2022

Toxic: A Feminist Legal Theory Approach to Guardianship

Margaret Bushko

COMMENT

TOXIC: A FEMINIST LEGAL THEORY APPROACH TO GUARDIANSHIP LAW REFORM

MARGARET BUSHKO*

> Anything that happened to me had to be approved by my dad. . . . The control he had over someone as powerful as me as he loved the control to hurt his own daughter, 100,000%. . . . I'm not happy. I can't sleep. I'm so angry. It's insane and I'm depressed. I cry every day. And the reason I'm telling you this is because I don't [know] how the state of California can have all this written in the court documents from the time I showed up and do absolutely nothing. Just hire—with my money—another person . . . and keep my dad on board. . . . [W]hen he works me so hard, when I do everything I'm told, and the state of California allowed my ignorant father to take his own daughter, who only has a role with me if I work with him . . . . That's given these people I've worked for way too much control. . . . I truly believe this conservatorship is abusive. And now we can sit here all day and say, "Oh, conservatorships are here to help people." But ma'am, there[] [are] a thousand conservatorships that are abusive as well.
>
> — Britney Spears, June 23, 2021[1]

From Netflix's 2021 film "I Care a Lot" to the New York Times' unauthorized documentary "Framing Britney Spears" and the #FreeBritney

* J.D. Candidate, 2023, University of Maryland Francis King Carey School of Law. The author would like to thank Professor Leigh Goodmark for her invaluable expertise and guidance throughout the research and writing process. She also wishes to thank her husband, Will, and son, August, for their patience and encouragement. Lastly, she would like to thank her *Maryland Law Review* colleagues for their thoughtfulness, hard work, and dedication.

1. NPR Staff, *Read Britney Spears' Statement to the Court in Her Conservatorship Hearing*, NPR (June 24, 2021, 6:52 PM), https://www.npr.org/2021/06/24/1009858617/britney-spears-transcript-court-hearing-conservatorship; *see also* Jem Aswad, *Read Britney Spears' Full Statement Against Conservatorship: 'I Am Traumatized'*, VARIETY (June 23, 2021, 3:59 PM), https://variety.com/2021/music/news/britney-spears-full-statement-conservatorship-1235003940/.

movement,[2] guardianships and conservatorships[3] have burst into the upper echelons of the popular consciousness in the last year.[4] Fundamentally, conservatorships in the United States are designed to help protect some of the most vulnerable members of the population—providing legal and financial oversight for those who are unable to manage their own affairs due to mental illness, substance abuse, dementia, or other medical conditions.[5] While the structure of conservatorships varies by state, most statutes allow the courts to shape a conservator's powers to meet the needs of the conservatee in terms of scope and duration of the conservatorship.[6]

While conservatorships are meant to help those who are unable to manage their finances or certain day-to-day decisions, the welfare of the conservatee is not always protected as well as it could be throughout the court

2. The #FreeBritney movement was formed by fans-turned-community-organizers who were concerned by Britney Spears' conservatorship. The movement gained momentum in 2019 and included online organization and rallies at Ms. Spears's court hearings. The movement has ultimately helped spark a national conversation regarding the level of control involved in conservatorships and has prompted calls for legislative reform. *See* Dani Anguiano, *The #FreeBritney Movement Finds Its Moment: 'All the Hard Work Was Worth It',* GUARDIAN (Nov. 14, 2021, 4:00 AM), https://www.theguardian.com/music/2021/nov/14/freebritney-movement-britney-spears-conservatorship.

3. The proper terminology varies depending on the state and its statutes. This Comment focuses on California, which uses the term "conservatorship," and Maryland, which uses the term "guardianship." The terms will be used interchangeably, with "conservatorship" used predominantly and "guardianship" used in the context of discussions of Maryland law. Within the scope of this Comment, the terms only apply to adult conservatorships or guardianships, and encompass both fiscal and personal oversight.

4. There has been extensive coverage of the movement in Spears' conservatorship case over the past year, from her oral testimony in June 2021, to calls for conservatorship reform, to announcements of her eventual release from conservatorship in November 2021. *See, e.g.*, Julia Jacobs & Sarah Bahr, *The Britney Spears Transcript, Annotated: 'Hear What I Have to Say'*, N.Y. TIMES (June 24, 2021), https://www.nytimes.com/2021/06/24/arts/music/britney-spears-transcript.html; Joe Coscarelli & Julia Jacobs, *Judge Ends Conservatorship Overseeing Britney Spears's Life and Finances*, N.Y. TIMES (Nov. 15, 2021), https://www.nytimes.com/2021/11/12/arts/music/britney-spears-conservatorship-ends.html; Chandra Bozelko, *After Britney Spears' Abusive Conservatorship, Don't Reform the System – Abolish It*, USA TODAY (Nov. 16, 2021, 4:48 PM), https://www.usatoday.com/story/opinion/2021/11/16/conservatorships-britney-spears-abolish-them/8625248002/ (calling for the complete abolition of conservatorships and claiming that "[c]alls for oversight over conservatorships aren't wrong, but they are redundant").

5. Lauren Krohn, *Cause of Action to Establish Involuntary Conservatorship for Estate of Adult Person*, *§ 2 – Nature of Action*, 6 CAUSES OF ACTION 2d 625 (Originally published in 1994, updated Dec. 2021).

6. *Id.* ("Great discretion is typically granted to courts . . . to fashion a conservator's powers to focus on the area of need for the conservatee while leaving his or her other civil rights untouched to the greatest degree possible."). For example, in California, there are two types of conservatorships (probate and Lanterman-Petris-Short, or LPS, conservatorships), and under the probate laws, there are both general and limited conservatorships. *Conservatorship – Types of Conservatorships*, CA. CTS., https://www.courts.ca.gov/selfhelp-conservatorship.htm (last visited Aug. 5, 2021).

proceedings or the conservatorship process overall.[7] Modern courts have come to recognize conservatorship proceedings as adversarial, because potential heirs and creditors often have interests that conflict with each other and with the conservatee.[8] Entering into a conservatorship may have a drastic effect on the conservatee personally, as they find their civil independence removed.[9] Depending upon the state's laws, conservatees may have limitations imposed, such as the inability to make decisions regarding their property, enter into contracts, establish their will, vote, marry, or even select their own attorney.[10]

Despite legal safeguards, conservatorships also carry with them the potential for abuse.[11] In 2005, a series of articles published by the *Los Angeles Times* revealed many cases of severe financial elder abuse by conservators following an investigation into over two-thousand conservatorship cases in California.[12] The articles prompted California's Omnibus Conservatorship and Guardianship Reform Act of 2006, intended to better protect the rights of conservatees and impose additional court oversight procedures.[13] However, the Act was not accompanied by the necessary funding,[14] and many of the issues outlined in the Los Angeles Times exposé continued to persist.[15]

The United States has a long history of exploitation disguised as "care," from early coverture laws in which a woman's legal rights were subordinate to those of her husband, to the use of guardianships to remove Native

7. Krohn, *supra* note 5.

8. *Id.*

9. *Id.*

10. *Id.*

11. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-1046, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT, AND ABUSE OF SENIORS, (2010) ("GAO identified hundreds of allegations of physical abuse, neglect and financial exploitation by guardians in 45 states and the District of Columbia between 1990 and 2010."); *see also* Kenneth Heisz, *Beware of the Con in Conservatorships: A Perfect Storm for Financial Elder Abuse in California*, 17 NAELA J. 1, 2, 5–7, 13 (2021) (discussing financial elder abuse in California, particularly as committed by the very conservators whose roles are intended to protect elders, and noting the problematic lack of data on financial elder abuse in the context of conservatorships).

12. Heisz, *supra* note 11, at 5–6.

13. *Id.* at 6–7.

14. Daisy Nguyen, *Spears Case Spotlights State Efforts to Rein in Conservators*, ABC NEWS (Oct. 1, 2021, 1:10 PM), https://abcnews.go.com/Entertainment/wireStory/spears-case-spotlights-state-efforts-rein-conservators-80350677 ("California lawmakers had passed a series of reforms to the state's conservatorship system in 2006, but they were never implemented by the courts because of budget cuts during the recession in 2008 . . . ."); *see also* Press Release, *Gov. Newsom Signs Conservatorship Reform Bill Authored By Assemblymember Evan Low, Senators Ben Allen and John Laird* (Oct. 1, 2021), https://a28.asmdc.org/press-releases/20211001-gov-newsom-signs-conservatorship-reform-bill-authored-assemblymember-evan (noting that many of the reform efforts of 2006 were defunded amidst the economic recession of 2008).

15. Heisz, *supra* note 11, at 7.

Americans from their land.[16] Feminist legal theory, which has existed in some form for over a century, but was formalized as a body of work in the academic world in the 1970s, highlights the ways in which the law perpetuates gender inequality.[17] Various categories of feminist legal theory offer insights into laws that are either gender-neutral with a discriminatory impact, or gender-specific with a paternalistic, discriminatory effect.[18] While adult conservatorships have been extensively examined for their potential for elder abuse,[19] this Comment seeks to offer a different perspective on conservatorship law. This Comment will examine the historical development of conservatorship laws, as well as the emergence of feminist legal theory and its sub-categories.[20] This Comment will also examine conservatorships through the lens of feminist legal theory (particularly the sub-categories of dominance theory and anti-essentialism), exploring the ways in which seemingly neutral conservatorships legally perpetuate and codify existing social issues and gender inequality.[21] Drawing upon the insights gained from the feminist legal perspective, this Comment will compare the conservatorship laws of California and the adult guardianship laws of Maryland as a case study.[22] While conservatorship laws differ by state, the statutes for California and Maryland offer a helpful point of comparison, as they reflect legislative approaches to conservatorships and judicial intervention that are at opposing ends of the philosophical spectrum.[23] Finally, this Comment will discuss proposed conservatorship reforms at the

16. *See generally* Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459, 460–63 (2002) (discussing the history of coverture in England and the United States, in which a wife was put "under [the] wing" of her husband and allowed no independent legal rights, and how the impact of coverture principles well into the twentieth century); Andrea Seielstad, *The Disturbing History of How Conservatorships Were Used to Exploit, Swindle Native Americans*, CONVERSATION (Aug. 13, 2021, 9:58 AM), https://theconversation.com/the-disturbing-history-of-how-conservatorships-were-used-to-exploit-swindle-native-americans-165140 (examining the ways in which conservatorship was mis-used in the early 1900s as a tool for taking control of properties and draining Native American families of their land and assets).

17. NANCY LEVIT & ROBERT R.M. VERCHICK, FEMINIST LEGAL THEORY: A PRIMER, 3, 11 (2d ed. 2016).

18. *Id.* at 13 (describing laws rejected by Equal Treatment theorists, which were gender-specific with a paternalistic effect, such as laws limiting women's employment hours); *id.* at 15 (noting that "[g]ender-neutral laws can keep women down if they do not acknowledge women's different experiences and perspectives").

19. *See, e.g.*, *Examples of Conservator Exploitation: An Overview*, NAT'L CTR. FOR STATE CTS. (Sept. 2018), https://www.eldersandcourts.org/__data/assets/pdf_file/0017/5822/ovc-brief-1.pdf (describing a case study of media coverage on conservatorship exploitation, in which the individuals averaged 82 years old, and most of the victims were women).

20. *See infra* Sections I.A–B.

21. *See infra* Section II.A.

22. *See infra* Section II.B.

