Columbia Journal of Gender & Law

2025 | Issue 46.2

Columbia Journal *of* Gender & Law

Issue 46.2

The spacious home of today's feminist movement.

The *Columbia Journal of Gender and Law* (*CJGL*) is published by students at Columbia University School of Law. Please direct general correspondence to the following addresses:

Columbia Journal of Gender and Law
Columbia University School of Law
435 West 116th Street
New York, NY 10027

Email: jrngen@law.columbia.edu

Subscriptions: Subscriptions are $65 per volume for institutions, $50 per volume for public interest organizations, $40 per volume for individuals, and $20 per volume for current students. For international subscribers, please add $10. Individual issues may be purchased for $20, subject to availability.
Email: jrngen@law.columbia.edu

Submissions: *CJGL* welcomes unsolicited submissions of articles, book reviews, essays, comments, and letters. Please note that due to the volume of materials received, submissions to *CJGL* will not be returned to the author.
Email: columbia.jgl.submissions@gmail.com

Copyright © 2025 by the *Columbia Journal of Gender and Law*.

The *Columbia Journal of Gender and Law* (*CJGL*) is an interdisciplinary journal designed to address the interplay between gender and sexuality law, and its effects at the personal, community, national, and international levels. The articles we publish reflect an expansive view of gender and sexuality law—embracing issues related to feminism and gender and sexuality studies that cut across all races, ethnicities, classes, sexual orientations, gender identities, and cultures. *CJGL* also publishes articles that merge and blend disciplines—revealing the connections between law and philosophy, psychology, history, religion, political science, literature, and sociology.

CJGL operates by consensus and welcomes all law students at Columbia Law School to apply, regardless of status as a first-year law student, J.S.D. student, or LL.M. student. All editors and staff members are involved in *CJGL*'s decision-making process with respect to selection and editing of articles. Members work in teams and follow articles from acceptance to publication.

In fostering dialogue, debate, and awareness about gender-related issues, our goal is to advance feminist scholarship and gender and sexuality studies at Columbia Law School. We strive to break through traditional legal and academic confines, and serve as both a community and an outlet for interested students, faculty members, and practitioners.

CJGL publishes issues in both the fall and spring semesters. The size of our issues depends upon the number of articles our members vote to accept. We traditionally publish two issues per volume.

The editors and staff members of *CJGL* are grateful for your support. We look forward to your continued readership and welcome your contributions and responses.

Advisory

Jessica Bulman-Pozen
Betts Professor of Law
Director, Center for Constitutional Governance
Columbia University School of Law

Elizabeth F. Emens
Thomas M. Macioce Professor of Law
Director, Mindfulness Program
Columbia University School of Law

Suzanne B. Goldberg
Herbert and Doris Wechsler Clinical Professor of Law
Director, Sexuality and Gender Law Clinic
Columbia University School of Law

Board

Jamal Greene
Dwight Professor of Law
Columbia University School of Law

Scott E. Kessler
Lecturer in Law
Columbia University School of Law
Former Bureau Chief, Domestic Violence Bureau
Queens County District Attorney's Office

Dr. Christine A. Ryan
Lecturer in Law
Director, Reproductive Justice Project and Prevention of Crimes Against Humanity Project, Human Rights Institute
Columbia University School of Law
Senior Fellow for Reproductive Rights, Law, Rights, and Religion Project
Union Theological Seminary

Senior Editorial Board

Editor-in-Chief
Kylie Regan

Executive Editor
Hannah LeBaron

Executive Managing Editor
Alexander Hempel

Managing Notes Editor
Sarah Hubner

Editors

Business & Digital Editor
Adara Rosenbaum

Notes Editors
Eliza Namnoum • Serra Tickey

Symposium & Special Projects Editor
Lauren Young

Submissions Editors
Rebecca Ju • Olivia Li

Article Editors
Carly Feldman • Joseph Kelly
Samantha Kerns • Jennifer Zhang

Production Editors
Isabella Husein • Omar Kassam
Madison Tammaro • Amy Tang

Staff Members

Hannah Agar • Hannah Ahn • Emily Baca Loaiza

Yiwen Bao • Manasi Chande • Meagan Chang

Will Damarjian • Ebrah Rabia Dubac • Meher George

Will Gu • Anushka Gupta • Chloe Hu

Pally Huang • Annie Isabel • Alex Jacobson

Caroline Kells • Olivia Kim • Claire Kim

Hadley Kim • Annie Jewel Kong • Maggie Kormann

Cheyanne Lawrence • Yoony Lee • Elliot Y. Lin

Sylvia Liu • Bryan Miller • Anouk Murmann

Lexi Nelson • Michelle Ondari • Emily Stanton Paule

Kristen Quesada • Yuka Saji • Henry Schock

Alyssa Sugar • Connor Sullivan • Catrin Thomas

Sophia Travis • Krithika Vasireddy • Maggie Wainwright

Alex Worrall • Joanne Yang

Table of

1 Gate(s) Keeping or Scot(t) Free? The Legal Environment of Marital Surname Use, Post-Divorce

Gregory R. Bordelon

88 Laboratories of Reproductive Justice: State Amendments and the Right to Paid Family Leave

Pamela Chen

Contents

Discerning One Primary Purpose From Two: The Inconsistent Treatment of Sexual Assault Nurse Examiner Testimony Under the Sixth Amendment's Confrontation Clause **132**

Tessa DeFranco

GATE(S) KEEPING OR SCOT(T) FREE? THE LEGAL ENVIRONMENT OF MARITAL SURNAME USE, POST-DIVORCE

GREGORY R. BORDELON*

Abstract

In virtually all states, individuals who adopt their spouse's surname in marriage do not have clear statutory guidance on the right to use that surname following marital dissolution. Because of the ongoing, pervasive practice of surname-taking in marriage, society has long placed the burden on women, not men, to make a choice upon divorce—one at the core of identity—to decide again on a name. The overwhelming majority of state statutes provide women the option to readopt a surname used before marriage; some even allow the adoption of any new surname. But what if a divorced woman wishes to continue using her marital surname? What if she contributed to the value of that surname during the marriage? What if her personal and social identity came to align with the marital surname? Should she not be able to continue using it on firm legal grounds, beyond mere custom? In a purely legal sense, is the name hers?

