birth certificate after having undergone SRS to reflect his or her new sex. Id.
Minnesota’s legalization of same-sex marriage in August 2013, the sex of an individual—for purposes of marriage—was based on his or her sex at the time of marriage, not birth.\footnote{Id. at 1032.} Minnesota also permits birth certificate amendments for people who have undergone SRS\footnote{See MINN. STAT. § 144.218(4) (2013).} and acknowledges that “[t]here is no basis to conclude that Minnesota recognizes Plaintiff as female for some purposes—birth records and driver’s licenses, but not for others—marriage certificates.”\footnote{Radtke v. Miscellaneous Drivers & Helpers Union Local #638 Health, Welfare, Eye & Dental Fund, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012); M.T., 355 A.2d at 211; Flynn, supra note 262, at 35–36.}

The courts in New Jersey, California, and Minnesota recognize that sex can no longer be defined narrowly and “gender identity plays a central role in determining sex.”\footnote{Id. at 1032; M.T., 355 A.2d at 211; Flynn, supra note 262, at 35–36.} While these decisions are favorable, and certainly an improvement from the rigid approach taken in \textit{Corbett}, \textit{Nash}, and \textit{Gardiner}, the decisions were very focused on what the New Jersey court considered \textit{harmony} between the \textit{transsexual’s gender and genitalia}. The approach to defining sex for the purposes of marriage in states that prohibit same-sex marriage has certainly expanded, but is still too focused on sexual anatomy and biology as definitive of a person’s gender.\footnote{See M.T., 355 A.2d at 209.}

This issue has been addressed in jurisdictions outside of the United States, and the approach taken by an Australian court is particularly noteworthy.\footnote{See in re Kevin (Validity of Marriage of Transsexual), [2001] FamCA 1074 ¶ 1 (Austl.).} In \textit{In re Kevin}, (Validity of Marriage of Transsexual),\footnote{Id. ¶ 1.} a FTM transsexual and his wife sought a declaration as to the validity of their marriage.\footnote{Id. ¶ 30.} Prior to their marriage, Kevin, a FTM transsexual, had undergone hormone treatments, a total hysterectomy and mastectomy, but did not undergo a phalloplasty and still had a vagina.\footnote{See id. ¶ 30.} The key difference in this case from the New Jersey, California, and Minnesota cases, is that Kevin had not undergone complete sex-reassignment surgery, and therefore, in the words of the New Jersey court, there was not complete harmony between gender and genitals.\footnote{Id. ¶¶ 30, 198; Radtke v. Miscellaneous Drivers & Helpers Union Local #638 Health, Welfare, Eye & Dental Fund, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012); M.T., 355 A.2d at 211; see also Flynn, supra note 262, at 35–36.} However, the Australian court was not...
concerned with finding this harmony, and concluded that Kevin was legally male for the purposes of marriage. The court’s determination was based on expert testimony by psychiatrists who stated that Kevin’s “brain sex or mental sex is male.” The court expressly rejected the approach taken in Corbett, finding that sex cannot be determined based on any single factor “such as chromosomes or genital sex,” and stated that to determine a person’s sex for the purpose of marriage:

[T]he relevant matters include . . . the person’s biological and physical characteristics at birth . . . the person’s life experiences, including the sex in which he or she is brought up and the person’s attitude to it; the person’s self-perception as a man or woman; the extent to which the person has functioned in society as a man or a woman; any hormonal, surgical or other medical sex reassignment treatments the person has undergone . . . and the person’s biological, psychological and physical characteristics at the time of the marriage, including—if they can be identified—any biological features of the person’s brain that are associated with a particular sex.

D. Issues That Arise During Divorce

Even if a transsexual has successfully entered into a valid marriage recognized as a legal opposite sex marriage, issues may still arise when one of the spouses file for divorce. What should generally be a straightforward divorce proceeding can turn into a complex judicial determination of the transsexual’s legal sex and potential invalidation of the marriage. This is the battle that Michael Kantaras—an FTM transsexual—faced when he filed a petition for dissolution of marriage, and his wife counter petitioned alleging that their marriage was void because Michael is female and Florida prohibits same-sex marriage. The court agreed, holding that Michael is

546. In re Kevin (Validity of Marriage of Transsexual), [2001] FamCA 1074 ¶ 330; see also M.T., 355 A.2d at 211.
547. In re Kevin (Validity of Marriage of Transsexual), [2001] FamCA 1074 ¶ 244; Flynn, supra note 262, at 35.
548. In re Kevin (Validity of Marriage of Transsexual), [2001] FamCA 1074 ¶¶ 328–330; see also Corbett v. Corbett, [1971] P. 83 at 104 (Eng.).
550. E.g., id. at 156–57.
551. Id. at 156.
female and invalidated the marriage.552 Due to the invalidation of their marriage, Michael faced an ongoing battle of establishing parental rights.553

More recently, an Arizona judge denied a divorce for Thomas Beatie—an FTM transsexual—based on the conclusion that he was a female at the time he married a woman, and due to Arizona’s prohibition on same-sex marriage, the marriage was invalid.554 Beatie is referred to as the Pregnant Man because he retained female reproductive organs and gave birth to three children during his marriage.555 He plans to appeal the divorce denial because “he wants the three children to whom he gave birth to know their parents’ marriage was legitimate” fearing that his children will “‘see that [the] court said that’s not your daddy.’”556

It is clear that the sex of an individual is based on many components, which cannot be determined by biology alone.557 It seems inappropriate, and rather counter-intuitive, to narrowly define sex of a person as fixed at the time of his or her birth, when the individual personally and psychologically identifies differently, has undergone SRS or transition-related treatments, or even has had his or her certificate changed to reflect his or her new sex.558 Moreover, states that prohibit same-sex marriage, but refuse to acknowledge the sex change of a transsexual, ultimately permit precisely what the same-sex marriage ban was enacted to prevent.559

When the ban on same-sex marriage meets the insistence that legal sex may not be changed, the result is as fitting as it is ironic: [I]n these jurisdictions, transgender gay and lesbian couples can . . . marry. Assume a transsexual woman lives in a state where birth anatomy—here, a penis—forever defines legal sex. As a legal male, she is free to marry another woman, even though she, her partner, and society at large view them as lesbian.560

552. Id. at 161.
553. See id.
559. Flynn, *supra* note 262, at 34.
560. Id. For example, Serafima is a MTF transsexual who is in a relationship with another woman and considers herself a lesbian. See Flynn, *supra* Part V. The jurisdiction that prohibits same-sex marriage and follows the strict biological approach to defining sex for the purposes of marriage would permit them to marry, because Serafima was born a male—even though in reality they are a same-sex couple. See Flynn, *supra* note 262, at 34; *supra* Part V.
The complex issues of determining the validity of a post-transition marriage would be greatly simplified through same-sex marriage equality by removing any and all sex pre-qualifications for couples that want to marry.\(^{561}\) However, the states that still prohibit same-sex marriage should follow the approach taken by the Family Court of Australia, which weighed more heavily psychological and personal perceptions of an individual’s gender identity in the determination of legal sex for the purposes of marriage.\(^{562}\)

X. THE RIGHT TO RAISE CHILDREN/PARENTAL RIGHTS

As seen thus far, the struggles faced by the trans community concern some of the most intimate aspects of life—the right to marry, the right to be recognized for all legal purposes as the gender one identifies with, the right to equal health care, and matters concerning child custody and parental rights.\(^{563}\)

Legal ties between a parent and child can be established biologically, through adoption, or through marriage.\(^{564}\) Unfortunately, none of these options for establishing and securing legal ties between a parent and child seem to hold true when a parent is transgender.\(^{565}\) The guiding standard governing child custody disputes is always the best interest of the child.\(^{566}\) Variation exists among the states in the interpretation of the best interest of the child standard, and judges have broad discretion in weighing factors in child custody determinations.\(^{567}\)

Unfortunately, this standard has been unfairly applied against transgender parents.\(^{568}\) Gender identity should not be a factor in custody determinations or adoption placements, absent special circumstances indicating a likely negative impact on the child’s best interests.\(^{569}\) Unfortunately, many courts have denied child custody to a parent based on a finding that the parent’s gender identity, by itself, would not be in the best

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561. See Flynn, supra note 262, at 40.
564. Flynn, supra note 262, at 41–42.
565. Id. at 42.
interest of the child. Some extreme cases have even gone as far as terminating a trans person’s parental rights.

In *Daly v. Daly*, the Supreme Court of Nevada terminated the parental rights of Suzanne—formerly known as Tim—the child’s biological father who underwent SRS. The court found that termination of parental rights were in the child’s best interest due to a “risk of serious physical, mental, or emotional injury to the child” if she were forced to maintain visitation with Suzanne. The court even went as far to state that “[i]t was strictly Tim Daly’s choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter.”

In addition to the extreme cases terminating parental rights of a trans parent, there have been numerous decisions restricting or denying child custody and visitation rights to a transgender parent. For example, the Missouri Court of Appeals in *J.L.S. v. D.K.S.* reversed the order of joint custody by the trial court because the father underwent sex-reassignment surgery. The court determined “that immediate contact between the children and father would impair the boys’ emotional development.”

A circuit court in Florida correctly recognized that transgender status should not be a factor in custody determinations. In *Kantarars*, Michael Kantaras, a FTM transsexual, was married to Linda Forsythe. Michael adopted Linda’s son from a previous marriage, and during their marriage Linda gave birth to a daughter through artificial insemination. After nine years of marriage to Linda, Michael filed for a


571. *E.g.*, *Daly*, 715 P.2d at 60.


573. *Id.* at 57, 60.

574. *Id.* at 57–58.

575. *Id.* at 59.


577. 943 S.W.2d 766 (Mo. Ct. App. 1997).

578. *Id.* at 774–75.

579. *Id.* at 772. Similarly, the Court of Appeals of Washington restricted the parental rights of a transgender father and granted residential placement with the mother, claiming to base this decision “on the children’s need for ‘environmental and parental stability.’” *In re Marriage of Magnuson*, 170 P.3d 65, 67 (Wash. Ct. App. 2007). The court did not follow the recommendation of the Guardian Ad Litem, who concluded that “Robbie was the more nurturing and engaged parent, and . . . recommended that the court designate Robbie as the primary residential parent.” *Id.* at 68.


581. No. 98-5375CA (Fla. 6th Cir. Ct. 2003).

582. *Id.* at 2, 4, 11.

583. *Id.* at 15, 18–19.
divorce and sought custody of both children.\textsuperscript{584} In their custody battle, Linda argued that Michael had no parental rights over the children because he was a female.\textsuperscript{585} She claimed that the adoption of her son was void because it was done when Florida prohibited gay adoption, and that Michael was not the biological or legal father of her daughter.\textsuperscript{586}

Surprisingly, a Florida circuit court determined that the marriage was valid and concluded that it would be in the children’s best interest to remain in the parental custody of their transgender father.\textsuperscript{587} The approach taken by this court, in determining the custody of the children, is particularly noteworthy because Michael’s transgender status had no impact on the court’s application of the best interest of the child standard.\textsuperscript{588} A psychologist, who testified about the qualities of a good parent, stated that there are no concerns about awarding custody to a trans parent as long as he is a good parent.\textsuperscript{589} The circuit court’s holding relied heavily on the finding that “with respect to the children, being a transsexual does not prevent him from being a good parent.”\textsuperscript{590}

However, the Second District Court of Appeal of Florida held the marriage between Michael and Linda as a same-sex marriage, and thus void \textit{ab initio}.\textsuperscript{591} The court’s decision did not reverse the custody determination of the trial court and instead left that issue for review on remand.\textsuperscript{592} This decision unfortunately meant that Michael faced continued litigation in the fight to protect the parental rights over his children.\textsuperscript{593} Luckily, the well-known television celebrity, Dr. Phil, heard about this ongoing case, invited Michael and Linda on his show, and successfully encouraged them to resolve the dispute in mediation.\textsuperscript{594} After two days of mediation, Michael’s battle was finally over when it was settled that he would retain all of his parental rights over his two children.\textsuperscript{595}

As demonstrated in \textit{In re Marriage of Simmons},\textsuperscript{596} judicial invalidation of marriage can also have devastating effects on the parental

\begin{thebibliography}{99}
\bibitem{584} Id. at 2–3, 102, 615.
\bibitem{585} See id. at 6.
\bibitem{586} \textit{Kantaras}, No. 98-5375CA at 4–5, 8.
\bibitem{587} Id. at 52, 799, 808.
\bibitem{588} Id. at 52, 799.
\bibitem{589} Id. at 294.
\bibitem{590} Id. at 52.
\bibitem{592} Id.
\bibitem{593} See id.
\bibitem{595} Id.
\bibitem{596} 825 N.E.2d 303 (Ill. App. Ct. 2005).
\end{thebibliography}
The marriage of Sterling, a transsexual male, to his wife Jennifer, was declared invalid as a same-sex marriage and the court declared sole custody of the child to the wife. During their marriage, Jennifer underwent artificial insemination, and pursuant to the Parentage Act, the two of them and their physician signed a contract stating that Sterling is the natural father of the child born from this procedure. However, the court awarded custody to Jennifer, finding that Sterling was not biologically tied to the child and “lacked parental rights or standing to seek custody.”

In order for the artificial insemination agreement they signed to be valid, Sterling would have to be a husband and Jennifer, a wife. However, due to the invalidity of their marriage, they were not husband and wife at the time the agreement was signed, and the court further concluded that the Parentage Act does not “include[] transsexual males who have signed artificial insemination agreements as husbands in an invalid same-sex marriage.”

The fact that someone is transgender should not affect his or her parental rights and should not be a factor in the courts application of the best interest of the child standard. Although courts may deny the fact that a parent’s transgender status had a negative impact on their decision restricting or terminating parental rights, “reading between the lines it is easy for one to discern a bias against the transgender person and his or her gender identity.” Courts should follow the approach used by the Kantaras court in determining the best interest of the child in child custody disputes. The focus should be solely on parenting ability, excluding gender identity in that determination. Being a transsexual does not prevent someone from being a good parent; bias, animus, or a lack of understanding should not restrict or prevent a person from the right to raise children.

597. See id. at 312.
598. Id. at 307, 311, 315.
599. Id. at 307.
600. Id.
601. In re Marriage of Simmons, 825 N.E.2d at 311.
602. Id.
604. See id. at 67.
605. HOWELL, supra note 290, at 68.
608. See HOWELL, supra note 290, at 68.
XI. CONCLUSION

As demonstrated, the American “legal system insists upon a male/female dichotomy.”609 Further, there are social expectations associated with what it means to be male and female, and those who fall outside of the cultural norm for femininity and masculinity are misunderstood, harassed, discriminated against, and even physically abused.610 For these reasons, there is a compelling need for legislative changes and specific legal protections for the trans community.611 The law should not categorize people based on his or her chromosomal make-up or attempt to fit an individual into a narrow category in which he or she may not belong. As shown, the insistence on legally defining an individual as either male or female creates difficulties for transsexuals at all stages of his or her life.612 This binary classification system has the effect of diminishing the trans person’s autonomy by refusing to acknowledge and respect him or her for who he or she is.613 Everyone deserves to be respected and acknowledged for exactly who they are, an individual, not as a sex. Instead of determining the rights and protections given to American citizens based on their classification of either male or female, the law should treat everyone equally—whether a person is male, female, transgender, intersex, homosexual, bisexual, pansexual, and so on—we are all individuals, entitled to the same rights, protections, and respect in society as well as in law.

609. Stirnitzke, supra note 314, at 289.
610. See GRANT ET. AL., supra note 20, at 3.
611. See id.
612. See id. at 3–8.
613. See Greenberg, supra note 2, at 935.
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I. FEDERAL DIVERSITY JURISDICTION: INTRODUCTION

One of the most basic tenets of federal judicial law is that a federal court must have subject matter jurisdiction in order to hear a case.1 Subject matter jurisdiction is conferred upon the courts by the U.S. Constitution or federal statutes.2 These sources provide two primary bases of subject matter jurisdiction.

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1. See Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (holding that “when a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety”).

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.; see also infra notes 3–6.
jurisdiction: Federal question jurisdiction and diversity jurisdiction. First, under 28 U.S.C. § 1331, federal district courts “have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” Alternatively, federal courts have subject matter jurisdiction over certain cases, based on diversity of citizenship, pursuant to 28 U.S.C. § 1332.

With respect to diversity jurisdiction, some diversity cases originate in the federal district court, but others are removed by defendants from state to federal court pursuant to § 1441. Regardless of their origin, in order to rely on the federal court’s diversity jurisdiction, the parties must demonstrate that they meet the requirements for subject matter jurisdiction found in § 1332, including the minimum amount in controversy and diversity of citizenship. Section 1332 provides specific jurisdictional requirements based upon the identity of the parties and whether a case is filed as a class action.

Although the diversity jurisdiction requirements appear to be straightforward—at least as they are presented in the statute—their application has proved to be more complex over time. An abundance of case law has developed regarding how the requirements for diversity jurisdiction should be interpreted; this Guide focuses on how the Eleventh Circuit Court of Appeals interprets them today. Specifically, Part II sets out the statutory foundations of diversity jurisdiction. Part III addresses Eleventh Circuit and Supreme Court of the United States precedents regarding § 1332’s amount-in-controversy requirement, while Part IV analyzes the statute’s

4. Id. § 1332. Title 28, Section 1367 of United States Code provides that the federal courts, in some circumstances, may also exercise supplemental jurisdiction over claims that are part of the same case or controversy as claims over which the courts have primary subject matter jurisdiction. Id. § 1367; see also, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 559 (2005) (“Once the court determines it has original jurisdiction over the civil action, it can turn to the question whether it has a constitutional and statutory basis for exercising supplemental jurisdiction over the other claims in the action.”).
6. Id. § 1332.
7. Id.; §§ 1332, 1441(a)–(h).
8. Id. § 1332(a).
10. See id. § 1332(a)–(d)(4); infra Parts II–VI.
11. See infra Parts II–VI.
12. See infra Parts II.
requirements for diversity of citizenship. Section 1332’s specific requirements for diversity jurisdiction in the context of class actions are set forth in Part V. Finally, Part VI presents some specific legal rules that come up in appellate litigation of diversity issues.

II. STATUTORY FOUNDATIONS OF DIVERSITY JURISDICTION AND GENERAL RULES OF APPLICATION

The starting point for federal courts’ diversity jurisdiction is § 1332. In subsection (a), that statute provides the basic requirements for diversity jurisdiction:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different states;

(2) citizens of a state and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a state and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same state;

(3) citizens of different states and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in § 1603(a) of this title, as plaintiff and citizens of a state or of different states.

Subsection (d) sets out specific diversity jurisdiction requirements for class action lawsuits, which are different from those in other diversity cases. More generally, Rule 8 of the Federal Rules of Civil Procedure (“FRCP”), provides the following requirement for pleading jurisdiction in

13. See infra Parts III–IV.
14. See infra Parts V.
15. See infra Parts VI.
17. Id. The amount in the amount-in-controversy requirement has increased numerous times since the nineteenth century, and has been set at more than $75,000 since 1996. See id. § 1332(a).
18. Id. § 1332(a)(1)–(4).
19. See id. § 1332(d).
cases filed originally in federal court: “A pleading that states a claim for relief must contain . . . a short and plain statement of the grounds for the court’s jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support.”20 Applying this rule, when a plaintiff files suit in federal court based on diversity, he or she must allege facts that demonstrate that the court has jurisdiction under 28 U.S.C. § 1332.21 If a plaintiff’s inadequate jurisdictional allegations remain uncured, the district court is required to dismiss the case without addressing its merits.22 Dismissal is required because “once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue.”23

Sometimes a diversity case is in federal court because a defendant has petitioned for its removal from state court.24 The statutory basis for removal of a civil action from a state court to a federal court is found in 28 U.S.C. § 1441:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a [s]tate court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.25

The burden is on the defendant to adequately plead diversity in a removal case.26 A defendant seeking to remove an action from state to federal court must file a notice of removal in the district court that “contain[s] a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders” served upon the defendant in the state court action.27 If the defendant fails to demonstrate that the § 1332 diversity requirements have been met in a removed case, the district court will remand the case back to the state court.28

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22. Travaglio, 735 F.3d at 1268–69; see also Goodman v. Sipos, 259 F.3d 1327, 1331 n.6 (11th Cir. 2001).
25. 28 U.S.C. § 1441(a); Triggs, 154 F.3d at 1287 (“A civil case filed in state court may be removed by the defendant to federal court if the case could have been brought originally in federal court.”).
27. Id.
28. See id. § 1332; Univ. of S. Ala., 168 F.3d at 410.
Even if the parties do not dispute a court’s subject matter jurisdiction based upon diversity, federal courts are “obligated to inquire into subject matter jurisdiction sua sponte whenever it may be lacking.” The parties may not agree to waive subject matter jurisdiction. As a result, the following legal issues may come up either by way of arguments raised by one or more of the parties, or because the federal court identifies a potential problem with diversity jurisdiction.

III. DETERMINING THE AMOUNT IN CONTROVERSY

In civil actions—aside from class actions—there are two basic requirements for diversity jurisdiction: (1) the amount in controversy must be more than $75,000; and (2) the parties must be completely diverse. This first section focuses on how the Eleventh Circuit applies the amount-in-controversy requirement.

A. Burden of Demonstrating that Amount in Controversy Has Been Met

As stated above, the diversity statute requires that “the matter in controversy exceed[] the sum or value of $75,000, exclusive of interest and costs.” The party responsible for bringing the case to the federal courts bears the burden of demonstrating that the diversity requirements have been met. In a case originating in the federal district court, the plaintiff must allege in good faith a sum adequate to meet the statutory requirements.

29. Univ. of S. Ala., 168 F.3d at 410.
30. Id.; see also Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 1000 (11th Cir. 1982).
31. See infra Parts III–IV.
33. See infra Part III.A–F.
34. 28 U.S.C. § 1332(a).
In contrast, in cases removed from state court to federal court, the defendant bears the burden of proving diversity. The defendant must “show, by a preponderance of the evidence, facts supporting jurisdiction.” Applying this standard in removal cases, the federal court will show deference to the plaintiff’s damages allegations when pleaded specifically. However, when the plaintiff has not alleged a specific amount of damages, the court will apply the preponderance of the evidence standard.

B. “Legal Certainty” Requirement for Dismissal Based on Failure to Meet Amount in Controversy Requirement

Federal courts “will not dismiss a case for lack of subject matter jurisdiction under the diversity statute ‘unless it appears to a ‘legal certainty’ that plaintiff’s claim is actually for less than the jurisdictional amount.” The Eleventh Circuit has explained that this standard “give[s] great weight to plaintiff’s assessment of the value of plaintiff’s case.” It is an objective standard.

In contrast, the court will not allow defendants seeking to remove cases from state to federal court to benefit from the legal certainty test. Thus, where the plaintiff seeks less than the amount required for diversity jurisdiction, “only the sum actually demanded is in controversy.” In order to avoid remand in removal cases involving alleged damages below the statutory amount-in-controversy minimum, the defendant “must prove to a legal certainty” that the plaintiff’s counsel has either falsely or incompetently assessed the case. The Eleventh Circuit has stated that one way that a

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38. Burns v. Windsor Ins. Co., 31 F.3d 1092, 1094 (11th Cir. 1994); see also Williams, 269 F.3d at 1319.
39. See Burns, 31 F.3d at 1095 (stating that “plaintiff’s claim, when it is specific and in a pleading signed by a lawyer, deserves deference and a presumption of truth”).
41. Broughton v. Fla. Int’l Underwriters, Inc., 139 F.3d 861, 863 (11th Cir. 1998) (quoting Burns, 31 F.3d at 1094) (emphasis added); see also St. Paul Mercury Indem. Co., 303 U.S. at 289 (“It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.”).
42. Burns, 31 F.3d at 1094.
43. Id. at 1096.
44. See id. at 1094–95 (noting that the plaintiff “is the master of his own claim.”).
45. See id. at 1095 (emphasis added).
46. Id.
removing defendant could remain in federal court in this circumstance was if “he showed that, if plaintiff prevails on liability, an award below the jurisdictional amount would be outside the range of permissible awards.”

C. **Timing of Amount in Controversy Determination for Removal Cases**

Jurisdictional facts—including those regarding the amount in controversy—must be determined as of the date of removal. However, the court is not limited to jurisdictional allegations in the removal petition; it may also consider post-removal evidence of the amount in controversy, such as that presented in affidavits, if that evidence is relevant to the time of removal.

D. **Calculating Amount in Controversy**

1. **Law Regarding Aggregating Claims to Meet Amount in Controversy Requirements**

The law regarding aggregation of claims to meet amount in controversy requirements is complex and not always consistent. This subsection sets out some of the rules regarding aggregation of claims.

a. **Aggregation of Multiple Claims by Plaintiff(s) Against a Single Defendant**

As a general rule, a plaintiff may aggregate multiple claims against a single defendant in order to meet the amount in controversy requirements for diversity jurisdiction. In contrast, the Supreme Court of the United States has held that multiple plaintiffs’ claims can be aggregated, for purposes of diversity jurisdiction, only when “plaintiffs [have] unite[d] to enforce a single title or right in which they have a common and undivided interest.”

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47. Burns, 31 F.3d at 1096.
49. Id.; see also Williams v. Best Buy Co., 269 F.3d 1316, 1319 (11th Cir. 2001) (stating that “a district court may properly consider post-removal evidence in determining whether the jurisdictional amount was satisfied at the time of removal”).
51. See infra Part III.D(1)(a–c).
when multiple plaintiffs have separate and distinct claims, the court will not aggregate those claims to meet the minimum amount in controversy.  

b.  **Aggregating Claims Against Multiple Defendants**

When a plaintiff brings separate and distinct claims against multiple defendants, the general rule is that claims cannot be aggregated to meet the amount in controversy requirement.  The outcome is different when a plaintiff brings claims against two or more defendants who are jointly liable to the plaintiff; in that situation, the claims may be aggregated. Applying this rule, the Fifth Circuit held that a plaintiff could not aggregate claims against two insurance companies when one company had primary liability and the other one had excess coverage of the same insured risk.

c.  **Aggregation in the Context of Class Actions**

There are additional specific aggregation rules in the context of class actions.  For a complete discussion of those rules, see Part V.  

2.  **Methods of Determining Amount in Controversy in Removal Cases**

The Eleventh Circuit has set out a specific approach to determining amount in controversy in removal cases. When the state court complaint seeks more than $75,000 in damages, “a removing defendant may rely on the plaintiff’s valuation of the case to establish the amount in controversy unless it appears to a legal certainty that the plaintiff cannot recover the amount claimed.” However, if the complaint does not contain a claim for a specific amount of damages, the federal court should consider whether “it is facially

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54.  *E.g.*, Niagara Fire Ins. Co. v. Dyess Furniture Co., 292 F.2d 232, 233 (5th Cir. 1961) (“The law has been . . . long settled . . . that when two or more plaintiffs, having separate and distinct demands, unite in a single suit for convenience of litigation, their claims cannot be aggregated to make up the jurisdictional amount.”).

55.  Jewell v. Grain Dealers Mut. Ins. Co., 290 F.2d 11, 13 (5th Cir. 1961); see also Cornell v. Mabe, 206 F.2d 514, 516 (5th Cir. 1953).

56.  Jewell, 290 F.2d at 13; Cornell, 206 F.2d at 516–17 (“However, when the action is to recover a single tract of land and the several defendants claim under a common source of title, the matter in controversy is the entire tract of land and not its several parts.”).


59.  See infra Part V.

60.  Williams v. Best Buy Co., 269 F.3d 1316, 1319 (11th Cir. 2001).

apparent from the complaint that the amount in controversy exceeds the jurisdictional requirement.\textsuperscript{62}

In evaluating whether the amount in controversy is facially apparent from the complaint, “the district court is not bound by the plaintiff’s representations regarding its claim, nor must it assume that the plaintiff is in the best position to evaluate the amount of damages sought.”\textsuperscript{63} Indeed, the court may decide that the defendant’s evidence regarding the amount in controversy is more reliable than that of the plaintiff.\textsuperscript{64} The district court “may use [its] judicial experience and common sense in determining whether the case stated in a complaint meets federal jurisdictional requirements.”\textsuperscript{65}

“If the jurisdictional amount is not facially apparent from the complaint, the court should look to the notice of removal and may require evidence relevant to the amount in controversy at the time the case was removed.”\textsuperscript{66} In order to sufficiently allege jurisdiction in the petition for removal, the defendant must do more than make “[a] conclusory allegation . . . that the . . . amount is satisfied, without setting forth the underlying facts supporting such an assertion.”\textsuperscript{67}

3. Determining Amount in Controversy in Cases Involving Only Declaratory and Injunctive Relief

In cases where the plaintiff seeks only declaratory and injunctive relief, the proper measure of amount in controversy is the value of the object of the litigation.\textsuperscript{68} The Eleventh Circuit has determined that this value should

\begin{itemize}
\item \textsuperscript{62} Williams, 269 F.3d at 1319; see also Roe v. Michelin N. Am., Inc., 613 F.3d 1058, 1061 (11th Cir. 2010).
\item \textsuperscript{63} Roe, 613 F.3d at 1061.
\item \textsuperscript{64} Id. at 1061.
\item \textsuperscript{65} Id. at 1062.
\item \textsuperscript{66} Id at 1064.
\item \textsuperscript{67} Williams, 269 F.3d at 1319.
\item \textsuperscript{68} Hunt v. Wash. State Apple Adver. Comm’n, 432 U.S. 333, 347 (1977); see also Ericsson GE Mobile Commc’ns, Inc. v. Motorola Commc’ns & Elecs., Inc., 120 F.3d 216, 218 (11th Cir. 1997).
\end{itemize}
be determined from the plaintiff’s perspective. If the value of the requested relief is too speculative or immeasurable, the Eleventh Circuit has held that the plaintiff fails to meet the amount in controversy requirements for diversity jurisdiction under 28 U.S.C. § 1332.

4. Determining Amount in Controversy for Specific Performance Cases

In diversity cases in which the plaintiff seeks specific performance of a contract, federal courts generally base their calculation of the amount in controversy on the value of the property at issue, not the amount that might be awarded in damages for breach of contract.

5. Challenges to Arbitration Awards and the Amount in Controversy Requirement

The Federal Arbitration Act does not provide subject matter jurisdiction for a case to be in federal courts. Instead, a party seeking to challenge an arbitration award must demonstrate an independent basis for jurisdiction, such as diversity. In Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc., the Eleventh Circuit held that “a federal court has subject matter jurisdiction where a party seeking to vacate an arbitration award is also seeking a new arbitration hearing at which he will demand a sum which exceeds the amount in controversy for diversity jurisdiction purposes.”

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69. Ericsson GE Mobile Commc’ns, Inc., 120 F.3d at 218–20; see also Davis v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792, 796 (11th Cir. 1999). Note: Not all circuits follow the plaintiff’s-viewpoint rule, although the majority have. Ericsson GE Mobile Commc’ns, Inc., 120 F.3d at 218 n.8.

70. 28 U.S.C. § 1332(a) (2012); Ericsson GE Mobile Commc’ns, Inc., 120 F.3d at 222 (“Because [the plaintiff] cannot reduce the speculative benefit resulting from a rebid to a monetary standard, . . . there is no pecuniary amount in controversy.”); see also Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1269 (11th Cir. 2000) (stating that “a plaintiff who bases diversity jurisdiction on the value of injunctive relief must show that the benefit to be obtained from the injunction is sufficiently measurable and certain to satisfy the . . . amount in controversy requirement”) (quotation omitted).