23. *See infra* Section II.B.

federal level and in several states, and recommend reforms to adult guardianship laws in the state of Maryland that aim to increase protection of individual liberties under adult guardianships.[24] In particular, this Comment recommends that the Maryland General Assembly pass a law requiring detailed annual reporting of conservatorship data for the purpose of transparency and accountability.[25]

I. BACKGROUND

The roots of conservatorship laws that are now the subject of prevalent debate date back to fourteenth century English feudal laws.[26] Over time, conservatorships have wavered between offering necessary protection and serving as a legally sanctioned method of exploitation.[27] Feminist legal theory, which has examined and critiqued the power structures inherent in the United States' legal system over the past fifty years, provides a unique perspective from which to view the power structure within the conservatorship system.[28] This Part will survey the history and development of conservatorships in England, the United States, and Maryland,[29] and will provide an overview of the basic tenets of feminist legal theory as a lens through which to view conservatorship laws.[30]

A. The History and Development of Conservatorships

Conservatorships are governed by state law and therefore vary by state both in structure and in terminology.[31] This Section will examine both the broader history of conservatorships and the origins of Maryland's guardianship laws.

1. Conservatorships in England and Early American History

The concept of conservatorship or guardianship, including guardianship of minors, has a long legal history—in United States law, it dates back to the colonial era.[32] Elements of modern guardianship law can be traced all the

24. *See infra* Section II.C.
25. *See infra* Section II.C.
26. *See infra* Section I.A.
27. *See infra* Section II.B.
28. *See infra* Section I.B.
29. *See infra* Section I.A.
30. *See infra* Section I.B.
31. *Guardianships: Key Concepts and Resources*, DEP'T JUST., https://www.justice.gov/elderjustice/guardianship-key-concepts-and-resources (last visited Mar. 6, 2022).
32. Lawrence M. Friedman, Joanna L. Grossman & Chris Guthrie, *Guardians: A Research Note*, 40 AM. J. LEGAL HIST. 146, 146 (1996).

way back to fourteenth-century English law, in the context of the *parens patriae*, or protective responsibility, of the king.[33] This protective responsibility conveyed upon the king a "fiduciary duty to protect the property of his subjects who were *non compos mentis*."[34] As early as 1324, a statute specified that the king would provide for anyone who had lost his faculties, keep his lands and property safe, and return it to him when he came to his "right mind."[35] The statute also specified that "the King shall take nothing to his own use . . . ."[36] The law differentiated between those who were "incompetent from birth" ("congenital"), and those who had become incompetent due to illness, emotional strain, or an accident, and who might be expected to recover or have "lucid intervals" ("transient").[37] For those who were incompetent from birth, the king was "ward of the land[],"[38] and the profits of the congenital individual's assets were paid to the king, who then returned the land to the individual's heirs upon the person's death.[39] For the "transient" who was temporarily incompetent, the king's duty was to act as a trustee and safeguard the individual's property until he had recovered.[40]

The king's *parens patriae*[41] authority was only implemented after an individual was found to be *non compos mentis* in an inquiry overseen by the lord chancellor.[42] The lord chancellor would issue a *writ*,[43] and a jury of

33. Joan L. O'Sullivan & Diane E. Hoffmann, *The Guardianship Puzzle: Whatever Happened to Due Process?*, 7 MD. J. CONTEMP. LEGAL ISSUES 11, 13 (1996). Joan O'Sullivan was a professor at the University of Maryland Francis King Carey School of Law and wrote THE GUARDIANSHIP HANDBOOK: A GUIDE TO ADULT GUARDIANSHIP AND GUARDIANSHIP ALTERNATIVES (1998). Diane E. Hoffmann is the Jacob A. France Professor of Health Law at the University of Maryland Francis King Carey School of Law and has played a leading role in Maryland's health care legislation.

34. *Id. Non compos mentis* may be translated as "not of sound mind" or "lacking mental ability to understand the nature, consequences, and effect of a situation or transaction." *Non Compos Mentis*, FINDLAW LEGAL DICTIONARY, https://dictionary.findlaw.com/definition/non-compos-mentis.html/ (last visited Mar. 6, 2022).

35. O'Sullivan & Hoffmann, *supra* note 33, at 13.

36. *Id.*

37. *Id.* at 14. The terms "congenital" and "transient" are used in this Comment to replace the archaic, historic terms that are now offensive in modern society—namely "idiot" and "lunatic," the terms used in the fourteenth century.

38. I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 293 ("This fiscal prerogative of the king . . . directs . . . that the king shall have ward of the lands of natural fools, taking the profits without waste or destruction . . . and after the death of such [individuals] he shall render the estate to the heirs . . . .").

39. O'Sullivan & Hoffman, *supra* note 33, at 14.

40. *Id.*

41. *Id.* at 13 ("Under [*parens patriae*] doctrine, the king was literally the 'parent of the country,' and had a fiduciary duty to protect the property of his subjects who were *non compos mentis*.").

42. *Id.*

43. A *writ* is an "order issued by a court in the name of a sovereign authority requiring the performance of a specific act." *Writ*, ENCYCLOPEDIA BRITANNICA (Aug. 22, 2017), https://www.britannica.com/topic/writ.

twelve men would investigate the issue.[44] The inquiry, and finding of incompetence, were required in order for the king to gain title to an individual's land.[45] If the jury found the person to be congenitally or transiently disabled, the king would have the duty to protect the disabled person's property.[46] While the individual's land would be entrusted to the king, his personal care and protection was committed to the custody of a family member or friend (his "committee").[47] To protect against "sinister practices," the individual's heir, who had "an interest in the [individual's] property after his death," was rarely allowed to be the committee for the disabled person.[48]

In the United States, many elements of English guardianship were absorbed into early American law. Although the colonies shed many aspects of English law and governance following the American Revolution, the king's *parens patriae* responsibility was seen as "benevolent," allowing the state governments to assume protection of those who were incapable of caring for themselves.[49] While some states in early American history lacked statutory guidelines for conservatorship proceedings, the procedures that occurred in courts of equity under the legal lineage of *parens patriae* were similar to modern conservatorship laws.[50] Alleged disabled persons had "the right to demand a jury trial, the right to receive adequate notice, and the right to call and cross-examine witnesses."[51]

All fifty states passed conservatorship laws over time, typically assigning jurisdiction of conservatorship proceedings to the state's probate court.[52] Since probate courts had previously focused on the distribution of and procedures pertaining to decedent's estates, the initial focus of the courts was on the property of proposed conservatees.[53] Ultimately, conservatorship laws evolved to include broader protection of the disabled individuals themselves.[54]

---

44. O'Sullivan & Hoffmann, *supra* note 33, at 14.

45. Tricia M. York, *Conservatorship Proceedings and Due Process: Protecting the Elderly in Tennessee*, 36 U. MEMPHIS L. REV. 491, 503 (2006).

46. *Id.*

47. O'Sullivan & Hoffmann, *supra* note 33, at 14 (citing I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 305). In Blackstone's treatise, the word "committee" is used to reference the individual to whom the disabled person's care is committed rather than a "committee" of multiple individuals, as in modern usage. *Id.*

48. *Id.* at 15.

49. *Id.*

50. York, *supra* note 45, at 504.

51. *Id.*

52. *Id.*

53. *Id.* at 505.

54. *Id*.

2. Development of Guardianships in Maryland

Maryland state's authority for guardianship of the property and the person of a disabled individual originated in the Act of 1785, which provided the court of chancery with complete authority to oversee and govern decisions regarding the individual's person and property (or to delegate such authority).[55] Early case law in Maryland affirmed the equity courts' jurisdiction, as well as components of the disabled person's right to due process, such as the notice requirement and the right to a jury hearing.[56]

The Act of 1785 and accompanying case law provided the groundwork for more contemporary iterations of the law.[57] As of 1957, the law contained a provision for a guardian of property for those "who by reason of advanced age, mental weakness (not amounting to unsoundness of mind), or physical incapacity," are unable to care for their own property.[58] The statute left the definitions of "unsoundness of mind" and "*non compos mentis*" to the courts.[59] The Maryland General Assembly revised the law in 1969 and used the term "guardian" for the first time to replace the use of "committee" and "conservator."[60]

In 1977, the General Assembly conducted a new round of revisions and established the substance of Maryland's current guardianship law, codified in Estates and Trusts, Title 13, Protection of Minors and Disabled Persons.[61] The law created the Adult Protective Services Division of the Maryland Department of Human Resources, thus creating an agency designed to intervene when an adult was not living in safe conditions.[62] Among other provisions, it allowed for the "appointment of a *public* guardian of the person"; "established the procedure for an emergency guardianship of the person, to be used when the person is living in conditions which could cause immediate and serious physical harm or death"; and "established a new subtitle in the Estates and Trusts article which concerned a guardian of the person only."[63] The law established rights for alleged disabled individuals, including that an individual who may be entered into a guardianship will be provided with legal assistance by the state if needed.[64] In addition, the bill

55. O'Sullivan & Hoffmann, *supra* note 33, at 16.

56. *Id.* (citing *In re* Estate of Colvin, 3 Md. 278, 282 (Ch. 1851)). *See generally* Supreme Council of Royal Arcanum v. Nicholson, 104 Md. 472, 65 A. 320 (1906); Hamilton v. Traber, 78 Md. 26, 27 A. 229 (1893)).

57. O'Sullivan & Hoffmann, *supra* note 33, 17–18.

58. *Id.* at 18 (quoting MD. ANN. CODE art. 16 § 132 (1957) (repealed 1969)).

59. *Id.* at 19.

60. *Id.* (citing MD. ANN. CODE art. 93A § 101 (1969)).

61. MD. CODE ANN., EST. & TRUSTS §§ 13-101–13-207(e), §§ 13-701–710 (West 1977).

62. O'Sullivan & Hoffmann, *supra* note 33, at 19.

63. *Id.* at 20.

64. *Id.* at 21.

provided due process rights such as "the right to be present at the hearing, the right to present evidence, and the right to cross-examine witnesses."[65] The bill also established that a court may appoint a guardian only if the need has been demonstrated through a standard of clear and convincing evidence.[66] In order to successfully initiate a guardianship, the petitioner must show that a person is incapacitated *and* that there is no less restrictive alternative to guardianship available that would still ensure the individual's wellbeing.[67]

B. Feminist Legal Theory Examines the Relationship Between Law and Women's Subordination, Patriarchy, and Gender and Sexual Inequality

While substantial commentary has been written examining the potential for abuse in conservatorships, particularly elder abuse,[68] scholars have not previously used feminist legal theory as a lens through which to critique conservatorship laws. However, feminist legal theory has developed over several decades to offer a unique perspective on the ways in which laws perpetuate historically problematic power dynamics in society, particularly pertaining to gender.[69] This Section offers background on the development of feminist legal theory over the past fifty years and presents a brief summary of the key principles that emerged. This Section also introduces two categories of feminist legal theory that are particularly helpful in examining conservatorship laws—dominance theory and anti-essentialism.

1. The Origins and History of Feminist Legal Theory

Feminist legal theory arose out of a stark juxtaposition between the increased gender equality in the law and the inequalities faced regularly in women's daily lives.[70] While the phrase "feminist legal theory" did not come into definition until the 1970s, many of the earliest arguments for gender equality involved legal and legislative issues.[71]

---

65. *Id.*

66. *Id.* at 22.

67. *Id.*

68. *See, e.g.*, Heisz, *supra* note 11; NATIONAL ASSOCIATION TO STOP GUARDIAN ABUSE (NASGA), *Public Awareness Program: Court Documents and Case Evidence*, https://stopguardianabuse.org/public-awareness-program/ (last visited Apr. 2, 2022).

69. *See infra* Section II.A.