This Article seeks to establish a firm legal foundation for a divorced individual's use of their former spouse's surname following marital dissolution. Part I presents a brief history of surnames, the genesis of hereditary surnames, and the development of patriarchal institutions, such as coverture, that shape a woman's naming rights. This account includes a history of marital surname usage in the United States, which borrowed from the English common law up to the advent of ostensibly egalitarian protection in a series of 1970s

© 2025 Bordelon. This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits the user to copy, distribute, and transmit the work provided that the original author and source are credited.

* J.D., Louisiana State University Paul M. Hebert Law Center; Assistant Professor of Legal Studies, Suffolk University, College of Arts & Sciences, Department of Political Science and Legal Studies. I would like to thank all of the colleagues who assisted in the idea creation, draft elements, and production of this work, particularly the law faculty at the September 2024 Central States Law Schools Association conference hosted by Texas Tech Law School. I would like to dedicate this piece to my friend Eileen D. Eisenstein, whose stern encouragement and naming fortitude consistently reminded me of the practical importance of this research. I also appreciate my family's patience, kindness, and love in my time researching this piece. Lastly, the editorial staff at the *Columbia Journal of Gender and Law* have been phenomenal in their editorial assistance and suggestions to make this piece and its core argument better. The views expressed here are my own, as author, as are any errors or omissions.

court decisions. Part II examines the social factors driving women to continue using a marital surname and discusses how these matters have shaped the current legal framework of surname usage during a marriage. Part III turns to the law of surname options at the time of divorce and thereafter, detailing the vast differences in the state law governing the area, particularly: what naming options are available in state statutes, when the name change must happen, and who may raise the issue. This section also addresses the legacy of gendered language in these statutes. Part IV proposes a model law on marital surname use post-divorce, establishing guidance and predictability in this area. The model law would allow divorced individuals the statutory ability to confirm their rights in a marital surname for all purposes under a clear, explicit framework.

INTRODUCTION

Names identify us; they are the core of our being, and there is an intimate relationship between name and self.[1] There are given names, which are those informal or familiar names we go by, and there are last names, family names, or surnames, which represent heritage and familial connections. Surnames give us a "personal identity and self-awareness."[2] The law is rarely involved in decisions regarding these most personal of matters.[3] When the law does get involved, states allow almost any name that individuals have asked the courts to entertain; this can be referred to as a naming autonomy principle.[4] Derived from English common law, naming autonomy allows individuals to be called what they would like to be

---

1 Gregory S. Alexander, *Name Takings*, 19 NW. J.L. & SOC. POL'Y 40, 49 (2023).

2 Roe v. Conn, 417 F. Supp. 769, 782 (M.D. Ala. 1976).

3 Omi, *The Name of the Maiden*, 12 WIS. WOMEN'S L.J. 253, 260 (1997) ("Each person has the right to use and be known for all purposes by the surname of his or her choice, without use of judicial proceedings, so long as fraudulent intentions are not involved.").

4 The phrase "naming autonomy" refers to the ability of an individual to go by any name they choose without the necessity of a legal name change, provided the use does not constitute fraud or cause confusion (or a few other standards that states have established for their formal change-of-name procedures). It is a phrase that represents the amalgamation of naming freedoms borrowed from English common law and imported into the American legal system. As this work describes, despite the right's unclear origins, states now accept the general proposition of naming autonomy. "At common law any adult or emancipated person was at liberty to adopt any name as his legal name except for fraudulent or criminal purpose, without resort to any court." Egner v. Egner, 337 A.2d 46, 48 (N.J. Super. Ct. App. Div. 1975); *see also* Roslyn G. Daum, *The Right of Married Women to Assert Their Own Surnames*, 8 U. MICH. J.L. REFORM 63, 66 (1974); Esther Suarez, *A Woman's Freedom to Choose Her Surname: Is It Really a Matter of Choice?*, 18 WOMEN'S RTS. L. REP. 233, 233 (1997).

called. This freedom has extended to standards in formal state name-change processes,[5] as well as in taking the name of another in marriage.[6]

The individual's motive in using a new name is presumed legitimate. In an ever-diversifying, pluralistic society, courts are "more sensitive to cultural differences and individual rights"[7] and tend to liberally grant name change requests made under formal state name-change processes.[8] While courts consider the public interest in a name change,[9] overriding the individual's interest in a request is often difficult.[10] With respect to married individuals, naming autonomy likewise extends into, through, and after the traditional social institution of marriage.[11] In opposite-sex marriages, however, women have for much (if not all) of this country's history bowed to societal pressures to adopt their male spouse's surname, rather than the other way around.[12]

As a result, the law seems to take a *laissez-faire* approach to marital surname use.[13] It likewise appears indifferent as to whether, following marital dissolution, a woman can keep her husband's surname or reacquire the surname she used before her marriage.[14] Many

---

5 *See In re* Porter, 31 P.3d 519, 521 (Utah 2001) (reversing the denial of petitioner's request to change their name to Santa Claus). "Statutes similar to sections 42–1–1 and–2 [Utah's name-change statutes] are recognized to merely provide a codified process to aid an individual's common law right to adopt another name at will. The statutory procedure benefits the petitioner and society by producing a record of the change. Consequently, applications under the statute should be encouraged and should generally be granted unless sought for a wrongful or fraudulent purpose." *Id.*

6 *See* Sec'y of Commonwealth v. City Clerk of Lowell, 366 N.E.2d 717, 723–24 (Mass. 1977); Malone v. Sullivan, 605 P.2d 447, 450 (Ariz. 1980) (en banc).

7 *In re* Ferner, 685 A.2d 78, 83 (N.J. Super. Ct. Law. Div. 1996).

8 *In re* Boardman, 166 A.3d 106, 110 (Me. 2017).

9 Generally speaking, the purpose for a name change is considered to ensure the new name is not being used to commit fraud (so as to cause public confusion or harm to others). *See, e.g.*, *In re* Serpentfoot, 646 S.E.2d 267, 269 (Ga. Ct. App. 2007) (denying name change when stated purpose was to disparage surname of local newspaper editor).

10 *See, e.g.*, *In re* Ferner, 685 A.2d at 81.

11 *Sec'y of Commonwealth*, 366 N.E.2d at 723.

12 Kelly Snyder, *All Names Are Not Equal: Choice of Marital Surname and Equal Protection*, 30 WASH. U. J.L. & POL'Y 561, 586 (2009).