71. Occidental Chem. Corp. v. Bullard, 995 F.2d 1046, 1047 (11th Cir. 1993) (per curiam). “When the value of property sought to be obtained by specific performance exceeds the sum which might have been awarded in damages, the amount in controversy is established by the value of the property.” Id.


73. See Peebles, 431 F.3d at 1325.

74. 431 F.3d 1320 (11th Cir. 2005).

75. Id. at 1325.
E. **Effect of Subsequent Events**

Subsequent events do not change a federal court’s analysis of the amount in controversy, as the court’s jurisdiction is determined as of the date that the case enters the district court. As the Supreme Court of the United States noted in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, the fact that the plaintiff does not ultimately recover the full amount alleged in the complaint does not void the federal court’s jurisdiction in a diversity case. In explaining the good-faith requirement, the Supreme Court explained, “[t]he inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction.”

Applying this rule, a plaintiff’s stipulation or amendment of the pleadings after a case is removed to federal court that reduces the amount in controversy below the statutory minimum does not divest the federal court of diversity jurisdiction. Moreover,

> the fact that it appears from the face of the complaint that the defendant has a valid defense, if asserted, to all or a portion of the claim, or the circumstance that the rulings of the district court after removal reduce the amount recoverable below the jurisdictional requirement, will not justify remand.

Thus, the Eleventh Circuit has held that, in determining the amount in controversy, it will not consider whether some damages may be precluded by the statute of limitations.

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77. 303 U.S. 283 (1938).
78. *Id.* at 289.
79. *Id.*; see also *Adolph Coors Co. v. Movement Against Racism & the Klan*, 777 F.2d 1538, 1544 (11th Cir. 1985) (stating that, once the amount in controversy requirement is met “and the federal court is seized of jurisdiction, the court’s power is not conditional on a later award of at least that amount”).
81. *Id.*

The district court also found it significant that Maytag’s calculation of the amount in controversy did not account for the effect of any applicable statutes of limitations. When determining the amount in controversy for jurisdictional purposes, however, courts cannot look past the complaint to the merits of a defense that has not yet been established.

*Miedema*, 450 F.3d at 1332 n.9.

https://nsuworks.nova.edu/nlr/vol39/iss2/5
F. Relevance of State Law to Determination of Amount in Controversy

Although the question of whether the plaintiff has met the amount in controversy requirement for diversity jurisdiction is a federal question, courts will often consider whether state law is relevant to that determination. Specifically, the court will utilize state law “insofar as it defines the nature and extent of the right plaintiff seeks to enforce.”

In *Broughton v. Florida International Underwriters, Inc.*, the Eleventh Circuit considered whether a plaintiff could rely upon claims for statutory penalties and attorney’s fees, brought pursuant to a Georgia statute, to meet the minimum amount in controversy requirement for diversity jurisdiction. Although the court was willing to consider these types of claims, it ultimately determined that the defendant was not liable under the state statute and, therefore, the plaintiff did not meet the minimum amount-in-controversy requirement. In *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc.*, the court also considered the availability of state-law remedies—this time under Alabama law—in determining whether the amount in controversy requirement was met.

IV. Determining Diversity of Citizenship

The following Part addresses in more detail the Eleventh Circuit’s analysis of § 1332’s requirement that parties seeking the federal court’s diversity jurisdiction demonstrate diversity of citizenship. In fact, most of the court’s analysis regarding jurisdiction under this statute has focused primarily on this specific requirement, as explained further.

83. *See* Broughton v. Fla. Int’l Underwriters, Inc., 139 F.3d 861, 863 (11th Cir. 1998); Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 352–53 (1961). Determination of the value of the matter in controversy for purposes of federal jurisdiction is a federal question to be decided under federal standards, although the federal courts must, of course, look to state law to determine the nature and extent of the right to be enforced in a diversity case.

84. *Broughton*, 139 F.3d at 863 (quoting Duderwicz v. Sweetwater Sav. Ass’n, 595 F.2d 1008, 1012 (5th Cir. 1979)).

85. *Id.* at 864.

86. *Id.* at 863–64.

87. *Id.* at 864.

88. *Id.* at 864.

89. *Id.* at 220–21 (holding that under Alabama law, if the plaintiff was successful it would only be entitled to rebid the contract and that the value of that benefit was too speculative to meet the amount-in-controversy requirement for diversity jurisdiction.).

90. *See infra* Part IV.A-B.

91. *See infra* Part IV.A.
A. Rules Related to Pleading Diversity of Citizenship Exists

1. The Rule for Cases Filed Originally in District Court

a. Requirements Under FRCP 8

When a party seeks to bring an original civil action in the federal court, pursuant to 28 U.S.C. § 1332(a), FRCP 8 applies. Under FRCP 8, the plaintiff’s complaint must provide a short and plain statement of the court’s jurisdiction. Applying FRCP 8 in the context of § 1332, in order to adequately allege diversity jurisdiction, a plaintiff must provide specific allegations regarding the amount in controversy and diversity of citizenship. Although the rule is straightforward, numerous legal issues can complicate the federal court’s analysis of the parties’ citizenship, as illustrated below.

b. Timing: Diversity Jurisdiction Is Determined as of Date that the Action Was Filed

In determining whether the district court has subject matter jurisdiction, the Eleventh Circuit looks to the facts as they existed at the time the action was filed.

i. Post-filing Changes in Citizenship Do Not Matter for Purposes of Diversity Jurisdiction

It is well established that the only citizenship that matters for purposes of determining whether diversity jurisdiction exists is the original parties’ citizenship at the time the lawsuit is filed; any changes in a party’s citizenship that occur after filing are irrelevant. Thus, the district court will not “lose jurisdiction over a diversity [claim that] was well founded at the outset even [if] one of the parties . . . later change[s] [its] domicile.” Moreover, post-filing changes in the citizenship of a party cannot cure jurisdictional defects in a diversity action, where “[t]he purported cure arose not from a

95. See infra Part IV.A.1.b.
change in parties to the action, but from a change in the citizenship of a continuing party.99

ii. The Substitution of Parties Under FRCP 25(c) Does Not Defeat Diversity Jurisdiction

Diversity jurisdiction was not defeated by the addition of a nondiverse party to the action—accomplished by substituting the nondiverse party as a plaintiff under FRCP 25(c)—when the plaintiffs and defendant were diverse at the time that the action arose and at the time that federal proceedings were commenced; the substituted party “was not an indispensable party at the time the complaint was filed”; and the substituted party “had no interest whatsoever in the outcome of the litigation until sometime after [the] suit was commenced.”100

iii. Permissive Intervention of a Party Under FRCP 24 Does Not Destroy Diversity Jurisdiction

FRCP 24 provides for intervention of right and permissive intervention by other parties.101 The intervention of a party, by leave of court, does not destroy the federal court’s diversity jurisdiction when the intervening party’s “presence is not essential to a decision of the controversy between the original parties.”102

Recent Eleventh Circuit case law suggests that an intervenor’s citizenship does have an effect on a court’s diversity jurisdiction analysis in some circumstances, however.103 In Flintlock Construction Services, L.L.C. v. Well-Come Holdings, L.L.C104 a case brought pursuant to diversity jurisdiction, the intervenor was a citizen of the same state as the plaintiff and sought to bring claims against both the plaintiff and the defendants.105 In order to maintain diversity jurisdiction, the court dismissed the intervenor’s

100. Freeport McMoRan Inc., 498 U.S. at 426–29 (noting that “[a] contrary rule could well have the effect of deterring normal business transactions during the pendency of what might be lengthy litigation”); see also FED. R. CIV. P. 25(c); Hardenbergh v. Ray, 151 U.S. 112, 118–19 (1894) (holding that the substitution of nondiverse defendants for diverse defendants did not destroy federal jurisdiction).
101. FED. R. CIV. P. 24(a)–(b). FRCP 24(a) provides for intervention of right, while FRCP 24(b) applies to permissive interventions. Id.
104. 710 F.3d 1221 (11th Cir. 2013).
105. Id. at 1222-23.
claims against the plaintiff but allowed the claims against the defendant to proceed.\(^ {106}\)

iv. Plaintiff Cannot Later Amend Complaint to Add Nondiverse Defendant

Although the Supreme Court has recognized that diversity jurisdiction is not destroyed by a federal court’s exercise of ancillary jurisdiction over nonfederal claims involving impleader, cross-claims, or counter-claims, a court will not have diversity jurisdiction where a plaintiff later amends the complaint to add a nondiverse party.\(^ {107}\)

v. In Evaluating Diversity, the Court Should Realign Parties According to Their Real Interests

The plaintiff’s alignment of the parties is not determinative for diversity purposes.\(^ {108}\) Thus, a federal district court, in determining whether there is complete diversity, has a duty to realign parties according to their real interests.\(^ {109}\) For example, in shareholder derivative suits brought in federal court pursuant to diversity jurisdiction, the court will align the corporation as a defendant whenever the corporate management has adopted a position that is antagonistic to that of the plaintiff shareholder.\(^ {110}\)

c. Curing Defects in Diversity Jurisdiction

Under certain circumstances, it is possible to cure defects in diversity jurisdiction.\(^ {111}\) The following subsection provides some analysis of when curing is possible and how it may be accomplished.\(^ {112}\)

i. Courts May Use FRCP 21 to Drop Nondiverse Dispensable Parties

“On motion or on its own, the court may at any time, on just terms, add or drop a party.”\(^ {113}\) Thus, although generally diversity jurisdiction is

\(^{106}\) Id. at 1225.
\(^{109}\) Id.; see also City of Vestavia Hills v. General Fid. Ins. Co., 676 F.3d 1310, 1313 (11th Cir. 2012) (noting that “federal courts are required to realign the parties in an action to reflect their interests in the litigation”).
\(^{111}\) See FED. R. CIV. P. 21; infra Part IV.A.1.C.
\(^{112}\) See infra Part IV.A.1.C.
determined at the time of filing, a jurisdictional defect relating to diversity of citizenship can be cured by the dismissal of a nondiverse dispensable party who destroyed diversity. 114 The Supreme Court of the United States has warned that federal courts should exercise this power sparingly. 115 In determining whether to dismiss a nondiverse party, the court “should carefully consider whether the dismissal of a nondiverse party will prejudice any of the parties in the litigation.” 116

Dismissal of nondiverse parties is not possible in all circumstances. 117 If the nondiverse party is indispensable, the court must dismiss the entire case for lack of subject matter jurisdiction. 118

ii. Under Some Circumstances, Parties Can Cure Defective Allegations of Jurisdiction

Parties may amend defective allegations of jurisdiction pursuant to 28 U.S.C. § 1653. 119 Title 28, Section 1653 of the United States Code provides that “[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.” 120 The statute applies only to allegations of jurisdiction, however, and not to the underlying jurisdictional facts. 121 Moreover, a defendant’s admissions as to his domicile—as well as record evidence regarding domicile—are sufficient to cure a plaintiff’s pleading defect when the complaint only pleaded the defendant’s residency. 122

Parties may also cure deficiencies in diversity jurisdiction allegations by submitting evidence of citizenship during case proceedings. 123 The
Supreme Court of the United States has held that a federal court may consider record evidence in determining whether diversity jurisdiction exists. Applying that rule, the appellate court “need not vacate a decision on the merits if the evidence submitted during the course of the proceedings cures any jurisdictional pleading deficiency by convincing [the court] of the parties’ citizenship.”

iii. Limitations on a Party’s Attempts to Cure Jurisdictional Allegations

Although it is possible for the plaintiff to cure the jurisdictional allegations in the complaint, a federal court will not accept the parties’ stipulation that diversity jurisdiction exists. Furthermore, although a party may cure insufficient allegations of diversity jurisdiction by amending pleadings, a party may not cure them solely through self-serving statements in an unsworn brief.

2. Case Removed from State Court to Federal District Court

As explained above, a defendant may also remove a case from state court pursuant to 28 U.S.C. § 1441, as long as he demonstrates that the federal court has subject matter jurisdiction over the case. As the Eleventh Circuit explained in Triggs v. John Crump Toyota, Inc., “[a] civil case filed in state court may be removed by the defendant to federal court if the case could have been brought originally in federal court.” Similar to the diversity rules for cases filed originally in the district court, the Eleventh Circuit has developed a series of legal rules for analysis of the federal court’s diversity jurisdiction in removal cases, as discussed further.

124. See Sun Printing & Publ’g Ass’n v. Edwards, 194 U.S. 377, 382 (1904) (stating “[t]he whole record . . . may be looked to, for the purpose of curing a defective averment of citizenship, where jurisdiction in a Federal court is asserted to depend upon diversity of citizenship”).


126. See id. at 1269–70 (stating “it is fundamental that parties may not stipulate to federal jurisdiction”).

127. See id. at 1269 (noting that “we have never held that an unsworn statement in a brief, alone, can demonstrate a party’s citizenship for purposes of establishing diversity jurisdiction”).


129. 154 F.3d 1284 (11th Cir. 1998).

130. Id. at 1287.

131. See infra Part V.B.
a. **Burden to Adequately Plead Diversity Is on the Defendant in a Removal Case**

Although the pleading requirements are somewhat similar in removal cases to those originating in federal court, the pleading requirements for removed cases are found in 28 U.S.C. § 1446(a), rather than FRCP 8(a)(1). As explained further, the defendant, not the plaintiff, bears the burden of pleading diversity in a case removed from state court. As part of that requirement, the defendant’s notice of removal must include “a short and plain statement of the grounds for removal.”

b. **Specific Statutory Rules for Removal of Diversity Cases**

Title 28, Section 1441 of the United States Code contains additional special rules for diversity cases in the context of removal cases, as described below.

i. **Fictitious Names (“Jane Does”) Are Disregarded for Purposes of Determining Jurisdiction in Removal Cases**

Title 28, Section 1441(b)(1) of the United States Code instructs that, “[i]n determining whether a civil action is removable on the basis of the jurisdiction under [§] 1332(a) . . . the citizenship of defendants sued under fictitious names shall be disregarded.”

ii. **Exception When Defendant Is Citizen of State in Which Action Was Brought**

Under 28 U.S.C. § 1441(b)(2), “[a] civil action otherwise removable solely on the basis of the jurisdiction under [§] 1332(a) . . . may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”

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133. See 28 U.S.C. § 1446(a); Leonard v. Enter. Rent A Car, 279 F.3d 967, 972 (11th Cir. 2002); supra Part III.A.
135. See infra Part IV.A.2.c.
136. 28 U.S.C. § 1441(b)(1); see also Walker v. CSX Transp., Inc., 650 F.3d 1392, 1395 n.11 (11th Cir. 2011).

When a plaintiff files in state court a civil action over which the federal district courts would have original jurisdiction based on diversity of citizenship, the defendant or
c. **Time For Determining Whether Diversity Exists for Purposes of Removal**

Pursuant to 28 U.S.C. § 1446(b), “[i]n a case not originally removable, a defendant who receives a pleading or other paper indicating the post-commencement satisfaction of federal jurisdictional requirements—for example, by reason of the dismissal of a nondiverse party—may remove the case to federal court within [thirty] days of receiving such information.”

The timing of a determination of diversity for purposes of removal is approached somewhat differently than it is in cases originating in federal court. In cases removed from state to federal court, the district court must look at the case at the time of removal, rather than the time of filing of the original complaint, to determine whether it has subject-matter jurisdiction. Generally, the right of removal is decided by the pleadings, viewed at the time when removal is filed.

d. **Curing Faulty Citizenship Allegations in Removal Petitions**

Faulty allegations of citizenship in a removal petition may be properly cured by filing an amended petition for removal in the federal district court. Moreover, “a district court’s error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time final judgment is entered.”

The Supreme Court has contrasted situations in which a jurisdictional defect remained uncured and situations in which there was no jurisdictional defect at the time that the district court entered judgment.

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138. 28 U.S.C. § 1446(b); Caterpillar Inc., 519 U.S. at 68–69.
140. Pintando v. Miami-Dade Hous. Agency, 501 F.3d 1241, 1243 n.2 (11th Cir. 2007) (per curiam); see also Behlen v. Merrill Lynch, 311 F.3d 1087, 1095 (11th Cir. 2002); Leonard, 279 F.3d at 972 (noting that “the critical time is the date of removal”); Poore v. Am.-Amicable Life Ins. Co. of Tex., 218 F.3d 1287, 1290–91 (11th Cir. 2000), abrogated by Alvarez v. Uniroyal Tire Co., 508 F.3d 639 (11th Cir. 2007).
141. Tillman v. R.J. Reynolds Tobacco Co., 253 F.3d 1302, 1306 n.1 (11th Cir. 2001) (per curiam). But see Gibson, 108 U.S. at 563 (holding that diversity of citizenship, when the basis of jurisdiction, must exist at the time of the filing of the original action, as well as at the time of the petition for removal).
143. Caterpillar Inc., 519 U.S. at 64.
144. Compare id. at 76–77, with Sun Printing & Publ’g Ass’n v. Edwards, 194
Despite a federal trial court’s threshold denial of a motion to remand, if, at the end of the day and case, a *jurisdictional* defect remains uncured, the judgment must be vacated. . . . In this case, however, no jurisdictional defect lingered through judgment in the District Court. To wipe out the adjudication post-judgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.145

e. **Effect of Subsequent Acts on Diversity Jurisdiction**

“[I]f a district court has subject matter jurisdiction over a diversity action at the time of removal, subsequent acts do not divest the court of its jurisdiction over the action.”146

**B. Types of Parties**

Over time, the Supreme Court of the United States and the Eleventh Circuit have further developed the requirements for how a federal court determines a party’s citizenship in the context of diversity jurisdiction.147 The rules vary, depending on the type of parties.148 Those rules are analyzed further below.149

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145. *Caterpillar Inc.*, 519 U.S. at 76–77 (citations omitted).


147. *See* Hertz Corp. v. Friend, 559 U.S. 77, 80 (2010); Molinos Valle Del Cibao, C. por A. v. Lama, 633 F.3d 1330, 1341–42 (11th Cir. 2011); McCormick v. Aderholt, 293 F.3d 1254, 1258 (11th Cir. 2002) (per curiam); Taylor v. Appleton, 30 F.3d 1365, 1367 (11th Cir. 1994).


149. *See infra* Parts IV.B.1–12.
1. Individuals

a. General Rules

The plaintiff is required to allege natural parties’ citizenship, not residence.\textsuperscript{150} As the court has observed, “[t]o be a citizen of a [s]tate within the meaning of [§] 1332, a natural person must be both a citizen of the United States, and a domiciliary of that [s]tate. For diversity purposes, citizenship means domicile; mere residence in the [s]tate is not sufficient.”\textsuperscript{151} Furthermore, the federal court applies federal law, not state law, to determine a party’s citizenship under § 1332.\textsuperscript{152} For purposes of diversity jurisdiction, “[t]he word ‘States’ . . . includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.”\textsuperscript{153}

The Eleventh Circuit has stated that a person’s “[c]itizenship is equivalent to domicile for purposes of diversity jurisdiction.”\textsuperscript{154} The court has defined a party’s domicile as “the place of ‘his true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom.’”\textsuperscript{155} There is a presumption that a person is a domiciliary of the State of his birth, unless and until he acquires a new domicile, regardless of whether his parents were citizens of that State.\textsuperscript{156} In order to demonstrate a change in domicile, a party must show both: “(1) physical presence at the new location, [and] (2) an intention to remain there indefinitely.”\textsuperscript{157}

b. United States Citizens Living Abroad

“[United States] citizens domiciled abroad are neither ‘citizens of a State’ under § 1332(a) nor ‘citizens or subjects of a foreign state’ and therefore are not proper parties to a diversity action in federal court.”\textsuperscript{158}

\textsuperscript{150} Molinos Valle Del Cibao, C. por A., 633 F.3d at 1342 n.12; Taylor, 30 F.3d at 1367 (“Citizenship, not residence, is the key fact that must be alleged in the complaint to establish diversity for a natural person.”).

\textsuperscript{151} Mas v. Perry, 489 F.2d at 1396, 1399 (5th Cir. 1974) (citations omitted); see also 28 U.S.C. § 1332 (2012).

\textsuperscript{152} Mas, 489 F.2d at 1399; see also 28 U.S.C. § 1332.

\textsuperscript{153} 28 U.S.C. § 1332(e).

\textsuperscript{154} McCormick v. Aderholt, 293 F.3d 1254, 1257 (11th Cir. 2002) (per curiam).

\textsuperscript{155} Id. at 1257–58 (quoting Mas, 489 F.2d at 1399).

\textsuperscript{156} See Gregg v. La. Power & Light Co., 626 F.2d at 1315, 1317 (5th Cir. 1980).

\textsuperscript{157} McCormick, 293 F.3d at 1258.

\textsuperscript{158} Molinos Valle Del Cibao, C. por A. v. Lama, 633 F.3d 1330, 1341 (11th Cir. 2011); see also 28 U.S.C. § 1332(a).
that a United States citizen domiciled abroad destroyed diversity jurisdiction, the Supreme Court of the United States applied the following reasoning:

In order to be a citizen of a state within the meaning of the diversity statute, a natural person must both be a citizen of the United States and be domiciled within the state. The problem in this case is that Bettison, although a United States citizen, has no domicile in any state. He is therefore stateless for purposes of § 1332(a)(3). Subsection 1332(a)(2), which confers jurisdiction in the district court when a citizen of a state sues aliens only, also could not be satisfied because Bettison is a United States citizen.159

Although *Newman-Green, Inc. v. Alfonzo-Larrain*160 applied this rule in the context of a defendant, it also applies to a United States citizen living abroad who is a plaintiff to a lawsuit: “A United States citizen with no domicile in any state of this country is stateless and cannot satisfy the complete diversity requirement when she, or her estate, files an action against a United States citizen.”161

There is one important exception to this rule.162 “[A] citizen of a state does not lose her domicile when her employer sends her abroad,” or, in other words, when the citizen is living abroad “in the exercise of some particular profession.”163

c. **Dual Citizenship**

There is also a special rule for individuals who have dual citizenship.164 The Eleventh Circuit has stated that “an individual who is a dual citizen of the United States and another nation is only a citizen of the United States for the purposes of diversity jurisdiction under § 1332(a).”165

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162. See King, 505 F.3d 1171–72.

163. *Id.* at 117–72 (quoting Ennis v. Smith, 55 U.S. 400, 423 (1853)).

164. Molinos Valle Del Cibao, C. por A. v. Lama, 633 F.3d 1330, 1341 (11th Cir. 2011).

d. **Permanent Resident Aliens**

The district court does not have diversity jurisdiction of “an action between citizens of a state and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same state.”

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e. **Other Aliens**

For a full discussion of how other aliens are treated for purposes of diversity jurisdiction, see Part IV.B.12. 167

2. **Corporations**

Pursuant to 28 U.S.C. § 1332(c)(1), “a corporation shall be deemed to be a citizen of every state and foreign state by which it has been incorporated and of the state or foreign state where it has its principal place of business.” 168 Thus, “the complaint must allege either the corporation’s state of incorporation or principal place of business.” 169 As demonstrated below, the interpretation of this statute has been more complicated in practice, and as a result, a number of Eleventh Circuit and Supreme Court cases provide further guidance for its application. 170

a. **Domestic Corporations—Principal Place of Business**

i. **The “Nerve Center” Test**

 “[T]he phrase ‘principal place of business’ refers to the place where the corporation’s high level officers direct, control, and coordinate the corporation’s activities.” 171 The Supreme Court has observed that “in practice, [the principal place of business] should . . . be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, i.e., the ‘nerve center,’ and not simply an office where the corporation holds its board meetings.”


167. See infra Part IV.B.12.


169. Taylor v. Appleton, 30 F.3d 1365, 1367 (11th Cir. 1994); see also 28 U.S.C. § 1332(c)(1).

170. See infra Part B.2.a.

171. Hertz Corp. v. Friend, 559 U.S. 77, 80–81 (2010) (noting that some lower federal courts have referred to that place as the corporation’s “nerve center”).

172. Id. at 93.
By taking this approach in *Hertz Corp. v. Friend*, the Supreme Court specifically rejected an approach to the “principal place of business” determination that measured the amount of business conducted within a state and compared that amount to the amount of business conducted in other states.

The Eleventh Circuit has not specifically addressed this issue in a published case since the Supreme Court decided *Hertz Corp.*. However, prior to *Hertz Corp.*, the Eleventh Circuit applied a “total activities” test to determine a corporation’s principal place of business. In *MacGinnitie v. Hobbs Group, LLC*, the court described the “total activities” test as follows:

[The “total activities”] test combines the “place of activities” test and the “nerve center” test used by other circuits. Under the “place of activities” test, the location of the majority of the corporation’s sales or production activities is its principal place of business. Under the “nerve center” test, the location of the corporate offices is generally the principal place of business.

The total activities test requires a somewhat subjective analysis to choose between the results of the nerve center and place of activities tests, if they differ. Where a company’s activities are not concentrated in one place, a district court is entitled “to give these ‘nerve-center’-related facts greater significance” in determining principal place of business.

In light of the Supreme Court’s decision in *Hertz Corp.*, the Eleventh Circuit’s application of the “total activities” test to determine a corporation’s “principal place of business,” as the Court did in *MacGinnitie* and earlier cases, appears to no longer be good law.

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174. See id. at 93–95.
175. See id.; cf. Holston Inv., Inc. v. LanLogistics Corp., 677 F.3d 1068, 1071 (11th Cir. 2012) (per curiam) (noting that, in *Hertz*, the Supreme Court “announced a simple rule wherein a corporation’s principal place of business is determined based on where the corporation’s ‘nerve center’ is located”).
177. 420 F.3d 1234 (11th Cir. 2005).
178. Id. at 1239 (citations omitted).
179. Compare *Hertz Corp.*, 559 U.S. at 80, 93–95, with *MacGinnitie*, 420 F.3d at 1239.
ii. Application

Applying the standard set out in *Hertz Corp.*, the Supreme Court determined that the mere filing of a Securities and Exchange Commission form “listing a corporation’s ‘principal executive offices’ would, without more, be sufficient proof to establish a corporation’s ‘nerve center,’” and thus its “principal place of business” for diversity jurisdiction purposes.\(^\text{180}\)

The Eleventh Circuit has also refused to apply alter ego theory in the context of diversity jurisdiction; thus, for diversity purposes, the Florida incorporation of a subsidiary could not be ignored on the ground that the subsidiary was the alter ego of its non-Florida citizen parent corporation and that the parent’s California citizenship should be imputed to the subsidiary.\(^\text{181}\)

b. Domestic Corporation with Principal Place of Business Outside of United States

There is a special rule for a domestic corporation whose principal place of business is outside of the United States.\(^\text{182}\) In *Cabalceta v. Standard Fruit Co.*,\(^\text{183}\) the Eleventh Circuit held that if “a domestic corporation’s world-wide principal place of business is not in one of the United States, the District of Columbia, or Puerto Rico, . . . then the foreign principal place of business cannot be considered for diversity jurisdiction purposes.”\(^\text{184}\) However, 28 U.S.C. § 1332(c)(1) was amended effective January 2012.\(^\text{185}\) That provision now states: “[A] corporation shall be deemed to be a citizen of every [s]tate and foreign state by which it has been incorporated and of the [s]tate or foreign state where it has its principal place of business.”\(^\text{186}\) It is unclear whether Eleventh Circuit’s holding from *Cabalceta* is still good law after that amendment.\(^\text{187}\)

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180. *Hertz Corp.*, 559 U.S. at 97.
183. 883 F.2d 1553 (11th Cir. 1989).
184. Id. at 1561.
186. Id. (emphasis added). That statutory provision states a different rule for cases in which the defendant is a liability insurer. See id.
187. See id.; Cabalceta, 883 F.2d at 1561.
c. **Foreign Corporations**

For jurisdictional purposes, federal courts treat the corporation of a foreign state as a citizen of that state.\(^{188}\) However, if a foreign corporation has its principal place of business in the United States, it is a citizen of the state in which its principal place of business is located.\(^{189}\) However, a corporation “owned by a foreign state is . . . deemed a foreign state for purposes of federal jurisdiction.”\(^{190}\) In that case, diversity jurisdiction will not exist unless the foreign state-owned corporation is the plaintiff, pursuant to 28 U.S.C. § 1332(a)(4).\(^{191}\)

For additional discussion of alienage jurisdiction, see Part IV.B.12.\(^{192}\)

d. **Corporations Chartered Pursuant to Federal Law**

Pursuant to 28 U.S.C. § 1348, “[a]ll national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the [s]tates in which they are respectively located.”\(^{193}\) However, the statute does not further define how the court should determine a national bank’s location.\(^{194}\) The Supreme Court has subsequently provided further guidance, holding in *Wachovia Bank v. Schmidt*\(^ {195}\) that “a national bank, for § 1348 purposes, is a citizen of the [s]tate in which its main office, as set forth in its articles of association, is located.”\(^{196}\)

Prior to *Wachovia Bank*, the Eleventh Circuit had stated that a federal savings bank, as a corporation chartered pursuant to federal law, “would not be a citizen of any state for diversity purposes and diversity jurisdiction would not exist unless the corporation’s activities were sufficiently localized in one


\(^{189}\) Vareka Invs., N.V. v. Am. Inv. Props., Inc., 724 F.2d 907, 909 (11th Cir. 1984) (“[A] foreign corporation is deemed to be a citizen of the state in which it has its principal place of business.”); *see also* Jerguson v. Blue Dot Inv., Inc., 659 F.2d 31, 32–33 (5th Cir. 1981) (determining that, pursuant to 28 U.S.C. § 1332(c), a Panamanian corporation was a citizen of Florida for purposes of diversity jurisdiction because its principal place of business was located in Florida).


\(^{191}\) *See* 28 U.S.C. § 1332(a)(4); *Vermeulen*, 985 F.2d at 1542.

\(^{192}\) *See infra* Part IV.B.12.

\(^{193}\) *28 U.S.C. § 1348.*

\(^{194}\) *See* id.


\(^{196}\) *Id.* at 307.
state.″

However, after Wachovia Bank, the Court’s analysis in Loyola Federal Savings Bank v. Fickling should no longer be good law.

e. Dissolved or Inactive Corporations

Circuit courts that have considered the issue are divided regarding whether a dissolved or inactive corporation has a principal place of business. In Holston Investments, Inc. v. LanLogistics Corp., the Eleventh Circuit adopted a bright-line rule for this issue: “[A] dissolved corporation has no principal place of business.” Thus, a dissolved corporation is only a citizen of its state of incorporation.

3. Unincorporated Associations

Unincorporated associations are treated differently than corporations when it comes to citizenships analysis.

[U]nincorporated associations do not themselves have any citizenship, but instead must prove the citizenship of each of their members to meet the jurisdictional requirements of 28 U.S.C. § 1332. Furthermore, no matter the particular features of an unincorporated entity, it has long been “[t]he tradition of the common law . . . to treat as legal persons only incorporated groups and to assimilate all others to partnerships,” which must plead the citizenship of each member.

Thus, an unincorporated association has no legal existence separate from its individual members, even if state law permits the unincorporated association to “sue or be sued in the association’s name.”