70. Robin West, *Women in the Legal Academy: A Brief History of Feminist Legal Theory*, 87 FORDHAM L. REV. 977, 984–85 (2018). Robin West is the Frederick Haas Professor of Law and Philosophy at Georgetown University Law Center and is a prolific writer and leading scholar of feminist jurisprudence.

71. LEVIT ET AL., *supra* note 17, at 2, 11. Nancy Levit is the Edward D. Ellison Professor of Law at the University of Missouri-Kansas City School of Law and a preeminent scholar in feminist legal theory.

As of the mid-nineteenth century, states still followed the common law doctrine of coverture, under which wives had no individual legal rights distinct from their husbands.[72] However, in the mid-1800s, states began to pass laws known as the "Married Women's Property Acts."[73] The Acts established rights for women that did not exist under coverture, including the rights to "make contracts, execute wills, . . . own their wages, and control their real and personal property."[74] What followed was decades of tireless work by women's rights advocates demanding equality in employment and voting rights in front of the Supreme Court.[75] These advocacy efforts culminated, finally, in the ratification of the Nineteenth Amendment in 1920.[76]

Despite the success in achieving equal voting rights, the twentieth century continued to present challenges in the legal fight for gender equality in the workplace and beyond.[77] Within the legal profession in the 1970s and 1980s, women struggled for admission to law schools and then for equal inclusion as students and as faculty members.[78] As women entered the legal academy in the 1970s and faced sizeable challenges, women legal scholars simultaneously produced the initial scholarly works that gave rise to feminist legal theory.[79]

---

72. *Id.* at 4.

73. *Id.* at 5. For example, New York's Married Women's Property Act was passed in 1848 and subsequently used as a model for other states. Research Guides, *Married Women's Property Laws*, LIBR. CONG., https://guides.loc.gov/american-women-law/state-laws (last visited Apr. 29, 2022). Among other provisions for the protection of women's property, the Act stated that "real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, . . . shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female." 1848 N.Y. Laws 307, ch. 200.

74. LEVIT ET AL., *supra* note 17, at 4.

75. *See, e.g.*, Bradwell v. Illinois, 83 U.S. 130 (1872) (following Myra Bradwell's rejection from the Illinois state bar due to Illinois lacking an affirmative law for admitting women to the bar, the Supreme Court upheld Illinois' decision and found that there was no "right to practice law" under the Fourteenth Amendment); Minor v. Happersett, 88 U.S. 162, 162 (1874) (holding that the Fourteenth Amendment did not offer women the right to vote because "[a]t the time of the adoption of that amendment, suffrage was not co-extensive with citizenship of the States").

76. LEVIT ET AL., *supra* note 17, at 6; U.S. CONST. amend. XIX.

77. West, *supra* note 70, at 977–78.

78. *Id.* at 977.

79. *Id.* at 980. Feminist legal theory in the late 1970s and early 1980s centered around equal treatment for women under the law. *See, e.g.*, Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451 (1978); Wendy W. Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Equal Opportunity Goals Under Title VII*, 69 GEO. L.J. 641 (1981). Other significant early scholarship on feminist legal theory included the works of Catherine MacKinnon, in the area of dominance theory, and the works of Robin West in "humanist jurisprudence." *See, e.g.*, CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

2. Key principles of feminist legal theory

Feminist legal theory has been centered around two main claims: (1) the "critical-feminist claim," which asserts that "at least one reason for women's continuing subordination to men . . . [is], in some measure, law itself"; and (2) the "feminist-aspirational claim," contending that, nevertheless, the law is central to increased gender equality.[80] In other words, law is seen as both the problem and the solution.[81] Feminist legal scholars therefore have had to grapple with the challenges and nuances of finding solutions within the very legal system they were critiquing.[82] For example, feminists who advocated for laws that were gender-neutral on their face risked inadvertently reinforcing subordinate roles for women whose lived experiences differ greatly from those of men.[83] In this way, theoretical questions arise for feminist jurisprudence regarding equality and rights, such as, "what understanding of equality will make it possible for women to have control over their lives . . . ? What understanding of equality will provide an adequate grounding for the concept of rights, such that women's rights can protect both their individual liberty and their identity as women?"[84]

As American activist and author, bell hooks has noted, "[f]eminism is not simply the struggle to end male chauvinism or a movement to ensure that women have equal rights with men; it is a commitment to eradicating the ideology of domination that permeates Western Culture on various levels . . . ."[85]

3. Categories of feminist legal theory

Feminist legal theory is distinguishable from other feminist theories in its emphasis on the significance of the law in understanding society and propelling change.[86] The following Sections present brief introductions to two categories of feminist legal theory particularly relevant as a lens for evaluating conservatorship law: dominance theory and anti-essentialism.[87] The numerous categories of feminist legal theory all share the critical and aspirational components of feminist legal theory more broadly—each

80. West, *supra* note 70, at 986–87.

81. *Id.* at 988.

82. *Id.* at 990.

83. *Id.*

84. *See Feminist Jurisprudence*, INTERNET ENCYCLOPEDIA PHIL., https://iep.utm.edu/jurisfem/ (last visited Mar. 7, 2022).

85. LEVIT ET AL., *supra* note 17, at 1 (citing BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM 194 (1981)).

86. *Id.* at 8.

87. *Id.* at 8, 20, 24. Note that feminist legal theory has grown many branches, which also include categories such as equal treatment theory, cultural feminism, and postmodern feminism, which contain valuable insights but will not be addressed in this Comment. *Id.* at 8.

contains an observation and an aspiration.[88] Feminist legal scholars observe the ways in which "the world has been shaped by men," and that "nearly all public laws in the history of existing civilization were written by men."[89] At the same time, feminist scholars aspire, through various means, to achieve equality throughout political, social, and professional spheres.[90]

a. Dominance Theory

Dominance theory was first introduced in 1979 by Catharine MacKinnon, and rather than focusing on achieving formal equality between women and men, dominance theory examines discrepancies in power between women and men, with the aspiration being women's "liberation from men."[91] Dominance theory argues that the inequalities women experience stem from the male privilege supported by cultural attitudes and beliefs, as well as social institutions—including the law.[92] Dominance theorists point to the "lack of legal controls on pornography and sexual harassment, excessive restrictions on abortion, and inadequate responses to violence against women" as ways in which the legal system perpetuates women's subordination.[93] For example, while sexual assault laws have undergone reform and vary by state, historically, the burden has been on a rape victim to prove lack of consent.[94] And, in the realm of unemployment insurance law, if a woman is forced to quit her job due to family obligations, she is not eligible for unemployment compensation.[95] While dominance theory has been criticized in several areas, including the notion of "gender essentialism"—assuming that all women share the same experience of subordination—it has been particularly influential in several legal areas in

88. *Id.* at 11–12.

89. *Id.*

90. *Id.* at 12.

91. *Id.* at 20. Catharine MacKinnon is the Elizabeth A. Long Professor of Law at the University of Michigan Law School, and is known as a pioneer in legal feminism, particularly in the realm of sexual harassment. Professor MacKinnon is a prolific author, known for works such as FEMINISM UNMODIFIED (1987) and her foundational book SEXUAL HARASSMENT OF WORKING WOMEN (1979). Ginia Bellafante, *Before #MeToo, There Was Catharine A. MacKinnon and Her Book 'Sexual Harassment of Working Women'*, N.Y. TIMES (Mar. 19, 2018), https://www.nytimes.com/2018/03/19/books/review/metoo-workplace-sexual-harassment-catharine-mackinnon.html.

92. LEVIT ET AL., *supra* note 17, at 20.

93. *Id.*

94. *Id.* at 21; *see also* Robin D. Wiener, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143 (1983); Christina M. Tchen, *Rape Reform and a Statutory Consent Defense*, 74 J. CRIM. L. & CRIMINOLOGY 1518 (1983).

95. LEVIT ET AL., *supra* note 17, at 21.

which women are particularly vulnerable, such as rape and sexual harassment laws.[96]

b. Anti-Essentialism and Critical Race Feminism

In the 1980s, women of color and queer women in the legal profession argued that feminist legal theory failed to address the challenges they faced.[97] They contended that by focusing exclusively on gender, traditional feminists were overlooking key differences between women, particularly differences of race that lead to varied experiences and critiques of the legal system.[98] Legal theorists were concerned that mainstream feminists were making generalized, unitary assertions about women's experiences—"independent[] of race, class, sexual orientation, and other realities of experience."[99] Opponents of the traditional feminist approach called themselves "anti-essentialists," and argued that discrimination is best understood not from the center of a class, but from the margins, because discrimination is experienced differently depending on the intersection of personal characteristics.[100]

Critical race feminists argue that legal doctrines in areas such as rape, sexual harassment, and domestic violence do not sufficiently address this intersectional discrimination.[101] For example, employment discrimination laws require that an individual choose between sex and race to make a claim, disregarding the fact that for a Black woman, both sexism and racism are integral to her experiences of discrimination.[102]

II. ANALYSIS

For decades, activists working on behalf of vulnerable populations have called for conservatorship reforms.[103] While some of those changes have

96. *Id.* at 23–24. Professor MacKinnon's scholarship laid the groundwork for legal sexual harassment claims, and her approaches to pornography and prostitution have influenced courts internationally. *Catharine A. MacKinnon*, UNIV. OF MICH. SCH. OF L., https://michigan.law.umich.edu/faculty-and-scholarship/our-faculty/catharine-mackinnon; *see supra* note 91.

97. LEVIT ET AL., *supra* note 17, at 24.

98. *Id.*

99. *Id.*

100. *Id.* (noting that "it is the *intersection* of characteristics like sex, race, wealth, and sexual orientation that really suggests how people will treat you").

101. *Id.*

102. *Id.*

103. *Guardianship Reform/WINGS Background*, AM. BAR ASS'N (May 27, 2020), https://www.americanbar.org/groups/law_aging/resources/wings-court-stakeholder-partnerships0/guardianship-reform-wings-background/ (noting that a groundbreaking 1987 Associated Press series prompted guardianship reform, but while states have improved their guardianship statutes over the past thirty years, "implementation in practice has been uneven and data is sparse to nonexistent").

come to fruition, calls for a systemic overhaul of conservatorships have recently increased in volume from multiple corners of the political arena.[104] This Part will examine the ways in which categories of feminist legal theory, particularly dominance theory and anti-essentialism, support reform in states like Maryland with guardianship laws that fail to rigorously protect conservatees.[105] This Part will also evaluate potential pitfalls in the fundamental structure of Maryland's guardianship laws, particularly as contrasted with more highly detailed laws in a state such as California, and lessons we can learn from feminist legal theory regarding the potential for gender-biased abuse underlying supposedly neutral laws.[106] Given these potential flaws in guardianships generally and Maryland's statutes specifically, this Part will also propose a bill to strengthen guardianship reporting and transparency, thereby taking an important step towards unearthing potential abuse and improving the Maryland state guardianship system as a whole.[107]

A. The General Assembly Should Pass the Bill Proposed Herein Because of the Disproportionate Impact Current Guardianship Laws Have on Women and People of Color, As Supported by Feminist Legal Theory

The potential for conservatorship abuse, from financial mismanagement to the deprivation of bodily autonomy, has been a subject of concern surrounding conservatorships for decades.[108] With the recent high profile of Britney Spears' conservatorship controversy, concern over the hidden underbelly of conservatorships has increased, particularly with regard to elder abuse and abuse of those with physical or mental disabilities.[109] As an institution, guardianships and conservatorships require separating those who are "competent" and able to care for themselves and their property from those who are not.[110] However, defining who is mentally ill or incompetent can be

104. Chris Farrell, *How To Fix Conservatorship In America*, FORBES (Aug. 6, 2021, 2:04 PM), https://www.forbes.com/sites/nextavenue/2021/08/06/how-to-fix-conservatorship-in-america/?sh=125c5b25380e ("The experience of Britney Spears with her 13-year conservatorship has disturbed Congressional lawmakers from both sides of the political aisle, including unlikely political bedfellows, Senators Elizabeth Warren (D-Mass.) and Ted Cruz (R-Texas). . . . Representatives Charlie Crist (D-Fla.) and Nancy Mace (R-S.C.) just introduced the bipartisan 'Free Britney Act' . . . .").