13 *See, e.g.*, Egner v. Egner, 337 A.2d 46, 48 (N.J. Super. Ct. App. Div. 1975).

14 *Sec'y of Commonwealth*, 366 N.E.2d at 723.

local courts have formulaic ways to predetermine the surnames used in the pleadings and in documents associated with a divorce proceeding.[15] In these instances, once a particular surname is requested at the time of a divorce, and a judge signs off on it, that is the end of the story.[16] That is your name from here on out. Or is it? What if, alternatively, nothing is said in the divorce decree about the use of a surname, or if a party asking to revert to a former surname later decides they want the one used during the marriage?

Some social science scholars would describe naming autonomy in marital surnames as related to third-wave feminism.[17] Popular culture writers have referred to a divorced woman keeping her former husband's surname as "a flex."[18] Recently, this new social

---

15 *See State of New Hampshire Certificate of Divorce, Civil Union, Dissolution, Legal Separation or Annulment*, N.H. JUD. BRANCH (Dec. 2010), https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-04/vsform_divorc_cu.pdf [https://perma.cc/M23B-ABF8]; *State of Alabama Divorce Complaint*, ALA. ADMIN. OFF. OF COURTS (Oct. 2008), https://eforms.alacourt.gov/media/lmgc2trw/divorce-complaint.pdf [https://perma.cc/7GTZ-4HBE].

16 *See How Do I File a Change of Name for an Adult? When You Don't Need to File a Name Change in Court*, MASS. CT. SYS., https://www.mass.gov/info-details/how-do-i-file-a-change-of-name-for-an-adult [https://perma.cc/BP7D-WCW8] ("If you're getting divorced and want to resume a name you have legally had in the past, you can ask to resume this former name in your Complaint for Divorce, Joint Petition for Divorce form, or Counterclaim for Divorce.").

17 Scholars refer to a "third wave of feminism" replacing a rejection of government and regulatory constraints on women's choice with a perception of not choosing what is expected of the modern woman. *See, e.g.*, Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. 893, 914 (2010) ("Current attitudes about naming may also reflect a greater sense of personal choice, which resonates with an increased sense that feminism means being able to do as one pleases, regardless of whether and how it comports with earlier versions of feminism. . . . '[T]hird wave' feminism, mostly comprised of women who came of age after the second wave of feminism, seeks women's 'freedom to live life as they choose.'" (footnote omitted) (quoting Harold P. Southerland, *"Love for Sale"—Sex and the Second American Revolution*, 15 DUKE J. GENDER L. & POL'Y 49, 117 (2008))). Some scholars of feminist studies posit that we are currently in a fourth-wave period of feminism that began in the early 2010s, embracing intersectionality, the use of technology to promote women's rights, and broader and more diverse interpretations of empowerment beyond the third wave. *See, e.g.*, Ealasaid Munro, *Feminism: A Fourth Wave?*, PSA BLOG: POL. STUD. ASSOC. (Sep. 5, 2013), https://www.psa.ac.uk/psa/news/feminism-fourth-wave [https://perma.cc/FUG9-Y87Z].

18 Kayla Kibbe, *Melinda French Gates is Keeping Bill Gates's Last Name*, INSIDE HOOK (Aug. 3, 2021), https://www.insidehook.com/culture/melinda-gates-keeping-last-name [https://perma.cc/D35S-89KN]. Kibbe's piece would likely resonate with younger generations' perception of feminism: "Melinda French Gates has ushered in a new trend in post-divorce feminism. Refusing to take your husband's name? Old news, your grandma's feminism. Holding onto that shit and reclaiming it for your own is the new feminist flex." *Id.*

phenomenon has played out in two high-profile divorces: Jeff Bezos[19] and MacKenzie Scott[20] in 2019, and Bill Gates and Melinda French Gates[21] in 2021. In both of these billion-dollar asset divisions, the woman was faced with the customary albatross of what to do with her surname.[22] Would she keep her marital surname, or would she return to the one she used before the marriage (or use another altogether)? In a divorce, American society has long placed the burden of this choice on women, not men.[23]

As explained below, because of the still extreme social (and other extralegal) pressures that many women feel to adopt a man's surname when entering into an opposite-sex marriage, the law disproportionately burdens women, especially in formalizing protections in surname use after a marriage ends. As the table of laws appended to this Article demonstrates, naming rights at the end of a marriage are muddled in a web of custom, common law, and inconsistent statutory guidance.[24] State statutes on naming rights post-divorce are not unified and rarely give clear guidance on naming options, and some states (such as Florida, Idaho, Mississippi, and Missouri) do not even have a statute addressing the matter. Very few of the statutes could be construed to confirm a baseline right to use the

---

19 *À propos* of this study, "Bezos" was not even Jeff Bezos's birth surname; he was adopted by his mother's second husband, Miguel (Mike) Bezos, at age four, and his surname was legally changed from Jorgensen to Bezos. RICHARD L. BRANDT, ONE CLICK: JEFF BEZOS AND THE RISE OF AMAZON.COM 21–22 (2011).

20 Lucy Pavia, *Triumph of the Former Mrs. Amazon: What Mackenzie Scott Did Next*, THE STANDARD (Mar. 23, 2022), https://www.standard.co.uk/lifestyle/celebrity/mackenzie-scott-success-jeff-bezos-divorce-a4512601.html [https://perma.cc/7YEF-E8AM]. Scott kept using the Bezos surname for some months after their divorce in 2019, but as she began her philanthropy, that changed. As Pavia writes, "Scott donated over $4.1 billion during 2020 to food banks and emergency relief funds amid the Covid-19 pandemic. That followed donations of $1.7 billion to causes including racial equality, LGBTQ rights, public health and climate change announced earlier in 2020, when she also revealed she would be dropping Bezos as a surname." *Id.*

21 Greg Bordelon, *What's a Last Name Worth in Divorce? If It's Gates, a Lot*, BLOOMBERG LAW (May 12, 2021), https://news.bloomberglaw.com/us-law-week/whats-a-last-name-worth-in-divorce-if-its-gates-a-lot [https://perma.cc/27NG-BZ3J].