198. 58 F.3d 603 (11th Cir. 1995).
200. See Holston Invs., Inc. v. LanLogistics Corp., 677 F.3d 1068, 1070–71 (11th Cir. 2012) (per curiam) (discussing the various approaches to this issue used by other circuits).
201. 677 F.3d 1068 (11th Cir. 2012) (per curiam).
202. Id. at 1071.
203. See id.
204. See Underwriters at Lloyd’s v. Osting-Schwinn, 613 F.3d 1079, 1081, 1086 (11th Cir. 2010).
205. Id. at 1086 (alteration in original) (quoting Puerto Rico v. Russell & Co., 288 U.S. 476, 480 (1933)).
206. Id. at 1091 (quoting Calagaz v. Calhoon, 309 F.2d 248, 251–52 (5th Cir. 1962)).
a. **Limited Liability Companies (LLCs)**

With this standard in mind, the Eleventh Circuit has held that “a limited liability company . . . ‘is a citizen of any state of which a member of the company is a citizen.’ . . . ‘To sufficiently allege the citizenships of these unincorporated business entities, a party must list the citizenships of all the members of the limited liability company.’” Applying this rule, it is not enough for the complaint to allege that an “[LLC was] created under the laws of the [s]tate of Georgia, with its principal place of business . . . in Scottsdale, Georgia.”

b. **Partnerships: General and Limited**

Similar to the approach taken for LLCs, for purposes of diversity jurisdiction, a partnership’s citizenship “depends on the citizenship of each of its partners.” Accordingly, “a limited partnership is a citizen of each state in which any of its [general or limited] partners . . . are citizens.” Furthermore, when one of the partners is also a partnership, the district court should inquire into the citizenship of the second partnership’s partners as well.

c. **Syndicates**

Syndicates—such as the underwriters associated with Lloyd’s of London—are required to plead every member’s citizenship, just like other unincorporated associations.

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208. *Mallory & Evans Contractors & Eng’rs, LLC*, 663 F.3d at 1305; *see also Rolling Greens MHP, L.P.*, 374 F.3d at 1021, 1022.


212. *See Underwriters at Lloyd’s v. Osting-Schwinn*, 613 F.3d 1079, 1088–89 (11th Cir. 2010).
d. **Unincorporated Joint Stock Companies**

Federal courts treat unincorporated joint stock companies as partnerships for purposes of diversity jurisdiction and apply the same rules for determining citizenship.213


e. **Unincorporated National Labor Unions**

The Supreme Court of the United States has stated that federal courts should not treat unincorporated national labor unions as corporations for diversity purposes but instead should look to the citizenship of the union’s members.214

f. **Unincorporated Business Trusts**

The Eleventh Circuit has held that the citizenship of an unincorporated business trust is to be determined on the basis of the citizenship of its shareholders.215 However, the court has also stated that a business trust is neither a corporation nor an association, and therefore, where the trustees hold, manage, and dispose of trust assets for the benefit of trust beneficiaries, the court should consider the citizenship of trustees rather than trust beneficiaries.216

g. **The Exception: Sociedad en Comandita**

As an exception to the general rule that the citizenship of an unincorporated association is determined by the citizenship of its individual members, the Supreme Court has held that a *sociedad en comandita*—an entity created under the civil law of Puerto Rico—could be treated as a citizen of Puerto Rico for purposes of diversity jurisdiction.217 In coming to this

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215. See Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 292 F.3d 1334, 1337–39 (11th Cir. 2002); Laborers Local 938 Joint Health & Welfare Trust Fund v. B.R. Starnes Co. of Fla., 827 F.2d 1454, 1457 (11th Cir. 1987) (per curiam) (“[T]he Trust Funds, which appear to be voluntary unincorporated associations, are not citizens of any particular state; rather, the citizenship of trust fund members is determinative of the existence of diversity of citizenship.”); Xaros v. U.S. Fid. & Guar. Co., 820 F.2d 1176, 1181–82 (11th Cir. 1987) (determining that, because trust funds were voluntary unincorporated associations, the citizenship of their members was determinative of the existence of diversity of citizenship).
determination, the Court reasoned that the sociedad’s juridical personality “is so complete in contemplation of the law of Puerto Rico that we see no adequate reason for holding that the sociedad has a different status for purposes of federal jurisdiction than a corporation organized under that law.”

4. Receivers

In an action by or against a receiver, the district court should consider the citizenship of the receiver for purposes of diversity jurisdiction. However, the case law distinguishes between situations in which a receiver is a proper party to litigation—and thus his citizenship should be considered—versus those in which he is not a proper party, and his citizenship should be ignored in diversity determinations. In the former, the receiver is a proper party because another party seeks to take property out of his possession or seeks relief against his acts. However, the receiver is not a proper party to litigation affecting parties’ rights in property not in his possession, or to litigation asserting rights to said property in his possession without disturbing his possession thereof.

5. Liability Insurance Companies

a. Statutory Basis

Section 1332 provides special rules for determining a liability insurance company’s citizenship for diversity purposes:

[I]n any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every [s]tate and foreign state of which the insured is a citizen;

(B) every [s]tate and foreign state by which the insurer has been incorporated; and

218. Id.
221. Id. at 501.
222. Id.
(C) the [s]tate or foreign state where the insurer has its principal place of business.223  

b.  Case Law Interpreting These Provisions

The “direct action” provision in 28 U.S.C. § 1332(c)(1) is limited to actions against insurers and thus is not applicable to a workers’ compensation action brought in federal court by an insurer.224  Thus, 28 U.S.C. § 1332(c)(1) “will defeat diversity jurisdiction only if the claim which the third party has against the insured—for intentional tort, negligence, fraud, etc.—is the same one asserted against the insurance company as within the zone of primary liability for which the company issued the policy.”225  As the Eleventh Circuit has observed, “courts have uniformly defined the term ‘direct action’ to refer to ‘those cases in which a party suffering injuries or damage for which another is legally responsible is entitled to bring suit against the other’s liability insurer without joining the insured or first obtaining a judgment against him.’”226

In contrast:

[W]here the suit, brought either by the insured or by an injured third party, is based not on the primary liability covered by the liability insurance policy but on the insurer’s failure to settle within policy limits or in good faith, the [§] 1332(c) direct action proviso does not preclude diversity jurisdiction.227

In Fortson v. St. Paul Fire & Marine Ins. Co.,228 the court explained that, “unless the cause of action against the insurance company is of such a nature that the liability sought to be imposed could be imposed against the insured, the action is not a direct action.”229

224. Id.; Northbrook Nat’l Ins. Co. v. Brewer, 493 U.S. 6, 7 (1989); see also Dairyland Ins. Co. v. Makover, 654 F.2d 1120, 1125 (5th Cir. 1981) (holding that § 1332(c) does not apply to a “declaratory judgment action in which a liability insurer is the plaintiff”).
227. Fortson, 751 F.2d at 1159; see also 28 U.S.C. § 1332(c).
228. 751 F.2d 1157 (11th Cir. 1985).
229. Id. at 1159.
6. Institutions of Higher Learning

The Eleventh Circuit held that a complaint insufficiently alleged the citizenship of Tuskegee University when it stated that Tuskegee University was “‘an Alabama institution of higher learning, located in Macon County, Alabama.’”230 The court has also applied an Eleventh Amendment immunity analysis to determine that a state university was not a state citizen for the purpose of diversity jurisdiction.231

7. Unincorporated Indian Tribes

There is also a special rule for determining the citizenship of unincorporated Indian tribes.232 As the Eleventh Circuit has observed, “unincorporated Indian tribes cannot sue or be sued in diversity under 28 U.S.C. § 1332(a)(1) because they are not citizens of any state.”233

8. Estates

“Where an estate is a party, . . . the citizenship that counts for diversity purposes is that of the decedent.”234 Thus, the legal representative of the estate is also deemed to be a citizen of the same state as the decedent.235

Note: Prior to May 18, 1989, “federal diversity jurisdiction in estate cases was determined by looking [into] the domicile of the representative of the estate,” rather than the decedent’s domicile.236 On that date, the amendment to 28 U.S.C. § 1332 requiring courts to “look to the domicile of the decedent to determine diversity jurisdiction” went into effect.237 Thus, as to this issue, case law predating the 1989 amendment is no longer good law.238

235. 28 U.S.C. § 1332(c)(2); see also King v. Cessna Aircraft Co., 505 F.3d 1160, 1170 (11th Cir. 2007) (“Where an estate is a party, the citizenship that counts for diversity purposes is that of the decedent, and she is deemed to be a citizen of the state in which she was domiciled at the time of her death.”).
237. Id.; see also 28 U.S.C. § 1332(c)(2).
238. See Glickstein, 922 F.2d at 668 n.3.
9. Infants and Incompetents

Section 1332 provides that “the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same [s]tate as the infant or incompetent.”

10. States

Special diversity jurisdiction rules also apply when a state is a party to the case. A state is not a citizen of a state for the purpose of diversity jurisdiction.

A public entity or political subdivision of a state, unless simply an ‘arm or alter ego of the State,’ however, is a citizen of the state for diversity purposes. Therefore, if a party is deemed to be ‘an arm or alter ego of the State,’ then diversity jurisdiction must fail.

When analyzing whether diversity jurisdiction exists over cases involving state entities as parties, the Eleventh Circuit has applied the Eleventh Amendment immunity analysis to determine the citizenship of the state entities.

11. State Agencies and State-Created Public Entities

a. Test for Determining Whether a State Agency Is a Citizen of a State

The Eleventh Circuit has applied the following analysis to determine whether state agencies are “sufficiently separate and independent from the state so as to confer citizen status upon them” for purposes of diversity jurisdiction:

(1) whether the agency can be sued in its own name; (2) whether the agency can implead and be impleaded in any competent court; (3) whether the agency can contract in its own name; (4) whether the agency can acquire, hold title to, and dispose of property in its own name; and (5) whether the agency can be considered a body

239. 28 U.S.C. § 1332(c)(2).
242. Univ. of S. Ala., 168 F.3d at 412 (quoting Moor, 411 U.S. at 717).
243. Id.; Coastal Petroleum Co., 695 F.2d at 1318.
As demonstrated below, the Eleventh Circuit takes a case-by-case approach to this analysis.245

b. Specific Examples

i. State Universities

As discussed above, the Eleventh Circuit applied the Eleventh Amendment immunity analysis to determine that a state university was not a state citizen for the purpose of diversity jurisdiction.246

ii. A State Entity’s Board of Trustees

The Supreme Court held—in a case in which the Board of Trustees of the Ohio State University was a party—that the complaint must allege the citizenship of each individual trustee because the board was not a corporation, even though under state law the Board had the power to sue and be sued, enter into contracts, and supervise lands and other property of the university under its collective name.247

Taking a different approach, the Eleventh Circuit determined that the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida was a citizen of Florida for purposes of diversity jurisdiction because the title of the land in dispute was vested with the Trustees and “because the Trustees ha[d] acted . . . as a separate and distinct entity from the state.”248

iii. Florida Department of Health and Rehabilitative Services

In Florida Department of Health & Rehabilitative Services v. Davis,249 the Eleventh Circuit determined that diversity jurisdiction was proper because Florida’s Department of Health and Rehabilitative Services “[w]as vested] with the power to sue and be sued and possessed other generally recognized corporate powers.”250

244. Coastal Petroleum Co., 695 F.2d at 1318.
245. See infra Part IV.B.11.b.
246. Univ. of S. Ala., 168 F.3d at 412; see supra Part IV.B.6, 10.
248. Coastal Petroleum Co., 695 F.2d at 1316, 1318.
249. 616 F.2d 828 (5th Cir. 1980).
250. Id. at 833.
iv. State Bar

In contrast, the Fifth Circuit held that the Florida Bar, having been explicitly created by and existing under the Supreme Court of Florida as an “official arm of th[at] court,” could not be sued in federal court under diversity jurisdiction.251

v. Board of Commissioners of the Port of New Orleans

The Fifth Circuit has determined that the Board of Commissioners of the Port of New Orleans—created by state law, granting the Board all of the rights, powers, and immunities incident to a corporation and specifically granting to it various business powers, including authority to employ legal services and engage counsel—is a separate entity from the State of Louisiana for diversity purposes.252

vi. Alabama State Docks Department

The Alabama State Docks Department is merely the alter ego of the State of Alabama and thus is not a citizen of Alabama for purposes of diversity jurisdiction.253

vii. Political Subdivisions, such as Municipalities or Counties

“It is well settled that for the purposes of diversity of citizenship, political subdivisions are citizens of their respective [s]tates.”254 Thus, “a municipality which is independent in character and function from the state should be considered a citizen for § 1332 diversity.”255 Moreover, a county may be a citizen for purposes of diversity jurisdiction if, under state law, it has a sufficiently independent corporate character.256

255. Reeves v. City of Jackson, 532 F.2d 491, 495 n.5 (5th Cir. 1976).
viii. Private Probation Companies as Officers of the Court

The Eleventh Circuit has rejected the argument that private probation companies, as officers of the court, are governmental entities for purposes of the Class Action Fairness Act of 2005 (“CAFA”). Instead, private probation companies are private entities, in the same way that attorneys would not qualify as government entities.

12. Specific Diversity Rules for Aliens

a. Statutory Basis for Alienage Jurisdiction

Title 28, Section 1332 of the United States Code also sets forth specific diversity requirements for cases involving foreign citizens. First, the statute provides that federal district courts have diversity jurisdiction of a civil action that meets the amount in controversy requirement and is between citizens of a state and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a state and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same state.

Second, it allows diversity cases to be brought between “citizens of different states and in which citizens or subjects of a foreign state are additional parties.” Finally, the statute allows diversity cases to be brought between “a foreign state, defined in § 1603(a) of this title, as plaintiff and citizens of a state or of different states.”

b. Case Law Analyzing Alienage Jurisdiction

The Eleventh Circuit has held that aliens who are in the United States on non-immigrant work visas are not permanent residents for purposes of 28

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258. McGee, 719 F.3d at 1242.


260. Id. § 1332(a)(2).

261. Id. § 1332(a)(3).

262. Id. § 1332(a)(4); see also 28 U.S.C. § 1603(a).
U.S.C. § 1332(a)(2). The court has determined that the permanent resident alien provision in 28 U.S.C. § 1332(a)(2) refers only to an alien’s official immigration status. Thus, an alien who resided in Florida for four years but had not yet attained official permanent resident status was not a citizen of Florida for purposes of diversity jurisdiction. The fact that an alien resides in the United States is not relevant for diversity jurisdiction; what matters for purposes of diversity is the alien’s citizenship, not residency. In comparison, “an individual who is a dual citizen of the United States and another nation is only a citizen of the United States for the purposes of diversity jurisdiction under § 1332(a).”

The Supreme Court has held that “the United Kingdom’s retention and exercise of authority over the [British Virgin Islands (“BVI”)] renders BVI citizens, both natural and juridic, ‘citizens or subjects’ of the United Kingdom under 28 U.S.C. § 1332(a).”

c. Foreign States

Where a foreign state is a party to a case, diversity jurisdiction may exist if the foreign state is the plaintiff but will not exist if the foreign state is the defendant. Suits may only be brought against foreign states pursuant to the Foreign Sovereign Immunities Act of 1976, rather than 28 U.S.C. § 1332.

For purposes of diversity jurisdiction, a foreign state is defined as including “a political subdivision of a foreign state or an agency or instrumentality of a foreign state.” Furthermore, the statute defines “instrumentality of a foreign state” as:

263. Molinos Valle Del Cibao, C. por A. v. Lama, 633 F.3d 1330, 1340 n.10 (11th Cir. 2011); see also 28 U.S.C. § 1332(a)(2).
264. Molinos Valle Del Cibao, C. por A., 633 F.3d at 1340 n.10.
[A]ny entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in [§] 1332(c) and (e) of this title, nor created under the laws of any third country.272

A corporation owned by a foreign state is deemed a foreign state for purposes of federal jurisdiction; thus, diversity jurisdiction will not exist unless the foreign state-owned corporation is the plaintiff, pursuant to 28 U.S.C. § 1332(a)(4).273 In order for a foreign state to bring a diversity action under 28 U.S.C. § 1332(a)(4), at least one of the defendants must be a citizen of a state, and diversity jurisdiction does not exist if all defendants are only citizens of foreign states.274

C. Complete Diversity Rule

Title 28, Section 1332 of the United States Code “require[s] complete diversity between all plaintiffs and all defendants.”275

D. Exceptions to Complete Diversity Rule

Although 28 U.S.C. § 1332 requires complete diversity, there are several exceptions to this rule, as discussed further.276

1. Court May Ignore Citizenship of a Plaintiff that Has Independent Basis of Original Federal Jurisdiction Against Defendant

Although the general rule is that diversity jurisdiction requires complete diversity, there is an exception to this requirement when a

272. Id. § 1603(b).
273. Id. § 1332(a)(4); Vermeulen, 985 F.2d at 1542–43.
non-diverse plaintiff “has an independent basis of original . . . jurisdiction against the defendant.”

2. Court May Properly Exercise Diversity Jurisdiction When Non-Diverse Defendant Is Sued Under Federal Law

Similarly, the district court still may properly exercise diversity jurisdiction “when the plaintiff joins a non-diverse defendant sued under federal law with a diverse defendant sued in diversity.”

3. Supp/Ancillary Claims Asserted Between Non-Diverse Defendants

While it is true that a nondiverse defendant must be formally dismissed from the case to permit a subsequent removal, this in effect requires only that the plaintiff dismiss all his claims asserted against the nondiverse defendant and does not prevent the federal court from exercising ancillary jurisdiction over a third-party claim against a defendant or a cross-claim between defendants. . . . Once a court has jurisdiction over a main claim, it also has jurisdiction over any claim ancillary to the main claim, regardless of the amount in controversy, citizenship of the parties or existence of a federal question in the ancillary claim.

The Supreme Court cases addressing this issue were decided prior to Congress’s passage of the supplemental jurisdiction statute, 28 U.S.C. § 1367, in 1990. That statute specifically provides:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction

shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on § 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the [FRCP], or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of [§] 1332.

The supplemental jurisdiction statute appears to have codified the Supreme Court’s holdings with respect to these issues, and therefore these cases should still be good law.

4. Nominal Parties

“[A] federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.” Applying this rule, courts will disregard nominal, nondiverse parties in determining whether diversity jurisdiction exists.


Claims brought pursuant to 28 U.S.C. § 1335, applying statutory interpleader, require only minimal diversity; the plaintiff does not have to be diverse from the defendants, but at least two defendants must be diverse from each other.

281. 28 U.S.C. § 1367(a)–(b).
282. Id. § 1367; e.g., Owen Equip. & Erection Co., 437 U.S. at 377.
284. See, e.g., Salem Trust Co. v. Mfr.’s Fin. Co., 264 U.S. 182, 190 (1924) (determining depository of a trust was a nominal party when it had no interest in the outcome); Geer v. Mathieson Alkali Works, 190 U.S. 428, 437 (1903) (holding that corporate directors were nominal parties when the relief prayed for by plaintiffs against both a company and its directors was to be recovered from the company only); Removal Cases, 100 U.S. 457, 469 (1879) (holding that the railroad was a nominal party for removal purposes after it resolved its dispute with the defendant and had no common interest with the trustee plaintiffs).
6. **Class Actions**

The statute sets forth requirements of minimal diversity, rather than total diversity, for class actions brought pursuant to the federal court’s diversity jurisdiction.\(^{286}\)

For further discussion of diversity jurisdiction and class actions, see Part V.\(^{287}\)

7. **Total Diversity Rule and Alienage Jurisdiction**


   In cases in which jurisdiction is sought pursuant to 28 U.S.C. § 1332(a)(2), the presence of aliens as both plaintiff and defendant destroys full diversity under alien jurisdiction.\(^{288}\)


   There is an exception to the previous rule.\(^{289}\) Under 28 U.S.C. § 1332(a)(3), the district court may have diversity jurisdiction over a case in which there are aliens on both sides of the actions, as long as there are also citizens of a state on both sides.\(^{290}\)

8. **Removal Cases, When Non-Diverse Party Fraudulently Joined**

Although the district court generally will not have diversity jurisdiction over removal cases where the parties are not completely diverse, district courts still have diversity jurisdiction when the plaintiff has


\(^{287}\) See infra Part V.

\(^{288}\) See 28 U.S.C. § 1332(a)(2); Molinos Valle Del Cibao, C. por A. v. Lama, 633 F.3d 1330, 1340 (11th Cir. 2011) (vacating judgment in favor of alien corporation against alien citizens because aliens’ presence destroyed full diversity under alienage jurisdiction); Cabalceta v. Standard Fruit Co., 883 F.2d 1553, 1557 (11th Cir. 1989) (noting that “the presence of at least one alien on both sides of an action destroys diversity”); Ed & Fred, Inc. v. Puritan Marine Ins. Underwriters Corp., 506 F.2d 757, 758 (5th Cir. 1975) (holding that the rule of complete diversity was applicable to an action brought by an alien against a citizen of a state and another alien).


\(^{290}\) Id.; Iraola & Cia, S.A. v. Kimberly-Clark Corp., 232 F.3d 854, 860 (11th Cir. 2000) (“It is a standard rule that federal courts do not have diversity jurisdiction over cases where there are foreign entities on both sides of the action, without the presence of citizens of a state on both sides.”).
The Eleventh Circuit has identified three circumstances when non-diverse parties have been fraudulently joined in state court. First, fraudulent joinder exists “when there is no possibility that the plaintiff can prove a cause of action against the resident—non-diverse—defendant.” Second, a plaintiff may fraudulently plead jurisdictional facts in an attempt to avoid removal. Finally, the Eleventh Circuit has identified a third example of fraudulent joinder: “[W]here a diverse defendant is joined with a non-diverse defendant as to whom there is no joint, several, or alternative liability and where the claim against the diverse defendant has no real connection to the claim against the non-diverse defendant.”

The Eleventh Circuit has stated that “[t]he determination of whether a resident defendant has been fraudulently joined must be based upon the plaintiff’s pleadings at the time of removal, supplemented by any affidavits and deposition transcripts submitted by the parties.” The district court should approach a fraudulent joinder claim in the same way that it would a motion for summary judgment under FRCP 56(b), resolving disputed questions of fact in favor of the plaintiff.

With respect to the first type of fraudulent joinder, there is a fairly high hurdle for a removal attempt. In Coker v. Amoco Oil Co., the Eleventh Circuit stated that “[i]f there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court.” Thus, “[t]he plaintiff need not have a winning case against the allegedly fraudulent defendant; he need only have a

292. Id.
293. Id.; see also Coker v. Amoco Oil Co., 709 F.2d 1433, 1440 (11th Cir. 1983).
294. Triggs, 154 F.3d at 1287; see also Coker, 709 F.2d at 1440.
295. Triggs, 154 F.3d at 1287; see also Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1360 (11th Cir. 1996).
297. Legg, 428 F.3d at 1322–23; see also FED. R. CIV. P. 56(b).
298. See Coker, 709 F.2d at 1440–41.
299. 709 F.2d 1433 (11th Cir. 1983).
300. Id. at 1440–41.
possibility of stating a valid cause of action in order for the joinder to be legitimate."  

The Eleventh Circuit has addressed the third type of fraudulent joinder in the context of class action cases. This Guide addresses that analysis in greater detail in Part V.

E. Exceptions Where Court Will Not Exercise Jurisdiction Even if Diversity Is Established

1. Probate Exception

Under limited circumstances, courts will abstain from hearing a case involving wills and estates, even if there is diversity of citizenship, pursuant to the judicially-created probate exception. However, this exception is narrowly construed.

2. Domestic Relations Exception

a. General Rule

The domestic relations exception divests the federal courts of power to issue divorce, alimony, and child custody decrees but does not ordinarily include tort claims. Thus, even if the district court has diversity jurisdiction, the court will abstain from hearing a claim in cases involving the


302. See Triggs, 154 F.3d at 1287–90; Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1359–60 (11th Cir. 1996).

303. See infra Part V.


305. See Markham, 326 U.S. at 494 (“[F]ederal courts of equity have jurisdiction to entertain suits ‘in favor of creditors, legatees and heirs’ and other claimants against a decedent’s estate to establish their claims so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court.”); Glickstein, 922 F.2d at 672–73; Mich. Tech. Fund v. Century Nat’l Bank, 680 F.2d 736, 737–38, 740 (11th Cir. 1982) (holding that district court properly exercised jurisdiction over action against decedent’s estate seeking a declaration that decedent’s will conveyed certain assets to plaintiff, in spite of fact that there were pending probate proceedings and the federal court was required to interpret the will); DeWitt v. Duce, 599 F.2d 676, 677 (5th Cir. 1979) (per curiam) (holding that a suit alleging independent tort claim for intentional interference with inheritance was properly before district court based on diversity jurisdiction).

parties’ domestic affairs. Speaking specifically to this issue, in Ingram v. Hayes, the Eleventh Circuit stated that “federal courts generally dismiss cases involving divorce and alimony, child custody, visitation[] rights, establishment of paternity, child support, and enforcement of separation or divorce decrees still subject to state court modification.”

b. **Limitations to the Domestic Relations Exception**

“The [domestic relations] exception . . . is to be read narrowly and does not—at least, ordinarily—include third parties in its scope.” The Eleventh Circuit has stated that courts should not abstain from cases related to domestic-relations law “when the following factors are absent: (1) strong state interest in domestic relations; (2) competency of state courts in settling family disputes; (3) the possibility of incompatible federal and state decrees in cases of continuing judicial supervision by the state; and (4) the problem of congested federal court dockets.” Instead, “federal courts should dismiss the action only if hearing the claim would mandate inquiry into the marital or parent-child relationship.”

c. **Examples**

In Rash v. Rash, the Eleventh Circuit determined that the domestic relations exception did not apply in a case disputing assets, specifically alimony, rights to pension, and real property, and which involved the question of which competing state decrees should be enforced. Similarly, in Kirby v. Mellenger, the court held “that the district court [had] abused its discretion [in] dismissing [the] case for lack of subject matter jurisdiction” in a diversity case in which a former wife sued her former husband to obtain a


308. 866 F.2d 368 (11th Cir. 1988) (per curiam).

309. Id. at 369–70 (determining that the district court properly dismissed child support arrearage claim because claim would require district court to decide the propriety of the Alabama state court’s order).

310. Stone v. Wall, 135 F.3d 1438, 1441 (11th Cir. 1998) (per curiam), reh’g granted, 719 So. 2d 288 (Fla. 1998); see also Ankenbrandt, 504 U.S. at 704 n.7 (observing that the third-party defendant in that case “would appear to stand in the same position with respect to [the plaintiff] as any other opponent in a tort suit brought in federal court pursuant to diversity jurisdiction”).

311. Stone, 135 F.3d at 1441; see also Ingram, 866 F.2d at 370.

312. Ingram, 866 F.2d at 370.

313. 173 F.3d 1376 (11th Cir. 1999).

314. See id. at 1380.

315. 830 F.2d 176 (11th Cir. 1987) (per curiam).
share of his military retirement benefits not awarded under a Texas divorce decree.\textsuperscript{316}

The Eleventh Circuit’s precedent also demonstrates that a federal court may have jurisdiction over some issues but not others in this context.\textsuperscript{317} Thus, in \textit{Jagiella v. Jagiella},\textsuperscript{318} the Circuit Court determined that the district court properly exercised jurisdiction over the former wife’s suit seeking alimony and child support arrears and properly refused to exercise jurisdiction of former husband’s counterclaims for modification of the divorce decree by reducing his child support payments and increasing his visitation rights and for alienage of his children’s affection.\textsuperscript{319}


Under 28 U.S.C. § 1359, “[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.”\textsuperscript{320}

V. SPECIAL RULES FOR CLASS ACTIONS AND MASS ACTIONS

Plaintiffs may bring a class action in federal court pursuant to FRCP 23.\textsuperscript{321} If the class action relies on the federal court’s diversity jurisdiction, it must meet the requirements set forth in 28 U.S.C. § 1332.\textsuperscript{322} Specifically, § 1332(d) provides specific rules for determining when a federal court may

\textsuperscript{316} See id. at 178–79.


\textsuperscript{318} 647 F.2d 561 (5th Cir. 1981).

\textsuperscript{319} See id. at 564–65.

\textsuperscript{320} 28 U.S.C. § 1359 (2012); see also Kramer v. Caribbean Mills, Inc., 394 U.S. 823, 826–29 (1969) (holding that § 1359 prevents federal courts from exercising diversity jurisdiction in cases in which parties have been collusively joined, regardless of whether diversity was based on parties being citizens of different states or alienage jurisdiction); Ambrosia Coal & Constr. Co. v. Pages Morales, 482 F.3d 1309, 1314–16 (11th Cir. 2007) (discussing the application of § 1359 in the context of transfers or assignments of claims and holding there is no presumption of collusion in determining whether diversity jurisdiction was manufactured in violation of the statute); Pacheco De Perez v. AT&T Co., 139 F.3d 1368, 1381 (11th Cir. 1998), cert. granted sub nom. AT&T Corp. Sigala, 549 S.E.2d 373 (Ga. 2001), superseded by statute, GA. CODE ANN. § 9-10-31.1 (2005), as stated in Hewett v. Raytheon Aircraft Co., 614 S.E.2d 875 (2005) (holding that fraudulent joinder of defendants could not be used to defeat diversity jurisdiction).

\textsuperscript{321} FED. R. CIV. P. 23.

\textsuperscript{322} See 28 U.S.C. § 1332(d).
exercise diversity jurisdiction in class actions. Many of the rules regarding diversity jurisdiction are different for class actions than for other diversity cases; and thus, it is important to look closely at the provisions in § 1332(d). Furthermore, in many circumstances, case law decided prior to passage of CAFA, which revised the requirements for diversity jurisdiction in class actions, may no longer be good law. CAFA sets out specific requirements for federal diversity jurisdiction in two types of cases: Class actions and certain mass actions that qualify as class actions. The following subsections analyze the requirements for diversity jurisdiction in class action and mass action lawsuits post-CAFA.

A. Class Actions versus Mass Actions

As stated above, CAFA applies to class actions and certain mass actions. A class action is defined as “any civil action filed under rule 23 of the [FRCP] or similar State statute or rule of judicial procedure.” The statute defines a mass action as “any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact.” For the most part, CAFA applies the same diversity jurisdiction rules to mass actions as class actions, going so far as to define a mass action as a class action for purposes of diversity jurisdiction, except for specific circumstances analyzed in the following subsections. The Eleventh Circuit has observed that, “CAFA’s mass action provisions present an opaque, baroque maze of interlocking cross-references that defy easy interpretation.”

323. See id.
324. Id.
326. Id.
328. See infra Parts A–C.
331. Id. § 1332(d)(11)(B)(i).
332. See id. § 1332(d)(11)(A) (“a mass action shall be deemed to be a class action removable under [§ 1332(d)(2)-(10)] if it otherwise meets the provisions of those paragraphs”); Lowery v. Ala. Power Co., 483 F.3d 1184, 1199–1201 (11th Cir. 2007).
333. See infra Parts B–C.
334. Lowery, 483 F.3d at 1198.
B. Amount-in-Controversy Requirements

As explained further below, CAFA sets out different amount-in-controversy requirements depending on whether the lawsuit is a class action or a mass action.335

1. Amount-in-Controversy Requirements for Class Actions

Class actions have a different amount-in-controversy requirement than other cases brought pursuant to 28 U.S.C. § 1332.336 Under CAFA, a class action brought pursuant to the federal court’s diversity jurisdiction must exceed the value of five million dollars excluding costs and interests.337 The statute explicitly states that each individual member’s claims will be aggregated to determine the amount in controversy.338 The statute does not require any individual class action plaintiff to assert a claim exceeding seventy-five thousand dollars.339 Although CAFA’s legislative history suggests Congress’s intent that courts resolve doubts about the amount in controversy in favor of finding jurisdiction, the Eleventh Circuit has rejected that approach.340 Instead, the court has held that doubts regarding amount in controversy should be resolved in favor of remanding the class action to the state court.341

Applying the same rule that applies in other diversity cases that are removed to federal court, when the plaintiffs in a class action have not pleaded a specific amount of damages, the removed defendant is required to prove that the amount in controversy meets the statutory minimum by a preponderance of the evidence.342 In those circumstances, the district court looks to the face


338. Id. § 1332(d)(6). Prior to CAFA, class action plaintiffs were only allowed to aggregate their claims in limited circumstances. See, e.g., Friedman v. N.Y. Life Ins. Co., 410 F.3d 1350, 1353–54 (11th Cir. 2005).