105. *See infra* Sections II.A–B.

106. *See infra* Section II.B.

107. *See infra* Section II.C.

108. Elinor Cleghorn, *The History of Coercion Dressed Up As Care Is a Long One*, VOGUE (June 25, 2021), https://www.vogue.com/article/history-of-reproductive-coercion-britney-spears-conservatorship.

109. *Id*.

110. Friedman et al., *supra* note 32.

problematic, because these categories are socially and culturally variable.[111] Many individuals committed to asylums in 1900 would not be considered mentally ill today; they simply did not conform to society's norms or rules at the time.[112]

All of these concerns have a common element: grappling with the inherent challenge of balancing the well-intentioned protective nature of conservatorships with the potentially perilous transfer of liberties from one individual into the hands of another.[113] This Section addresses the many lessons we can learn from feminist legal theory regarding conservatorship laws—laws which are gender-neutral on their face and involve the protective-yet-restrictive legal structure that feminist theorists have often observed, cautioned against, and advocated to change.[114]

1. Dominance Theory Supports Expansive Reform of Conservatorship Law

Dominance theory, which focuses on liberation from male power and privilege—a privilege supported by social systems and institutions—has shed light on the ways in which our legal system perpetuates the subordination of women.[115] Dominance theory has had a particularly prominent role in shaping domestic violence laws, in part because domestic violence represents clear and drastic patriarchal domination within the household.[116] While the significant involvement of the legal system in domestic violence has been heavily critiqued, for some, the very creation of laws against domestic violence was a victory.[117] Prior to the 1980s, domestic violence was generally treated as a private matter, to be handled within the

111. *Id.* at 146.

112. *Id.*; *see also* Lee Rawles, *A Tale of Love, Loss and Conservatorships in the Golden Age of Hollywood*, ABA J. ONLINE (Sept. 8, 2021, 9:08 AM), https://www.abajournal.com/books/article/podcast-episode-154?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email. Author Liz Brown has recently written about the life of Harrison Post, the lover and companion of wealthy heir, William Andrews Clark Jr., in Hollywood prior to World War II. Clark provided Harrison Post with a trust to ensure his financial stability following Clark's death, but Post's sister became his conservator, drained his funds, and then "freed" him from the conservatorship. Brown posits that anti-Jewish and homophobic public opinions at the time likely contributed to the establishment of Post's conservatorship. LIZ BROWN, TWILIGHT MAN: LOVE AND RUIN IN THE SHADOWS OF HOLLYWOOD AND THE CLARK EMPIRE (2021).

113. Friedman et al, *supra* note 32, at 146–47.

114. *See supra* Section II.A.

115. *See supra* Section I.B.

116. LEVIT ET AL., *supra* note 17, at 21.

117. LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 1 (2012).

home.[118] Police seldom made arrests for domestic violence.[119] Any prosecutions or convictions—which would have been based on the general criminal laws of assault or battery—were also rare.[120] However, dominance feminism, along with feminist political power, ultimately led to nation-wide construction of laws and policies on domestic violence.[121] Dominance feminism formed a particular lens through which domestic violence was viewed—contending that "male domination of women in the sexual sphere was the primary vehicle for women's continued subordination."[122] While MacKinnon's work ultimately drew criticism on multiple fronts, including its depiction of women as helpless victims and its frequent embodiment of essentialism (discussed further *infra*), it exposed the potential for the legal system to "codify[] the male perspective in law" and thereby perpetuate women's subordination to men.[123]

Dominance theorists have examined legal regulations governing sexual conduct with the aspirational aim of both "reducing sexual violence and exploitation and increasing women's sexual autonomy and integrity."[124] For example, feminist legal theorists campaigned for the reform of rape law and the elimination of the marital rape exemption, which immunized husbands from rape charges in a marital setting, even when physical force was involved.[125] Feminists noted that the marital rape exemption demonstrated that the law was more interested in regulating women as "property" among men, rather than in protecting the individual rape victims, thereby completely disregarding the "sexual autonomy of married women."[126]

In addition to advocating for the manifestation of women's sexual autonomy in the law, feminists have also advocated for reproductive rights.[127] While abortion rights are a priority within feminist legal scholarship, scholars have broadened their examination of reproductive justice to include women who wish to become mothers but face legal and social obstacles.[128] In particular, reproductive justice scholarship categorizes "forced sterilization,

118. *Id.* at 9.

119. *Id.*

120. *Id.*

121. *Id.* at 10.

122. *Id.* at 2–3.

123. *Id.* at 11 (quoting CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 163 (1989)). Professor MacKinnon views "the state as 'male jurisprudentially'" because "the law sees and treats women the way men see and treat women." *Id.* To end women's subjugation, the law should acknowledge "that male forms of power over women are affirmatively embodied as individual rights in law." *Id.*

124. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 285 (3d ed. 2013).

125. *Id.* at 286.

126. *Id.*

127. *Id.* at 364–65.

128. *Id.* at 365.

mistreatment of Medicaid recipients, and economic disincentives for having children while on welfare as restrictions on reproductive autonomy"—restrictions that particularly burden women in vulnerable populations.[129] While women may not be as explicitly pressured into sterilization as they were prior to litigation and reform in the 1970s, reproductive justice is still elusive for many women.[130]

a. Dominance Theory Supports Conservatorship Reform Because Reproductive Rights of Conservatees Are Overlooked in Statutory Schemes Such As Maryland's

In multiple areas of law, dominance theory has revealed the troubling ways in which the legal system, even when promulgating gender-neutral laws, perpetuates society's patriarchal systems.[131] These revelations are no less applicable in raising concerns about the potential for gender-based abuse under conservatorship laws. Conservatorships of the person allow a legally appointed conservator to control the social lives and reproductive freedoms of individuals.[132] Dominance theory highlights the extent to which a patriarchal legal structure has historically already given men control of women's sexuality and reproductive choices.[133] Dominance theory thus supports conservatorship reform because the reproductive rights of women in conservatorships are not rigorously protected under laws such those of Maryland.[134]

California's conservatorship laws include a provision on sterilization which explicitly addresses the fundamental right to "choice over matters of procreation."[135] The provision acknowledges that some adults with developmental disabilities may engage in sexual activity, but may be "unable to give the informed, voluntary consent necessary to their fully exercising the right to procreative choice, which includes the right to choose sterilization."[136] The statute recognizes the historical abuse of sterilization and states that "[i]t is the intent of the Legislature that no individual shall be sterilized solely by reason of a developmental disability and that no

129. *Id.* at 366, 399 (stating a 1974 class action lawsuit, Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974), revealed nationwide abuse, with an indefinite number of poor people improperly coerced into accepting sterilization operations).

130. *Id.* at 399.

131. *See* GOODMARK, *supra* note 117, at 2–3.

132. *See infra* Section II.B.

133. *See* LEVIT ET AL., *supra* note 17, at 22.

134. *See* MD. CODE ANN., EST. & TRUSTS § 13-708(b)(9) (West 2019) (outlining the powers of the guardian, including the power to give necessary consent or approval for medical care, and lacking provisions specifically addressing reproductive rights).

135. CAL. PROB. CODE, § 1950 (West 1991).

136. *Id.*

individual who knowingly opposes sterilization be sterilized involuntarily."[137]

Under California's law, procedures are in place for a conservator of an adult with a developmental disability to petition the court to appoint a limited conservator, who would in turn be able to consent to sterilization on behalf of the adult.[138] The conservator's petition must include the components of a standard petition for conservatorship and detail the "specific reasons why court-authorized sterilization is deemed necessary."[139] The provision also requires that the conservatee retain counsel or have court-appointed counsel, who advocates for the conservatee under the presumption that the conservatee opposes the petition for sterilization.[140] The director of a regional center for the developmentally disabled must conduct an investigation and provide a written report based upon "comprehensive medical, psychological, and sociosexual evaluations of the individual" under specifications detailed in the law.[141] For example, physical examinations are required by two physicians (including a surgeon who is capable of performing the medical procedure) and one psychologist or social worker.[142] All the examiners are required to consider alternatives to sterilization and only recommend sterilization as a last resort.[143] The law attempts to provide safe-guards against involuntary sterilization by requiring that the conservatee be present at the court hearing; that the court attempt to obtain and take into account the wishes of the conservatee; and that the petitioner establish multiple elements "beyond a reasonable doubt," including that the conservatee has not knowingly objected to their sterilization.[144]

These statutory safeguards, along with the slow but definite progress towards banning sterilization,[145] appear to have made California courts wary of court-sanctioned sterilization.[146] According to experts, the rare cases in which a guardian has asked a court to order contraception involved severely

137. *Id.*

138. *Id.* § 1952.

139. *Id.*

140. *Id.* § 1954.

141. *Id.* § 1955.

142. *Id.*

143. *Id.*

144. *Id.* §§ 1956–58.

145. Jan Hoffman, *Is the Forced Contraception Alleged by Britney Spears Legal?*, N.Y. TIMES (Aug. 12, 2021), https://www.nytimes.com/2021/06/24/health/britney-spears-forced-IUD.html ("[B]y the end of the 1970s, most states had repealed laws authorizing sterilization, although allegations of forced hysterectomies and tubal ligations on women in immigrant detention centers continue to be raised. It wasn't until 2014 that California formally banned the sterilization of female inmates without consent").

146. *Id.*

disabled individuals who could not understand the reproductive consequences of sexual activity.[147]

However, under Maryland's guardianship laws, there is no such explicit acknowledgement of the dark history of forced sterilization, or a clear petitioning procedure for guardians to follow in cases where court-sanctioned sterilization is deemed necessary.[148] Reproductive rights are just one potential way in which abuse may occur under the cloak of conservatorships.[149] In general, the power dynamic and transfer of rights involved in the fundamental structure of conservatorships and the lessons learned from dominance theorists indicate that abuse—perpetuated by a long history of patriarchal dominance in the legal system itself—is potentially occurring under the guise of conservatorship laws, and greater transparency is vital for the evaluation and prevention of such abuse.

2. Anti-Essentialism Supports Widespread Reform Because States like Maryland Fail to Protect Women of Color and of Low Income

While dominance theory has offered insight in many areas of law, it has also been criticized for embodying "gender essentialism," or "the assumption

147. Reproductive rights under conservatorships in California still come into question. *Id.* In Britney Spears' June 2021 court testimony, she said her conservatorship team would not allow her to have her intrauterine device ("IUD") removed "because [they] did not want her to have more children," alarming guardianship law and reproductive rights experts. *Id.* While Ms. Spears was not surgically sterilized, forced contraception would be a "proxy for sterilization," particularly because she expressed a desire to have more children. *Id.*; *see also* Kaitlynn Milvert, *How Adult Guardianship Law Fails to Protect Contraceptive Decision-Making Rights*, HARV. L. PETRIE-FLOM CTR. BILL HEALTH BLOG (Oct. 7, 2021), https://blog.petrieflom.law.harvard.edu/2021/10/07/guardianship-reproductive-rights/ (noting that reproductive rights are an area where guardianship law is ill-defined, and reform is needed); Sara Luterman, *For Women Under Conservatorship, Forced Birth Control Is Routine*, NATION (July 15, 2021), https://www.thenation.com/article/society/conservatorship-iud-britney-spears/ (noting that even with the safe-guards in place under California law, advocates have found that sterilization may still be requested by a conservator under the guise of medical care or the conservatee's well-being).