22 Omi, *supra* note 3, at 255–56.

23 Michael Rosensaft, *The Right of Men to Change Their Names Upon Marriage*, 5 U. PA. J. CONST. L. 186, 192 (2002). Rosensaft frames his argument as a constitutional equal protection concern as to men being restricted in using their wives' surname during marriage as well as changing to a surname other than their own if a marriage terminates. The reference to the article simply indicates that the surname decision is one that has been, and continues to be, a sex-based concern that women must deal with.

24 *See infra* Table 1.

borrowed, marital surname, but really do nothing beyond stating such.[25] As a result, women may feel an uncertain sense of identity in their name following divorce. State statutes should be explicit about naming options upon divorce and should remedy this uncertainty by formalizing custom in positive law, thereby protecting a divorced woman's right to use a marital surname.

No statutes yet enacted in this area detail the parameters of an unfettered *right* in a surname, either during or after marriage, inasmuch as anyone has a right to any "legal" name.[26] Commercial protections provided by the law, such as trademark infringement claims[27] and tortious right of publicity actions[28] could conceivably determine the rights of use to a marital surname, but "the ubiquity of some names makes it almost "an 'impossibility' for anyone 'to arrogate to himself the exclusive use of a name which he shares in common with many other persons.'"[29] Likewise, there is a presumption that statutes do not intend to "displace 'bedrock' features of the common law"[30] (like naming autonomy), so trademark and tort protections likely do not secure rights in the use of a

---

25 Louisiana's Code of Civil Procedure seems to confirm that a divorced woman may take her husband's name under LA. CIV. CODE art. 100 (Westlaw through 2024 1st Extr. Sess., 2d Extr. Sess., Reg., and 3d Extr. Sess.) ("Marriage does not change the name of either spouse. However, a married person may use the surname of either or both spouses as a surname."). *See* LA. CODE CIV. PROC. ANN. art. 3947(B) (Westlaw through 2024 1st Extr. Sess., 2d Extr. Sess., Reg., and 3d Extr. Sess.). As discussed in more detail below, Illinois and Rhode Island's statutes are the only other two that seem to confirm rights in marital surnames for divorced individuals.

26 Austin A. Baker & J. Remy Green, *There Is No Such Thing as a "Legal Name"*, 53 COLUM. HUM. RTS. L. REV. 129, 133–34 (2021) ("[T]here is a deep irony to this near-universal insistence on using legal names: *legally speaking*, there is no agreement about what a 'Legal Name' is. Many people have several legal names—e.g., the name on their birth certificate, the name on their driver's license, the name on their Social Security card, the name on their green card, the name they are referred to by in their community, etc.—depending on the definitions used, all of which might be different." (emphasis in original)).

27 The United States Supreme Court recently held that a person does not have a First Amendment right to obtain a trademark in another living person's name without that person's consent. Vidal v. Elster, 602 U.S. 286, 310 (2024).

28 *See generally* Alexander, *supra* note 1, at 74 ("The right of publicity prevents the unauthorized use of a person's name, likeness, or other aspects of one's identity and gives the individual the exclusive right to license the commercial use of these personal features.").

29 Jennifer E. Rothman, *Navigating the Identity Thicket: Trademark's Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 HARV. L. REV. 1271, 1300 (2022) (footnote omitted) (quoting LEWIS BOYD SEBASTIAN ET AL., THE LAW OF TRADE MARKS AND THEIR REGISTRATION AND MATTERS CONNECTED THEREWITH 39 (5th ed. 1911)) (regarding the inability to trademark an individual's name).

30 Dewberry Grp., Inc. v. Dewberry Eng'rs, 604 U.S. 321, 327 (2025) (citing United States v. Bestfoods, 524 U.S. 51, 62 (1998)).

surname. And the vast majority of women who take a man's surname in an opposite-sex marriage, often in response to strong extralegal pressures, are likely unaware of the legal protections around their (perhaps even commercial) use of that surname.

If a man were to contest a woman's right to a name, what legal grounds would she have to defend it? In this intersection of custom and law with a "right" that is not clearly a property interest or a constitutional liberty interest, coupled with broad judicial discretion in post-marital naming, firmer and more predictable rules are warranted. Courts need guidance on how to adjudicate surname usage disputes between divorced individuals. Considering how long, when, to what degree, and for what purpose a surname is used during a marriage can aid in establishing this legal framework.[31] Federal statutory law abutting surname usage must also be considered: this includes federal employment discrimination law, federal voting rights laws (like the recently proposed Safeguard American Voter Eligibility "SAVE" Act), and the REAL ID Act.[32]

Throughout this work, I refer to two types of surnames: a former surname and a marital surname. A "former surname" can refer to any surname an individual used before a marriage; it can include one that is given at birth and registered on an official state document, such as a birth certificate, or one that an individual used from a previous marriage or formal name change.[33] "Marital surname" refers to a surname used by an individual that is not their former surname and is the surname of the individual's current or former spouse.

As a preliminary matter, it is important to describe the limits of this Article's scope. Though the analytical framework and legal proposals herein can be applied to both opposite-sex and same-sex divorced individuals, the Article discusses how claims for a statutory right in the use of a marital surname post-divorce exists more strongly for women leaving opposite-sex marriages than it does for individuals leaving a same-sex marriage (at

---

31 *See infra* Part III, addressing these elements within the existing statutes dealing with marital surname options for usage upon divorce.

32 *See infra* Part II.C.3.b, addressing the federal statutes that touch on considerations of surname usage and incidentally, potentially those used (and the documentation required therefor) by an individual after a marriage terminates.

33 The law (primarily through administrative documents) still has some elements of the patrilineal hierarchy of marital surnames by frequently using the term "maiden name." The term itself implies that an unmarried woman, a "maiden," will take a new surname upon marriage. *See, e.g.*, Deborah J. Anthony, *A Spouse by Any Other Name*, 17 WM. & MARY J. WOMEN & L. 187, 206 (2010) [hereinafter Anthony, *A Spouse*].

least for now).[34] As time passes, states will likely see naming disputes between same-sex couples as well. Furthermore, for reasons explained below, a man does not traditionally take a woman's surname in an opposite-sex marriage. While there is scholarship analyzing this possibility and discussing how state laws and local marriage license applications can facilitate it, the social forces driving women to adopt their male spouse's surnames mean that a woman taking a man's name is far more common than the inverse.[35]

This Article focuses on the law of surname usage in the United States. Comparative and international surname law is highly varied, with numerous cultural, historical, and social customs influencing how positive laws are enacted and enforced.[36] Some of these phenomena may exist in the United States, but many will differ. Although the Article references system-based legal theories (common law systems and civil law systems) to aid in classifying naming rights, reference to specific contemporary non-U.S. laws will be sparse.