341. Id. at 1329–30.

342. Id. at 1330 (citing Williams v. Best Buy Co., 269 F.3d 1316, 1319 (11th Cir. 2001)); see also Pretka v. Kolter City Plaza II, Inc., 608 F.3d 744, 752 (11th Cir. 2010), aff’d, 550 F. App’x 830 (11th Cir. 2013).
of the complaint, and, “[i]f the jurisdictional amount is not facially apparent from the complaint, the court [looks] to the notice of removal and may require evidence relevant to the amount in controversy at the time the case was removed.”343 A defendant’s conclusory allegation in the notice of removal, stating that the jurisdictional amount has been met, is insufficient to satisfy CAFA’s amount in controversy requirement.344 In applying this rule, the Eleventh Circuit has held that a defendant’s bare assertions that the amount in controversy in one case was similar to that in other cases that the federal court had jurisdiction over, without specific factual details, affidavits, or other evidence to support those assertions, was insufficient to establish the court’s diversity jurisdiction in CAFA cases.345 In contrast, the federal court may consider a defendant’s own affidavits, declarations, and other evidence in inferring that the jurisdictional minimum has been met.346

The Eleventh Circuit has also applied the same standard for determining the amount in controversy when class action plaintiffs seek injunctive or declarative relief as the court does for other types of diversity cases.347 Thus, in *South Florida Wellness, Inc. v. Allstate Insurance Co.*,348 the court determined that “the value of declaratory relief is ‘the monetary value of the benefit that would flow to the plaintiff if the [relief he is seeking] were granted.’”349 In the case of a class action, the federal court should therefore “aggregate the claims of individual class members and consider the monetary [benefit] that would flow to the entire class if declaratory relief were granted.”350

Furthermore, in class actions in which a class has not yet been certified, a named plaintiff cannot stipulate that the class will not seek damages in excess of five million dollars in an attempt to avoid removal to federal court.351 In *Standard Fire Insurance Co. v. Knowles*,352 the Supreme

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343. *Miedema*, 450 F.3d at 1330 (quoting *Williams*, 269 F.3d at 1319); see also S. Fla. Wellness, Inc. v. Allstate Ins. Co., 745 F.3d 1312, 1315 (11th Cir. 2014) (“What counts is the amount in controversy at the time of removal.”). Like other removal cases, the calculation of the amount in controversy in CAFA removal cases is based upon the time of removal.  *See Pretka*, 608 F.3d at 751.

344. *Pretka*, 608 F.3d at 752 (citing *Williams*, 269 F.3d at 1320).

345. *See Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1189, 1210–11, 1220–21 (11th Cir. 2007); *Pretka*, 608 F.3d at 752–54 (discussing the court’s reasoning in *Lowery*).


348. 745 F.3d 1312 (11th Cir. 2014).

349. *Id.* at 1316 (quoting *Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1268 (11th Cir. 2000)).

350. *Id.*


Court explained that such a stipulation was ineffective “because a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified.”

The Supreme Court observed that this rule is different from non-class action diversity cases, where the plaintiff has the ability to legally bind himself through his stipulations.

2. Amount in Controversy Requirements for Mass Actions

Title 28, Section 1332 or the United States Code sets out different amount-in-controversy requirements for mass actions than for class actions. In addition to requiring total aggregated claims of more than five million dollars, the statute specifies that the federal court only has diversity jurisdiction over plaintiffs in mass actions whose individual claims satisfy the $75,000 amount in controversy requirement provided for in 28 U.S.C. § 1332(a).

C. Diversity Requirements under CAFA

1. Basic Requirements for Diversity

Under CAFA, complete diversity of citizenship is not required. Instead, the statute only requires minimal diversity for both class actions and mass actions. CAFA’s diversity requirements can be met in the following three specific circumstances:

353. Id. at 4.
354. Id. at 7.
356. 28 U.S.C. §§ 1332(a), (d)(11)(B)(i). The Eleventh Circuit considered this requirement in Lowery, but did not ultimately determine how the $75,000 amount in controversy requirement fit within the five million dollar amount in controversy requirement because the court determined that the defendant did not demonstrate that the removed action met the five million dollar minimum. See id. § 1332(d)(2); Lowery v. Ala. Power Co., 483 F.3d 1184, 1221 (11th Cir. 2007).
358. See id.; Mississippi ex rel. Hood v. AU Optronics Corp., No. 12-1036, slip op. at 2 (U.S. Jan. 14, 2014). Prior to CAFA’s effective date, the Supreme Court interpreted § 1332(a) to require that each named plaintiff in a class action be diverse from each defendant, but that standard was replaced by CAFA’s minimal diversity standard. Lowery, 483 F.3d at 1193 n.24 (citing Snyder v. Harris, 394 U.S. 332, 340 (1969) and Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 365 (1921)).
(A) any member of a class of plaintiffs is a citizen of a state different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a state; or

(C) any member of a class of plaintiffs is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state.359

A class action also requires a minimum of one hundred plaintiffs, including named and unnamed class members.360 In contrast, a mass action requires a minimum of one hundred named plaintiffs.361 In Mississippi ex rel. Hood v. AU Optronics Corp.,362 the Supreme Court of the United States specifically rejected the argument that the numerosity requirement for mass action diversity jurisdiction could be met when a state filed suit as a sole plaintiff based upon injuries suffered by the state’s citizens.363 Moreover, the Eleventh Circuit has held that a defendant may not attempt to combine two separate cases under the mass action provision by arguing that the cases involved common questions of law and fact, when the plaintiffs of those suits did not seek to consolidate their claims and each case, when considered separately, did not meet the numerosity requirements for federal diversity jurisdiction over mass actions.364

2. Federal Court’s Discretionary Authority to Decline to Exercise Diversity Jurisdiction Over Some Class Actions

There are certain circumstances when the district court may decline to exercise diversity jurisdiction in class action cases even when minimal diversity exists.365 This discretionary authority exists in cases where more than one-third, but less than two-thirds, of the proposed class members—as well as the primary defendants—are citizens of the state in which the action has been filed.366 The statute directs the district court to consider the

360. 28 U.S.C. § 1332(d)(5)(B); see also id. § 1332 (d)(1)(D).
361. See AU Optronics Corp., No. 12-1036, slip op. at 5 (interpreting the requirements set out in 28 U.S.C. § 1332(d)(11)(B)(i)).
363. See id. at 1.
366. Id.
following factors in determining whether to decline to exercise diversity jurisdiction in these circumstances:

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the [s]tate in which the action was originally filed or by the laws of other [s]tates;

(C) whether the class action has been pleaded in a manner that seeks to avoid [f]ederal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the [s]tate in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other [s]tate, and the citizenship of the other members of the proposed class is dispersed among a substantial number of [s]tates; and

(F) whether, during the [three]-year period preceding the filing of that class action, [one] or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.367

3. Federal Court Must Decline to Exercise Diversity Jurisdiction over Class Actions in Certain Circumstances

Title 28 § 1332 of the United States Code also sets out certain circumstances when the district court must decline to exercise diversity jurisdiction in class action cases, even when the minimal diversity requirements in § 1332(d)(2) have been met.368 Specifically, the district court will not exercise diversity jurisdiction over the following class actions:

(A)(i) . . . a class action in which—

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the [s]tate in which the action was originally filed;

(II) at least [one] defendant is a defendant—

367. Id. § 1332(d)(3)(A)–(F).
368. See id. § 1332(d)(4).
(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the state in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the state in which the action was originally filed; and

(ii) during the three-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.369

The Eleventh Circuit refers to this provision as the “local controversy” exception.370

The Eleventh Circuit has noted that CAFA’s legislative history indicated “Congress intended the local controversy exception to be a narrow one, with all doubts resolved ‘in favor of exercising jurisdiction over the case.’”371 The party seeking to keep the class action out of federal court has the burden of demonstrating that CAFA’s local controversy exception applies.372 With respect to the first prong, the Eleventh Circuit has noted that plaintiffs’ designation of particular classes may make it difficult for the plaintiffs to demonstrate that more than two-thirds of the plaintiff class were citizens of a particular state, but that difficulty did not excuse them from the local controversy exception’s requirements.373

The court has also provided some guidance regarding the second prong, known as the “significant defendant” prong.374 In Evans v. Walter Industries, Inc.,375 the Eleventh Circuit determined that the non-diverse defendant was not a significant defendant because: (1) the plaintiffs did not demonstrate that the defendant was significantly liable for the damages alleged by the plaintiffs, in comparison to seventeen other co-defendants;

369. Id. § 1332(d)(4)(A)(i)–(ii).
370. Evans v. Walter Indus., Inc., 449 F.3d 1159, 1161 (11th Cir. 2006).
371. Id. at 1163 (quoting S. Rep. No. 109-14, at 42 (2005)).
372. Id. at 1164 (stating that “when a party seeks to avail itself of an express statutory exception to federal jurisdiction granted under CAFA, . . . we hold that the party seeking remand bears the burden of proof with regard to that exception”).
373. Id. at 1166.
374. See id. at 1166–68.
375. 449 F.3d 1159 (11th Cir. 2006).
(2) the plaintiffs did not demonstrate that the defendant played a significant role in the underlying actions that caused the plaintiffs’ damages; and (3) the facts showed that the defendant’s actions were primarily limited to a small part of the time period and geographical location at issue in the case.\textsuperscript{376}

The district court should also not exercise diversity jurisdiction over class actions when at least two-thirds of the proposed class members, as well as the defendants, are citizens of the State in which the action has been filed.\textsuperscript{377}

4. Statutory Limitations on a Federal Court’s Exercise of Diversity Jurisdiction in Mass Action Removal Cases

Although district courts may exercise diversity jurisdiction over certain mass actions removed from state court, the statute provides additional limitations for jurisdiction in that context.\textsuperscript{378} Specifically, § 1332(d)(11)(B) specifically bars the federal courts’ exercise of diversity jurisdiction in mass action removal cases under the following circumstances:

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public—and not on behalf of individual claimants or members of a purported class—pursuant to a [s]tate statute specifically authorizing such action\textsuperscript{379}; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.\textsuperscript{380}

Aside from these requirements, the same rules that apply to class actions originating in federal court also apply to removal cases.\textsuperscript{381}

\textsuperscript{376} Id. at 1167–68 (stating that “plaintiffs’ evidence offers no insight into whether U.S. Pipe played a significant role in the alleged contamination, as opposed to a lesser role, or even a minimal role. The evidence does not indicate that a significant number or percentage of putative class members may have claims against U.S. Pipe, or indeed that any plaintiff has such a claim.”).


\textsuperscript{378} See id. § 1332(d)(11).

\textsuperscript{379} Id. § 1332(d)(11)(B). The Supreme Court has referred to this provision as the “general public exception.” See Mississippi \textit{ex rel}. Hood v. AU Optronics Corp., No.12-1036, slip op. at 4 (U.S. Jan. 14, 2014).


\textsuperscript{381} See id. § 1332(d)(11)(A).
5. The Defendant Has the Burden of Demonstrating that Diversity Jurisdiction Exists in Removal Cases.

Although CAFA’s legislative history suggests that Congress intended the plaintiff to bear the burden of demonstrating that diversity jurisdiction exists in removal cases, the statute is silent as to that issue. As a result, the Eleventh Circuit has held that “CAFA does not change the traditional rule that the party seeking to remove the case to federal court bears the burden of establishing federal jurisdiction.”

6. Timing of Citizenship Determination in Class Actions

The statute directs the federal court to base citizenship determinations as of the date on which the complaint is filed. If the original complaint did not meet federal subject matter jurisdictional requirements, the district court should base citizenship determinations as of the date on which an amended complaint is filed, if the amended complaint then adequately pleads federal subject matter jurisdiction.

7. Other Special Diversity Rules in Class Action and Mass Action Cases

a. Only Named Parties Considered for Diversity Purposes

It is a long-standing rule that the federal court ordinarily considers, for purposes of diversity jurisdiction, only the citizenship of the named parties.

b. Citizenship of Unincorporated Associations

Unincorporated associations are treated differently in class actions than they are in other diversity cases. “For purposes of [a class action], an
unincorporated association [is] deemed to be a citizen of the [s]tate where it has its principal place of business and the [s]tate under whose laws it is organized.”

VI. APPELLATE CONSIDERATIONS FOR CASES INVOLVING DIVERSITY JURISDICTION ISSUES

A. Standard of Review

Because jurisdictional questions are questions of law, appellate courts review de novo whether the federal court has diversity jurisdiction in a civil action. The court also applies a de novo standard to the review of the district court’s denial of a motion to dismiss for lack of subject matter jurisdiction under FRCP 12(b)(1). However, the Eleventh Circuit reviews a district court’s jurisdictional factual findings regarding the parties’ citizenship for clear error.

B. Adequacy of Diversity Allegations

When the pleadings were inadequate for the court to assess whether diversity jurisdiction existed, the Eleventh Circuit has “issued a jurisdictional question asking the parties whether the allegations of citizenship were deficient and, if so, whether amendment of the complaint was necessary.” After determining that the plaintiff’s “allegations of citizenship were fatally deficient,” the court remanded the case to the district court for jurisdictional findings.

388. Id.
390. FED. R. CIV. P. 12(b)(1) (amended 2007); Underwriters at Lloyd’s v. Osting-Schwinn, 613 F.3d 1079, 1085 (11th Cir. 2010).
391. See Travaglio v. Am. Express Co., 735 F.3d 1266, 1269 (11th Cir. 2013); Osting-Schwinn, 613 F.3d at 1085.
392. Travaglio, 735 F.3d at 1267–68; see also Williams v. Best Buy Co., 269 F.3d 1316, 1319 (11th Cir. 2001) (noting that, when the court could not ascertain whether the amount in controversy in a removal case was sufficient for diversity jurisdiction, it required the parties to submit supplemental briefs on the issue).
393. See Travaglio, 735 F.3d at 1268.
C. Requirement that Appellate Court Sua Sponte Consider Whether Diversity Jurisdiction Exists

If it appears that subject matter jurisdiction is in question, the appellate court is required to sua sponte inquire into both its own jurisdiction and that of the district court whose opinion is under review.394

D. Objections Based on Lack of Subject-Matter Jurisdiction Can Be Raised at Any Time

A party can raise an objection to the federal court’s subject-matter jurisdiction at any time.395 Applying this rule, the Supreme Court has held that, even after a party loses at trial, he or she may still move for dismissal under FRCP 12(b)(1).396

394. Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 410 (11th Cir. 1999); see also Henderson v. Shinseki, No. 09-1036, slip op. at 5 (U.S. Mar. 1, 2011) (stating that “federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press”); Mitchell v. Maurer, 293 U.S. 237, 244 (1934).

395. Henderson, No. 09-1036, slip op. at 5.

WHY THE ELEVENTH CIRCUIT GOT IT WRONG: HISTORICAL CELL SITE LOCATION INFORMATION IS NOT CONSIDERED A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT

STEPHANIE H. CARLTON*

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I. INTRODUCTION

On August 7, 2010, three men brandishing guns entered a pizzeria in South Florida and demanded cash from an employee. About a month later,

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the same group ran into a car parts store and forced an employee at gunpoint to unlock the safe.\textsuperscript{2} When the employee scrambled to open the safe, the armed men screamed in the employee’s face, threatening to kill him.\textsuperscript{3} “Eventually, when the safe did not open, [the robbers] fled.”\textsuperscript{4} As he fled with his accomplices, Davis shot at a dog that was merely barking at them.\textsuperscript{5} The group of robbers, in a two-month span, terrorized the South Florida community by committing a series of seven armed robberies.\textsuperscript{6} Eventually, surveillance video, DNA, and cell site location information (“CSLI”) enabled the police to catch the violent group.\textsuperscript{7} Notably, “[h]istorical [CSLI] showed that Davis and his accomplices had placed and received cell phone calls in close proximity to the locations of the crimes around the times that the crimes were committed.”\textsuperscript{8} Obtaining historical CSLI, and the use of it as evidence during Davis’s trial, became a controversial issue during Davis’s appeal.\textsuperscript{9} The governmental obtainment of historical CSLI with a court order rather than a warrant has created a Fourth Amendment debate.\textsuperscript{10} Should the government be required to demonstrate probable cause to secure a warrant to obtain historical CSLI?\textsuperscript{11} Although this modern constitutional debate has been considered in other circuits, \textit{United States v. Davis}\textsuperscript{12} raises an issue of first impression in the Eleventh Circuit Court of Appeals.\textsuperscript{13}

This Comment analyzes the prevailing controversy surrounding technology, government, and privacy.\textsuperscript{14} It begins by exploring the elements of the Fourth Amendment and the predominant cases dealing with privacy such as \textit{Katz v. United States}.\textsuperscript{15} Part two discusses what constitutes a search under the Fourth Amendment and presages the discussion of why obtaining

\begin{enumerate}
\item Brief for the United States at 5, United States v. Davis, 754 F.3d 1205 (11th Cir. 2014) (No. 12-12928-EE).
\item \textit{Id.} at 6–7.
\item \textit{Id.} at 7.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{See Brief for the United States, supra} note 1, at 4–9.
\item \textit{See id.} at 9–10.
\item \textit{Id.} at 10.
\item \textit{See United States v. Davis, 754 F.3d 1205, 1211 (11th Cir.), reh’g granted en banc, 573 F. App’x 925 (11th Cir. 2014)}.
\item \textit{See id.}
\item \textit{See id.}
\item 754 F.3d 1205 (11th Cir.), \textit{reh’g granted en banc, 573 F. App’x 925 (11th Cir. 2014)}.
\item \textit{Id.} at 1210.
\item \textit{See infra} Parts II–V.
\item 389 U.S. 347 (1967); \textit{see infra} Part II.
\end{enumerate}
historical CSLI does not constitute a search that will be discussed in the latter part of the Comment. 16

Part three of this Comment discusses historical CSLI and this non-invasive law enforcement practice. 17 This section elaborates on the difference between historical and real-time CSLI while explaining why historical CSLI is non-invasive and does not constitute a search within the meaning of the Fourth Amendment. 18

Part four—the largest and most significant part—focuses on the recent Eleventh Circuit decision of *Davis*. 19 This section contains an in-depth critique of the opinion. 20 Additionally, it explains the mistake the Eleventh Circuit made in comparing the case at hand to *United States v. Jones*. 21 This Part then discusses other weaknesses of the opinion and explains how and why the court’s decision was misguided. 22

The purpose of this Comment is to educate the public on the misinterpretation of the Fourth Amendment and to explain why one does not have an expectation of privacy in public. 23 Lastly, this Comment analyzes the recent Eleventh Circuit decision and discusses why the court got it wrong when it comes to Fourth Amendment implications and historical CSLI. 24

II. FOURTH AMENDMENT OVERVIEW

The Fourth Amendment of the United States Constitution warrants “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” 25 The Fourth Amendment is designed to protect the privacy of individuals from unlawful intrusion by the government. 26 An individual must have a “constitutionally protected reasonable expectation of privacy” in order to obtain protection

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16. See infra Part II.A.
17. See infra Part III.
18. See infra Part III.
19. *United States v. Davis*, 754 F.3d 1205, 1223 (11th Cir.), reh’g granted en banc, 573 F. App’x 925 (11th Cir. 2014); see infra Part IV.
20. See infra Part IV.
21. No. 10-1259, slip op. 1 (U.S. Jan. 23, 2012); see infra Part IV.
22. See infra Part IV.
23. See United States v. Shanks, 97 F.3d 977, 980 (7th Cir. 1996) (finding defendant lacked legitimate expectation of privacy when he left garbage bags filled with contraband next to the street).
24. See infra Parts II–IV.
25. U.S. CONST. amend. IV.
under the Fourth Amendment from an unreasonable search or seizure. To determine whether an individual’s expectation of privacy is reasonable the Court in Katz developed a two-part test. The first part of the test involves whether “the individual manifested a subjective expectation of privacy in the object of the challenged search.” The second part of the test asks whether “society [is] willing to recognize that expectation as reasonable.” The reasonable expectation of privacy, however, does not extend to what an individual consciously reveals to the public. Furthermore, the expectation of privacy, construed from the Fourth Amendment, is determined by the context of each case.

A. What Constitutes a Search?

To determine whether the government has performed an unreasonable search protected under the Fourth Amendment, one must determine whether that person exhibits an actual or subjective expectation of privacy which society is ready to accept as reasonable. If no expectation of privacy exists then a search without a warrant does not violate the Fourth Amendment. If, however, a person does have a reasonable expectation of privacy, the government cannot seize evidence without a warrant supported by probable cause.

A person does not have a subjective expectation of privacy to what he or she exposes to the public. When “a person knowingly exposes [information] to the public,” he or she can no longer subjectively believe that information will be kept private, and therefore will not benefit from Fourth Amendment protections.

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29. Ciraolo, 476 U.S. at 211; see also Katz, 389 U.S. at 361 (Harlan, J., concurring).
30. Ciraolo, 476 U.S. at 211; see also Katz, 389 U.S. at 361 (Harlan, J., concurring).
32. Malone, supra note 26, at 712.
34. See id.
35. See U.S. CONST. amend. IV.
36. See United States v. Shanks, 97 F.3d 977, 980 (7th Cir. 1996).
III. FOURTH AMENDMENT AND CELL PHONE TECHNOLOGY

There are roughly three hundred million cell phone subscribers in the United States alone. Notwithstanding the country’s growing affinity with technology, a lack of appellant precedent exists regarding what the government can and cannot obtain from technological devices, such as cell phones. It is important to understand how a cell phone works in order to evaluate the few cases available regarding CSLI and to help predict future decisions.

When a person places a cell phone call, a signal is conveyed to the nearest cell tower, and eventually to the carrier’s office. What experts refer to as a cell site is the “geographical location containing the cell tower, radio transceiver, and base station controller.” Anytime a person receives or makes a cell phone call, the carrier stores that information. It should be noted that even when a cell phone user is not placing a call, his or her location can be identified because the phone is continuously interacting with the mobile network. According to many scholars, due to the sophistication of mobile devices, CSLI can be obtained within a few hundred feet.

A. Cell Site Location Information (“CSLI”)

What is typically referred to as CSLI has become a widely used method for the government to help fight crime. Although it has recently been used to combat criminal activity, many fear that obtainment of this information infringes on a person’s Fourth Amendment rights. Courts frequently differentiate between historical CSLI and real-time CSLI, also

40. See United States v. Davis, 754 F.3d 1205, 1210 (11th Cir.), reh’g granted en banc, 573 F. App’x 925 (11th Cir. 2014) (stating that “Davis’s Fourth Amendment argument raises issues of first impression in this circuit, and not definitively decided elsewhere in the country”); Malone, supra note 26, at 703 (stating that “many people probably do not consider how this technology works or what information they may inadvertently be sharing with their cell phone company”).
41. Malone, supra note 26, at 707–08.
42. Christopher Fox, Comment, Checking In: Historic Cell Site Location Information and the Stored Communications Act, 42 SETON HALL L. REV. 769, 773–74 (2012).
43. See id.
44. Malone, supra note 26, at 708.
45. Id. at 704.
46. Id.
47. Id.; see also U.S. CONST. amend. IV.
known as prospective CSLI. This distinction between real-time and historical CSLI is vital in the evaluation and response to privacy issues. Courts have yet to sufficiently address whether CSLI deserves any constitutional protection at all. The major issue facing CSLI among legal scholars is whether a warrant should be required to obtain historical CSLI. Before one can obtain a warrant, probable cause must be established. Even before one can delve into this complex constitutional issue, two questions must be answered. The first question is whether collecting CSLI is considered a search; if it is considered a search, then there must be compliance with the Fourth Amendment. Second, if obtaining CSLI is not considered a search, then what standard must the government meet in order to obtain historical CSLI?

1. Historical Versus Real-Time Location Information

Historical CSLI records are obtained from a past date in time and only provide “the date, time, and duration of calls, whether calls are inbound or outbound, and show the originating and terminating cell sites for calls received or placed on the phone.” Cell phone carriers retain this information for a given amount of time for business purposes. Real-time CSLI permits the government in present time to track a cell phone user’s whereabouts. The majority of courts faced with requests for real-time CSLI consistently have held the material is considered “tracking information as defined by 18 U.S.C. § 3117, which requires a warrant—and thus a showing of probable cause—before an order for disclosure of that CSLI may

50. Malone, supra note 26, at 704.
51. Id. at 704–05.
52. See U.S. CONST. amend. IV (“The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . .”)
54. Id.
55. Id.
56. Aaron Blank, The Limitations and Admissibility of Using Historical Cellular Site Data to Track the Location of a Cellular Phone, RICH. J.L. & TECH., Fall 2011, at 1, 10.
58. See id. at 582.
be granted.”

The real debate, however, regarding CSLI concerns historical data, as seen in Davis. Courts have interpreted historical CSLI to be overseen by section 201 of the Stored Communications Act.

a. The Stored Communications Act

The Electronic Communications Privacy Act of 1986 oversees the discovery of CSLI. The Electronic Communications Privacy Act encompasses the Stored Communications Act in title two and “serve[s] as the basic statutory framework within which CSLI jurisprudence has developed.” Congress passed the Stored Communications Act to combat privacy concerns regarding the voluntary obtainment of consumers’ personal information. Under the Stored Communications Act, the government cannot simply compel communication companies, specifically cell phone companies, to turn over private customer information such as telephone numbers and call logs. In addition, the communication companies are similarly constricted in their ability to turn over customer information to the government.

Under the Stored Communications Act, a government agency may compel a communication service provider to provide the “contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant.” Under section 201 of the Stored Communications Act, the government may therefore obtain the actual location of a cell phone subscriber in real time only when the government agency obtains a warrant.


60. United States v. Davis, 754 F.3d 1205, 1210–11 (11th Cir.), reh’g granted en banc, 573 F. App’x 925 (11th Cir. 2014); Malone, supra note 26, at 710–11.


63. Harkins, supra note 49, at 1894; see also Stored Communications Act § 201.

64. See Harkins, supra note 49, at 1899.


67. 18 U.S.C. § 2703(a); Malone, supra note 26, at 718.
pursuant to probable cause. While § 2703(a) only allows the government to obtain real-time location information pursuant to a warrant, § 2703(c) permits the government to obtain historical location information. To obtain historical information,

[a] governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service . . . only when the governmental entity: (A) obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure; . . . (B) obtains a court order for such disclosure; [or] . . . (D) submits a formal written request relevant to a law enforcement investigation . . . .

Accordingly, the government, pursuant to § 2703(c), may obtain records of cell phone subscribers with a court order by following § 2703(d) of the codified Stored Communications Act.

The Stored Communications Act, section 201, sets forth the requirements needed for a government agency to obtain a court order, which would compel a carrier to turn over the information of a subscriber. This subsection of the statute allows the government to obtain the location information “only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.”

Although most scholars and courts acknowledge that “a record or other information pertaining to a subscriber” refers to historical CSLI, the central dispute involves what standard should be employed by courts to

68. U.S. CONST. amend. IV; 18 U.S.C. § 2703(a). According to the Act, a government agency may obtain the actual location of a subscriber’s communications only when the agency obtains a warrant pursuant to probable cause required by the Fourth Amendment. U.S. CONST. amend. IV; 18 U.S.C. § 2703(a).
70. 18 U.S.C. § 2703(c)(1).
In order for historical CSLI to be available under 18 U.S.C. § 2703(c)(1), three qualifications must be met: [F]irst, the CSP must be a provider of an electronic communication service; second, the data may not be content information as defined in 18 U.S.C. § 2510(8); and third, the data must be a “record or other information pertaining to a subscriber to or customer of” an electronic communications service. Fraser, supra note 57, at 583 (quoting 18 U.S.C. § 2703(c)(1)); see also Electronic Communications Privacy Act of 1986 § 101, 18 U.S.C. § 2510(8) (2012).
71. 18 U.S.C. §§ 2703(c)–(d); Fraser, supra note 57, at 585.
72. 18 U.S.C. § 2703(d).
73. Id.
74. Id. § 2703(c)(1).
authorize disclosure of historical CSLI.75 “Over the last several years, the prevailing view among the courts was that historical CSLI was governed by the S[stored] C[ommunications] A[ct] and thus could be obtained without a warrant pursuant to an 18 U.S.C. § 2703(d) order.”76

Conversely, many argue that a cell phone is really a tracking device and thus outside the scope of the Stored Communications Act since a tracking device is not within its definition of what is considered an electronic communication.77 Therefore, in order for the government to compel a carrier to provide historical CSLI of a subscriber, “the information must have been stored by [a provider of electronic communications].”78 The Third Circuit, however, has specifically addressed this issue and determined that a cell phone is not considered a tracking device.79

b. Third Circuit Opinion

In its holding, the Third Circuit articulated that by its nature, CSLI is not considered a tracking device and therefore should not be held to the higher probable cause standard.80 The Third Circuit decision was the first on the appellate level that decided “whether a court can deny a [g]overnment application under 18 U.S.C. § 2703(d) after the [g]overnment has satisfied its burden of proof under that provision.”81

The government in In re Application of the United States for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government82 submitted a request to the magistrate judge for a court order to obtain

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75. In re Application of U.S. for an Order Directing a Provider of Elec. Commc’n Serv. to Disclose Records to the Gov’t, 620 F.3d 304, 307–08 (3d Cir. 2010).
76. Malone, supra note 26, at 721; see also 18 U.S.C. § 2703(d).
78. Malone, supra note 26, at 724.
79. In re Application of U.S. for an Order Directing a Provider of Elec. Commc’n Serv. to Disclose Records to the Gov’t, 620 F.3d at 309, 313.
80. Id. at 313.
81. In re Application of U.S. for an Order Directing a Provider of Elec. Commc’n Serv. to Disclose Records to the Gov’t, 620 F.3d at 305–06.
82. 620 F.3d 304 (3d Cir. 2010).
historical CSLI. The magistrate judge denied the government’s request and insisted on a government showing of probable cause when obtaining CSLI. The Third Circuit, however, disagreed with the magistrate’s ruling and held “that CSLI from cell phone calls is obtainable under a [court] order and that such an order does not require the traditional probable cause determination.”

Notwithstanding the Third Circuit decision, some still believe that a cell phone is considered a tracking device when the government is attempting to obtain real-time or prospective data. Although many scholars support this contention, this Comment from here on focuses solely on historical CSLI.

Even though government agencies frequently use historical CSLI to investigate criminal activity throughout the country, a few scholars and courts believe section 2703(d) should be discarded and replaced with a newer and higher standard of probable cause. The Third Circuit, however, has held that to determine what standard a court should employ when a government agency attempts to obtain historical CSLI is not an issue for the courts to decide, and that the standard should, instead, be left up to Congress.