148. MD. CODE ANN., EST. & TRUSTS § 13-708 (West 2019) (outlining the powers of the guardian, including the power to give necessary consent or approval for medical care, approve the withholding of care, and withdrawing medical or other professional care). Provisions specify that the court must authorize the guardian's approval for medical procedures that "involve[] a substantial risk to the life of a disabled person," but no provisions are included for decisions surrounding reproductive rights. *Id.*

149. Sterilization is one of several areas in which conservatorships nationally lack data and transparency. The National Women's Law Center has listed Maryland as one of thirty-one states in which forced sterilization is allowed under certain circumstances. NAT'L WOMEN'S L. CTR., *Forced Sterilization of Disabled People in the United States* at Appendix (Jan. 24, 2022), https://nwlc.org/resource/forced-sterilization-of-disabled-people-in-the-united-states/ (citing Wentzel v. Montgomery Gen. Hosp., 293 Md. 685, 693, 447 A.2d 1244, 1248 (1982) (asserting the *parens patriae* jurisdiction of the state courts and establishing safeguards that the circuit court would need to consider)). For a broader discussion of forms of conservatorship abuse, see Section II.A, *supra*.

that all women share the same experience, namely, that of victims."[150] Moreover, dominance theory has been criticized for treating the lived experiences of white women as representative of all women, ignoring the differences that race, class, and ethnicity make in the discrimination that individuals face.[151] Opponents of "feminist essentialism"[152] argued that discrimination must be understood in the context of an individual's wholistic identity, including characteristics such as sex, race, financial status, and sexual orientation.[153]

Critical race feminists contend that certain legal doctrines, such as those addressing rape, sexual harassment, and domestic violence, do not properly account for discrimination resulting from the totality of a person's identity.[154] For example, when making a claim of employment discrimination, a Black woman would have to make the claim based on *either* sex or race discrimination—she would not be able to claim discrimination based upon both, even though both aspects of her identity impact how she is treated and perceived by others.[155] Critical race feminism argues that while many laws may be facially neutral, they are actually a means of maintaining historical socio-political power dynamics.[156] Critical race feminists have noted that, just as biological race influenced laws and legal decisions historically—such as in the prohibition of interracial marriage—race influences contemporary court decisions in matters such as surrogacy by Black women, transracial adoption, and the prosecution of pregnant women who use drugs.[157]

Angela Harris, a leading anti-essentialist and feminist legal theorist, examines the concept of "voice" in law—a point worthy of observation in the

150. LEVIT ET AL., *supra* note 17, at 23; *see also* Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 WM. & MARY J. WOMEN & L. 273, 275, 285–87 (1998) (noting that "[t]he precise meaning of essentialism in feminist legal theory has not been fixed." It may be described as an assumption that a "woman's essence" is universally similar because of biology, or an assumption that women generally share "psychological characteristics").

151. LEVIT ET AL., *supra* note 17, at 23–24 ("[Anti-essentialists] charged that feminist legal theory doted excessively on the needs of privileged white women. Mainstream feminists made universal assertions about women's experiences" which "stifled the voices of lesbians and minority-race women 'in the name of commonality.'").

152. "Feminist essentialism" or "gender essentialism" is used to describe the concept that "a unitary, 'essential,' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience." Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV, 581, 585 (1990).

153. LEVIT ET AL., *supra* note 17, at 24.

154. *Id.*

155. *Id.*

156. *Id.* at 25.

157. *Id.* at 26–27 (Critical race feminists have revealed how race "influences courts to make surrogacy decisions that view black women acting as gestational surrogates simply as breeders. They have also exposed how pregnant women of color who use drugs are more likely than white women to be prosecuted on drug charges or for child endangerment, abuse, or neglect.").

context of conservatorships, where the conservatee's voice is at risk of being lost.[158] Harris notes that the legal voice, in its attempts to speak from a position of "objectivity" and "neutrality," "is ultimately authoritarian and coercive in its attempt to speak for everyone."[159] Harris also argues that while the works of feminist legal theorists such as Catharine MacKinnon and Robin West hold value, their body of work tends towards gender essentialism, leading some voices—including the voices of Black women—to be silenced in order to ensure others are heard.[160]

A stark reminder of the horrifying, racially-charged potential for conservatorship abuse is found in the early-1900s practice of putting Native Americans into guardianship, particularly when oil and gas were discovered under their land.[161] Lawyers and conservators had themselves appointed as guardians over Native Americans with full fiduciary authority to spend their wards' money, or lease and sell their lands, allowing them to essentially steal lands and funds with court-appointed authority.[162] As described by a Native American activist in 1924, "[w]hen oil is 'struck' on an Indian's property, it is usually considered prima facie evidence that he is incompetent, and in the appointment of a guardian for him, his wishes in the matter are rarely considered."[163] Wards were often left to struggle financially while their funds and lands were depleted by excessive guardianship fees, negligence, deception, and other forms of abuse.[164]

Professor Leigh Goodmark offers anti-essentialist feminist legal theory as a lens through which the current system of domestic violence law can be re-examined and reconstructed.[165] Goodmark notes that the goal of anti-essentialist feminism is to ensure the needs and concerns of marginalized subgroups are not lost, and that women's multiple identities are considered when striving to eliminate discrimination and oppression.[166] A key difference in the approach to domestic violence when shifting from a dominance to an anti-essentialist perspective is the focus on the need of the state to intervene, allocating power to the state, as opposed to empowering the individual first.[167] Professor Goodmark notes that "[a]n anti-essentialist system would be premised on the importance of giving individual women as

158. Harris, *supra* note 152, at 583.
159. *Id.*
160. *Id.* at 585.
161. Seielstad, *supra* note 16.
162. *Id.*
163. *Id.* (quoting prominent Native American activist, Zitkála-Šá).
164. *Id.*
165. GOODMARK, *supra* note 117, at 137.
166. *Id.*
167. *Id.*

much power as possible, to the greatest extent possible, to define the abuse they experience and decide how it should be addressed."[168]

Just as anti-essentialism offers a guide to reforming domestic violence law and policy that is focused on the individual women and attentive to diversity among women, anti-essentialism may also be a valuable tool for reforming conservatorship laws focused on the needs of individuals and with an emphasis on alternatives to conservatorship that offer the greatest amount of individual liberty possible.[169] Abuse due to the intersection of any combination of gender, race, income, and sexual orientation is a potential pitfall within conservatorship systems, and the legal system must increase transparency to address and prevent discrimination amidst the rights-restrictive conservatorship process.

B. Maryland's Current Law Is Not Designed To Be the Least Restrictive To Individual Liberty

Conservatorships, by their very nature, restrict individual liberties, from personal control over finances to medical decisions to voting rights.[170] For this reason, it is vital that safeguards are built into the laws and procedures surrounding the implementation, maintenance, and termination of conservatorships.[171] Concerns among advocates include the fact that, while conservatorships are meant to be the last resort for those who are unable to care for themselves, they are "very often the first resort."[172] Moreover, once

168. *Id.* at 137–38.

169. This would likely include an emphasis on guardianship alternatives such as supported decision-making, as recommended by disability advocates. *See, e.g.*, Fourth National Guardianship Summit, Recommendations Adopted by Summit Delegates, Part II – Supporting Decision-Making (May 2021), http://law.syr.edu/uploads/docs/academics/Fourth_National_Guardianship_Summit_-_Adopted_Recommendations_%28May_2021%29.pdf.

170. *Guardianship Court Improvement Program*, AM. BAR ASS'N (Oct. 27, 2021), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/october-2021-wl/guardianship-1021wl/ (noting that conservatorship "is a drastic state intervention proceeding where an adult's authority to make decisions is removed . . . . In some jurisdictions, this even deprives them of such fundamental rights as the right to marry and vote," and it is "[o]ften described as a 'civil death' because it severely curtails an individual's due process rights").

171. National Council on Disability, *Turning Rights Into Reality: How Guardianship and Alternatives Impact the Autonomy of People with Intellectual and Developmental Disabilities*, 24–25 (June 10, 2019), https://ncd.gov/sites/default/files/NCD_Turning-Rights-into-Reality_508_0.pdf (noting that guardianship is a significant intervention with the inherent potential to be a "drastic restraint on a person's liberty," and that guardianship "raises fundamental questions concerning federal civil rights and constitutional due process worthy of examination and intervention at the national level" (quoting *In re* M.R., 638 A.2d 1274, 1282 (N.J. 1994)).

172. Abigail Abrams, *Exclusive: Elizabeth Warren, Bob Casey Ask for Data on Conservatorships After Britney Spears Testimony*, TIME (July 1, 2021, 1:02 PM) (quoting Zoe Brennan-Krohn, a staff attorney at ACLU's Disability Rights Project), https://time.com/6077374/elizabeth-warren-bob-casey-conservatorship-oversight-britney-spears/.

a conservatorship is established, it can only be terminated by the court system.[173]

Organizations advocating for conservatorship reform, such as the Conservatorship Accountability Project ("CAP"),[174] have expressed the need for reform because guardianships are often granted with too much ease, guardians often lack certification and training, and courts lack resources for effective oversight.[175] While the California court system is often under-resourced and the subject of critiques,[176] particularly in the wake of the #FreeBritney movement, the underlying code provides more detail, nuances, and opportunity for protection of individual liberties than Maryland's laws.[177] In many ways, California's laws, as written, address CAP's concerns regarding the ease with which conservatorships are granted, the requirements for licensing and training conservators, and the oversight required during the conservatorship.[178] Overall, California's conservatorship laws are more rigorous from the beginning to the end of the process—from the types of conservatorships established by law, to reporting and oversight requirements, and the available means of terminating a conservatorship.[179]

1. California's Variety in Its Types of Conservatorships Is Less Restrictive To Individual Liberty Than Maryland's Broader Guardianship Categories

Anti-essentialism supports conservatorship reform that aims to cultivate individual liberty and prevent abuse at the intersection of gender, race, income, and sexual orientation.[180] From this perspective, California's law is superior to Maryland's given the degree to which conservatorships in California may be limited and tailored to the individual conservatee.[181]

---

173. *Id.*

174. *Conservatorship Accountability Project*, CTR. FOR ELDERS & CTS., https://www.eldersandcourts.org/guardianship/CAP (last visited Mar. 9, 2022). The Conservatorship Accountability Project is a research project conducted by the National Center for State Courts and funded by a grant from the State Justice Institute. *Id.*

175. *Id.*

176. Heisz, *supra* note 11.

177. *See supra* Section II.A (comparing the safeguards built into California's sterilization provisions, which are absent in Maryland's laws).

178. *See infra* Section II.B.

179. *See infra* Section II.B.

180. *See supra* Section II.A.

181. *Compare* CAL. PROB. CODE § 1801(d) (West 1991) (establishing the importance of tailoring a limited conservatorship to support the independence of the individual), *with* MD. CODE ANN., EST. & TRUSTS, § 13-708 (a)–(b) (West 2019) (stating generally that a court may grant a guardian "only those powers necessary" to support the disabled individual and enumerating the powers that may be granted).