Though this Article analyzes and ultimately proposes a legal framework for predictable and unrestricted use of a marital surname by a divorced woman, decisions regarding children's surname choices are discussed as an analytical ancillary to the law of divorced women's surname options.[37]

---

34 As discussed in Part II.B, *infra*, the constitutional right to same-sex marriage was established relatively recently, so there are few cases analyzing surname usage disputes between divorcing same-sex couples. However, the analysis herein and the protections of the statute proposed at the conclusion of this article would apply equally to both opposite-sex divorcing couples and same-sex divorcing couples.

35 According to a 2023 study by the Pew Research Center, 92% of men in opposite-sex marriages kept their last names. Five percent took their spouse's last name, and only one percent hyphenated both last names. 79% of women took their husband's last name upon marriage. Luona Lin, *About 8 in 10 Women in Opposite-Sex Marriages Say They Took Their Husband's Last Name*, PEW RSCH. CTR. (Sep. 7, 2023), https://www.pewresearch.org/short-reads/2023/09/07/about-eight-in-ten-women-in-opposite-sex-marriages-say-they-took-their-husbands-last-name/ [https://perma.cc/Q9PQ-YUHG].

36 *See*, *e.g.*, Motoko Rich & Kiuko Notoya, *A Litmus Test in Japan: Should Spouses Be Able to Have Different Surnames?*, N.Y. TIMES (Sep. 25, 2024), https://www.nytimes.com/2024/09/25/world/asia/japan-election-surnames.html [https://perma.cc/W3N3-X4PY]; Sharon Shakargy, *You Name It: On the Cross-Border Regulation of Names*, 68 AM. J. COMP. L. 647, 655 (2020) (analyzing the need for firm choice-of-law rules regarding naming because "[t]he regulation of names presents unique challenges due to the disparity of outlooks on the matter among different jurisdictions").

37 When state court judges face child surname disputes, they determine "good cause" to decide whether a name change to the child should occur. UNIF. PARENTAGE ACT § 622(e) (UNIF. L. COMM'N 2017). State courts are linking the "best interest" test (frequently used in child custody determinations) to this provision in the Uniform Parentage Act to determine whether a surname change of a child should be granted. *See, e.g.*, E.R.J.

Lastly, this Article's analysis applies to marriages terminated by means other than divorce.[38] However, given that marriages terminate by divorce in a greater proportion than annulment, the analysis has the most practical effect in the realm of divorce.[39] The immediate practical application of this research is to help formalize a legal right in the use of a marital surname for a divorced woman without fear of legal action by her former husband. Future research will explore, once that right to use the surname is better established (preferably by statute), the financial utility of the name's use as a commodity and how it might be valued it in a business context, as well as how the right could be further supported by the law of trademark and the right of publicity cause of action in tort.

This article proceeds in four parts. Part I presents a brief history of surname usage, tracing the development of marital surname usage in the United States from the English common law to the advent of ostensible gender egalitarian surname protection through a series of court decisions in the 1970s. Part II examines the significant reasons, beyond the law, why women in opposite-sex marriages still choose to take their husband's surname before addressing the state of marital surname taking for same-sex couples. Part II also assesses the existing legal environment of marital surnames, identifying how case law

---

v. T.L.B., 990 N.W.2d 570, 572, 575–76 (N.D. 2023) (interpreting North Dakota's analogous provision to §622(e), found in N.D. CENT. CODE ANN. § 14-20-57 (West 2022)). Though some of these cases' analyses may be helpful by comparison, the "best interest" test is inapplicable to courts' determinations involving naming rights of adults.

38 As a general matter, state law governing marriage indicates that a marriage terminates by one of three primary ways: divorce, annulment, or death (or judicial declaration of death) of either party to the marriage. *See, e.g.*, 27 FED. PROC., L. ED. § 61:540. For all intents and purposes, a marriage that is terminated by annulment results in the same dilemma for the use of a marital surname as this article postulates. A marriage that ends in death of one of the parties presents a very interesting question regarding *who* can enforce rights analyzed here. To the extent a state trial or probate court would entertain the question of continued use of a marital surname, could it do so in the context of an estate administration? If so, could the heir(s) or legatee(s) enforce such a right on behalf of the deceased "original" holder of the surname? Could the use of a marital surname be called for in a will or as a condition in a trust? At least one court has ruled that when a husband dies during the pendency of a divorce action, and the wife requests to change her name back to a former surname, his death does not abate her request provided she is not seeking to change the name for fraudulent purposes (such as avoiding creditors). Hesson v. Hesson, 919 A.2d 907, 910 (N.J. Super. Ct. Ch. Div. 2007).

39 Comprehensive data on the specific way marriages end, as between divorce and annulment, are not centralized, as many states archive these records at the county or otherwise local level. In 2022, according to the U.S. Centers for Disease Control and Prevention, the provisional marriage rate was 6.2 per 1,000 total population, and the provisional number of divorces and annulments was 2.4 per 1,000 total population. *National Marriage and Divorce Rate Trends for 2000–2022*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nchs/data/dvs/marriage-divorce/national-marriage-divorce-rates-00-22.pdf [https://perma.cc/B5N3-TXJ4].

shapes this legal landscape. Part III analyzes how state statutes inform the use of surnames following marital dissolution, particularly what options are expressly provided, who may raise the issue, how, and when. Part III also addresses the residual legacy of gendered language in some of the statutes. Part IV proposes a model statute on post-divorce surname options and analyzes its constituent parts. The model statute would provide clear guidance and predictability in this area, allowing divorced individuals the option to continue using the name of their former spouse, including the ability to make commercial use of it.

I. The Origins of Surnames in Marriage and Divorce

The use of names to identify individuals has been "ubiquitous in both primitive and modern society."[40] Surname usage increased in formality alongside the advancement of wealth in land[41] and, later, governments' need for keeping administrative records on their citizens.[42] When property was involved, it was not uncommon for children to even adopt the surname of their mother if she owned the majority of wealth or possessed a larger estate than her husband.[43]

The identity purpose of naming is well analyzed in the scholarly literature of psychology and sociology.[44] In the English tradition, from which American common law developed, surname usage was a "highly variable and fluid cultural practice" before the Norman Conquest of 1066.[45] Surname usage, through a hereditary naming convention, became customary in mid-sixteenth-century England under Elizabeth I.[46] As a second identifier to supplement given names, surnames developed in ways that referenced the individual's

---

40 Alistair Berg, An Institutional Analysis of the Economics of Identity 100 (Aug. 20, 2021) (Ph.D. dissertation, Royal Melbourne Institute of Technology) (on file with author).