We respectfully suggest that if Congress intended to circumscribe the discretion it gave to magistrates under § 2703(d) then Congress, as the representative of the people, would have so provided. Congress would, of course, be aware that such a statute mandating the issuance of a § 2703(d) order without requiring probable cause and based only on the Government’s word may evoke protests by cell phone users concerned about their privacy. The considerations for and against such a requirement would be for Congress to balance. A court is not the appropriate forum for
such balancing, and we decline to take a step to which Congress is silent.91

This precedent-setting decision offered by the Third Circuit—while one of the first federal circuit court decisions regarding historical CSLI—most likely will determine how future courts will examine the governmental obtainment of historical CSLI.92

IV. UNITED STATES V. DAVIS: WHY THE ELEVENTH CIRCUIT GOT IT WRONG

The next section of this Comment focuses on the misguided decision of the Eleventh Circuit in Davis.
93 This section will provide evidence showing why the court was misguided.
94

A. No Reasonable Expectation of Privacy: Third Party Doctrine

Although the Eleventh Circuit claims that a cell phone subscriber has a subjective expectation of privacy, this expectation of privacy may not be one that society is willing to accept as reasonable.95 The Supreme Court has repeatedly articulated that Fourth Amendment protection does not extend to the information a person voluntarily reveals to a third party.96 Accordingly, if historical CSLI is considered to be information that is voluntarily given to a third party, then it is presumed that the government obtainment of historical CSLI is not considered a search and no warrant is required.97 To support this argument, many opponents of a warrant requirement standard cite to the Court’s ruling in United States v. Miller.
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In Miller, the Supreme Court held that a person has no legitimate expectation of privacy to the voluntary information provided to a bank.99 Before his trial, the respondent sought to suppress bank records obtained

91. Id.
92. Malone, supra note 26, at 723.
93. See United States v. Davis, 754 F.3d 1205, 1223 (11th Cir.), reh’g granted en banc, 573 F. App’x 925 (11th Cir. 2014); infra Part IV.A–E.
94. See infra Part IV.A–E.
95. Malone, supra note 26, at 712, 733.
97. Id.
through a purportedly flawed subpoena. The lower court denied his motion and respondent was subsequently convicted on conspiracy charges. On appeal, the Fifth Circuit reversed, but the Supreme Court later affirmed the district court’s denial of the motion to suppress. Additionally, in its decision, the Supreme Court reasoned that when a person conveys personal information to a third party, that person anticipates that the third party will inevitably convey that personal information to the government.

The checks are not confidential communications but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. The lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress . . . the expressed purpose of which . . . to require records to be maintained because they [are useful] “in criminal . . . investigations and proceedings.”

Banks retain a record of their customers’ accounts to comply with the Bank Secrecy Act, which is “merely an attempt to facilitate the use of a proper and longstanding law enforcement technique by insuring that records are available when they are needed.” The Court concluded that because customers are aware that the information within their account is kept by the bank—a third party—there is no Fourth Amendment right violated when that information is conveyed to law enforcement.

In addition to citing *Miller*, challengers to the warrant requirement standard for historical CSLI also cite the Court’s decision in *Smith v. Maryland* to bolster their argument. In that case the Court held—three years after *Miller*—that a person does not have a reasonable expectation of privacy to the telephone numbers they dialed. In *Smith*, the government obtained an installation of a pen register on the petitioner’s phone to collect

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100. *Id.* at 436.
101. *Id.* at 436–37.
102. *Id.* at 437, 440.
105. *Id.* at 444.
106. *Id.* at 444–45.
108. See *id.* at 745–46 (1979); *Miller*, 425 U.S. at 446; *In re* Application of U.S. for an Order Directing a Provider of Elec. Commc’n Serv. to Disclose Records to the Gov’t, 620 F.3d 304, 317 (3d Cir. 2010).
the phone numbers he dialed.\textsuperscript{110} The police installed the pen register on the petitioner’s phone without obtaining a warrant or court order.\textsuperscript{111} The petitioner was suspected of participating in a robbery and subsequently making harassing phone calls to his victim.\textsuperscript{112} With the help of the pen register, the police were able to identify the petitioner as the robbery suspect.\textsuperscript{113} The victim was ultimately able to identify her robber, and thereafter, the petitioner was arrested.\textsuperscript{114} Prior to his trial, the petitioner sought to suppress all evidence obtained from the pen register on the contention it violated his Fourth Amendment rights against unreasonable search and seizure.\textsuperscript{115} The lower court ultimately denied the petitioner’s motion to suppress and the appeal went all the way to the Supreme Court.\textsuperscript{116} Eventually, the Supreme Court held that because the information is voluntarily conveyed to a third party, a person does not have a subjective expectation of privacy to the phone numbers he or she dials.\textsuperscript{117} In addition, most people are aware that the carrier retains a record of the numbers dialed because they eventually appear on a monthly telephone bill.\textsuperscript{118}

Telephone users, in sum, typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes. Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret.\textsuperscript{119}

The petitioner attempted to argue that he had a legitimate expectation of privacy because the telephone calls originated in his house.\textsuperscript{120} Nevertheless, the Supreme Court quickly shut down this argument by stating “[r]egardless of his location, petitioner had to convey that number to the

\begin{enumerate}
\item \textsuperscript{110} Id. at 737.
\item \textsuperscript{111} Id.
\item \textsuperscript{112} See id.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Smith, 442 U.S. at 737.
\item \textsuperscript{115} Id. at 737–38.
\item \textsuperscript{116} Id.
\item \textsuperscript{117} Id. at 743–44; see also Fraser, supra note 57, at 588. “Further, in Smith v. Maryland, the Supreme Court found that the user of a telephone had voluntarily conveyed records of telephone numbers dialed when calls were made, and therefore assumed the risk that those records would be revealed to the police.” Fraser, supra note 57, at 588.
\item \textsuperscript{118} Smith, 442 U.S. at 742.
\item \textsuperscript{119} Id. at 743.
\item \textsuperscript{120} Id.
\end{enumerate}
telephone company in . . . the same way if he wished to complete his call. The fact that he dialed the number on his home phone rather than on some other phone could make no conceivable difference . . . .” 121 Even if he had an expectation of privacy to his dialed telephone numbers, the Supreme Court further noted that society is not willing to acknowledge this expectation of privacy as reasonable.122

B.  *Historical CSLI: A Voluntary Disclosure to a Third Party*

The underlying policy argument in both *Miller* and *Smith* is identical: When a person voluntarily reveals information to a third party they surrender any legitimate expectation of privacy over that information.123 Courts have extended the third party argument to comprise information regarding: “[C]redit card statements, electric utility records, motel registration records, and employment records.”124 Proponents of a warrant requirement, however, challenge this line of reasoning and contend “cell phones automatically register with cell phone towers and send location information without any voluntary action by the user.”125 Although this may be the case, the automatic registration of a cell phone with a tower is an acknowledged consequence of possessing a cell phone.126

Moreover, cell phone subscribers who simply pay their monthly bills without looking at them and who do not have GPS functions on their phones are still likely to know that the government uses such techniques due to the high-profile crimes that law enforcement agencies have reported and solved with the help of CSLI.127

The Third Circuit, however, attempted to argue that a typical cell phone user likely does not even realize that a carrier retains their location

121.  *Id.*
122.  *Id.*
123.  *Smith*, 442 U.S. at 743–44; *United States v. Miller*, 425 U.S. 435, 442–43 (1976); see also *United States v. Graham*, 846 F. Supp. 2d 384, 399 (D. Md. 2012). “Historical CSLI has been analogized with other types of personal records, such as bank records, that courts have ruled are [freely given] to a third party.” Malone, *supra* note 26, at 739.
126.  *Id.*
information.\(^\text{128}\) However, this argument can easily be invalidated.\(^\text{129}\) When a cell phone user places a call, the user must undoubtedly anticipate that their carrier will determine their call location for billing purposes.\(^\text{130}\) How would a carrier determine the proper billing rate for a cell phone call without determining the subscriber’s location when making the call?\(^\text{131}\) Therefore, a subscriber must recognize that their cell phone provider retains their location information as part of the ordinary course of business.\(^\text{132}\)

An additional argument for why historical CSLI is considered a voluntary conveyance of information is because a cell phone user can easily turn off their phone, thereby preventing the registration of their location with a cell tower.\(^\text{133}\) In addition, most cell phone thieves immediately turn off the stolen phone because they understand that their location will likely be traceable.\(^\text{134}\) “[T]he prevalence of cell phones with GPS functions and subscribers’ increased use of these services directly undermine the position that cell phone customers are not voluntarily sharing their location information with [cell site providers].”\(^\text{135}\)

1. Comparison to United States v. Davis

Similar to the telephone numbers dialed in Smith,\(^\text{136}\) and the bank information provided to the bank in Miller,\(^\text{137}\) the defendant in Davis

\[\text{References}\]

128. In re Application of U.S. for an Order Directing a Provider of Elec. Commc’n Serv. to Disclose Records to the Gov’t, 620 F.3d 304, 317 (3d Cir. 2010); Malone, supra note 26, at 739.
129. See Malone, supra note 26, at 739.
130. Id. at 739–40.
131. See id.

As users become more aware of cell phone technology, there will no longer be a widespread lack of knowledge regarding the type of location data cell phone companies routinely collect. If people continue to use their cell phones even after they learn and understand how historical CSLI is gathered and maintained, they will have a much harder time arguing that the CSLI has not been voluntarily conveyed.

Id. at 740.

132. Id. at 739–40.
133. Malone, supra note 26, at 740.
135. Fox, supra note 42, at 788.

Therefore, a cell phone user has no legitimate expectation of privacy in the CSLI that the [cell site provider] records when the user makes or receives a call because the subscriber has voluntarily shared this information with the [cell site provider] and assumes the risk that the [cell site provider] may turn the information over to law enforcement agencies.

Id. at 788–89.

voluntarily transmitted his location to cell towers in order to make and receive calls.138 The carrier then retained the location information of the defendant for its personal business records.139 “[H]istorical [CSLI] are records created and kept by third parties that are voluntarily conveyed to those third parties by their customers. As part of the ordinary course of business, cell[] phone companies collect information that identifies the cell[] towers through which a person’s calls are routed.”140

C. The Beeper Cases

Soon after the decisions of United States v. Knotts141 and United States v. Karo,142 the Supreme Court decided two cases within a two-term period that addressed the issue of governmental use of tracking devices in determining the whereabouts of suspected drug manufacturers.143 These two cases assist in determining whether a person has a reasonable expectation of privacy to his or her precise location.144 Additionally, “[t]hese cases are especially apt when discussing historical CSLI because they dealt with a technology that many critics of the current interpretation of the SCA compare to cell phones: [T]racking devices.”145

Employing the use of beepers allows law enforcement agents to track the object the beeper has been attached to by following the emitted signals, similar to the way in which one can compute historic CSLI to create a general picture of the movements of a cell phone, but with greater accuracy and in real-time.146

In Knotts, law enforcement agents positioned a tracking beeper in a container that was holding chloroform that agents suspected was used by the defendants in their production of drugs.147 Law enforcement agents were able to track the container to a remote cabin.148 With the assistance of the

138. United States v. Davis, 754 F.3d 1205, 1209–10, 1216 (11th Cir.), reh’g granted en banc, 573 F. App’x 925 (11th Cir. 2014).
139. Id. at 1209–10.
143. Fox, supra note 42, at 780.
144. Malone, supra note 26, at 713.
145. Id.
146. Fox, supra note 42, at 780 (footnote omitted).
148. Id.

https://nsuworks.nova.edu/nlr/vol39/iss2/5
beeper and surveillance of the defendant’s cabin, the agents were able to obtain a search warrant. During the execution of the search warrant, agents discovered a drug laboratory and subsequently arrested the defendant. The defendant sought to suppress the evidence law enforcement obtained through the warrantless tracking of the beeper. After his motion to suppress was denied, the defendant was convicted and sentenced for producing a controlled substance.

On appeal, the Eighth Circuit reversed the defendant’s conviction and found the use of the beeper to track the defendant was a violation of his Fourth Amendment rights. The Supreme Court, however, reversed the Eighth Circuit’s decision and found the defendant’s expectation of privacy was not violated because the warrantless tracking of the beeper was not a search within the Fourth Amendment. The Court reasoned that “[t]he governmental surveillance conducted by means of the beeper . . . amounted principally to the following of an automobile on public streets and highways.” Additionally, the Court noted that a person has no reasonable expectation of privacy when traveling in a car on a public road because that person voluntarily conveys that information to the public. The Court therefore once again concluded that a person cannot have a reasonable expectation of privacy to what is voluntarily conveyed to the public.

A similar fact pattern involving a beeper occurred in Karo. After the defendants purchased cans of ether from a confidential informant that were used in the extraction of cocaine from clothes that had been imported into the United States, the government secured a warrant that allowed the installation and tracking of a beeper in one of the cans. Once the defendant picked the cans of ether up from the informant, the agents then followed the defendant to his home. After the cans were moved to a

149. Id. at 279.
150. Id.
151. Id.
152. Knotts, 460 U.S. at 279.
153. Id. at 279.
154. Id. at 285.
155. Id. at 281.
156. Id. at 281–82.
157. Id. at 281–82.
159. Id.
160. Id.
number of locations, through the use of the beeper, the government agents finally discovered that the cans were at the house rented by the defendants. The agents then obtained a warrant to search the house and subsequently discovered the defendants’ cocaine and laboratory paraphernalia. The defendants were consequently arrested and moved to suppress the evidence derived from the initial warrant to install the beeper.

After the court of appeals affirmed the district court’s decision to grant the defendant’s suppression of evidence, the Supreme Court granted certiorari. The Court ultimately decided that although the defendant’s Fourth Amendment rights were not violated when the government installed the beeper on the ether can, the monitoring of the can when it was inside the defendant’s home was considered an unreasonable search. Unlike Knotts, as the Court noted, the beeper in Karo showed that it was inside the defendants’ home. The Court furthermore held that the use of a beeper to track a person in his or her private residence that is not open to visual surveillance is considered a search within the Fourth Amendment.

Where exactly the beepers were broadcasting their precise location is the key difference between these two cases. The most significant question to ask when one is studying electronic surveillance cases is “what kind of information can be collected and whether that sort of information would be freely available to, say, a passerby?” Moreover, these two cases inevitably created a public/private distinction to evaluate the use of warrantless tracking devices and their potential Fourth Amendment implications.

161. Id. at 708–10.
162. Id. at 710.
163. Karo, 468 U.S. at 710. “The [d]istrict [c]ourt granted respondents’ pretrial motion to suppress the evidence seized from the . . . residence on the grounds that the initial warrant to install the beeper was invalid and that the . . . seizure was the tainted fruit of an unauthorized installation and monitoring of that beeper.” Id.
164. Id. at 710–11.
165. Id. at 713, 715.
167. Id. at 715.
168. Malone, supra note 26, at 715.
169. Id. at 714.
170. Fox, supra note 42, at 782; see also Karo, 468 U.S. at 714; Knotts, 468 U.S. at 284.
1. CSLI Differs from Beeper Cases

Supporters of a warrant requirement for CSLI argue that the same analysis used in the beeper cases should be employed in CSLI cases. 171 Employing the same public/private analysis, however, would be superfluous.172

Currently CSLI is not consistently accurate enough to implicate the home of a suspect, but rather only indicates the general area where the call was made from, which may or may not give rise to the inference that the defendant was at home. Knotts and Karo make clear that acquiring location information about an object in the vicinity of the home or other private space, but not within its interior, is not a search. 173

In addition, “historical CSLI does not convey information about the interior of a home.” 174 Unlike the beeper cases that provide a precise location of the tracking device, historical CSLI typically only reveals the location of a cell phone within roughly 200 feet. 175

The historical [CSLI] at issue identifies only the closest cell[] tower to the Defendants’ phones, and not the precise location of the Defendants themselves. . . . Indeed, even with an ever-denser cell[] tower grid, such precision is impossible. Moreover, even if cell site records could definitively indicate that an individual is in his home, that information only reveals that a person made or received a phone call while at home—in other words, non-incriminatory information that is clearly obtainable via the constitutional pen register at issue in Smith v. Maryland. 176

171. Fox, supra note 42, at 789. “Further, as CSLI becomes increasingly accurate, it will cause historical CSLI to fall under the ambit of Karo, as that information will allow law enforcement to determine if a suspect is in his or her home.” Fraser, supra note 57, at 609; see also Karo, 468 U.S. at 714.

172. See Fraser, supra note 57, at 611–12. “The tracker beeper cases simply do not carry over well to a tracking device that has other uses; there is a need for a different distinction in CSLI analysis.” Id. at 612.

173. Id. at 609; see also Karo, 468 U.S. at 714; Knotts, 460 U.S. at 285.


175. Id. “Unless a person is standing in the middle of a residence and the walls are 100 feet away in any direction, his historical CSLI will not be precise enough to prove that he is actually inside the walls of the residence and secluded from the public eye.” Id.

176. United States v. Graham, 846 F. Supp. 2d 384, 404 (D. Md. 2012); see also Smith v. Maryland, 442 U.S. 735, 745–46 (1979); Malone, supra note 26, at 738. “CSLI cannot indicate with certainty anything about the interior of a private residence. Thus, the
Consequently, unlike the more precise tracking of a beeper, historical CSLI does not provide a precise location of a cell phone because the cell tower only gives an approximate location. Because historical CSLI substantially differs from beeper tracking, “CSLI falls outside of the traditional Fourth Amendment protections. Accordingly, when a law enforcement agent uses voluntarily conveyed historical CSLI information to approximate a subscriber’s location, it does not constitute a Fourth Amendment search.”

D. United States v. Jones

The most recent case that dealt with Fourth Amendment implications on tracking devices occurred in United States v. Jones. In Jones, the government secured a search warrant to install a GPS on a vehicle that was registered to the respondent’s wife. The government suspected the respondent of trafficking drugs through his nightclub and accordingly sought the warrant to allow the government to install the electronic tracking device. The warrant authorized the government to install and track the car in the District of Columbia for only ten days. Disobeying the terms of the warrant, the government installed the device in Maryland on the eleventh day. Signals from the device documented the vehicle’s location within roughly one hundred feet. With help from the tracking device, the government was able to obtain an indictment against the respondent and

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Fourth Amendment does not protect historical CSLI, and current law does not require a warrant or probable cause to obtain historical CSLI.” Malone, supra note 26, at 738.

177. Fox, supra note 42, at 789. “This information does not provide the actual location of the cell phone because CSLI only gives the cell tower location used to carry a call and because location calculations based on cell towers give only an approximation of a subscriber’s phone’s location.” Id. at 789.

178. Id. at 790.

If multiple cell sites record CSLI, the approximate location of the cell phone at the initiation of the call can be computed. This approximate location, however, provides the general area of the caller, not the exact location. A tracking beeper, on the other hand, can be traced to a precise location. . . . [H]istoric CSLI cannot show that a subscriber was at a particular place at a particular time; it can only show that the phone was in a general area.

Id. at 789–90.


180. Id. at 1–2.

181. Id.

182. Id. at 2.

183. Id.

several of his co-conspirators, charging them with conspiracy to distribute cocaine.185

Prior to trial, the respondent sought to suppress the evidence obtained from the GPS tracking, arguing that the installation and tracking of the GPS on the vehicle was an unreasonable search within the Fourth Amendment.186 The court, however, only suppressed the evidence obtained through the GPS while the vehicle was parked in the garage of the respondent’s house.187 Subsequently, the respondent was convicted at trial.188 The District of Columbia Circuit reversed the conviction on the grounds that the evidence acquired from the warrantless tracking of the GPS violated the Fourth Amendment.189

On appeal to the Supreme Court, the majority opinion, written by Justice Scalia, indicated that the case was primarily about the physical intrusion by the government onto private property for the sole purpose of obtaining evidence.190 “We have no doubt that such a physical intrusion would have been considered a search within the meaning of the Fourth Amendment when it was adopted.”191 The Court, therefore, predominantly based its decision on the common law trespass doctrine.192 The physical trespass by the government to install the GPS device, outside the requirements set forth by the warrant, violated the respondent’s Fourth Amendment right against unreasonable searches.193

1. Why Jones Analysis Does Not Apply

The Eleventh Circuit in Davis erroneously applied the analysis set forth by the Supreme Court in Jones to arrive at its holding.194 Several reasons exist why the analysis set forth in Jones cannot be applied to historical CSLI cases.195

185. Id. at 2–3.
186. Id. at 2.
187. Id.
188. Id. at 3.
190. Id. at 4.
191. Id. at 4.
192. Id. “The majority decided only that a search occurs when the government trespasses on an individual’s property for the purpose of gathering information.” Rothstein, supra note 96, at 501.
194. See id. at 3–4; United States v. Davis, 754 F.3d 1205, 1212, 1214 (11th Cir.), reh’g granted en banc, 573 F. App’x 925 (11th Cir. 2014).
195. Jones, No. 10-1259, slip op. at 3–4; Fraser, supra note 57, at 620.
First, the Eleventh Circuit indicated that GPS tracking and CSLI are analogous. As previously discussed, the tracking produced by a GPS and historical CSLI yield different levels of accuracy when determining an individual’s location. In Jones, the device was attached to a car, and the law enforcement agents tracked its movements in real-time. In Davis, however, the government did not track the suspect’s movements in real-time; the government simply obtained historical CSLI which does not track an individual’s precise real-time movements. “Historical cell site location data is, as its name implies, historical—the information revealed by such data exposes to the government only where a suspect was and not where he is.”

In addition, unlike Jones, the agents in Davis obtained records from the defendant’s cell phone carrier that only revealed the vicinity in which he made or received a cell phone call. And, unlike Jones, “this information can only reveal the general vicinity in which a cell[] phone is used.” The court even noted that “[w]e do not doubt that there may be a difference in precision, but that is not to say that the difference in precision has constitutional significance.” This argument is flawed because a person does not have a legitimate expectation of privacy to everything, and a person’s precise location is vital in determining whether their Fourth Amendment rights have been violated. Therefore, the Eleventh Circuit erred when it compared the tracking device employed in Jones to the historical CSLI employed in Davis.

Next, the analysis set forth in Jones cannot be applied to the Davis case because there was no trespass in Davis. Nevertheless, although the court addresses this factual distinction, it still used Jones to arrive at its decision.

In the controversy before us there was no GPS device, no placement, and no physical trespass. Therefore, although Jones clearly removes all doubt as to whether electronically transmitted
location information can be protected by the Fourth Amendment it is not determinative as to whether the information in this case is so protected. The answer to that question is tied up with the emergence of the privacy theory of Fourth Amendment jurisprudence. While Jones is not controlling, we reiterate that it is instructive.\(^{208}\)

Such an emphasis on the Supreme Court’s analysis set forth in Jones further demonstrates why the Eleventh Circuit got it wrong.\(^{209}\) Because the obtainment of one’s historical CSLI does not involve a physical trespass to one’s property, the Eleventh Circuit should not have employed the trespass theory to analyze the possible Fourth Amendment implications.\(^{210}\) Instead, the Eleventh Circuit should have employed the analysis set forth in Katz—to determine whether the defendant had a reasonable expectation of privacy that society was willing to accept as reasonable—to his CSLI.\(^{211}\)

E. Katz Analysis Applied to Davis

If the Eleventh Circuit decided to instead employ the Katz analysis it would have found that the defendant had no reasonable expectation of privacy.\(^{212}\) Conversely, even if the court found that the defendant had a reasonable expectation of privacy, it would have found that society would not be willing to accept that expectation of privacy as reasonable because his location was voluntarily conveyed to the public through his cell phone provider.\(^{213}\)

The Eleventh Circuit stated that:

\[\text{E}ven on a person’s first visit to a gynecologist, a psychiatrist, a bookie, or a priest, one may assume that the visit is private if it was not conducted in a public way. One’s cell phone, unlike an automobile, can accompany its owner anywhere. Thus, the

\(^{208}\) Davis, 754 F.3d at 1214; see also Jones, No. 10-1259, slip op. at 12.

\(^{209}\) See Jones, No. 10-1259, slip op. at 12; Fraser, supra note 57, at 620. While it remains to be seen what the lasting effect of Jones will be, the Court’s narrow holding that the installation and use of the GPS device was a search provides little guidance on what the standard of proof should be to obtain historical CSLI records. First, with respect to cell phones, the government does not have to install the devise used to generate location information—the user is already carrying around his or her cell phone.

Fraser, supra note 57, at 620; see also Jones, No. 10-1259, slip op. at 12.


\(^{211}\) Katz v. United States, 389 U.S. 347, 361 (1967); see also Graham, 846 F. Supp. 2d at 396–401.

\(^{212}\) See Katz, 389 U.S. at 361; Graham, 846 F. Supp. 2d at 396–401.

\(^{213}\) See Graham, 846 F. Supp. 2d at 398–99; Malone, supra note 26, at 733.
exposure of the [CSLI] can convert what would otherwise be a private event into a public one. . . . [CSLI] is private in nature rather than being public.214

However, as previously indicated, “historical CSLI are the provider’s business records, and are not protected by the Fourth Amendment.”215 Because the defendant’s historical CSLI was retained by his cell phone provider within its ordinary course of business, the defendant had no expectation of privacy to those records and consequently his Fourth Amendment rights were not violated.216 Therefore, because the Eleventh Circuit disregarded the third party doctrine in arriving at its decision, it got it wrong when it comes to historical CSLI and the Fourth Amendment.217

V. CONCLUSION

Requiring a warrant each time law enforcement wishes to obtain historical CSLI would hinder the efforts of law enforcement and slow down their ability to investigate crimes.218 While society’s dependence on cell phones continues to grow and the government’s need to solve crimes continuously persists, a uniform standard to obtain historical CSLI needs to be addressed by Congress.219 However, as the Third Circuit articulated, it is not for the courts to decide what standard should be employed to obtain these records, but it is for Congress to decide.220 The Eleventh Circuit failed to follow its sister circuit in this regard.221

As discussed at length, historical CSLI is not protected by the Fourth Amendment.222 The Stored Communications Act223 helps protect citizens and enables law enforcement to efficiently do their job.224 Because a cell phone user does not have a legitimate expectation to privacy to the records voluntarily conveyed to their cell phone provider, the Fourth Amendment is

214. United States v. Davis, 754 F.3d 1205, 1216 (11th Cir.), reh’g granted en banc, 573 F. App’x 925 (11th Cir. 2014).
215. Graham, 846 F. Supp. 2d at 398; see also U.S. CONST. amend IV.
216. Graham, 846 F. Supp. 2d at 398; see also U.S. CONST. amend IV.
217. See Davis, 754 F.3d at 1216–17; Graham, 846 F. Supp. 2d at 398–400.
218. Malone, supra note 26, at 744.
219. Fox, supra note 42, at 792.
220. In re Application of U.S. for an Order Directing a Provider of Elec. Commc’n Serv. to Disclose Records to the Gov’t, 620 F.3d 304, 319 (3d Cir. 2010).
221. Davis, 754 F.3d at 1216–17.
222. See Fox, supra note 42, at 792.
not implicated.\textsuperscript{225} The Eleventh Circuit failed to analyze \textit{Davis} properly and consequently its decision was misguided.\textsuperscript{226}

After the submission of this Comment, the government filed a petition for rehearing en banc.\textsuperscript{227} With a majority of judges agreeing in favor of rehearing, the Eleventh Circuit ultimately vacated the \textit{Davis} decision.\textsuperscript{228}

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\begin{enumerate}
\item \textsuperscript{225} Malone, \textit{supra} note 26, at 745.
\item \textsuperscript{226} \textit{Davis}, 754 F.3d at 1210; \textit{see also} United States v. Graham, 846 F. Supp. 2d 384, 403 (D. Md. 2012); Fraser, \textit{supra} note 57, at 613; Malone, \textit{supra} note 26, at 745.
\item \textsuperscript{227} \textit{See} Davis, 754 F.3d at 1223.
\item \textsuperscript{228} \textit{Id.}
\end{enumerate}
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THE USE OF RESTRAINT AND SECLUSION ON DISABLED STUDENTS IS A VIOLATION OF THEIR PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS

JENNIFER NOUD*

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I. INTRODUCTION

In public and private schools, disabled children are being restrained and secluded against their will. One Florida disabled student was restrained in a hot dog roll, which is when teachers roll the student up in blankets. After the school admitted the teachers had rolled the child up for fun, the parents then realized their child had odd reactions to blankets and towels at home. Another autistic student, who weighs only fifty-two pounds and is in second grade, was restrained and pinned down to the floor repeatedly. His mother said the teachers “bust[ed] his lip, bruis[ed] his torso and arm, and sprain[ed] his neck on different occasions.” When the mother found the bruises, she filed a no-restraint letter with the school, but despite this, the abuse continued. Additionally, another disabled student—who was crying—was restrained in a chair at a public school by a teacher using packing tape. The twenty-one year old teacher taped the five-year-old disabled student to a chair so tightly that he could not move, and then turned the chair upside down. The teacher said he did this as a form of discipline, and would not release the student until he stopped crying. On another

1. See infra Part II.
3. Id.
5. Id.
6. Id.
8. Id.
9. Id.
occasion, another student put the same child into a trashcan, and the teacher pushed him down so he could not get out of the trashcan.\textsuperscript{10} This teacher was arrested for aggravated child abuse.\textsuperscript{11} Another abuse incident transpired when an aide broke a disabled student’s arm at an elementary school.\textsuperscript{12} The school fired the special education aide, who was also a behavioral specialist, for using inappropriate discipline but was not arrested on criminal charges.\textsuperscript{13} This is what occurs daily in our Florida public schools.\textsuperscript{14} Florida and federal statutes do not prohibit the restraining and secluding of disabled students.\textsuperscript{15} Florida and federal statutes ought to limit restraining and secluding disabled students to emergency purposes only.\textsuperscript{16}

This Comment analyzes the problems with the current Florida laws on restraining and secluding disabled children in school.\textsuperscript{17} Part II explains the historical aspects of federal statutes regarding disabled children from 1973 until the present.\textsuperscript{18} Part III examines the history of all past and current federal statutes that have been proposed in both the U.S. House of Representatives and the U.S. Senate from 2009 through 2015.\textsuperscript{19} None of these bills have been enacted yet.\textsuperscript{20} Part IV surveys Florida statutes and regulations concerning disabled students, when school personnel are allowed to restrain or seclude them and how the school personnel are supposed to document and record the incidents.\textsuperscript{21} Part V scrutinizes how schools violate disabled students’ Fourteenth Amendment rights by inflicting corporal punishment on them.\textsuperscript{22} Part V also analyzes disabled students’ procedural due process rights and their substantive due process rights.\textsuperscript{23} Part VI provides recommendations on how to prevent school personnel from restraining and secluding disabled students in school improperly and to only restrain or seclude students if they are an imminent threat to themselves or others around them.\textsuperscript{24}

\begin{itemize}
\item \textsuperscript{10} Id.
\item \textsuperscript{11} Id.
\item \textsuperscript{12} NAT’L ASS’N FOR PREVENTION OF TEACHER ABUSE, supra note 2.
\item \textsuperscript{13} Id.
\item \textsuperscript{14} See infra Part IV.
\item \textsuperscript{15} See infra Parts III–IV.
\item \textsuperscript{16} See infra Part VI.
\item \textsuperscript{17} See infra Parts III–IV.
\item \textsuperscript{18} See infra Part II.
\item \textsuperscript{19} See infra Part III.
\item \textsuperscript{20} See infra Part III.
\item \textsuperscript{21} See infra Part IV.
\item \textsuperscript{22} See infra Part V.
\item \textsuperscript{23} See infra Part V.
\item \textsuperscript{24} See infra Part VI.
\end{itemize}
II. FEDERAL STATUTES REGARDING DISABLED CHILDREN

A. The Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") was passed in 1990 to protect the civil rights of individuals with disabilities. The Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b) (2012); Nat’l Disability Rights Network, School Is Not Supposed to Hurt: The U.S. Department of Education Must Do More to Protect School Children from Restraint and Seclusion 41 (2012), available at www.ndrn.org/images/Documents/Resources/Publications/Reports/School_is_Not_Supposed_to_Hurt_3_v7.pdf. Title II of the ADA specifically prohibits discrimination of individuals with disabilities. 25 The school district falls under Title II Chapter 2.8000 of the ADA as a public service. 27 Congress had to clarify what it intended when it passed the ADA in 2008. 28 In September of 2008, President Barack Obama signed into law the Americans with Disabilities Act Amendments Act of 2008 ("ADA AA"). 29 This law came into effect on January 1, 2009. 30 Congress passed the ADA AA because the Supreme Court of the United States’ decisions interpreted the ADA’s definition of a disability too narrowly. 31 Congress explained that the ADA AA rejects the high burden from the Supreme Court and reiterates Congress’ intent for the scope of the ADA to be broad and inclusive, not narrow. 32 Congress specified that “[i]t is the intent of the legislation to establish a degree of functional limitation required for an impairment to constitute a disability that is consistent with what Congress


30. § 8, 122 Stat. at 3559.


originally intended.” In this amendment, it also broadens the scope of major life activities, and provides a non-exhaustive list of both general activities and bodily functions.

B. Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 (“Section 504”)—now 29 U.S.C. § 794—prohibits any program that receives federal financial assistance to deny a qualified handicapped person benefits, exclude participation, or be subjected to discrimination solely due to the person’s handicap. The ADA AA affects the Rehabilitation Act of 1973 by changing what it means to have a disability. This amendment now broadens the scope of a disability, and students who were denied before based on the narrow definition of disability, might now be able to qualify under the broader definition. Section 504 requires that a free appropriate public education (“FAPE”) be provided to all students that qualify with a disability.

C. Title II of the ADA of 1990

Title II of the ADA of 1990 prohibits discrimination due to a person’s disability. Title II cannot be construed to any lesser standard other than the standards under Section 504 and its implementing regulations. Title II prohibits discrimination by all state and local government services,

36. Disability Discrimination, supra note 34; Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities, supra note 27; see also § 3, 122 Stat. 3555.
37. See § 3, 122 Stat. at 3555; Disability Discrimination, supra note 34.
programs, and activities—which include public schools—regardless of whether the state or local government service receives any federal financial assistance.41

D. History of the Protection and Advocacy System and the National Disability Rights Network

The federally mandated Protection and Advocacy System (“P&A”) program is located in every state in the country.42 The P&A program provides support for people with mental, emotional, intellectual, and physical disabilities.43 The National Disability Rights Network (“NDRN”) is a nonprofit organization for P&A, which allows NDRN to try and make a society that gives disabled individuals equal opportunities, where they can exert their meaningful choices and their autonomy.44 Through legal assistance, legislative advocacy, and training assistance, NDRN hopes to create a better society for disabled individuals.45 However, while these programs are all in place to help disabled individuals, the Office of Special Education Programs (“OSEP”) is directly accountable for administering the implementation of special education laws.46

NDRN published its first report in 2009 on restraint and seclusion in schools and found that, notwithstanding twenty years of allegations of abuse, nineteen states had no laws on restraint and seclusion to protect children in school.47 Florida was one of the states that did not have any laws on restraint


42. NAT’L DISABILITY RIGHTS NETWORK, supra note 25, at 42.

43. Id. at 42–43.

44. Id.

45. Id.

46. Id.

and seclusion in schools in 2009.\textsuperscript{48} The Government Accountability Office ("GAO") then reported that restraint and seclusion laws vary from state-to-state and are very broad in their interpretation.\textsuperscript{49} The Individuals with Disabilities Education Act ("IDEA") requires that students aged three to twenty-one receive education in the least restrictive environment.\textsuperscript{50}

\section*{E. History of the Individuals with Disabilities Education Act}

On November 29, 1975, President Gerald Ford signed the Education for All Handicapped Children Act ("EHA")—also known as Public Law 94-142—into law.\textsuperscript{51} The EHA was passed to help disabled children attend school and to not be discriminated against while in school.\textsuperscript{52} Before the EHA passed in 1970, schools in the United States only educated one in five children who had disabilities.\textsuperscript{53} During this time, most states had laws excluding students who were deaf, blind, emotionally disturbed, or mentally retarded.\textsuperscript{54} The EHA was amended in 1990, and is now called IDEA.\textsuperscript{55} IDEA was passed to specifically protect children with disabilities.\textsuperscript{56}

There are landmark cases furthering educational support for disabled students.\textsuperscript{57} Cases like Pennsylvania Ass’n for Retarded Children v. Pennsylvania\textsuperscript{58} and Mills v. Board of Education of the District of Columbia\textsuperscript{59} recognized that states and local neighborhoods have the

\begin{footnotesize}
\begin{enumerate}
\item[48.] U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 47, at 4 n.4.
\item[49.] Id. at 4.
\item[51.] Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (amended 1990); The Office of Special Education and Rehabilitative Services Celebrates 35 Years of the Individuals with Disabilities Education Act (IDEA), OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERVS., http://www2.ed.gov/about/offices/list/osers/idea35/index.html (last modified June 6, 2012).
\item[52.] History: Twenty-five Years of Progress in Educating Children with Disabilities through IDEA, OFFICE OF SPECIAL EDUC. & REHABILITATIVE SERVS., http://www2.ed.gov/policy/speced/leg/idea/history.pdf (last modified July 19, 2007).
\item[53.] Id.
\item[54.] Id.
\item[55.] 20 U.S.C. § 1400.
\item[56.] History: Twenty-five Years of Progress in Educating Children with Disabilities through IDEA, supra note 52.
\item[57.] Id.
\item[58.] 334 F. Supp. 1257 (E.D. Pa. 1971) (per curiam).
\end{enumerate}
\end{footnotesize}
responsibility to educate children with disabilities.\textsuperscript{60} In \textit{Mills}, the court held that children with disabilities have the right to be educated because the right to an education is protected by the equal protection clause of the Fourteenth Amendment to the U. S. Constitution.\textsuperscript{61}

The United States has made progress to better accommodate disabled children’s basic needs.\textsuperscript{62} Nevertheless, even though disabled students were being accommodated, they were accommodated not so they could go to school, but so they could go to state institutions.\textsuperscript{63} At these state-run institutions, they were provided with minimal food, shelter, and clothes, which is not in itself very accommodating.\textsuperscript{64} The United States finally started making programs for the disabled students and their families.\textsuperscript{65} Through IDEA, children with disabilities now receive FAPE in every state in the United States, which is provided by OSERS.\textsuperscript{66} IDEA and FAPE were a response to the millions of disabled students who were either excluded from being educated, or had limited access to education.\textsuperscript{67}

Now disabled children are able to attend schools, become educated, and become productive members of society, instead of being in state institutions.\textsuperscript{68} With the implementation of IDEA and FAPE, disabled students are now attending high school graduation, going to college, and finding employment.\textsuperscript{69} These implementations are moving this country in the right direction; however, there is still more work to be done.\textsuperscript{70} What these federal laws have tried to implement is a safeguard for disabled

\begin{thebibliography}{9}
\bibitem{60} Id. at 878; \textit{Pa. Ass’n for Retarded Children}, 334 F. Supp. at 1259–60; \textit{History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA}, supra note 52.
\bibitem{61} \textit{Mills}, 348 F. Supp. at 868, 875; see also \textit{History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA}, supra note 52.
\bibitem{62} \textit{History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA}, supra note 52.
\bibitem{63} \textit{History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA}, supra note 52.
\bibitem{64} Id.
\bibitem{65} Id.
\bibitem{66} \textit{The Office of Special Education and Rehabilitative Services Celebrates 35 Years of the Individuals with Disabilities Education Act (IDEA)}, supra note 51.
\bibitem{67} \textit{History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA}, supra note 52; see also \textit{Education for All Handicapped Children Act of 1975}, Pub. L. No. 94-142, § 3(b)(9), (c), 89 Stat. 773, 775 (amended 1990).
\bibitem{68} \textit{History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA}, supra note 51; see also \textit{Education for All Handicapped Children Act of 1975}, § 3(b)(9), (c), 89 Stat. at 775.
\bibitem{69} \textit{History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA}, supra note 52.
\bibitem{70} See id.
\end{thebibliography}
children to attend school and be accommodated. With these laws also came federal training assistance for special education teachers and related specialists. However, all of this training for special education teachers and related specialists fell short because there are hundreds of cases of disabled students being restrained and secluded in Florida schools. When these disabled children are restrained and secluded against their will, although they sometimes may not be hurt physically, they are hurt mentally and emotionally. Some cases have been reported of disabled children who were restrained or secluded, and as a consequence, were physically injured, and in rare cases some children have even died.

IDEA authorizes the federal government to give funds to states for educating disabled children as long as the state complies with the provisions of IDEA. All disabled students are located and evaluated to establish if the child is eligible for special education and related services that the state offers. If a child is accepted for special education, the child’s parents and school personnel develop an Individualized Education Program (“IEP”). An IEP is a document that explains the goals of the student and what services are to be provided to the student. The IEP was created to give the student goals, cater to the student’s unique needs, and provide services throughout the student’s education in order to improve their learning capabilities while

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71. See Education for All Handicapped Children Act of 1975, § 3(c), 89 Stat. at 775; History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA, supra note 52.


73. U.S. Gov’t Accountability Office, supra note 47, at 7–8.

74. Id. at 8.

75. Id.


77. Id.


in school.  With the 2004 reauthorization of IDEA, Congress required the U.S. Department of Education to create model forms for IEP, prior written notice, and procedural safeguards.

F. Guidelines from U. S. Secretary of Education Arne Duncan

On July 31, 2009, U. S. Secretary of Education Arne Duncan sent a letter to all Chief State School Officers and advised each state to review its current policies on restraint and seclusion. In Mr. Duncan’s letter, he advised the Chief State School Officers of a technique that is available called positive behavior interventions and support (“PBIS”). He urged schools to apply the PBIS technique to all students, staff, and all places in school so that eventually restraining and excluding any child would be unnecessary. He also urged schools to start reporting incidents where students were restrained or secluded. Mr. Duncan wanted these reports to be published so other students, administrators, teachers, and parents of children can consent to the procedures and techniques used at a particular school. Furthermore, in 2009, the U.S. Department of Education “asked its regional Comprehensive Centers to collect [every] [s]tate’s statutes, regulations, policies, and guidelines [relating to] the use of restraint and seclusion” in school. This information was then posted on the U.S. Department of Education’s website. Additionally, the Substance Abuse and Mental Health Services Administration (“SAMHSA”)—which is affiliated with the U.S. Department of Health and Human Services—asked the OSEP to look at a paper written by SAMHSA concerning abusive restraints and seclusions in school. The OSEP concluded, after reading the report, that it would benefit everyone at school, but especially students “if information and technical assistance were provided to [s]tate departments of education, local school districts, and preschool, elementary, and secondary schools” to help reduce restraint and

83. Id. at iii, 5, 25.
84. Id. at iii.
85. See id. at 5.
86. Id.
87. U.S. DEP’T OF EDUC., supra note 82, at 5.
88. Id.
89. Id.
The information and technical assistance provided to the schools, instruct schools to use restraint or seclusion only when a student is an immediate, serious, physical danger to himself or others.91

In the GAO report documenting instances of abuse from 1990–2009, most of the instances where children were restrained or secluded were due to "problems with untrained or poorly trained staff."92 The GAO report presented four encompassing themes: (1) disabled children were restrained and secluded when there was no physically aggressive trigger and when their parents did not give consent for those techniques to be used; (2) a disabled child restrained face-down or a restraint that blocks the airway so no air can get to the lungs can make the child die; (3) school personnel were not trained on how to properly restrain and seclude disabled children; and (4) school personnel that were not properly trained on how to restrain and seclude children and have seriously injured or killed them, are still employed as teachers.93

On May 19, 2009, “[t]he GAO report was presented to the U.S. House of Representatives’ Committee on Education and Labor [during] a hearing [regarding] restraint and seclusion."94 During this hearing and other hearings on the same issue, other testimony was also presented, such as disabled students who were abused by being restrained or secluded in school.95 This led to the drafting of the first federal legislation to protect students from being restrained or secluded in school.96

The U.S. Department of Education recognizes that all districts and all states can surpass the fifteen principles framework, but all states are going to be urged strongly to follow these fifteen principles.97 It gives guidelines as to when to use restraint and seclusion, how teachers should be trained, school policies on restraint and seclusion, and documenting restraint and seclusion incidents.98 The fifteen principles exemplify how to reduce or eliminate restraint and seclusion school wide.99 These fifteen principles offer schools appropriate behavior guideline, not only to develop policies on

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90. Id.
91. Id.
95. Id.
96. See id. at 7–8.
97. Id. at 11–12.
98. See id. at 12–13.
restraining and secluding children, but to also ensure the students’ safety as well as the safety of the adults. Mr. Duncan said it best when he correctly stated:

[T]he standard for educators should be the same standard that parents use for their own children. . . . There is a difference between a brief time out in the corner of a classroom to help a child calm down and locking a child in an isolated room for hours. This really comes down to common sense.

III. THERE IS NO FEDERAL STATUTE THAT ADDRESSES RESTRAINT OR SECLUSION OF DISABLED CHILDREN IN SCHOOLS

There is no federal statute prohibiting restraint or seclusion in schools. Only states have guidelines, statutes, and regulations to prohibit types of restraint and seclusion in schools. Congressman George Miller—who was chair of the Education and Labor Committee—introduced a bill called Preventing Harmful Restraint and Seclusion in Schools Act on December 9, 2009. This title was shortened to Keeping All Students Safe Act. It passed in the House on March 3, 2010, but it died in the Senate. The next bill was introduced at the same time as the previous bill on December 9, 2009, but in the Senate by former Senator Christopher Dodd, who was chair of the Subcommittee of Health, Education, Labor, and Pensions Committee; however, it did not pass the Senate. Congressman George Miller introduced the next bill—the Keeping All Students Safe Act—on April 6, 2011, which died in the House. The most recent bill in the Senate on prohibiting restraint and seclusion in schools was introduced by Senator Tom Harkin—current chair of the Health, Education, Labor, and

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100. Id.
101. Id.
103. Id.
105. Id.
106. See id.

https://nsuworks.nova.edu/nlr/vol39/iss2/5
Pensions Committee—on February 24, 2014. This bill is also called Keeping All Students Safe Act, and it has been referred to the committee on Health, Education, Labor, and Pensions. The most recent bill introduced in the House was by Congressmen Bobby Scott and Don Beyer on February 12, 2015—also called Keeping All Students Safe Act—has been referred to the committee on House Education and the Workforce. Curt Decker—NDRN Executive Director—asked, “‘[h]ow many more students dying and being emotionally traumatized are needed for Congress to pass this legislation?’” The Cindy Smith, Policy Counsel at NDRN urges this bill to swiftly pass in the Senate because federal action is needed to ensure that all students and families have adequate protection. ‘The states have had the opportunity to pass legislation, yet the patchwork of state laws is . . . inadequate. A parent should know if they move from one state to another that they will be notified if their child is restrained or secluded, yet less than half the states require parents of all students to be notified.’

Restraining and secluding children in mental health facilities are prohibited because they realize the danger. Researchers have concluded that restraining and secluding disabled students in school has no therapeutic effect, and conversely it increases the student’s agitation and disruptive behavior.

IV. FLORIDA RESTRAINT AND SECLUSION LAWS

In Florida, a teacher’s assistant at Coral Gables Elementary School taped five first graders’ arms to their laps, bound their ankles together, taped

110. Id.
113. Id.
their heads to the blackboard, and taped the chairs they sat in to the blackboard.\textsuperscript{116} These children were only six years old.\textsuperscript{117} The teacher’s assistant was arrested eight times for various felonies, and the school stated it did not allow corporal punishment.\textsuperscript{118} Many children have died, have become severely injured, physically or mentally, and have experienced trauma from techniques like restraint and seclusion.\textsuperscript{119} Another boy in kindergarten was restrained three times in less than one month in his U.S. Cerebral Palsy School in Orange County.\textsuperscript{120} One of those times, he was restrained and held face down for forty-five minutes, and the school did not have the parents’ consent to restrain their child.\textsuperscript{121} A parent said there could be harmful consequences every time a disabled child is restrained.\textsuperscript{122} From this incident the boy developed “post-traumatic stress disorder, epilepsy and autism-spectrum behaviors.”\textsuperscript{123} Now seven, the boy is still hurt from his experience of being restrained for non-aggressive behavior, and cries for no reason.\textsuperscript{124} His father said “[i]t damage[d] [his son’s] core belief that [he is] safe” in school.\textsuperscript{125} Another case involved a Florida teen that had post-traumatic stress disorder from being dangerously restrained and repeatedly secluded, and as a result the boy had to be admitted to a psychiatric facility.\textsuperscript{126} The court did not find the school’s acts to be excessive, egregious or a shock to the conscience, even when the school did not have parental consent to physically restrain or seclude the child.\textsuperscript{127}

\textsuperscript{116} Mulay, \textit{supra} note 47, at 325–26; Jean-Paul Renaud, \textit{Teacher, Aide Arrested on Child-Abuse Charges—First-Grade Students Say They Were Tied up for Misbehaving}, SUN SENTINEL, Oct. 10, 2003, at 1B.

\textsuperscript{117} Renaud, \textit{supra} note 116.

\textsuperscript{118} \textit{Id}.

\textsuperscript{119} See NAT’L DISABILITY RIGHTS NETWORK, \textit{supra} note 25, at 9.


\textsuperscript{121} \textit{Id}.

\textsuperscript{122} \textit{Id}.

\textsuperscript{123} \textit{Id}.

\textsuperscript{124} \textit{Id}.

\textsuperscript{125} Roth, \textit{supra} note 120.

\textsuperscript{126} STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, AND PENSIONS, 113TH CONG., REP. ON DANGEROUS USE OF SECLUSION AND RESTRAINTS IN SCHOOLS REMAINS WIDESPREAD AND DIFFICULT TO REMEDY: A REVIEW OF TEN CASES 4 (Comm. Print 2014) [hereinafter STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, AND PENSIONS, 113TH CONG.].

\textsuperscript{127} \textit{Id}. at 19.
A. Child with a Disability Definition

[A] child with a disability—in general—means a child—

(i) with intellectual disabilities, hearing impairments—including deafness—speech or language impairments, visual impairments—including blindness—serious emotional disturbance, referred to in this chapter as emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

The term child with a disability for a child aged [three] through [nine]—or any subset of that age range, including ages [three] through [five]—may, at the discretion of the State and the local educational agency, include a child—

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in [one] or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and

(ii) who, by reason thereof, needs special education and related services.128

B. Florida Restraint Regulations

The Department’s Office for Civil Rights (“OCR”) started researching and collecting data on how many times restraint and seclusion occurred in schools in 2009.129 The OCR did this research as part of the Department’s 2009 to 2010 Civil Rights Data Collection (“CRDC”).130 For this study, the OCR and the CRDC had to come up with definitions for restraint and seclusion because they had not yet been defined by federal statute.131 Today, the Florida statutes and the Florida Administrative Code

130. Id.
131. See id. at 7, 10. But see FLA. STAT. § 393.063(32)–(33) (2014).
provide definitions and regulations on reactive strategies such as restraint and seclusion.\textsuperscript{132} The most common type of restraint used in school on disabled students is physical or mechanical restraint.\textsuperscript{133}

Florida Statute section 393.063(32) defines restraint as “a physical device, method, or drug used to control dangerous behavior.”\textsuperscript{134} Section 393.063 of the Florida Statutes defines physical or manual restraint as “any manual method or physical or mechanical device, material, or equipment attached or adjacent to an individual’s body so that he or she cannot easily remove the restraint and which restricts freedom of movement or normal access to one’s body.”\textsuperscript{135} The Florida Administrative Code adds to this statute by including specific time periods and defining what physical restraint does not include.\textsuperscript{136} The Florida Administrative Code provides that manual restraint is when a person uses his hands or body to physically immobilize a person’s freedom of movement or normal access to his or her body for more than fifteen continuous seconds. It does not include physically guiding a client during transport or skill training for up to two minutes. Repeated applications and releases of manual restraint in order to circumvent the fifteen-second and two-minute criteria are prohibited.\textsuperscript{137}

The term mechanical restraint is defined as “a physical device used to restrict an individual’s movement or restrict the normal function of the individual’s body.”\textsuperscript{138} “This term does not include devices [that are] implemented by trained school personnel or [used] by a student” that has a medical or service need that has been prescribed by a doctor or related services professional, and the student is using it for its appropriate purpose.\textsuperscript{139} Some of these approved mechanical restraint devices are devices that support a student’s spine so the student can sit up straight, have more

\textsuperscript{132}. E.g., FLA. STAT. § 393.063(32)–(33); FLA. ADMIN. CODE ANN. r. 65G-8.001 (2014). “Reactive strategies means . . . procedures or physical crisis management techniques of seclusion or manual, mechanical, or chemical restraint utilized for control of behaviors that create an emergency or crisis situation.” FLA. ADMIN. CODE ANN. r. 65G-8.001(15).


\textsuperscript{134}. FLA. STAT. § 393.063(32).

\textsuperscript{135}. Id. § 393.063(32)(a).

\textsuperscript{136}. See FLA. ADMIN. CODE ANN. r. 65G-8.001(12), (17).

\textsuperscript{137}. Id. r. 65G-8.001(12).

\textsuperscript{138}. Id. r. 65G-8.001(13).

\textsuperscript{139}. U.S. DEP’T OF EDUC., supra note 82, at 10; see also FLA. STAT. § 393.063(32)(b)–(c); FLA. ADMIN. CODE ANN. r. 65G-8.001(13).
mobility, and improve their balance. These devices are approved because the student would not be able to do any of these things without the support from mechanical restraints. Most often, mechanical restraints are “straps, handcuffs or bungee cords.” Other mechanical restraints that are allowed are mechanical safety restraints used for transportation purposes, mechanical restraints used for medical immobilization, and orthopedically prescribed restraint devices that allow a student to participate in activities without causing harm to himself. A student who is being mechanically restrained must be allowed to move for a minimum of ten minutes for every hour that the student is restrained.

Chemical restraint is using medication to control and alter a disabled student’s behavior immediately. Chemical restraint is only allowed when there is written authorization from “an authorized physician who has [established] that the chemical [medication] is the least restrictive, most appropriate alternative available.” The authorizing physician must be present or must be on the telephone when a trained and authorized staff person examines the disabled child. If a disabled child is restrained, an authorized, certified, and trained staff member must observe the student during the restraint to monitor heart rate and determine when the release criteria have been reached. Every effort must be made before using any type of restraint on a student. Restraint used for a period of more than one hour on a disabled student “require[s] approval by an authoriz[ed] agent”; if it exceeds two hours, then the teacher needs to visually examine the student and receive re-approval from the authorized agent.

141. See U.S. Dep’t of Educ., supra note 82, at 10.
142. Vogell, supra note 133.
145. Id. r. 65G-8.001(5), .008(1).
146. Id. r. 65G-8.008(2).
147. Id. r. 65G-8.008(3).
148. Id. r. 65G-8.005(3), .007(3); .008(3). A staff member or school personal authorized to use mechanical restraint must be a Certified Behavior Analyst certified by the Behavior Analyst Certification Board [R], Inc.; a behavior analyst certified by the Agency pursuant to [s]ection 393.17 [of the Florida Statutes], and by Rule 65G-4.003 [of the Florida Administrative Code]; a physician licensed under [c]hapter 458 or 459 [of the Florida Statutes]; a psychologist licensed under [c]hapter 490 [of the Florida Statutes]; or a clinical social worker, marriage and family therapist, or mental health counselor licensed under [c]hapter 491 [of the Florida Statutes].
149. Id. r. 65G-8.007(1).
150. Id. r. 65G-8.007(4)–(5).
The following restraints are prohibited from use:

1. Reactive strategies involving noxious or painful stimuli, as prohibited by [s]ection 393.13(4)(g), [of the Florida Statutes];

2. Untested or experimental procedures;

3. Any physical crisis management technique that might restrict or obstruct an individual’s airway or impair breathing, including techniques whereby staff persons use their hands or body to place pressure on the client’s head, neck, back, chest, abdomen, or joints;

4. Restraint of an individual’s hands, with or without a mechanical device, behind his or her back;

5. Physical holds relying on the inducement of pain for behavioral control;

6. Movement, hyperextension, or twisting of body parts;

7. Any maneuver that causes a loss of balance without physical support—such as tripping or pushing—for the purpose of containment;

8. Any reactive strategy in which a pillow, blanket, or other item is used to cover the individual’s face as part of the restraint process;

9. Any reactive strategy that may exacerbate a known medical or physical condition, or endanger the individual’s life;

10. Use of any containment technique medically contraindicated for an individual;

11. Containment without continuous monitoring and documentation of vital signs and status with respect to release criteria . . . .

C. Florida Seclusion Regulations

Most people equate secluding a disabled child with putting the child in a time out period. However, the Florida Administrative Code explicitly

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151. Id. r. 65G-8.009(1)–(11).
provides seclusion is not a time out. 153 If a teacher puts a disabled student in time out and it exceeds the duration of twenty consecutive minutes, the time out has now been converted into a reactive strategy of seclusion. 154 Seclusion is defined as “involuntary isolation of a person in a room or area from which the person is prevented from leaving.” 155 There must be an authorized and trained staff member present to approve the school personnel’s action to seclude the student. 156 Any room where the disabled student is going to be secluded must have adequate lighting and ventilation to allow the student to breathe at a normal pace. 157 The room must also have enough space for the student to lie down comfortably. 158 The door to the room must be unlocked when the student is secluded without being monitored by a staff member. 159 “[T]he door can be held shut by a staff person using a spring bolt, magnetic hold, or other mechanism” that enables the student to leave the room if the teacher leaves the locale. 160 Before a teacher uses seclusion, all other options must have been used, and there must be a threat of imminent danger to the student or to others. 161 Use of a reactive strategy must be continuously monitored, be the least possible restriction for its use, and end when the emergency ends. 162 If the seclusion lasts for more than one hour, it needs to be approved by an authorized agent; if it lasts more than two hours, then the teacher must observe the student before seeking re-approval. 163

153. Fla. Admin. Code Ann. r. 65G-8.001(16). Time out is very short and can only last from one minute to twenty consecutive minutes. Id. r. 65G-8.001(17)(a).
154. Id. r. 65G-8.001(17); see also supra note 132 and accompanying text.
156. See Fla. Admin. Code Ann. r. 65G-8.005(3)(d)–(e). The authorized staff member must have at a minimum:
[A] bachelor’s degree, two years of experience serving individuals with developmental disabilities, and be certified in reactive strategies through an Agency-approved emergency procedure curriculum; and [t]he authorizing agent or staff person with approval authority for manual restraint must be certified in reactive strategies through an Agency-approved emergency procedure curriculum.

Id.
157. Id. r. 65G-8.007(8).
158. Id.
159. Id. r. 65G-8.007(9).
161. See id. r. 65G-8.001(15), .006(1)–(2).
162. Id. r. 65G-8.006(4)–(6).
163. Id. r. 65G-8.007(4)–(5).
D. Florida Statutes and Regulations That Are Supposed to Protect Students from Restraint and Seclusion

Florida labels children with disability as exceptional students because they are eligible for special programs and services approved by the Board of Education. Special education services are defined as designed instruction and services, which are necessary for exceptional students to benefit from their education. Some special services that may be included for exceptional students are: transportation, physical therapy, aide for the blind, braillists, counseling, speech therapy, assistive technology devices, and mental health services. Reactive strategies, such as types of restraint and seclusion, must neither be implemented robotically—as soon as a teacher sees or punishes undesirable behavior—nor for the convenience of school personnel. The restraint and seclusion must stop when the emergency ends. For a teacher to become a special education teacher, the teacher must: (1) have received certification of a special education teacher or passed a Florida special education teacher license exam; (2) have not had a special education certification or license be waived for any basis; and (3) have at least a bachelor’s degree.

To provide meaningful protection against restraint or seclusion for disabled students, a state can either: (1) “provide[] multiple protections against restraint or seclusion for students”; or (2) “ha[ve] few protections but strictly limit[] the technique to emergency threats of physical harm. This designation does not necessarily mean that a state’s laws provide sufficient protection . . . .” The State of Florida has statutes that prohibit restraint or seclusion when the student’s breathing is compromised, but it does not limit it to emergency situations only.

165. Id. § 1003.01(3)(b).
166. Id. Special services can include:
[T]ransportation; diagnostic and evaluation services; social services; physical and occupational therapy; speech and language pathology services; job placement; orientation and mobility training; braillists, typists, and readers for the blind; interpreters and auditory amplification; services provided by a certified listening and spoken language specialist; rehabilitation counseling; transition services; mental health services; guidance and career counseling; specified materials, assistive technology devices, and other specialized equipment; and other such services as approved by rules of the state board.
170. Butler, supra note 47, at 12 n.33.
171. Id. at 14 n.35; see also Fla. Stat. § 1003.573(4).
Florida Statute, section 393.13, provides that a disabled person has a right to be free from harm.\textsuperscript{172} This includes any “unnecessary physical, chemical, or mechanical restraint, isolation . . . abuse, [and] neglect.”\textsuperscript{173} This statute also provides that discriminating against disabled children and excluding disabled children from any program or activity that is publicly funded is prohibited.\textsuperscript{174}

Florida Statute, section 1003.57, defines five options disabled students have for a classroom environment in school.\textsuperscript{175} The first option is learning in a regular classroom where the disabled student spends eighty percent or more of his time learning with non-disabled students during the week.\textsuperscript{176} The second option is in a resource room where the disabled student spends “[forty] to [eighty] percent of the school week with non-disabled” students.\textsuperscript{177} The third option is in a separate class where the disabled student “spends less than [forty] percent of the school week with non-disabled” students.\textsuperscript{178} The fourth option is a separate environment which is where the disabled student is sent to a “separate private school, residential facility, or hospital or homebound program.”\textsuperscript{179} The last option is an “[e]xceptional student education center or special day school,” where the disabled student attends “a separate public school to which non-disabled peers do not have access.”\textsuperscript{180} When making the IEP, after the student is found eligible to receive an exceptional student education (“ESE”), all of these options should be discussed with the parents and student.\textsuperscript{181} The statute also requires the school district to communicate to the parents what services are available and appropriate for the student.\textsuperscript{182} At the IEP meeting, the school district must disclose how much money it receives from the state for ESE support levels for a full time student.\textsuperscript{183} The school district must also approve the student’s IEP if it can be implemented at the student’s current school, or deny the IEP when it cannot be implemented at the student’s current school.\textsuperscript{184}

Florida almost made it to the weak category of states on laws protecting children, but it is now in the bottom of the states that provide

\begin{itemize}
  \item \textsuperscript{172} FLA. STAT. § 393.13(3)(g).
  \item \textsuperscript{173} Id.
  \item \textsuperscript{174} Id. § 393.13(3)(i).
  \item \textsuperscript{175} Id. § 1003.57(1)(a).
  \item \textsuperscript{176} Id. § 1003.57(1)(a)(1)(c).
  \item \textsuperscript{177} FLA. STAT. § 1003.57(1)(a)(1)(d).
  \item \textsuperscript{178} Id. § 1003.57(1)(a)(1)(e).
  \item \textsuperscript{179} Id. § 1003.57(1)(a)(1)(b).
  \item \textsuperscript{180} Id. § 1003.57(1)(1)(a).
  \item \textsuperscript{181} See id. § 1003.57.
  \item \textsuperscript{182} FLA. STAT. § 1003.57(1)(g).
  \item \textsuperscript{183} Id. § 1003.57(1)(j).
  \item \textsuperscript{184} Id. § 1003.57(3)(c).
\end{itemize}
Florida did not make it in the weak category of state laws on protecting children because of its strong data collection on abuse instances. Florida monitors all of its schools by district to make sure the schools are complying with state laws, and then publishes the findings on the Department of Education’s website.