California conservatorships fall into two main categories: probate conservatorships, based on laws in the California Probate Code,[182] and Lanterman-Petris-Short ("LPS") conservatorships, based on the LPS Act, found in the Welfare and Institutions Code.[183] Within California's conservatorship structure is the "limited conservatorship" version of both conservatorships of the person and the estate.[184] Limited conservatorships in California are tailored to adults with developmental disabilities, structured to allow individuals under such a conservatorship to maintain and progress towards as much independence as possible.[185] The law specifies that a limited conservatorship may be used as necessary to promote the well-being of the individual, aimed at encouraging the development of "maximum self-reliance and independence."[186] California's laws strive to avoid excessive restriction of individual liberties in these cases, specifying that the conservatee "shall retain all legal and civil rights except those which by court order have been . . . specifically granted to the limited conservator."[187] The legislative intent underlying these laws was to ensure "developmentally disabled citizens of this state receive services resulting in more independent, productive, and normal lives . . . ."[188] For example, in a case involving an impaired adult who had been under a general probate conservatorship, the conservatee's petition for termination of the general conservatorship was granted, and replaced with a limited conservatorship, based on evidence of progress.[189] The court considered the conservatee's developmental progress and capacity to control her living situation and finances, while also noting that she was subject to undue influence regarding aspects of her relationships, therefore specifically awarding her conservators powers relating to marriage, socialization, and sexual contacts.[190]

In addition to the detailed provisions for limited conservatorships, according to a national study of conservatorships, California is one of only four states with a statutory scheme for public guardianship directed to

182. CAL. PROB. CODE §§ 1800–2033 (West 2016).

183. CAL. WELF. & INST. CODE §§ 5000–5556 (West 2019).

184. CAL. PROB. CODE § 1801(d) (West 1995).

185. *Id.* § 1828.5(e); *see also* Abigail Abrams, *How Britney Spears' Case Could Change the Future of Conservatorship*, TIME (June 25, 2021, 2:30 PM), https://time.com/6075859/britney-spears-conservatorship-disability/ ("In California . . . the system is supposed to favor limited conservatorships and give the conservator only those powers that a judge determines are truly necessary. This could mean someone only gets help with making financial decisions or has a guardian attend medical appointments, while retaining the rest of their autonomy.").

186. CAL. PROB. CODE § 1801(d) (West 1995).

187. *Id.*

188. *Id.*

189. Conservatorship of Hermans v. Hermans, No. G047464, 2013 WL 5036555 (Cal. Dist. Ct. App. 2013).

190. *Id.* at *7.

persons with specific mental disabilities.[191] Under the LPS Act, a conservator of the person or estate may be appointed for any "person who is gravely disabled as a result of a mental health disorder or impairment by chronic alcoholism."[192] While the LPS conservatorship is ultimately designed to be highly protective of the conservatee and is therefore restrictive of individual liberties, California law is structured to prevent those liberties from being unduly restrained by distinguishing LPS conservatorship from probate conservatorship.[193] LPS conservatorship laws establish a higher burden of proof, limit the duration of an LPS conservatorship, and include provisions addressing the interaction between a probate conservatorship and an LPS conservatorship.[194]

By contrast, Maryland's adult guardianship laws do not establish such extensive guidelines for narrowly tailoring the guardianship of a person or property to their needs, and therefore do not fundamentally offer types of guardianship structured to minimize restrictions on individual liberties.[195] Maryland's guardianships may be established for any of the variety of underlying causes that are more specifically addressed by California's limited conservatorships and LPS conservatorships, including "physical or mental disability, . . . habitual drunkenness, addiction to drugs, . . . [and] compulsory hospitalization."[196] This broad categorization does not include the characteristics of, for example, California's limited conservatorships, that explicitly established legislative intent aimed at maximizing the individual liberties of developmentally disabled adults.[197] In addition, the inclusion of "compulsory hospitalization" under the umbrella of guardianships more generally does not offer the same level of structure surrounding involuntary

191. *See* PAMELA B. TEASTER ET AL., WARDS OF THE STATE: A NATIONAL STUDY OF PUBLIC GUARDIANSHIP at 37 (2005), https://www.americanbar.org/content/dam/aba/administrative/law_aging/wardofstatefinal.pdf (noting that "[f]our statutory schemes are directed to persons with specific mental disabilities." California, Maine, Ohio, and South Carolina each have provisions that provide for a public guardian of individuals with mental or other disabilities).

192. CAL. WELF. & INST. CODE § 5350.

193. *Guide to LPS Conservatorship for Family & Friends*, NAT'L ALL. ON MENTAL ILLNESS (NAMI), https://namila.org/resources/guide-to-lps-conservatorship-family/ (last visited Mar. 8, 2022) (An LPS conservatorship may be important to obtain, despite its restrictive nature, when seeking to protect an individual because an LPS conservatorship functions as "a tool that gives the conservator the power to work with the doctor to achieve recovery treatment for a mentally ill individual beyond the standard of 'stable.' . . . It is involuntary treatment, especially for those who have no insight into their illness and are non-compliant with treatment and medication.").

194. CAL. WELF. & INST. CODE § 5350 (West 2015).

195. MD. CODE ANN., EST. & TRUSTS, § 13-708 (West 2019).

196. *Id.* § 13-201(c)(1).

197. CAL. PROB. CODE § 1801(d) (West 1995).

hospitalization as California's LPS conservatorships do.[198] LPS conservatorships require a higher burden of proof for establishment and contain numerous provisions for limited duration, individualized treatment plans, and termination of conservatorship for severe disabilities.[199] Under Maryland's guardianship of the person, there are provisions for orders authorizing emergency protective services, but the parameters are arguably less protective of the individual requiring services.[200] For example, a hearing may be held up to sixty days after the filing of the petition for appointment of a guardian or temporary guardian following an emergency order—as opposed to allowing for a jury trial within ten days of the conservatee's request, as California's LPS conservatorships require.[201]

Ultimately, California's guidelines for limited and LPS conservatorships go beyond the standard conservatorships of the person and/or property as found in Maryland and lay the foundation for more nuanced provisions that aim to protect, when possible, the individual liberties at stake for conservatees.[202] By doing so, California's provisions are in greater alignment with anti-essentialist legal theory because they allow individual circumstances to be acknowledged.[203]

2. California's Process for the Establishment of Conservatorship and Multi-tiered Standards of Proof Provides More Safeguards for Individual Liberties Than Maryland's Single-tiered Approach

Since conservatorships can, once established, be highly restrictive of personal liberties and difficult to terminate, a rigorous burden of proof for

198. *Compare* MD. CODE ANN., EST. & TRUSTS, § 13-201(c)(1) (West 2019), *with* CAL. WELF. & INST. CODE § 5350(d)(2) (West 2015) (stating that, in the case of a conservatorship for "a person who is gravely disabled as a result of a mental health disorder or impairment by chronic alcoholism," a court or jury trial must begin within ten days of the date of the demand for trial, and no more than fifteen days upon the request of conservatee's counsel); CAL. WELF. & INST. CODE § 5352.1 (West 2008) (stating the court may establish a temporary conservatorship under this law for a period not to exceed thirty days, and all temporary conservatorships shall expire automatically after thirty days, with one exception specified).

199. CAL. WELF. & INST. CODE § 5352.3 (West 1988) (stating the involuntary detention period under this provision is limited to forty-seven days unless a continuance is granted); CAL. WELF. & INST. CODE § 5352.6 (West 1986) (stating within ten days after conservatorship of the person has been established, an individualized treatment plan must be in place, and that when the person is no longer severely disabled, the progress must be reported by a designated individual and the conservatorship must be terminated). LPS Conservatorships require proof "beyond a reasonable doubt" of their need because of the constitutional due process concerns involved. Sorenson v. Superior Court, 219 Cal. App. 4th 409, 424 (2013).

200. MD. CODE ANN., EST. & TRUSTS § 13-709 (West 2019).

201. *Id.* § 13-709(c)(5)(iii).

202. *See supra* Section II.B.

203. *See supra* Section II.B.

establishing a conservatorship is vital for the protection of the conservatee.[204] There are some commonalities between California and Maryland's laws for establishing a conservatorship, such as the basic information required in submitting a petition, and the requirement to explore less restrictive alternatives.[205] However, California's process requires a court investigator to complete an extensive list of tasks prior to a hearing, including conducting extensive interviews and informing the conservatee regarding the proceedings.[206]

While California's standard of proof for a probate conservatorship is the same as Maryland's guardianship standard—"clear and convincing evidence"[207]—the burden of proof is higher for an LPS conservatorship due to its greater restrictions on an individual's civil liberties, requiring proof "beyond a reasonable doubt" that a conservatee is gravely disabled.[208] For example, in a case involving an LPS conservatorship for an individual diagnosed with multiple mental disorders, a hearing for re-establishment of the conservatorship emphasized the requirement "to prove beyond a reasonable doubt" that a conservatee is gravely disabled.[209] At issue was the conservatee's claim that a jury instruction expanded the definition of gravely disabled to include the possibility of a future failure to take medication.[210] However, the court noted that a "conservator must show the conservatee is *presently* gravely disabled" and not just that he may become disabled in the future for a failure to take medication.[211] Through medical testimony establishing that the conservatee required medication in order to provide for his basic needs, yet lacked insight into his illness and would not take

204. Laurel Wamsley, *Britney Spears Is Under Conservatorship. Here's How That's Supposed to Work*, NPR (June 24, 2021, 5:36 PM), https://www.npr.org/2021/06/24/1009726455/britney-spears-conservatorship-how-thats-supposed-to-work (noting that the step of imposing a conservatorship "is extreme and one that should be done as a 'last resort'").

205. CAL. PROB. CODE § 1821(a)(3) (West 2016) (requiring the petition to include alternates to conservatorship considered by the petitioner, and reasons why those alternatives were not selected); MD. CODE ANN., EST. & TRUSTS § 13-705(b)(2) (West 2020) (specifying that a guardian of the person shall be appointed if the court determines from clear and convincing evidence that, *inter alia*, "[n]o less restrictive form of intervention is available that is consistent with the person's welfare and safety").

206. CAL. PROB. CODE § 1826(a) (West 2022).

207. *Id.* § 1801(e); MD. CODE ANN., EST. & TRUSTS § 13-705(b) (West 2020).

208. Sorenson v. Superior Court, 219 Cal. App. 4th 409, 424 (2013) ("Because an involuntary civil commitment constitutes a deprivation of liberty . . . , due process under the California Constitution requires that a finding of grave disability in an LPS jury trial must be unanimous and based upon proof beyond a reasonable doubt.").

209. Conservatorship of Guerrero v. Guerrero, 69 Cal. App. 4th 442, 446 (1999).

210. *Id.* at 445.

211. *Id.* at 446 (emphasis added).

medication without supervision, the court determined beyond a reasonable doubt that the conservatee was presently gravely disabled.[212]

By contrast, Maryland's guardianship laws do not engage a court investigator or require a report that provides multi-faceted context for the petition and the disabled adult's needs.[213] Rather, a petition for guardianship must include certificates of competency from health care professionals who have examined or evaluated the disabled individual—either two licensed physicians or one licensed physician and one licensed psychologist, social worker, or nurse practitioner.[214] Counsel for the disabled individual may be appointed by the court, at a fee for the individual.[215] While stating that the disabled person is "entitled to be present"[216] at the hearing, the Maryland Code provisions for establishing guardianship do not include instructions for ensuring that the disabled individual has been fully informed of the nature of the proceedings, his or her rights to oppose the proceeding, or report to the court the wishes of the individual—all of which are detailed in California's provisions.[217]

Furthermore, since Maryland's guardianship laws do not contain a separate statutory scheme for severely disabled adults requiring hospitalization, as California's LPS Act does, there is also no higher burden of proof for guardianship under more extreme circumstances.[218] In Maryland's provisions for orders authorizing emergency protective services, a law enforcement officer must transport an adult to a medical facility when, based on the officer's observations, it appears likely that:

(i) "The adult will suffer immediate and serious physical injury or death if not immediately placed in a health care facility;
(ii) The adult is incapable of giving consent; and
(iii) It is not possible to follow the procedures of this section [regarding the establishment of a guardian of the person]."[219]

Successful petitions for protective services on an emergency basis require a finding "based on clear and convincing evidence"—the same standard as other guardianships under Maryland law—that the "person lacks capacity," "an emergency exists," and "no person authorized by law or court

212. *Id.* at 446–47.