41 Deborah J. Anthony, *To Have, To Hold, and To Vanquish: Property and Inheritance in the History of Marriage and Surnames*, 5 BRIT. J. AM. LEGAL STUD. 217, 236 (2016) [hereinafter Anthony, *To Have*].

42 Berg, *supra* note 40, at 103.

43 Dunn v. Palermo, 522 S.W.2d 679, 681 (Tenn. 1975).

44 *See* Berg, *supra* note 40, at 101. *See generally, e.g.*, Kenneth L. Dion, *Names, Identity, and Self*, 31 J. ONOMASTICS 245 (1983); Peter N'diang'ui, *Is Peter Your Real Name? An Autohistoria-Teoría Exploration of Self-Identity Conflict Through Cultural Naming and Colonial Renaming Among the Kikuyu People of Kenya*, 8 J. CULTURE VALUES EDUC. 64 (2025).

45 Anthony, *To Have*, *supra* note 41, at 218.

46 Julia Shear Kushner, *The Right to Control One's Name*, 57 UCLA L. REV. 313, 325 (2009).

place in society and aided government actors in recordkeeping.[47] However, flexibility in realms outside these government functions remained.[48]

Surnames developed to fulfill a variety of functions, including connecting individuals to places (locational naming) and to their physical characteristics (like height).[49] They also connected individuals to professions and businesses (occupational naming) and to other individuals (relational naming), helping document long-term social and economic growth.[50] Historical and etymological studies bear out these functions.[51] For example, the *-son* suffix in a surname like "Richardson" initially meant "son of Richard";[52] the same patronymic relational derivatives exist for common American surnames such as "Johnson."[53] Surnames ending in suffixes like *-berg* (derived from *borough*), *-wick* (abode or village), and *-leigh* or *-ley* (meadow), to name a few, are locationally or geographically grounded.[54] Occupationally, surnames such as "Taylor" evoke the old-English clothes trades, and the common surname of "Smith" takes its origins from the variety of historical occupations[55] connected to local commerce and community needs.

Historically, surnames have been used for nefarious reasons in furtherance of governments' political agendas.[56] Surname regulation has been used to oppress and control by stripping groups of rights to self-determination and self-identification.[57] When used as

47 Berg, *supra* note 40, at 103–04.

48 Anthony, *To Have*, *supra* note 41, at 239.

49 Jonathan Herring, *The Power of Naming: Surnames, Children, and Spouses*, *in* LAW AND LANGUAGE 310, 311 (Michael Freeman & Fiona Smith eds., 2013).

50 Berg, *supra* note 40, at 87–88, 105. Many names are likely derived from a historical connection to an occupation—Brewer, Miller, and Carpenter to name just a few—and, as integrated into American culture, morphed from other languages (e.g., Schumacher—shoemaker).

51 Berg, *supra* note 40, at 104.

52 Deborah J. Anthony, *In the Name of the Father: Compulsion, Tradition*, *and Law in the Lost History of Women's Surnames*, 25 J. JURIS. 59, 64 (2015) [hereinafter Anthony, *In the Name*].

53 Anthony, *A Spouse*, *supra* note 33, at 192.

54 Anthony, *In the Name*, *supra* note 52, at 64–65.

55 Deborah J. Anthony, *Eradicating Women's Surnames: Law, Tradition, and the Politics of Memory*, 37 COLUM. J. GENDER & L. 1, 5 (2018) [hereinafter Anthony, *Eradicating Women's Surnames*].

56 Berg, *supra* note 40, at 105–06.

57 Anthony, *A Spouse*, *supra* note 33, at 194.

a way to differentiate between families, ethnic groups, or other formal classifications of individuals, "surnames [could] be imposed by a state to ensure standard naming practices, including as a way of pursuing a political agenda."[58] Name changes have been used as a measure of cultural oppression and social dominance.[59]

Surnames have also functioned as a marker for the transfer of ownership and to define property rights,[60] which could then influence lawmakers' decisions on who is entitled to the use of a particular surname. This relationship becomes very clear in the context of the heritability of surnames and claims on property,[61] which operated initially as a marker to indicate familial relationships in wealth and property transfer without sovereign intervention.[62] For a long stretch of history, before the practice of surname borrowing in marriage was brought over to the United States, this focus on inheritance of property was not necessarily patrilineal. Before the advent of coverture and the patrilineal surname preference, married individuals often used the birth surname of the spouse with more wealth, which could have been the woman as well as the man.[63] Laying claim and proving title to property, however, was far more difficult in practice for women than men.[64]

---

58 Berg, *supra* note 40, at 105–06. Berg's research points out historical examples of governments using lists of "approved names" and "standardized naming practices" as a means of preferring certain ethnic groups or classes of individuals over others. In some governmental regimes, surnames were changed for some by legal decree. *Id.* at 106.

59 Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 770 (2007).

60 *See, e.g.*, Anthony, *A Spouse*, *supra* note 33, at 192–93. Historically, if a woman's family's wealth was greater than that of her husband's, and he took her name, "*property ownership became tied to surnames*, but neither property nor surnames had yet come to inhere solely in the male." Anthony, *Eradicating Women's Surnames*, *supra* note 55, at 7 (emphasis added).

61 Berg theorizes that after the Norman Conquest of 1066, different parts of a larger family tended to adopt different surnames to diffuse and spread out the influence of the root and branch surnames to stake claims on property, mostly land. Berg, *supra* note 40, at 90–91.

62 Governmental rules evidencing an interest in surname usage wouldn't develop formally in England until the reign of Henry VIII and the enactment of the *Statute of Wills* in 1540. *Id.* at 93–96.

63 Michael Mahoney Frandina, *A Man's Right to Choose His Surname in Marriage: A Proposal*, 16 DUKE J. GENDER L. & POL'Y 155, 159 (2009).