1. Florida’s Monitoring and Reporting Systems

Florida’s strong monitoring system is due to the 2010 Florida Legislature passing House Bill 1073 which created section 1003.573 of the Florida Statutes. The statute, titled Restraint and Seclusion on Students with Disabilities, directly focuses on the problem of restraining and excluding disabled children, even though there are schools where nondisabled children are secluded and restrained. Nevertheless, two years after this statute was implemented, Florida still had problems with monitoring and reporting. From 2011 to 2012, one set of data from the Florida Department of Education stated there were four times as many students who were secluded in rooms “than a second set of data [called] the School Environmental Safety Incident Report (“SESIR”).” Some districts only view SESIR as a place to report disciplinary incidents and not restraint and seclusion incidents. Cheryl Elters, a representative for the Florida Department of Education, stated that school district personnel do not realize they need to record restraint and seclusion data in two places. The disconnect comes from how restraint and seclusion are used in schools because most of these techniques are used on disabled children. Teachers use restraint and seclusion on disabled children and view it not as a disciplinary action for a behavior, but they view it as a safety precaution.

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186. Id. at 12–13, 92.
187. Id. at 13, 91; see also, e.g., FLA. DEP’T OF EDUC., 2013-14 EXCEPTIONAL STUDENT EDUCATION MONITORING AND ASSISTANCE ON-SITE VISIT REPORT FOR SEMINOLE COUNTY SCHOOL DISTRICT 1 (2014), http://www.fldoe.org/core/fileparse.php/7673/urlt/1314OSSeminole.pdf.
188. FLA. STAT. § 1003.573 (2014); H.R. 1073, Reg. Sess., at 1 (Fla. 2010).
189. FLA. STAT. § 1003.573; see also BUTLER, supra note 47, at 10.
191. Id.
192. Id.
193. Id.
194. Id.
195. Gonzalez & O’Connor, supra note 190.
Teachers use restraint and seclusion when disabled students exhibit dangerous behaviors that can cause a danger to themselves or others. Teachers also use restraint or seclusion as a disciplinary action to break up a school fight. This is why there is a discrepancy in both sets of data. Even with these two sets of data, we still do not know the amount of disabled children restrained and secluded—one reason is because school personnel do not report to both data collections, and the other reason is because it occurs in the classroom where it is most likely not going to be reported. Monitoring restraint and seclusion on disabled students should occur at the “classroom, building, district, and state levels.”

The research collected from all Florida school districts is available on the Disability Rights Florida website, and when you find a report, it links to the Florida Department of Education website for the charts. In 2012, there were only nine Florida counties that were authorized to use mechanical restraint. From August 1, 2011 through June 30, 2012, there were a total of 9712 incidents of restraint, and there were 4347 disabled students. Forty-six percent of all disabled students restrained were in pre-kindergarten through third grade. The students were restrained on average for eleven minutes; forty-five percent of students restrained were white and eighty-four percent were male. From August 1, 2011 through June 30, 2012, there were a total of 4193 incidents of seclusion, and there were 1435 disabled students. Forty-two percent of these children that were secluded were in pre-kindergarten through third grade, and forty-three percent that

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196. Id.
197. Id.
198. See id.
199. Id.
203. Restraint and Seclusion—County by County, supra note 201. The nine counties that were authorized to use mechanical restraint in 2012 were: Alachua, Hillsborough, Levy, Madison, Manatee, Marion, Pinellas, Orange, and Santa Rosa. Id.
205. Id.
206. Id.
207. Id.
were secluded were in fourth grade through eighth grade.\textsuperscript{208} The students were secluded on average for twenty minutes; forty-five percent of the students secluded were black and eighty-three percent were male.\textsuperscript{209}

From August 1, 2012 through June 30, 2013, there were a total of 9218 incidents of restraint, and there were 4000 students with disabilities.\textsuperscript{210} Forty-nine percent of the restrained students were in pre-kindergarten through third grade.\textsuperscript{211} From August 1, 2012 through June 30, 2013, there were a total of 2913 incidents of seclusion, and there were 1145 students with disabilities.\textsuperscript{212} Forty-seven percent of these students were in fourth grade through eighth grade.\textsuperscript{213}

From August 1, 2013 through June 30, 2014, there were a total of 8895 incidents of restraint, and there were 3461 students with disabilities.\textsuperscript{214} Forty-eight percent of disabled students restrained were in pre-kindergarten through third grade.\textsuperscript{215} From August 1, 2013 through June 30, 2014, there were a total of 2264 incidents of seclusion, and there were 882 students with disabilities.\textsuperscript{216} Forty-four percent of seclusion incidents occurred with students from fourth to eighth grade.\textsuperscript{217}

One example of how school districts are changing due to the reporting of restraint and seclusion of disabled children is Orange County.\textsuperscript{218} Orange County eliminated seclusion of disabled students in 2012.\textsuperscript{219} Orange County schools still restrain the most students.\textsuperscript{220} “Restraint and seclusion are totally out of control,” says one parent of a disabled child.\textsuperscript{221} She says, “children . . . us[e] behaviors to communicate,” and school teachers “need to understand that.”\textsuperscript{222} The guideline from the U. S. Secretary of Education, Mr. Arne Duncan, says restraint and seclusion should never be used as

\begin{thebibliography}{99}
\bibitem{208} Id.
\bibitem{209} BUREAU OF EXCEPTIONAL EDUC. & STUDENT SERVS., supra note 204.
\bibitem{211} Id.
\bibitem{212} Id.
\bibitem{213} Id.
\bibitem{214} BUREAU OF EXCEPTIONAL EDUC. & STUDENT SERVS., supra note 202.
\bibitem{215} Id.
\bibitem{216} Id.
\bibitem{217} Id.
\bibitem{218} See Roth, supra note 120.
\bibitem{219} STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, & PENSIONS, 113TH CONG., supra note 126, at 21; Roth, supra note 120.
\bibitem{220} Roth, supra note 120.
\bibitem{221} Id.
\bibitem{222} Id.
\end{thebibliography}
punishment or discipline.\textsuperscript{223} This guideline is also in compliance with Florida Administrative Code chapter 65G-8.006, section 2.\textsuperscript{224} The guidelines state wrap mats should never be used as a mechanical restraint.\textsuperscript{225} In Orange County, Florida, schools still use wrap mats to strap disabled students lying flat against a board.\textsuperscript{226} Anna Diaz, head of a special education service in Orange County, Florida, said restraining a disabled student should only be used when the student is in imminent danger of hurting himself or others.\textsuperscript{227} This statement is in accord with the guidelines, but saying it and doing it by implementing and overseeing that those guidelines are being followed, are two different things.\textsuperscript{228}

Every school in Florida must have a policy that discusses restraint and seclusion of students.\textsuperscript{229} These policies must follow chapter 65G-8.003 of the Florida Administrative Code.\textsuperscript{230} These policies must also include the district’s plan to reduce or eliminate restraint and seclusion, which may include additional training in positive behavioral support and crisis management, parental involvement, and more student evaluation.\textsuperscript{231} With the passage of this law, Florida school districts and school personnel are banned from using any mechanical or physical “restraint that restricts a student’s breathing.”\textsuperscript{232} Florida schools and school personnel are also prohibited from “clos[ing], lock[ing], or physically block[ing] a student in a room that is unlit and does not meet the rules of the State Fire Marshal for seclusion time-out rooms.”\textsuperscript{233}

2. Documentation Requirement

Florida Statutes, section 1003.573 makes it a requirement that every incident of restraint or seclusion be documented and reported within twenty-four hours.\textsuperscript{234} This report must contain the following items:

\begin{itemize}
  \item \textsuperscript{223} Id.
  \item \textsuperscript{224} Fla. Admin. Code Ann. r. 65G-8.006(2) (2014).
  \item \textsuperscript{225} Roth, supra note 120.
  \item \textsuperscript{226} Id.
  \item \textsuperscript{227} Id.
  \item \textsuperscript{228} See id.
  \item \textsuperscript{229} Fla. Stat. § 1003.573(3)(a) (2014); Seclusion in Developmental Disability Facilities, supra note 152.
  \item \textsuperscript{231} Fla. Stat. § 1003.573(3)(a)(6)(a)–(b), (e); see Fla. Admin. Code Ann. r. 65G-8.003(1).
  \item \textsuperscript{232} Fla. Stat. § 1003.573(4); Fla. Admin. Code Ann. r. 65G-8.009(3).
  \item \textsuperscript{233} Fla. Stat. § 1003.573(5); see also Fla. Admin. Code Ann. r. 69A-58.0084(1)–(5) (2014).
  \item \textsuperscript{234} Fla. Stat. § 1003.573(1)(a).
\end{itemize}
1. The name of the student restrained or secluded.

2. The age, grade, ethnicity, and disability of the student restrained or secluded.

3. The date and time of the event and the duration of the restraint or seclusion.

4. The location at which the restraint or seclusion occurred.

5. A description of the type of restraint used in terms established by the Department of Education.

6. The name of the person using or assisting in the restraint or seclusion of the student.

7. The name of any nonstudent who was present to witness the restraint or seclusion.

8. A description of the incident, including:
   a. The context in which the restraint or seclusion occurred.
   b. The student’s behavior leading up to and precipitating the decision to use manual or physical restraint or seclusion, including an indication as to why there was an imminent risk of serious injury or death to the student or others.
   c. The specific positive behavioral strategies used to prevent and deescalate the behavior.
   d. What occurred with the student immediately after the termination of the restraint or seclusion.
   e. Any injuries, visible marks, or possible medical emergencies that may have occurred during the restraint or seclusion, documented according to district policies.
   f. Evidence of steps taken to notify the student’s parent or guardian. 235

This statute provides that a restraint or seclusion incident report should include: Everything about the child, the child’s disability, the reason the teacher used restraint or seclusion, and what the teacher did to prevent the situation from escalating to having to use restraint or seclusion. 236

235. Id. § 1003.573(1)(b).
236. Id.
Implied by this statute is that physical restraint or seclusion must be used only if there is “an imminent risk of serious injury or death to the student or others.” Nevertheless, this requirement is implicit in an incident report, and it is not specifically provided as a requirement before a teacher can restrain or seclude a disabled student. It can be interpreted that restraint and seclusion can be used for any reason, and there does not need to be any threat of serious bodily injury or harm before restraint or seclusion can be used on the student.

Documentation of the abuse should be given to the “school principal, the district director of [ESE], and the bureau chief of the Bureau of Exceptional Education and Student Services electronically each month that the school is in session.” This data should be reported to the Florida Department of Education so it can analyze the data and figure out what methods were most used and by what county. Parents or students can also fill out a complaint form online about an incident that occurred at school, and OCR will investigate it.

Nevertheless, even with all these laws on documenting these abusive incidents, a Florida disabled teen was continuously restrained using the dangerous technique of prone restraint, and most of the documents were either incomplete or missing. Prone restraint is when the student is forced to put his face down for a period of time. Florida once banned school personnel from using prone restraint techniques; however, that restriction was later removed by legislators. This student was restrained at least eighty-nine times over a fourteen-month period, which included twenty-seven prone restraints. This student could not tell his parents because his disability interfered with his ability to communicate. His parents discovered the abuse that had occurred in school when the student’s

237. See id. § 1003.573(1)(b)(8)(b).
238. BUTLER, supra note 47, at 25–26 n.53.
240. FLA. STAT. § 1003.573(2)(b).
241. See id. § 1003.573(2)(c).
243. STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, & PENSIONS, 113TH CONG., supra note 126, at 19.
244. Mulay, supra note 47, at 330.
245. Id. at 331, 332 & n.40.
246. STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, & PENSIONS, 113TH CONG., supra note 126, at 17.
247. Id. at 19.
“outbursts became so debilitating that he had to be removed from the school.”248 When his parents requested the logs the school used to document restraint and seclusion, the “logs were incomplete or missing.”249 The parent’s attorney believed that without all of the documentation completely filled out—and the logs that were missing—“it was impossible to substantiate the parents’ claims that the school had been indifferent to their child’s suffering.”250 In this case, the disabled student had to be put into a psychiatric facility as a direct result from the harm he suffered when teachers put him in repeated restraint and seclusion.251 The court did not find the school’s actions to be excessive, egregious, or a shock to the conscious because the court “do[es] not take . . . psychological trauma [evidence] as seriously as . . . physical injury” evidence.252

V. CORPORAL PUNISHMENT IN SCHOOLS VIOLATES DISABLED STUDENTS’ CONSTITUTIONAL RIGHTS TO BE FREE FROM EXCESSIVE CORPORAL PUNISHMENT AND DISCRIMINATED AGAINST SOLELY DUE TO THEIR DISABILITIES

A. Procedural Due Process

A child with a disability should never be restrained or secluded in school unless it is for the safety of others or for the child’s safety.253 Corporal punishment on disabled students will not give rise to the procedural due process rights in the U.S. Constitution, unless the corporal punishment is for disciplinary reasons, and it does not violate the common law privilege of teachers being able to use reasonable force—but not excessive force—to educate and discipline a child.254 Public and private schools use restraint and seclusion methods to try to control disabled students.255

The Fourteenth Amendment to the U.S. Constitution states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or
enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. 256

This means that public schools and its representatives—like teachers, aides, and specialists—cannot deprive any disabled child of his life or liberty without the due process of the law. 257 The Fourteenth Amendment further implies that disabled children must have equal protection of the laws of the United States, and no person can deprive them of the rights that they are entitled to by being citizens of the United States. 258 No state can “deprive [a] person of life, liberty, or property [interest] without [the] due process of law.” 259 The Supreme Court of the United States has rejected the argument that any grave loss upon a person from the state is a violation of the Fourteenth Amendment. 260 For there to be a violation of the Fourteenth Amendment, the Court looks toward the nature of the interest at issue. 261

The test to determine if the Fourteenth Amendment is applicable is: (1) whether the individual’s interest is an interest within the Fourteenth Amendment’s life, liberty, or property interests; and (2) if the Fourteenth Amendment life, liberty, or property interests are implemented, what process of law is due. 262

The liberty interest of the Fourteenth Amendment “encompass[es] freedom from bodily restraint and punishment.” 263 The State cannot physically punish a person unless the punishment is in agreement with due process of law. 264

In Ingraham v. Wright, 265 the Supreme Court held that corporal punishment in public schools is associated with the constitutionally protected liberty interest of the Fourteenth Amendment. 266 This is because when a school official, acting under color of state law, punishes a child for behavior by restraining the child and physically hurting the child, the liberty interest of

257. See id.
258. See id.
259. Id.
261. Id.
262. Id.
263. Id. at 673–74.
264. Id. at 674.
266. Id. at 674.
the Fourteenth Amendment is implicated. 267 But it “held that the traditional common law remedies [were] adequate to afford due process” of law. 268

The Supreme Court has held that corporal punishment restraining the child’s freedom of movement violates the Fourteenth Amendment. 269 The first step of the test is satisfied when Florida special education teachers, acting under color of state law, inflict corporal punishment on disabled students in public school by forcibly restraining them against their will. 270

The next step is to determine what process of law is due. 271 To determine what process is due, the Supreme Court applies the Mathews v. Eldridge 272 three-part test:

(1) [what is] the private interest that will be affected . . . ; (2) the risk of an erroneous deprivation of such interest . . . and the probable value, if any, of additional or substitute procedural safeguards; and . . . (3) the [state] interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 273

The Supreme Court has repeatedly stated that when a state actor inflict corporal punishment on a child in school by restraining the child that involves serious physical pain, it implicates the liberty interest of the Fourteenth Amendment. 274 The importance of the liberty interest is freedom of movement, and it can be argued that it is not only the liberty interest at stake, but the life interest is also implicated if the student restrained is restrained too long or improperly. 275 This is because when a school actor restrains a child and inflicts excessive corporal punishment the child could die, and there have been cases reported where children have died from excessive corporal punishment. 276

In Goss v. Lopez, 277 the Court held that “a student must be given [notice and] an . . . opportunity to be heard [at an informal hearing] before

267. Id.
268. Id. at 672.
269. Id. at 674.
270. Ingraham, 430 U.S. at 674 (holding that any corporal punishment inflicted on a student in public school by a state actor implicates the Fourteenth Amendment liberty interest).
271. Id.
273. Id. at 335.
274. Ingraham, 430 U.S. at 674, 676; see also U.S. CONST. amend XIV.
275. See Ingraham, 430 U.S. at 673–74.
276. See U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 47, at 8–11.
[the student] is . . . suspended from public school.” 278 At the very least, the minimum due process requirements that are due when a state actor arbitrarily deprives a person of a liberty interest are notice and an opportunity to be heard. 279 The suggestion from Goss and Ingraham for procedural due process purposes is that, for a student to be suspended ten days or more, the school must give the student notice and an opportunity to be heard. 280 Nevertheless, for a school official to inflict serious pain and corporal punishment on a student there is no requirement for notice or an opportunity to be heard. 281

The Ingraham Court distinguished Goss by stating:

Unlike Goss . . . , this case does not involve the state-created property interest in public education. The purpose of corporal punishment is to correct a child’s behavior without interrupting his education. That corporal punishment may, in a rare case, have the unintended effect of temporarily removing a child from school affords no basis for concluding that the practice itself deprives students of property protected by the Fourteenth Amendment.

Nor does this case involve any state-created interest in liberty going beyond the Fourteenth Amendment’s protection of freedom from bodily restraint and corporal punishment. 282

The Ingraham Court held that the United States allows reasonable corporal punishment as long as it is not excessive. 283 This demonstrates that a balance must be struck between the state’s interest of furthering education—which sometimes requires reasonable corporal punishment—and the student’s interest of personal security and freedom of movement. 284 The Court stated the prevalent rule, which is that teachers and administrators can exert a reasonable amount of force for what they “reasonably believe[] to be [required] for [the student’s] proper control, training, or education.” 285

The next part of the test is: What procedural safeguards are due? 286 Florida has procedural safeguards in place if a student is punished by a

278. Ingraham, 430 U.S. at 692 (White, J., dissenting); Goss, 419 U.S. at 581.
279. Goss, 419 U.S. at 579.
280. Ingraham, 430 U.S. at 682; Goss, 419 U.S. at 579.
281. See Ingraham, 430 U.S at 659 n.12; Goss, 419 U.S. at 579.
282. Ingraham, 430 U.S. at 674 n.43 (citation omitted) (citing Goss, 419 U.S. at 565).
283. Id. at 676.
284. Id.
285. Id. at 661.
286. Id. at 674.
school teacher, and later it was found that the school teacher’s use of corporal punishment was not reasonable but excessive.\textsuperscript{287} In such a case, tort and penal law provides a procedural safeguard and an adequate remedy.\textsuperscript{288} For more severe types of abuse cases than paddling a student, there are procedural safeguards in civil and criminal law when taken into consideration with the openness of the school environment.\textsuperscript{289}

In \textit{Ingraham}, the uncontradicted evidence showed that a student was paddled by a teacher and that such corporal punishment—and the pain associated with it—in Dade County public schools was rare with the exception of a few cases.\textsuperscript{290} Furthermore, paddling is normally inflicted in response to direct conduct of the student, and there are usually other teachers present.\textsuperscript{291} Thus, the risk that a teacher will paddle a student “without cause is typically insignificant.”\textsuperscript{292} The Court held that a teacher can paddle a student for disciplinary reasons, and this does not threaten “any substantive rights nor condemns the child ‘to suffer grievous loss of any kind.’”\textsuperscript{293} The Court would not hold that corporal punishment should be eliminated in schools because it has a deep-rooted history in the United States that serves an important educational interest; the elimination of corporal punishment must occur by its own social policy, and not by a court’s ruling of a right to due process.\textsuperscript{294} The Court held that it is not in violation of the Fourteenth Amendment’s liberty interest to not give notice and an opportunity to be heard when there are traditional common law remedies.\textsuperscript{295}

Before 2009, the schools were not monitoring or reporting restraint and seclusion incidents on disabled children, and there were no procedural safeguards in place.\textsuperscript{296} Now, every Florida school district needs to create a plan of action on how to reduce restraint and seclusion, and have parental consent to restrain or seclude a child.\textsuperscript{297} Even though all of these laws are in place, school personnel and districts do not follow them and still restrain and

\begin{itemize}
\item[\textsuperscript{287}]
\textit{Ingraham}, 430 U.S. at 677.
\item[\textsuperscript{288}]
\textit{See id.} at 677–78.
\item[\textsuperscript{289}]
\textit{Id.} at 678.
\item[\textsuperscript{290}]
\textit{Id.} at 677.
\item[\textsuperscript{291}]
\textit{Id.} at 677–78.
\item[\textsuperscript{292}]
\textit{Ingraham}, 430 U.S. at 678.
\item[\textsuperscript{293}]
\textit{Id.} at 678 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).
\item[\textsuperscript{294}]
\textit{Id.} at 681.
\item[\textsuperscript{295}]
\textit{Id.} at 682. It is important to note that the \textit{Ingraham} Court refused to review Petitioner’s third argument for certiorari, which was that “the infliction of severe corporal punishment upon public school students [is] arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process Clause of the Fourteenth Amendment.” \textit{Id.} at 659 n.12.
\item[\textsuperscript{296}]
\textit{See U.S. Gov’t Accountability Office, supra} note 47, at 3–5.
\item[\textsuperscript{297}]
\end{itemize}
seclude children without consent; some do not even fill out the necessary forms after the incident.\textsuperscript{298} School personnel are not giving notice to the student’s parents or an opportunity to be heard at a hearing because schools are trying to cover up how much they are abusing these students.\textsuperscript{299} Most of the time when students are restrained or secluded, teachers will say it was due to their aggressive behavior, when in reality, students had non-aggressive behavior and just had not followed a command.\textsuperscript{300} Most students cannot control their actions because of their disability, and when they do not follow their teacher’s instructions, they are trying to communicate something other than \textit{I am not following directions}.\textsuperscript{301} Not following a teacher’s instructions and exhibiting non-aggressive behavior are not reasons to restrain and seclude students, that is merely punishing them for their disabilities.\textsuperscript{302}

Parents of the disabled child must write a complaint containing “any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to such child,” and the complaint must present “an alleged violation that occurred not more than [two] years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint.”\textsuperscript{303} Also, parents must meet with the IEP board to discuss the problem in mediation.\textsuperscript{304} If mediation does not work, an administrative due process hearing is given, then the parents can appeal, and then they can file a civil action.\textsuperscript{305} Throughout the entire process, the burden of proof is on the parents and disabled child to show that the school district violated the student’s rights.\textsuperscript{306} It is still a violation of procedural due process when a disabled student’s liberty is taken away first and then the school provides them with an administrative hearing.
afterwards, only if requested by the parents or the child.\textsuperscript{307} This makes it seem that disabled students and parents are given their procedural due process rights.\textsuperscript{308} Yet, it takes time for the parents and students to go through this process before being able to file in court, while their child is still in school being abused by the teacher.\textsuperscript{309} However, this makes the rights of disabled children insurmountable when arguing a constitutional violation because the burden in court is too high to reach.\textsuperscript{310} Despite all these laws to aid disabled students, in practicing these laws, disabled students have an uphill battle.\textsuperscript{311} In \textit{Schaffer ex rel. Shaffer v. Weast},\textsuperscript{312} Justice Ruth Bader Ginsburg argued that “policy considerations, convenience, and fairness” justify the high burden that should be placed upon the defendant, the school district, because they are in a \textit{far better position} to show they had complied with the statutory requirements.\textsuperscript{313} The procedural due process rights that are due are to notify the parents that the school uses restraint or seclusion techniques, the school should have the parents sign a consent form, and the parents should have a due process hearing before an incident.\textsuperscript{314} Then, after the incident occurs, the school should notify the parents within twenty-four hours to let them know why it occurred.\textsuperscript{315} If the parents want to have a due process hearing after, to see if it was truly necessary, they should be afforded that right as well.\textsuperscript{316} 

\textbf{B. Substantive Due Process Rights}

Excessive use of corporal punishment, “‘at least where not administered in conformity with a valid school policy authorizing corporal punishment . . . may be actionable under the Due Process Clause when it is tantamount to arbitrary, egregious, and conscience-shocking behavior.'”\textsuperscript{317} “Many corporal punishment cases involve . . . traditional applications of physical force, [like when] school officials, subject to an official policy, or in

\textsuperscript{307} See Mulay, supra note 47, at 341.
\textsuperscript{308} See id.
\textsuperscript{309} See id. at 341, 348.
\textsuperscript{310} STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, & PENSIONS, 113TH CONG., supra note 126, at 24; Mulay, supra note 47, at 348.
\textsuperscript{311} See Mulay, supra note 47, at 341, 348.
\textsuperscript{312} 546 U.S. 49 (2005).
\textsuperscript{313} Id. at 63–64 (Ginsburg, J., dissenting).
\textsuperscript{314} U.S. DEP’T OF EDUC., supra note 82, at 5; see also Fla. Stat. § 1003.573(3)(a)(6) (2014).
\textsuperscript{315} Fla. Stat. § 1003.573(1)(a).
\textsuperscript{316} See id. § 1003.573(3)(a)(6); U.S. DEP’T OF EDUC., supra note 82, at 5.
However, the Eleventh Circuit in *Neal ex rel. Neal v. Fulton County Board of Education* stated that it does not want to open the door to a floodgate of litigation.

The Supreme Court has been reluctant to expand substantive due process rights because of the lack of preconstitutional history, and the need for judicial restraint. The Fourteenth Amendment “protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them.” However, cases dealing with abusive executive action have repeatedly emphasized that “only the most egregious official conduct can be said to be arbitrary in the constitutional sense.”

In the context of disciplinary corporal punishment in the public schools, we emphasize once more that the substantive due process claim is quite different than a claim of assault and battery under state tort law. In resolving a state tort claim, the decision may well turn on whether “ten licks rather than five” were excessive, so that line-drawing this refined may be required. But substantive due process is concerned with violations of personal rights of privacy and bodily security of so different an order of magnitude that inquiry in a particular case simply need not start at the level of concern these distinctions imply. As in the cognate police brutality cases, the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience. Not every violation of state tort and criminal assault laws will be a violation of this constitutional right, but some of course may.

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318. *Neal*, 229 F.3d at 1072.
319. 229 F.3d 1069 (11th Cir. 2000).
320. *Id.* at 1076.
322. *Neal*, 229 F.3d at 1074 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (per curiam)).
324. Hall *ex rel.* Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) (citations omitted).
Under *Hall ex rel. Hall v. Tawney*, to have a viable substantive due process claim one must claim severe injury, the force to cause the injury must be disproportionate to the need, and the action must be inspired by malice. It must be brutal and inhumane abuse that shocks the conscience. The *Hall ex rel. Hall* standard of *shock the conscience* is followed in the Eleventh Circuit. The Due Process Clause is not triggered “‘whenever someone cloaked with state authority causes harm,’” and it is not meant to conform state causes of action into federal causes of action.

In determining if a student’s allegations of corporal punishment rise to the level of arbitrariness, and *shock the conscience* in violation of the Substantive Due Process Clause of the Fourteenth Amendment, the student, plaintiff, must allege: “(1) [a] school official intentionally used . . . excessive [force] under the circumstances, and (2) the force used presented a reasonably foreseeable risk of serious bodily injury.”

*T.W. ex. rel. Wilson v. School Board of Seminole County, Florida* is a recent Eleventh Circuit case involving corporal punishment inflicted on a disabled student in school. In this case, T.W. was a disabled fourteen-year-old student who had “separation anxiety disorder, major depressive disorder, dysthmic disorder, receptive expressive language disorder, and [was] eventually [diagnosed] with pervasive developmental disorder.” T.W. was able to communicate verbally, but his receptive communicative abilities were impaired. His teacher, Kathleen Garrett, “completed two courses on physical restraint techniques and was certified in crisis prevention intervention.” Garrett abused T.W. over several months. The first incident occurred when Garrett—who weighs over three-hundred pounds—got annoyed at T.W.’s comments for not going into the cool down room, put T.W. on the floor face first, sat on his buttocks, and put his hands behind his back. The second incident was when he did not follow Garrett’s command.

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325. 621 F.2d 607 (4th Cir. 1980).
326. *Id.* at 613.
327. *Id.*
328. *Id.; see also T.W.*, 610 F.3d at 602.
329. *T.W.*, 610 F.3d at 603 (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 848 (1998)).
331. 610 F.3d 588 (11th Cir. 2010).
332. *Id.* at 592.
333. *Id.* at 593.
334. *Id.*
335. *Id.* at 595.
336. See *T.W.*, 610 F.3d at 595–96.
337. *Id.* at 595.
and started to walk away from her. 338 Garrett tried to restrain T.W. while he was standing, so T.W. began swinging his hands at her, which then led Garrett to force him face down on the floor, and pull his right leg behind his left leg for two to three minutes. 339 Sabrina Mort, a witness and an aide to Garrett who also observed this restraint, said “‘the strength that [Garrett] took [T.W.] down with . . . was hard,’ and ‘[t]hey both probably got hurt that day.’” 340 “Mort testified that it was inappropriate for Garrett to pull T.W.’s leg up in that manner.” 341 “Mort [also] testified that, at least once a week, Garrett would ‘pick and nag at [T.W.] until he would just get to the point where he just [could not] take it anymore.’ Garrett often restrained her students after doing something to upset or anger them.” 342

The third incident occurred when T.W. did not listen to Garrett’s instruction to stop scratching the insect bite on his arm, which was when Garrett pushed T.W.’s arms down to prevent him from scratching. 343 When T.W. began screaming and cursing at Garrett, she pulled T.W. from the table—without pushing the chair out first—causing his legs to hit the table. 344 She put his arms behind his back, forced him against the table, and leaned on his back with all of her weight to keep him in this position. 345 When Garrett held T.W. in this position, he told her it hurt him, but Garrett would only release him once he said he would do his work. 346 He then said he would do his work, she released him, and he went back to scratching the bite on his arm. 347 “Garrett told T.W. to go to the cool down room, but he refused.” 348 She then forced him into the cool down room and shut the door. 349 “Mort heard T.W. scream[ing] ‘leave me alone,’ ‘stop it,’ and ‘[you are] hurting me,’” while furniture was being moved inside the cool down room. 350 Garrett came out, and minutes later, T.W. came out screaming at Garrett that he would tell his mother what she did to him. 351 “The next day, T.W.’s mother [wrote] a note to [the] school asking why

338. Id.
339. Id.
340. Id. (alterations in original).
341. T.W., 610 F.3d at 595.
342. Id. at 594 (alterations in original).
343. Id. at 595.
344. Id.
345. Id.
346. T.W., 610 F.3d at 595.
347. Id.
348. Id.
349. Id.
350. Id.
351. T.W., 610 F.3d at 595–96.
Garrett had twisted T.W.’s arm and shoved him against the wall in the cool down room.”352

In the fourth incident, another aide, Jennifer Rodriguez, observed T.W. standing when Garrett pulled his hands behind his back and escorted him to the cool down room.353 Rodriguez testified that it is not appropriate to put a student’s arms behind his or her back because it can cause asphyxiation.354

The fifth time, which Mort testified to in court, was when Garrett put T.W. in the cool down room, shut off the lights, and then blocked the exit by sitting in front of it for more than five minutes.355 When T.W. was allowed out of the cool down room, he started mumbling, and Garrett put her foot out to purposefully trip him.356

On two separate occasions, T.W.’s mother observed bruises on his arms and he told her that Garrett had hurt him.357 Dr. Upchurch, a psychologist, “explained that ‘[t]he systemized application of harsh words and actions towards the students in the class and towards [T.W.] himself created an environment of danger and fear . . . , which resulted in his exhibiting symptoms of Post-Traumatic Stress Disorder.’”358 Dr. Upchurch also explained that, “[b]ecause T.W. was ‘one of the higher functioning students in the class, . . . [h]is inability to protect the [other students] created a sense of guilt and powerlessness.”’359 Dr. Upchurch concluded that T.W.’s aggravated stress and his feeling of not being safe at school caused him to drop out.360 Dr. Danziger, another psychiatrist retained by T.W., said Garrett probably “‘suffered from both sexual masochism and sexual sadism’ [because] Garrett’s verbal and physical abuse of her students was ‘consistent with someone whose private sadistic sexual practices spilled over into the classroom setting.”’361

It is important to note that the police arrested Garrett for child abuse based on the four students’ allegations and the jury found her guilty on one count, but the court withheld adjudication.362

T.W. claims that Garrett verbally and physically abused the disabled students “and engaged in sadistic sexual behavior [that] supports an

352. Id. at 596.
353. Id.
354. Id.
355. Id.
356. T.W., 610 F.3d at 596.
357. Id.
358. Id. (alterations in original).
359. Id. (alterations in original).
360. Id.
361. T.W., 610 F.3d at 597.
362. Id.
inference that Garrett restrained T.W. out of malice and sadism, not for the purpose of discipline." The court stated that the key inquiry is not the manner of the use of force, but if the use of force is directly related to the student’s misconduct and whether it is used for disciplinary purposes. The court found that, out of the five incidents that were testified to, only one incident was not for the use of disciplinary purposes. The first incident was related to discipline because Garrett said she would release him when he followed her instructions, and she did. The second incident was related to discipline because she told him that she would release him once he calmed down, and she did. The third incident was related to discipline because she said she would release him when he agreed to do his work, and she did. The fourth incident was related to discipline because Garrett only restrained T.W. on the way to the cool down room. The fifth incident, however—when Garrett tripped T.W. on his way out of the cool down room—was not related to disciplinary purposes. The court held that it does not have to determine if Garrett’s use of force was elevated to a shock the conscience level in the fifth incident because tripping a student, which causes the student to stumble—without anything more—does not violate the Constitution.