213. MD. CODE ANN., EST. & TRUSTS § 13-705(c)(1) (West 2020).

214. *Id.* § 13-705(c)(2).

215. *Id.* § 13-705(d)(1)(i).

216. MD. CODE ANN., EST. & TRUSTS § 13-705(e)(1)(i) (West 2020).

217. CAL. PROB. CODE § 1828 (West 2017) (requiring the court investigator to inform the proposed conservatee of the proceedings and his or her rights).

218. MD. CODE ANN., EST. & TRUSTS § 13-705(b) (West 2020) (including mental disability, habitual drunkenness, and drug addiction as underlying causes for appointment of a guardian).

219. *Id.* § 13-709(a).

order to give consent for the person is available to consent to emergency services."[220]

The more rigorous and thorough the process is to establish a conservatorship, the more likely it is that the conservatorship is truly needed by the proposed conservatee.[221] Maryland's fixed requirement for affidavits from specified health professionals, without additional mandated inquiry and conversation with the disabled individual and those who know them, does not provide protection against gratuitous implementation of guardianships and the accompanying deprivation of individual liberties.[222]

3. California's Conservatorship Laws Have A More Comprehensive Model of Review Than Maryland's Guardianship Laws, Thus Providing More Protection Against Abuse and the Excessive Restriction of Individual Liberties

Once a conservatorship has been established, oversight and review are necessary to detect abuse.[223] One national survey found that "California has the most comprehensive model of review, with a regular visit to each incapacitated person by a court investigator six months after appointment and at least every two years thereafter."[224] The initial meeting six months after the establishment of the conservatorship requires the court investigator to evaluate whether the conservatorship continues to be appropriate and necessary, and whether the conservator is "acting in the best interests of the conservatee."[225] Based on the investigator's report, the court may order a review of the conservatorship or take other steps to ensure appropriate oversight.[226]

California's LPS conservatorships also include a structure for oversight, requiring the establishment of a treatment plan within ten days of the establishment of the conservatorship.[227] The LPS Act requires that the treatment plan specify the goals for the individual's recovery, and once the goals have been reached, the conservatorship must be terminated by court.[228]

220. *Id.* § 13-709(b).

221. *See, e.g.*, *Conservatorship Accountability Project*, CTR. FOR ELDERS & CTS., https://www.eldersandcourts.org/guardianship/CAP (last visited Mar. 9, 2022) (noting CAP's key concern that conservatorships are granted too easily).

222. MD. CODE ANN., EST. & TRUSTS § 13-705 (West 2020).

223. *See generally Conservatorship Accountability Project*, CTR. FOR ELDERS AND CTS., https://www.eldersandcourts.org/guardianship/CAP (last visited Mar. 9, 2022) (noting CAP's priority concern that courts lack resources and staff for effective oversight).

224. *See* TEASTER ET AL. *supra* note 191, at 36.

225. CAL. PROB. CODE § 1850(a)(1) (West 2022).

226. *Id.*

227. CAL. WELF. & INST. CODE § 5352.6 (West1986).

228. *Id.*

It is worth noting that California's conservatorship laws specifically address the impact of the conservatorship on the civil liberties of the conservatee, including when it comes to the right to vote, the right to marry, and reproductive rights.[229] California's conservatorship laws are less restrictive on individual liberties by explicitly addressing the nature of these rights under conservatorship and limiting the times when conservatorship negatively impacts the conservatee's rights.[230]

Maryland, by contrast, only requires an annual report completed by the guardian, rather than requiring oversight by an independent investigator.[231] The report form includes information on the individual's address, medical care, school and job training, employment, social and recreational activities, contacts and decision-making, community support, funds, and whether the guardian believes that the guardianship could continue or not.[232] The report does not inquire as to whether the disabled individual wishes to petition for the termination or modification of the guardianship.[233] While challenging to implement in practice, California's laws requiring a neutral party to have ongoing oversight of the conservatorship are more protective of the conservatee's individual liberties.[234]

4. While Terminating A Conservatorship Is Challenging in California As Well As Maryland, California's Laws Are Less Restrictive of Individual Liberties by Offering More Guidance for A Conservatee Who Wishes to Terminate Conservatorship

While the termination of a conservatorship is challenging in most states, California's statutory provisions offer more guidance than Maryland's laws for a conservatee who wishes to modify or terminate a conservatorship.[235] Under California law, a probate conservatorship (excluding limited conservatorships) may be terminated by the death of the conservatee or by

229. *See* CAL. PROB. CODE § 1900 (West 2005) (addressing the capacity of conservatee to marry); *Id.* § 1950 (West 1991) (addressing conservatee's reproductive rights and expression of the complexities surrounding sterilization).

230. *See id.* § 1823(b)(3)(B) (West 2016) (stating that while a conservatee may be disqualified from voting if he or she is incapable of communicating a desire to participate in the voting process, the conservatee will *not* be disqualified from voting on the basis that he or she needs to sign the affidavit of voter registration with a symbol or with another individual's assistance) (emphasis added); *Id.* § 1900 (West 2005) ("The appointment of a conservator of the person or estate or both does not affect the capacity of the conservatee to marry or to enter into a registered domestic partnership.").

231. MD. R. 10-206(e).

232. *Annual Report of Guardian of Disabled Person*, MD. JUDICIARY, https://www.courts.state.md.us/sites/default/files/court-forms/family/forms/ccgn013.pdf/ccgn013.pdf.

233. *Id.*

234. CAL. PROB. CODE § 1850(a)(1) (West 2022).

235. *Id.* §§ 1860–1865 (West 2022).

order of the court.[236] A petition for termination of the conservatorship may be filed by the conservator, conservatee, spouse, relative, or other interested person.[237] The court will then hold a hearing to determine whether a conservatorship is no longer required.[238] LPS conservatorships are automatically terminated one year after the appointment of the conservator, and an extension of the LPS conservatorship requires the opinion of two physicians.[239]

Under Maryland law, the only guidance for terminating a guardianship is found under guardianship of property, noting that a guardianship proceeding may be terminated by the "cessation of the . . . disability," death of the disabled individual, or "[o]ther good cause for termination as may be shown to the satisfaction of the court."[240] Therefore, given that the ability to terminate a guardianship is vital to ensuring the reclamation of individual liberties if the guardianship is no longer needed, California's laws offer more guidance regarding the termination of conservatorships and less restrictions on individual liberties.

C. Maryland Should Require Reporting on Conservatorship Data As A First Step Towards Reform

Overall, increased cultural awareness of conservatorships, and the #FreeBritney movement in particular, has prompted nation-wide calls for conservatorship reform on both the state and federal levels.[241] At the state level, the California Legislature recently passed Assembly Bill 1194, which aims to strengthen protections against conservatorship abuse.[242] The law features new requirements for professional fiduciaries to publish fees on their websites and for the Professional Fiduciaries Bureau to impose sanctions and conduct an investigation in response to allegations of abuse.[243] The law also revises the information that a court investigator is required to gather and

236. *Id.* § 1860 (West 2022).

237. *Id.* § 1861 (West 2001).

238. *Id.* § 1863 (West 2022).

239. CAL. WELF. & INST. CODE § 5361 (West 1979).

240. MD. CODE ANN., EST. & TRUSTS § 13-221(b) (West 2019).

241. *See, e.g.*, Farrell, *supra* note 104.

242. Assemb. B. No. 1194, Ch. 417, (Cal. 2021); *see also* Weimond Wu, *Britney Spears and "Marla Grayson" May Propel Tightened Oversight Over California Conservators*, TRUST ON TRIAL (May 10, 2021), https://www.trustontrial.com/2021/05/britney-spears-and-marla-grayson-may-propel-tightened-oversight-over-california-conservators/ (noting that both the #FreeBritney movement and "I Care a Lot" were cited in the Assembly's bill analysis to illustrate why the California Legislature is taking protective measures.); Jocelyn Wiener, *The Britney Effect: How California Is Grappling With Conservatorship*, LAIST (July 22, 2021, 10:32 AM), https://laist.com/news/health/britney-spears-how-california-is-grappling-with-conservatorship.

243. Assemb. B. No. 1194, Ch. 417, (Cal. 2021).

review, and the determinations the investigator is required to make.[244] Furthermore, the law makes changes to the processes for petitioning to terminate a conservatorship or to appoint a new conservator, including requiring the court to consider modifying or terminating the conservatorship at hearings.[245]

Transparency has been a particular target for advocates of conservatorship reform.[246] The current lack of conservatorship data leaves the entire institution of conservatorship open to potential abuse.[247] While multiple studies have attempted to collect state-level data on conservatorships, each attempt only exposed the current absence of data.[248] Guardianship advocates have made ongoing recommendations in order to strengthen the protection of individual rights, but the absence of data makes it impossible to identify and track incidents of exploitation or fraud.[249] In May 2021, recommendations were adopted by the Fourth National Guardianship Summit under the banner of "maximizing autonomy and ensuring accountability."[250] Recommendations included, *inter alia*:

a) Convening a task force to develop an enforceable bill of rights for passage by state legislatures in plain language that clearly identifies the affirmative rights of individuals under guardianship. The task force would consider "specific rights to ensure dignity, privacy, autonomy, and the opportunity to fully participate in all decisions which [significantly] affect them," including reproductive health.[251]
b) "States and courts must ensure full access to a full or partial restoration of rights as soon as possible after a right is legally restricted."[252]
c) "The state's highest court should require ongoing collection of [] guardianship data through [recommended] steps."[253]

244. *Id.*

245. *Id.*

246. *See, e.g.*, *State-Level Adult Guardianship Data: An Exploratory Survey*, A.B.A. COMM'N L. & AGING FOR NAT'L CTR. ELDER ABUSE (Aug. 2006), https://ncea.acl.gov/NCEA/media/docs/archive/State-Level-Guardianship-Data-2006.pdf.

247. *Id.* at 8 ("Strengthened guardianship data collection could shed light on both the extent of abuse by guardians and the extent to which they protect individuals from abuse.").

248. Diane Robinson et al., *Guardianship/Conservatorship Monitoring*: *Recommended Data Elements*, NAT'L CTR. FOR STATE CTS. & STATE JUST. INST. (Oct. 2020), https://www.eldersandcourts.org/__data/assets/pdf_file/0029/54758/GuardianshipConservatorship-Monitoring-Recommended-Data-Elements.pdf.

249. *Id*.

250. Fourth National Guardianship Summit, Recommendations Adopted by Summit Delegates, *supra* note 169.

251. *Id.* at Recommendation 1.1.

252. *Id.* at Recommendation 1.3.

253. *Id.* at Recommendation 4.1.