64 Berg, *supra* note 40, at 92 ("[T]he ability for females to successfully lay claim to property was substantially more difficult compared to their male counterparts.").

Eventually, the heritable use of a surname would give way to the government's ostensible need for recordkeeping; the surname proved useful to the state beyond merely indicating hereditary wealth transfer.[65] Scholars believe this was a façade, though, for governments were simply restricting women's rights by moving towards the system of coverture.[66] Individuals with little or no wealth were swallowed up by this legal regime and mandated to follow it.[67]

Coverture created a property system of marital assets that slowly eroded any gains in financial and social independence for married women. Under the coverture system, married women lost property rights over both land and movable assets and could neither sue nor be sued in their own name.[68] At this time, the law recognized one person in a marriage of the union of two, and that "person" was represented in all dealings by the husband.[69] The law gave the husband a "superior legal status as head of household and gave him legal dominion over his wife and children and all marital labor and property,"[70] morphing the husband's surname into the default "title" of "control and ownership"[71] of the "covered" unit. That concept of the marriage as a "single marital entity"[72] persisted as a legal concept well into the 1800s. But the English common law that developed from the law of coverture did not require that the wife use the husband's surname in all cases; if she did, it remained

---

65 *Id.* at 95 ("[The] process was later adopted as a nationwide institution, whereby state authorities used the identity technology to unambiguously identify individuals from all classes for the purposes of taxation, legibility . . . as well as the legal enforcement of claims over landed property.").

66 *See, e.g.*, Anthony, *To Have*, *supra* note 41, at 218 ("As women's property ownership became more severely restricted over time, these variable surname practices also disappeared. The operation and function of property, especially as applied to women, is connected to the operation of surnames as a socio-legal function.").

67 Berg, *supra* note 40, at 99–100 ("[W]hat is apparent is that surnames as an identity technology emerged endogenously from [the Norman Conquest of] 1066, and were subsequently recognized through legal-centric means when the technology was used by, or forced upon, less wealthy individuals. . . . [T]hose from the lower classes tended to adopt surnames as the incentive to do so arose, and often as a result of some interaction with a state authority who demanded it for reasons of taxation, conscription and so forth.").

68 Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change: A Proposal for Individual Contracts and Contracts in Lieu of Marriage*, 62 CALIF. L. REV. 1169, 1172 (1974).

69 *In re* Reben, 342 A.2d 688, 691 (Me. 1975).

70 Anthony, *To Have*, *supra* note 41, at 237.

71 *Id*.

72 *In re* Reben, 342 A.2d at 692.

a matter of custom or practice, not a legal requirement.[73] Other U.S. state courts have not only acknowledged the antiquity of the coverture model but have shown, within it, that property and asset singularity was not necessarily the same as compelled surname taking.[74]

Nineteenth-century and early twentieth-century court decisions dealt inconsistently with the tension between common law naming autonomy for women and the single-unit property system of coverture. During this time, courts applied custom if it was convenient, but not in a way that would impede states' interest in cataloging and administratively organizing assets under the husband as head of a marital household.[75] When in doubt, these institutions would remain beholden to patrilineal structures of coverture and related legal principles that subsumed women's rights into the patrimony of her husband.

One of the first American state court cases addressing naming rights in this context involved a woman who purchased shares of bank stock using her name, Verina S. Moore.[76] She then married a Rev. Dr. Chapman. The shares of stock were later seized by the United States government under allegations that Verina was using funds to support the Confederacy during the Civil War. When the notice of the seizure "to all interested parties" (sent to her in the name of "Ver. S. Moore") was returned to the federal court approving cancellation of the stocks, she challenged for lack of notice. The court found the notice unacceptable by acknowledging that since her marriage to Chapman, her "legal" surname changed from Moore to Chapman.[77] Although she won the case on procedural grounds, the court's assumption that her name had legally changed to that of her husband's resulted in a coverture-esque rule of patrilineal surname preference in marriage. Shortly after this

---

73 Kruzel v. Podell, 226 N.W.2d 458, 463 (Wis. 1975).

74 *See In re* Natale, 527 S.W.2d 402, 405 (Mo. Ct. App. 1975) ("The concept that the husband and wife are one, the 'one' being the husband, has been abandoned. Insistence that a married couple use one name, the husband's, is equally outmoded.").

75 Emens, *supra* note 59, at 772 ("Custom became law by a series of cases in the late nineteenth and early twentieth century. These cases built dicta upon dicta until many states had plainly declared in case law or by statute that married women's ability to engage legally in certain activities — such as driving or voting — was dependent on her bearing her husband's name.").

76 Chapman v. Phoenix Nat'l Bank of N.Y., 85 N.Y. 437, 445 (1881).

77 *Id.* at 449 ("[A]t the time this information was filed, the name of the plaintiff was not even Verina S. Moore. Her name was then, and for more than three years had been, Verina S. Chapman. For several centuries, by the common law among all English speaking people, a woman, upon her marriage, takes her husband's surname. That becomes her legal name, and she ceases to be known by her maiden name. By that name she must sue and be sued, make and take grants and execute all legal documents. Her maiden surname is absolutely lost, and she ceases to be known thereby.").

decision was the famous case of Lucy Stone, who refused to use the name of her husband, Blackwell, to vote in a local Massachusetts school board election, having consistently used the Stone surname for more than half of a century prior.[78]

In 1897, also in a New York court, a divorced husband asked to enjoin and hold in contempt his former wife for using his surname of Blanc after they divorced.[79] He had asked for her to not use the name as part of his divorce decree (suing on the grounds of her adultery), but she continued going by "Baroness Blanc" thereafter, even after remarrying.[80] She alleged that she used the surname only in her professional life as an actress.[81] The court reasoned that the decree governed the use of the surname, and traced the history of marital surnaming custom through coverture, reasoning that her continued use of the surname tarnished his reputation and noting the concern it could cause his second wife if he were to remarry. The court ultimately held the former wife in contempt for not abiding by the divorce decree, but also apparently decided not to enjoin her from continued use of the Blanc surname in her acting career.[82]

It would take a judicial decision back across the Atlantic to slowly turn the tide in American courts. That seminal English case, much like *Blanc v. Blanc* in New York a few years earlier, involved an action by a divorced husband to enjoin his former wife from using his surname, Cowley.[83] Earl Cowley was concerned about his former wife's use of the Cowley title once she planned remarriage to someone outside of his peerage:[84]

---

78 Una Stannard, *Manners Make Laws: Married Women's Names in the United States*, 32 NAMES 114, 115 (1984). Subsequently, in 1921, a group of women, led by Ruth Hale, who experienced hardships as a result of refusing to take their husbands' surname in registering to vote, formed the Lucy Stone League. *Id.* at 118.