The court then looked towards the other four incidents to see if T.W.’s rights were violated because he was not free from excessive corporal punishment. The first step is to have the plaintiff prove that the school’s use of corporal punishment was excessive. To establish if the amount of force was excessive, the court looks at the totality of the circumstances, which encompasses three steps: (1) the need for using corporal punishment; (2) the relationship between the need of corporal punishment and the amount of punishment used; and (3) the degree of the inflicted injury. The court held that the first four incidents resulted from attempts to “restore order, maintain discipline, or protect T.W. from self-injurious behavior.” These incidents of restraint were due to T.W. not following Garrett’s instructions,

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363. *Id.* at 598.
364. *Id.* at 598–99.
365. *Id.* at 599.
366. *T.W.*, 610 F.3d at 599.
367. *Id.*
368. *Id.*
369. *Id.*
370. *Id.*
371. *T.W.*, 610 F.3d at 599.
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.* at 600.
refusing to go to the cool down room, refusing to stop scratching an insect bite, and what led to the fourth incident is unclear, but it occurred on the way to the cool down room.\textsuperscript{376} T.W.’s argument was that the need for Garrett’s use of force was non-existent because Garrett was the one who provoked him to act out.\textsuperscript{377} The court noted that there was evidence that Garrett teased T.W. until he became angry, but there was no evidence to assert Garrett provoked him.\textsuperscript{378}

T.W. also claimed that Garrett’s actions were purposely inflicted at him and other students, and that Garrett engaged in sadistic sexual behavior.\textsuperscript{379} The court stated that “‘[i]f the use of force was objectively reasonable—that is, if it “was not excessive as a matter of law and was a reasonable response to the student’s misconduct”—then the subjective intent of the school official is unimportant.’”\textsuperscript{380} The court reasoned that by viewing the four incidents objectively, even if force was used too soon, Garrett’s use of force was not \textit{wholly unjustified}.\textsuperscript{381}

The next step is to consider if the need of force was proportionate to the force exerted.\textsuperscript{382} The court found that Garrett’s use of force was not necessary and was inappropriate, but also that Garrett’s “‘amount of force . . . was [not] unrelated’ to the need to . . . use force.”\textsuperscript{383} This was because Garrett only restrained or secluded him for a few minutes at a time, and even though the force might have been inappropriate, it was directly related to furthering the government’s goal of furthering education.\textsuperscript{384} All of Garrett’s restraining and seclusions were so T.W. could calm down, stop being disruptive, and do his work.\textsuperscript{385}

The third factor looks at the extent and nature of T.W.’s injuries.\textsuperscript{386} The court found that T.W. only suffered minor injuries—a few bruises that his mother saw.\textsuperscript{387} The court found Garrett’s conduct did exacerbate T.W.’s developmental disability, behavioral problems, and caused him to have post-traumatic stress disorder.\textsuperscript{388} The court has never considered if substantive

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{376} \textit{T.W.}, 610 F.3d at 600.
\item \textsuperscript{377} \textit{Id}.
\item \textsuperscript{378} \textit{Id}.
\item \textsuperscript{379} \textit{Id}.
\item \textsuperscript{380} \textit{Id}. (quoting Peterson v. Baker, 504 F.3d 1331, 1337 n.5 (11th Cir. 2007) (per curiam)).
\item \textsuperscript{381} \textit{T.W.}, 610 F.3d at 600.
\item \textsuperscript{382} \textit{Id}. at 601.
\item \textsuperscript{383} \textit{Id}. (alteration in original).
\item \textsuperscript{384} See \textit{id}.
\item \textsuperscript{385} \textit{Id}.
\item \textsuperscript{386} \textit{T.W.}, 610 F.3d at 601.
\item \textsuperscript{387} \textit{Id}.
\item \textsuperscript{388} \textit{Id}.
\end{enumerate}
\end{footnotesize}
due process can be violated by psychological injuries.\textsuperscript{389} The court looked at the totality of the circumstances, including T.W.’s psychological problems, and found that Garrett’s behavior was not arbitrary, egregious, or a shock to the conscience.\textsuperscript{390} The court said it did “not condone the use of [excessive] force [on] a vulnerable student . . . but no reasonable jury could [have] conclude[d] that Garrett’s use of force was obviously excessive in the constitutional sense.”\textsuperscript{391}

The Supreme Court does not have a case on point of a student’s substantive due process rights being violated due to excessive force of corporal punishment.\textsuperscript{392} The lower courts have had to develop a test to approach corporal punishment, and the Seventh and Ninth Circuits use the Fourth Amendment approach, while the Second, Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits use the substantive due process tests.\textsuperscript{393} When parents and disabled students finally get to the court system, they have to satisfy the factors of the \textit{Hall ex rel. Hall} test, they have to have evidence because they have a high burden of proof; additionally, the disabled children can have communication problems, and these behavioral problems, can limit the student’s credibility.\textsuperscript{394} Looking at all of the factors, the court is not set up for justice, and even if by some chance the parents and disabled student win in court, the disabled student was still abused and that is something the court cannot undo.\textsuperscript{395} The test that the Eleventh Circuit applies—the \textit{shock the conscience} standard—is too high of a burden for parents and disabled students to meet.\textsuperscript{396} In T.W.’s case, the same techniques that Garrett used on him killed another student, and that still did not violate substantive due process rights.\textsuperscript{397} After what Garrett did to T.W., the Florida Administrative Code rules—which have been in effect since August 7, 2008—prohibited

\begin{footnotes}
\footnote{389. Id.}
\footnote{390. Id. at 602.}
\footnote{391. \textit{T.W.}, 610 F.3d at 602.}
\footnote{393. Wasserman, \textit{supra} note 392, at 1098–99.}
\footnote{394. Mulay, \textit{supra} note 47, at 347–48; \textit{see also} \textit{Hall}, 621 F.2d at 613.}
\footnote{395. Mulay, \textit{supra} note 47, at 348.}
\footnote{396. \textit{See id.}}
\end{footnotes}
“[r]estraint of an individual’s hands, with or without a mechanical device, behind his or her back,” “[m]ovement, hyperextension, or twisting of body parts,” and “[a]ny reactive strategy that may exacerbate a known medical or physical condition, or endanger the individual’s life.” If T.W.’s case went to the Eleventh Circuit today with these new procedures now in effect, the Eleventh Circuit might hold that Garrett did violate T.W.’s substantive due process rights by using excessive corporal punishment, and restricting his freedom of movement by restraining him.

In another case, M.S. ex rel. Soltys v. Seminole County School Board— involving the same teacher as in T.W.—the Middle District of Florida generated a different outcome. M.S. ex rel. Soltys concerns a disabled student who is mentally retarded, severely autistic, nonverbal, and only say about ten to twenty words. M.S. is alleging that “Garrett subjected M.S. to . . . physical, emotional, and verbal abuse” and that M.S. observed other acts similar to what he experienced to fellow classmates.

The way Garrett treated M.S. was what led to Garrett’s arrest in 2004 when Mort and Rodriguez told the assistant principal about the way Garrett treated some of the disabled students. The incident occurred when Garrett was unhappy that M.S. was looking at a magazine instead of doing his work. M.S. refused to do his work, and pinched Garrett, which was normal when he did not get his way. When this occurred, Garrett

“jerked him out of his desk so fast and flipped [his] body down on the desk, had the one arm behind him, took the other arm and put it behind him, started to lean down and with her left hand she held his head down.” Garrett then pushed M.S.’s head down across the desk while holding his hands behind his back until “his eyes were bulging” and “his lips started turning . . . a purply light blue.”

398. FLA. ADMIN. CODE ANN. r. 65G-8.009(4), (6), (9) (2014); see also T.W., 610 F.3d at 595.

399. See T.W., 610 F.3d at 602 (inferring that from these now effective rules—Florida Administrative Code rules 65G-8.009(4), (6), and (9)—the Eleventh Circuit might have held differently because Garrett’s use of force was not in line with her duties as a teacher, and it went beyond her duties to restrain him the way she did multiple times as well with the other students).


401. Compare id. at 1326, with T.W., 610 F.3d at 602.


403. Id.

404. Id. at 1320.

405. Id. at 1319.

406. Id.

Mort, a school aide, told Garrett to release M.S. because he had enough and Garrett finally released him.\footnote{408} Upon releasing him, Garrett physically assaulted Mort by pushing him against the door and telling him 

“‘[t]his is my fucking class and [I will] run it the way I see fit.’”\footnote{409}

Other acts that Mort and Rodriguez testified to involved Garrett’s behavior toward M.S.\footnote{410} In Mort’s deposition, she recounted several incidents of Garrett abusing M.S.\footnote{411} “One incident [was] when Mort took M.S. to [use] the restroom to change his clothes because he . . . wet his pants [which was] common . . . due to his developmental disabilities and his lack of toilet training.”\footnote{412} Garrett followed M.S. and Mort, and when they reached the restroom door she shut it and told M.S. “‘[y]ou will not piss [your pants] in my class,’” and after every word she continuously struck M.S. “in the back of the head with the [bottom] of her palm.”\footnote{413} Mort said Garrett hit M.S. hard, and the last strike was “‘so hard that his chin hit his knee.’”\footnote{414} In another instance like the one just mentioned, M.S. had to change his pants in the restroom again, and Garrett “‘smacked him on the butt’” which was firm enough to leave three fingerprint marks, which Mort saw when she changed his clothes.\footnote{415} Another incident that Mort relayed was that Garrett frequently hit M.S. with her fist and elbow for a wide variety of reasons like making him be quiet, to make him continue his school work, to stop M.S. from trying to kiss her, and to stop him from laying down to go to sleep.\footnote{416} At times, these blows from Garrett were firm enough to make M.S.’s whole head jerk.\footnote{417} Rodriguez gave the same accounts as Mort did and some other instances where Garrett abused M.S.\footnote{418} M.S.’s parents said that before enrolling him in this school, he was not an aggressive child; he played with the neighbors and his parents, and even traveled to Europe with his parents.\footnote{419} But after being at this school with Garrett abusing M.S., he is now more aggressive towards his siblings and even strangers.\footnote{420} His parents remember one incident when they drove him to school and M.S. had a panic
attack; he started to cry and scream “no school” repeatedly while trying to get back into his parents car.\footnote{421}

M.S. and his parents allege that his Fourteenth Amendment substantive due process rights were violated due to being mentally and physically abused by his teacher Garrett.\footnote{422} “Embodied in the [Fourteenth Amendment] right is the right to be free from excessive force at the hands of a government official.”\footnote{423} To establish if a governmental actor is liable under 42 U.S.C. § 1983\footnote{424} the court must look to the following four factors: (1) the need for using corporal punishment, (2) the relationship between the need for corporal punishment and the amount of punishment used, and (3) the degree of the inflicted injury, and (4) “whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.”\footnote{425} The shock the conscience threshold is quickly reached when the victim is more vulnerable to abuse and is defenseless.\footnote{426}

First, the court considered the need to use corporal punishment by looking to M.S.’s normal conduct, which is pinching to get attention and an inability to control bodily functions, versus Garret smashing M.S.’s head into the desk and leaning on him, all three hundred pounds worth of Garrett, “until his eyes bulged out [of his head] and his face turned blue.”\footnote{427} The court found that a jury could determine that there was no need for Garrett to use corporal punishment for M.S.’s normal actions and for actions he could not control like wetting his pants.\footnote{428} The court then considered the relationship between the need of corporal punishment and the amount of

\begin{itemize}
\item \footnote{421} Id.
\item \footnote{422} M.S., 636 F. Supp. 2d at 1323.
\item \footnote{423} Id.
\item \footnote{424} 42 U.S.C. § 1983 (2012). Title 42, Section 1983 of the United States Code states:
\begin{quote}
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
\end{quote}
\item \footnote{425} Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).
\item \footnote{426} M.S., 636 F. Supp. 2d at 1323.
\item \footnote{427} Id. at 1324; see also T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cnty., Fla., 610 F.3d 588, 595 (11th Cir. 2010).
\item \footnote{428} M.S., 636 F. Supp. 2d at 1324.
\end{itemize}
punishment used, finding that a jury could determine that Garrett’s use of corporal punishment and physical force was disproportionate to the disciplinary actions needed.429

Next in the court’s analysis, was the extent of M.S.’s injury.430 Garrett’s sole argument was that M.S.’s injury did not meet the shock the conscience threshold, and that there were no physical injuries.431 The court rejected Garrett’s argument because a reasonable jury could have found—if it accepted the plaintiff’s evidence—that M.S.’s injuries were physical, mental, and emotional.432 “[E]ven though [M.S.’s] alleged injuries [were] more difficult to quantify than . . . the average [corporal punishment] case, that [did] not mean they [were] nonexistent.”433 M.S.’s mother noticed he had bruising on multiple occasions but that it was due to his own self-infliction.434 M.S.’s parents said they noticed behavioral changes in M.S. after he was put in the school where Garrett was his teacher.435 M.S. was also in the classroom with ten other students who were all autistic, and observed Garrett abuse other disabled students verbally and physically.436 The court noted that this could have created an aggressive and abusive environment.437 A violation of the Fourteenth Amendment is determined on a case-by-case basis.438 The degree of injury must be weighed with the need to exert excessive physical force and the plaintiff’s vulnerability.439 There are circumstances that call for extreme, immediate measures to ensure the

429. Id. at 1323–24.
430. Id. at 1324.
431. Id.
432. Id.
434. Id.
435. Id.
436. Id. at 1324 n.6. The court noted that Garrett wanted it to disregard other allegations of child abuse besides M.S. Id. The court concluded that it could not do that because M.S. could have been affected by watching his classmates be abused by Garrett. M.S., 636 F. Supp. 2d at 1324 n.6.

In a classroom of fewer than ten students, all of whom were autistic, the regular use of unnecessary violence and the consistent barrage of verbal assaults could have created a harmful and perhaps emotionally abusive environment. When that environment is coupled with evidence of direct physical assault such as alleged here, the question of whether a constitutional violation occurred is one for a jury. Garrett’s direct abuse of one child was a different kind of abuse for another. An absurd result might follow, particularly in this setting, if Garrett’s actions were considered in a vacuum and Garrett benefitted from the fact that she mistreated all of the children rather than confining her abuse to a single child.

437. Id. at 1324 n.6.
438. See id. at 1325.
439. Id.
safety of other students and those around them. Nonetheless, “school . . . restraints used as aversive techniques to control behavior or impose negative consequences should never be used on children.” Garrett physically abused M.S. by slapping him on his buttocks so hard she left fingerprint marks, slapping his head so that his head shook and hit his chin, and slamming him into the desk so that he could not breathe—his face turning blue and his eyes bulging out. Here, a jury could have determined that Garrett maliciously used unnecessary and excessive physical force against a helpless autistic child.

Finally, the court considered “whether the force was [used] in good faith” to maintain order and restore discipline to the room, or was inspired by malice. The court found that Garrett could have needed to use some type of physical restraint to maintain order in the room and restore discipline when M.S. pinched her; however, the court found that the excessive force Garrett used by slamming M.S. into the desk, leaning on him so he could not breathe, and causing his eyes to bulge out of his head, was not needed to restore order to the room. M.S. suffered severe physical and emotional damages due to multiple abusive incidents. If Garrett only had this one abusive incident with M.S. she might have escaped constitutional liability under Hall ex rel. Hall. Nevertheless, this was evidence that there was not only one incident of abuse, but multiple incidents, making a pattern of abuse.

If at trial M.S. was found to have suffered a violation of his Fourteenth Amendment rights, Garrett would not be subject to qualified immunity because she used excessive punishment on an autistic, helpless child who could not communicate, which is prohibited by the Fourteenth Amendment. M.S. has “the right to be free from excessive and arbitrary

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441. Id.
443. Id. at 1324.
444. Id. at 1325.
445. Id.
446. Id.
447. M.S., 636 F. Supp. 2d at 1325; see also Hall ex rel. Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980).
449. Id.
450. Id.; see also U.S. CONST. amend. XIV, § 1.
corporal punishment,” especially in a school milieu.451 This was established under the precedent from the Supreme Court of the United States in *Ingraham* and from the Eleventh Circuit in *Neal ex rel. Neal*.452 The court denied Garrett’s motion for summary judgment because a jury could have concluded that Garrett’s use of corporal punishment was excessive, and it violated M.S.’s Fourteenth Amendment right to freedom of movement and to be free from corporal punishment.453

C. The Rowley Court Set the Legal Test to Determine if a Child Has a FAPE in School

The Supreme Court of the United States has consistently held that a FAPE is comprised of:

> [E]ducational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child *to benefit* from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the [s]tate’s educational standards, approximate the grade levels used in the [s]tate’s regular education, and comport with the child’s IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a *free, appropriate public education* as defined by the Act.454

Its holding gave special education providers a loophole to not educate to the fullest extent possible because under the law, if they abide by the student’s IEP, give them any special education instruction, and an aide—plus anything else that the statute requires—the child is receiving a FAPE.455 Although it is a FAPE, nevertheless, it is not the best free public education.456 The disabled child’s parents’ argument is that the goal of the

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452. Neal *ex rel.* Neal v. Fulton Cnty. Bd. of Educ., 229 F. 3d 1069 (11th Cir. 2000); *see also* *Ingraham* v. Wright, 430 U.S. 651, 678 (1977).

453. M.S., 636 F. Supp. 2d at 1325–26; *see also* U.S. CONG. amend. XIX, § 1.


455. *See id.* at 203.

456. *See id.* at 189.
EHA—what is now amended as IDEA457—is to provide FAPE to disabled children who qualify, but it fails to provide an equal opportunity for education.458 Mills and Pennsylvania Ass’n for Retarded Children both held that handicapped children are required to receive access to “adequate, publicly supported education,” not that handicapped children require “any particular substantive level of education.”459 The Supreme Court of the United States noted in a footnote that every need of disabled children cannot be met, which is why the special education teachers and the parents make an IEP, to see what services the student will receive.460 “If sufficient funds are not available to finance all of the services and programs that are needed . . . then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom.”461 The Supreme Court of the United States stated that insufficient funding or even administrative inefficiency of a school could not burden the exceptional disabled student more than a normal child.462 This case purports that there is no equality in education for disabled—or exceptional students, as called by IDEA—and normal children.463 IDEA provisions provide that disabled children should be in the least restrictive environment, which is being in a regular class with other nondisabled students, along with an aide, if possible.464 This means that a disabled child would be learning at the same rate of a nondisabled child in school.465

In Board of Education of the Hendrick Hudson Center School District v. Rowley466, the school would not provide a deaf child with a qualified sign language interpreter in her classes.467 The parents and the

457. Disability Rights Section, supra note 80, at 15; see also 20 U.S.C. § 1400 (2012).
460. Id. at 193 n. 15, 194 n.16.
461. Id. at 199 (quoting Mills, 348 F. Supp. at 876).
462. See id. at 193 n.15; Mills, 348 F. Supp. at 876.
463. See Rowley, 458 U.S. at 198.
467. Id. at 184–85.
student sued the School District of New York under EHA of 1975—amended now as 20 U.S.C. § 1401—because the school district denied her a FAPE. The school district denied the student’s request because she was excelling in all her classes and understanding the material without the help of a sign language interpreter. The court applied a two-part test to determine if a disabled child had a FAPE: (1) whether the state has complied with the procedures required by EHA or IDEA; and (2) was the IEP reasonably calculated to have the disabled student obtain educational value?

The Rowley standard has been prominent in EHA cases—the predecessor to IDEA cases—for over twenty-five years, and Congress has still not expressed disagreement with it. If Congress did explicitly disagree with the Rowley standard, it could change the FAPE definition. Yet Congress still has not amended the statutory FAPE definition, which “weighs strongly against finding a congressional intent to alter the Rowley standard,” of FAPE.

Cases are brought under the Rowley standard by the parents and disabled children arguing that being restrained and secluded is a denial of their FAPE. Their argument is supported by a report which states that the restraining or secluding of a disabled child takes away from their goals in the IEP. It also distracts them from their education since they will not be educated during the time they are restrained or secluded. It can also make them anxious, and even develop more behavioral issues in the future.

470. Id. at 206–07.
472. Kaplan, supra note 471, at 590 n.60; see also Rowley, 458 U.S. at 206–07.
474. Rowley, 458 U.S. at 189; Kaplan, supra note 471, at 589–90.
476. See id.
D. Disabled Children and Their Parents Suing Schools Under the Federal Statute IDEA Does Not Provide the Protection Most Disabled Students Sought for in the Federal Court System

IDEA is what most litigants sue under when trying to protect the rights of their disabled children.\(^{478}\) In the IDEA provisions, a school is supposed to provide FAPE to disabled students.\(^{479}\) This is because IDEA is a federal program that gives money to state and local agencies that comply with the conditions in IDEA to aid disabled students in receiving a better education.\(^{480}\) FAPE is supposed to tailor education services and provide aides to disabled students, which help them learn better in a least restrictive environment.\(^{481}\) With all of these provisions in IDEA to help disabled children receive a better and free education, it would seem logical that this statute would aid disabled students in vindicating their rights that have been infringed.\(^{482}\) However, most parents of disabled children who were restrained or secluded in school cannot immediately sue the school or anyone involved.\(^{483}\) This is because through IDEA, one of the provisions is that all administrative remedies have to be exhausted before a parent can file a suit in court on their child’s behalf.\(^{484}\)

VI. RECOMMENDATIONS

There should be a federal and state mandate from the Supreme Court of the United States, U.S. Congress, and the Florida Legislature, that expressly prohibits all restraint and seclusion techniques, except in emergency circumstances where the disabled student is a threat to himself or to others around him.\(^{485}\) The federal and state statutes should ban all:

1. Reactive strategies involving noxious or painful stimuli, as prohibited by section 393.13(4)(g) [of the Florida Statutes];

2. Untested or experimental procedures;

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480. Greer, 950 F.2d at 694; see also 20 U.S.C. § 1400.
482. See Mulay, supra note 47, at 340.
483. Id. at 341.
484. See 20 U.S.C. § 1415 (b)(1)–(8), (g)(1); Mulay, supra note 47, at 341.

https://nsuworks.nova.edu/nlr/vol39/iss2/5
3. Any physical crisis management technique that might restrict or obstruct an individual’s airway or impair breathing, including techniques whereby staff persons use their hands or body to place pressure on the client’s head, neck, back, chest, abdomen, or joints;

4. Restraint of an individual’s hands, with or without a mechanical device, behind his or her back;

5. Physical holds relying on the inducement of pain for behavioral control;

6. Movement, hyperextension, or twisting of body parts;

7. Any maneuver that causes a loss of balance without physical support—such as tripping or pushing—for the purpose of containment;

8. Any reactive strategy in which a pillow, blanket, or other item is used to cover the individual’s face as part of the restraint process;

9. Any reactive strategy that may exacerbate a known medical or physical condition, or endanger the individual’s life;

10. Use of any containment technique medically contraindicated for an individual;

11. Containment without continuous monitoring and documentation of vital signs and status with respect to release criteria.\footnote{486}{See, e.g., FLA. ADMIN. CODE. ANN. r. 65G-8.009(1)–(11).} Furthermore, all disabled students and special education teachers should start using a positive reinforcement system instead of a negative reinforcement system—like secluding or restraining children.\footnote{487}{See, e.g., JIM WRIGHT, INTERVENTION CENT., HOW TO: IMPROVE CLASSROOM BEHAVIORS USING SELF-MONITORING CHECKLISTS 1–2 (2014), available at http://www.interventioncentral.org/sites/default/files/pdfs/pdfs_blog/self_management_self_monitoring_behavior_checklist.pdf.} All special education teachers should be required to get certified and recertified every five years, and do continuing education to learn more about working with disabled children properly and effectively.\footnote{488}{See FLA. ADMIN. CODE. ANN. r. 65G-8.005(3).} The statutes should also restate that all disabled students should be entitled to due process of law, and have a
right to be free from bodily restraint and corporal punishment from a governmental actor.\footnote{See U.S. CONST. amend. XIV, § 1; FLA. STAT. § 393.13(g) (2014).}

The solution should be modeled after the U.S. Department of Education’s solution, which states that no student should be restrained or secluded unless the student is in imminent danger to cause physical harm to himself or others.\footnote{U.S. DEP’T OF EDUC., supra note 82, at 16–17.} The U.S. Department of Education also proposes that when a student has a history of dangerous and escalating behavior, and teachers have previously restrained or secluded the child to restore order, “a school [ought to make] a plan for (1) teaching and supporting more appropriate behavior; and (2) determining positive methods to prevent behavioral escalations that have previously resulted in the use of restraint or seclusion.”\footnote{Id. at 17.}

To aid with this new positive behavior technique, the federal statute and the Florida statute should also include a monitoring checklist, so students can monitor their own progress.\footnote{See Wright, supra note 487, at 1.} There are two checklists that students can fill out with their teachers.\footnote{Id. at 3–5.} The school can obtain sample checklists online.\footnote{E.g., id. at 2.} It has been proven that students who have their own checklists that target positive behavioral conduct and replacement behaviors—which replace problem behaviors known to trigger restraint and seclusion—show improvement in their general classroom conduct.\footnote{See id. at 1–2.} The teacher can customize each checklist for each disabled student with what each student needs to work on throughout the day.\footnote{Id. at 1.} The teacher can then conduct a monitoring session for certain students, and as the school day progresses, the student can check off what he thought he did correctly and what improvements are needed.\footnote{Wright, supra note 487, at 1, 3–5.} Then, this can be compared to the teacher’s self-assessment through the student’s conduct, and the student can better equate what is expected of him throughout the day.\footnote{See id. at 1.}

Researchers have also found that “[s]tudents are more likely to achieve [success] when they are (1) directly taught school and classroom routines and social expectations that are predictable and contextually relevant; (2) acknowledged clearly and consistently for their displays of positive academic and social behavior; and (3) treated by others with...
To do this the entire school needs to be invested in having a positive behavioral support system, not just the students with behavioral problems. The school should: Focus on preventing the problem behavior by finding the underlying root to the behavioral problem and “review[] behavioral data regularly” that they are required to report, so they can adopt “procedures to the needs of all students and provid[e] additional academic and social behavioral supports for students who are not making expected progress.” There is no evidence that shows that school officials, teachers, or aides who use restraining and secluding methods actually positively benefit the child. There is also no evidence that shows that using restraining and secluding methods reduce the occurrence of behavioral outbursts. These behavioral outbursts are normally what cause others to use these abusive methods on the disabled students in the first place. A ban should be in place for all types of restraint and seclusion, and be replaced with positive behavioral reinforcement techniques.

VII. CONCLUSION

Students with disabilities should not be abused when they go to school by being restrained and secluded. Disabled students being restrained and secluded in school violates their Fourteenth Amendment procedural and substantive due process rights. When this occurs, school personnel violate the students’ procedural due process rights because the disabled students’ interests fall within the scope of the Fourteenth Amendment’s life, liberty, or property interests; due process is the addition of procedural safeguards which cost the school little to nothing. These procedural safeguards should be: (1) notifying the parents of restraining or secluding students before it occurs so they can sign a consent form; (2) allowing the parents and student to have a due process hearing before an incident occurs; and (3) after the incident occurs, letting the parents know why it happened. Then, the parents and student can be afforded a due

500. Id. at 3.
501. Id.
502. Id. at 2.
503. Id.
504. See U.S. DEP’T OF EDUC., supra note 82, at 15–16, 18–19.
505. Id. at 8, 12, 15, 18; see also Wright, supra note 487, at 1.
506. FLA. STAT. § 393.13(3)(g) (2014).
507. See U.S. CONST. amend. XIV, § 1.
509. See OFFICE OF SPECIAL EDUC. PROGRAMS, supra note 81, at 1.
process hearing to make sure the restraint or seclusion was necessary after the incident. These procedural safeguards are required by the reauthorization of IDEA in 2004, which requires the U.S. Department of Education to create model forms for an IEP, prior written notice, and procedural safeguards for restraint and seclusion of disabled students.

Furthermore, disabled students’ substantive due process rights are violated when: (1) there is a severe injury; (2) the force to cause the injury was disproportionate to the need; and (3) the action was inspired by malice. For a court to establish if a student’s allegations of corporal punishment rise to a level of arbitrariness and the shock the conscience standard—which would violate the student’s substantive due process rights—the student or parents must allege: “(1) a school official intentionally used ... excessive [force] under the circumstances, and (2) the force used presented a reasonably foreseeable risk of serious bodily injury.” It also would aid them if they were able to prove that the teacher has a pattern of abuse instead of one isolated incident. This would prove it was done with malicious intent. If a student proves the above test, then the court would rule that the student’s substantive due process rights were violated because the teacher’s actions were not made in good faith to restore order to the classroom, but were done with malicious intent. In most cases, the teachers that abuse disabled students by restraining and secluding them are not isolated incidents. Disabled students have suffered severe injury from these techniques used in schools. Courts have held that excessive corporal punishment used maliciously on disabled students violates their substantive due process rights to be free from bodily restraint and punishment.

511. Office of Special Educ. Programs, supra note 81, at 1.
512. See Hall ex rel. Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980).
515. See T.W., 610 F.3d at 602; M.S., 636 F. Supp. 2d at 1325.
516. See T.W., 610 F.3d at 602; M.S., 636 F. Supp. 2d at 1325.
517. See U.S. Gov’t Accountability Office, supra note 47, at 7.
518. Id. at 7, 10.
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