The National Council on Disability has called for guardianship reforms that include "[b]etter oversight of guardianships"; "[i]mproved measures to make sure people have due process in guardianship proceedings"; "[c]learer standards for determinating whether someone lacks [] capacity"; and "[r]equirements that courts try less-restrictive alternatives . . . before resorting to a guardianship."[254] Ultimately, guardianship reform and the prevention of abuse cannot be achieved without being based upon an informed understanding of existing patterns and trends.[255] Fundamental data on the number of guardianships in a state, changes in cases over time, powers granted, and changes in guardian—as recommended herein—form a foundation for understanding those patterns and developing substantive reform.[256]

1. The Principles of Feminist Legal Theory Support Transparency As A Step Towards Reform and Better Protection of Individual Liberties

This Section offers the Maryland General Assembly a model bill for increased data collection and transparency in the adult guardianship system. The implementation of this bill would be a step towards preventing the potential conservatorship abuses revealed by examining conservatorships in relation to feminist legal theory. Viewed through the lens of feminist legal theory, conservatorships possess several potential perils.[257] Dominance theory warns of the potential for the legal system to embody male perspectives and perpetuate women's subordination to men, particularly in areas relating to bodily autonomy and reproductive rights.[258] In addition, anti-essentialism offers insight into the potential for conservatorships to be used against individuals because of many aspects of their identity—gender, race, ethnicity, sexual orientation, or income, to name just a few.[259] Disability advocates have long called for greater conservatorship transparency in order to prevent just such abuses.[260] On the federal level, the recently-introduced "Free Britney Act," also known as the Freedom and

254. Dennis Thompson, *How 1.3 Million Americans Became Controlled by Conservatorships*, U.S. NEWS & WORLD REP. (Oct. 18, 2021), https://www.usnews.com/news/health-news/articles/2021-10-18/how-13-million-americans-became-controlled-by-conservatorships.

255. Robinson et al., *supra* note 248.

256. Fourth National Guardianship Summit, Recommendations Adopted by Summit Delegates, *supra* note 169.

257. *See supra* Section II.A.

258. *See supra* Section II.A.1.

259. *See supra* Section II.A.2.

260. *See, e.g.*, *Conservatorship Accountability Project*, CTR. FOR ELDERS AND CTS., https://www.eldersandcourts.org/guardianship/CAP (last visited Mar. 9, 2022); Robinson et al., *supra* note 248.

Right to Emancipate from Exploitation Act,[261] would include a provision requiring states to update their databases on the number of individuals under conservatorship in the state, in order to begin improving national data collection.[262] Without consistent data, it is impossible to track conservatorship abuse and explore patterns that might illuminate the causes of abuse, or to develop well-informed policies that prevent issues from occurring in the future.[263]

2. Enactment of the Following Bill Would Further Transparency of Adult Guardianships in Maryland and Lay the Groundwork for Guardianship Reform

The following bill offers a template for establishing legislation that requires thorough data collection and greater transparency regarding Maryland state guardianships, thus allowing Maryland to remain vigilant against guardianship abuse.[264] Transparency and oversight are so vital to reform that senators have called for more federal oversight of conservatorships.[265] Between states, there is a wide variation in how and whether data is collected, and on the national level, data is sparse.[266] Just as the senators seek greater transparency at the national level in order to track disparities, determine whether the rates of guardianship are increasing, and make policy recommendations, Maryland needs data on the local level in order to monitor the same concerns.[267]

This proposed bill includes statutory definitions drawn from existing Maryland Code, and "case status" definitions drawn from a report for the State Justice Institute and National Center for State Courts, which recommends data elements for monitoring adult guardianships.[268] In addition, the structure of this proposed bill is modeled after Section 9-614 of the Maryland Correctional Services Code—Maryland legislation which

261. H.R. 4545, 117th Cong. (1st Sess. 2021).

262. Farrell, *supra* note 104.

263. Robinson et al., *supra* note 248, at 3 ("Without consistent data, it is impossible to enumerate incidents of exploitation or fraud and understand root causes.").

264. Fourth National Guardianship Summit, Recommendations Adopted by Summit Delegates, *supra* note 169, Recommendation 4.1.

265. Abrams, *see supra* note 172. Lawmakers asked the Department of Health and Human Services and Department of Justice to provide information about data the agencies collect on the "prevalence of guardianship in the U.S., any efforts the agencies have made to protect people under guardianship and ways Congress can improve federal collection of guardianship data." *Id.*

266. *Id.*

267. *Id.* (The senators wrote, "While guardians and conservators often serve selflessly and in the best interest of the person under guardianship, a lack of resources for court oversight and insufficient due process in guardianship proceedings can create significant opportunities for neglect, exploitation, and abuse.").

268. Robinson et al., *supra* note 248, at 7.

similarly calls for more rigorous data collection, albeit in the context of the correctional system rather than guardianships.[269]

Definitions

a) *Guardianship of the Person*: Guardianship in which the court has granted to a guardian *"*only those powers necessary to provide for the demonstrated need of the disabled person.*"*[270]

b) *Guardianship of Property*: A court may appoint a guardian of property if the court determines that the *"*person is unable to manage effectively the person*'*s property and affairs because of physical or mental disability, disease, habitual drunkenness, addition to drugs, imprisonment, compulsory hospitalization, detention by a foreign power, or disappearance; and the person has or may be entitled to property or benefits which require proper management.*"*[271]

c) *Limited guardianship*: The court may appoint a guardian *"*for the limited purpose of making one or more decisions related to the health care of that person.*"*[272] The court may appoint a guardian *"*of a disabled person for a limited period of time if it appears probable that the disability will cease within 1 year of the appointment of the guardian.*"*[273]

d) *Guardian*: A guardian of property may be any individual, trust company, or *"*other corporation authorized by law to serve as a trustee.*"*[274] A guardian of the person may be appointed in accordance with the current priorities as detailed in MD. CODE ANN., EST. & TRUSTS § 13-707.

e) *Disabled person*: *"*[A] person other than a minor who: [h]as been judged by a court to be unable to manage the person*'*s property for reasons listed in § 13-201(c)(1) of this title;*"* and therefore *"*requires a guardian of the person*'*s property; or [h]as been judged by a court to be unable to provide for the person*'*s daily needs sufficiently to protect the person*'*s health or safety for reasons listed in § 13-705(b) of this title;*"* and therefore *"*requires a guardian of the person.*"*[275]

f) *Case status definitions*:[276]

269. MD. CODE ANN., CORR. SERVS. § 9-614 (West 2020).

270. MD. CODE ANN., EST. & TRUSTS § 13-708(a)(1) (West 2019).

271. *Id.* § 13-201(c).

272. *Id.* § 13-708(a)(2).

273. *Id.*

274. *Id.* § 13-206(a).

275. *Id.* § 13-101(f).

276. Robinson et al., *supra* note 248. The following case status definitions are derived from Robinson et al., *Guardianship/Conservatorship Monitoring*: *Recommended Data Elements*, a report

1) *Pending:* "An open case [] with a petition pending before the court."[277]
2) *Inactive and set for review:* "An inactive case is one whose status has been administratively changed to inactive during the reporting period due to events beyond the court's control. The court can take no further action on an inactive case until an event restores the case to the court's active pending caseload."[278]
3) *Disposed/Closed:* "A case is disposed/closed if additional court action would require a new petition to be filed. . . . [T]his may occur because: the petition was denied; the vulnerable person has died; . . . or competency has been restored."[279]

Reporting requirements[280]

a) On or before December 31 each year, [county courts] shall submit data to the Maryland Judiciary regarding all adult guardianships in Maryland that have been initiated, continued, or terminated in the past year.[281]
b) The data submitted shall include:
   1) The number of guardianships by jurisdiction;
   2) The types of guardianships (guardianship or the person, property, or both);[282]
   3) Powers granted to the guardian (full or limited; and if limited, which powers);[283]
   4) Current case status (open/pending, inactive, disposed and set for review, closed);[284]
   5) If case is closed, the reason for such closure (restoration of rights, death, transfer out of jurisdiction, dismissal);[285]

supported by the State Justice Institute and the National Center for State Courts. The report focuses on the collection of data relevant to adult guardianship policy. Defining and tracking the status of cases is particularly important in the case of adult guardianships, as the cases are often under the purview of the court system for many years. If the case status is merely listed as "active" or "open" during that time, courts cannot accurately track whether there is a petition pending or whether the case is being actively monitored by the court.

277. *Id.* at 7.

278. *Id.*

279. *Id.*

280. The tripartite structure of this bill was modeled after MD. CODE ANN., CORR. SERVS. § 9-614, *supra* note 269. As in MD. CODE ANN., CORR. SERVS. § 9-614, this bill requires annual reporting, lists the required data to be reported, and offers the means of implementation.

281. MD. CODE ANN., CORR. SERVS. § 9-614(b)(1) (West 2020).

282. Robinson et al., *supra* note 248 at 5.

283. *Id.* at 6.

284. *Id.* at 7.

285. *Id.*

6) Data on all adults under protective guardianships that were initiated, continued, or terminated, including age, race, gender, and financial status within a range of classifications and based on net worth of all assets;[286]
7) The underlying reason for protective guardianship and a summary of the evidence offered;[287]
8) Data on whether petitions were made for a life-threatening medical procedure or other emergency petitions were submitted;[288]
9) Whether the guardian is a friend or family member of the individual, or a publicly appointed guardian;[289]
10) Attorney and advocate information (whether the individual has an advocate and/or an attorney, and if so, whether the attorney was court-appointed)[290]

c) Means of implementing:
1) Additional data fields shall be added to the Annual Report of Guardian of Disabled Person (implementing Md. Rule 10-206 (e)) commensurate with the information required by this bill.
2) The Maryland Judiciary shall aggregate all data and prepare an annual report for the Maryland General Assembly, with additional details available upon request for relevant legislative committees reviewing or amending adult guardianship laws and policies.

III. CONCLUSION

The historical development of conservatorships, while well-intentioned, is rife with examples of abuse based on factors such as age, race, and sexuality.[291] Given the acknowledgement within contemporary academic, political, and pop-culture settings that conservatorships have the potential for abuse and require wide-spread, comprehensive reform for the establishment of safe-guards, this Comment finds support in the realm of feminist legal theory.[292] Within feminist legal theory, dominance theory supports conservatorship reform because of the ways in which conservatorship laws

286. MD. CODE ANN., CORR. SERVS. § 9-614(b)(1)(ii) (West 2020) (requiring reporting on age, race, and gender); Robinson et al., *supra* note 248 at 14 (requiring data on the status of assets at the start of the case and during monitoring).
287. Robinson et al., *supra* note 248 at 12.
288. *Id.*
289. *Id.* at 10.
290. *Id.* at 11.
291. *See supra* Section I.A.1.
292. *See supra* Section II.A.

perpetuate historical restrictions on reproductive rights.[293] In addition, anti-essentialism highlights the unique challenges and biases faced by individuals at the intersection of multiple aspects of identity, and supports legal reform that reduces those biases and acknowledges individual voices.[294] Ultimately, feminist legal theory supports reform that bends statutory frameworks towards the end of the conservatorship spectrum that rigorously protects the individual liberties of conservatees given the potential for abuse.[295] Maryland and California represent two opposing approaches to conservatorships, with California's laws in greater alignment with feminist legal theory.[296] While widespread reform is needed throughout the United States, this Comment proposes that Maryland take a first step towards reform through increased data collection on adult guardianships in the state.[297] Greater transparency will open the door to analysis of any troubling patterns or trends, and will enable the legislature to tailor further legislative amendments to eliminate and prevent guardianship abuses.[298] By rigorously protecting individual liberties, Maryland's guardianship laws will avoid the discriminatory biases and hazards illuminated by feminist legal theory and truly guard the most vulnerable among us.

293. *See supra* Section II.A.1.
294. *See supra* Section II.A.2.
295. *See supra* Section II.B.
296. *See supra* Section II.B.
297. *See supra* Section II.C.
298. *See supra* Section II.C.