79 Blanc v. Blanc, 47 N.Y.S. 694 (N.Y. Sup. Ct. 1897).

80 *Id.* at 695.

81 *Id.*

82 The court did reiterate the ongoing injunction from the original divorce decree even though its punishment in the instant case seemed to permit the continued use of the Blanc surname. "[A]s she has acted under the advice of counsel, with some show of plausibility for her reasons of belief that she might have the right to use the name in the way she did, a light fine may be sufficient punishment for the present occasion. . . . The judgment for divorce, continuing in its effect as to the injunctive clause, does not require any assistance from a second injunction issuing in another action. On this ground, therefore, the motion is denied." *Id.* at 696.

83 Cowley (Earl) v. Cowley (Countess) [1901] AC (HL) 450.

84 The term "peerage" refers to relationships within an aristocracy. *Peerage*, CAMBRIDGE ADVANCED LEARNER'S DICTIONARY & THESAURUS (4th ed. 2013). It was particularly used in the British monarchy.

a commoner. Seeking to maintain the integrity of the Cowley name,[85] he sued her "to restrain . . . his former wife . . . from bearing the name and arms of [Cowley]."[86] Earl Cowley's legal argument was premised on a property theory of ownership in names, as he alleged the former wife's use was a "trespass . . . amounting to a legal wrong for her to still call herself Countess Cowley."[87] Countess Cowley's response cited the "courtesy" of the marital surname and the noble rank given to her in the English peerage system by such use. She further defended herself by invoking the English Crown's practice of allowing divorced women to retain titles of nobility, as well as her desire that her child be welcomed (with the Cowley surname) into the family of his father, her former husband.[88]

The House of Lords dismissed Earl Cowley's suit:

> [G]iven, as it is assumed here, that there was no malice and no annoyance, and no either implied or expressed assertion of marriage so as to give rise to a suit of jactitation, the simple broad question being whether this lady who, it is not doubted, bona fide, claims a right, and intends to claim a right, to be known by the name by which during the whole period of her married life she undoubtedly was known, can retain that right notwithstanding the divorce, it seems to me absolutely clear that no such suit could be entertained.[89]

Lord Macnaghten echoed his colleagues' position in this case of first impression by going on to say that there would be no relief that a court of law could grant to Earl Cowley, as she had used the name during the marriage and was entitled to its use thereafter.[90] He also seemed to waver on the nature of the right but indicated she would be allowed to

---

85 Scholars have documented the history of peerage and the scandals related to how far British royals would go to maintain the integrity of their names. *See generally, e.g.*, Charles R. Mayes, *The Sale of Peerages in Early Stuart England*, 29 J. MOD. HIST. 21 (1957).

86 *Cowley*, [1901] AC (HL) at 450.

87 *Id.* at 452.

88 *Id.* at 454. There were elements of modern name-change law standards in her allegations that she was not attempting to retain the name for reasons of confusion or "claims to participate in Earl Cowley's hereditament." *Id.*

89 *Id.* at 453. In essence, there would be no claim for relief that the court could grant to Earl Cowley, finding that Countess Cowley had a right to use the former marital surname.

90 *Id*. at 455.

continue use of the name. "It is not a matter of right. It is merely a matter of courtesy, and allowed by the usages of society. In accordance with this usage the respondent still calls herself Countess Cowley."[91]

The *Cowley* case is notable for its assumption that a complainant must allege some injury or harm caused by the defendant's use of the surname—damage would be essential to the violation of whatever rights Earl Cowley claimed were infringed.[92] Without being able to prove such a harm, Earl Cowley was not afforded a remedy by the courts.[93] The case suggested an idea further developed in later U.S. state cases: property rights in names, whatever they may be, are not exclusively held by one individual in a marriage, even after that marriage ends.[94]

When there was doubt as to a married woman's surname in the mid-twentieth century, U.S. state courts seemed to fall back on property-based patrilineality and would often designate the name as that of the husband.[95] Basic tasks such as obtaining a driver's license and registering to vote all pulled women towards adopting the marital surname.[96] Some court decisions into the 1970s disfavored naming autonomy.[97] Others wrestled with the

---

91 *Id.*

92 *Id.* at 460.

93 *Id.* at 456 ("Lord Cowley has not suffered either legal wrong or damage. . . . [E]ven if the matter were cognizable at law, I should hold that there was no right to an injunction. There is no precedent for such an order, and I should be very sorry to advise your Lordships to make a precedent in this case.").

94 *See, e.g.*, Baumann v. Baumann, 165 N.E. 819, 821 (N.Y. 1929) ("If the plaintiff has any property rights, that decree also protects those rights by legally establishing her status. . . . The plaintiff has a legal right to use the name 'Baumann,' but not necessarily an exclusive right to the use of that name."); Mueller v. Kamenesh, 864 So. 2d 38, 40 (Fla. Dist. Ct. App. 2003), *reh'g denied*, (2004) ("It is clear, however, that the trial court had no authority to order, at the instance of the former husband, the ex-wife to discontinue using her married name.").

95 *See, e.g.*, Kif Augustine-Adams, *The Beginning of Wisdom Is to Call Things by Their Right Names*, 7 S. CAL. REV. L. & WOMEN'S STUD. 1, 4–5 (1997) ("Historically, various courts, government entities and treatises in the United States legally assigned a married woman her husband's surname under the common law and otherwise. . . . Clearly, married women were dependent and largely invisible under the common law doctrine of merger, under which a married woman's legal identity was subsumed into that of her husband and she could not acquire or sell property, make contracts, sue or be sued independently.").

96 Emens, *supra* note 59, at 763.

97 *See, e.g.*, Forbush v. Wallace, 341 F. Supp. 217, 222–23 (M.D. Ala. 1971), *aff'd*, 405 U.S. 970 (1972) ("We conclude, therefore, that the existing law in Alabama which requires a woman to assume her husband's

naming rights analyzed in *Cowley* and whether common law could be used for the benefit of women's naming autonomy during marriage,[98] as well as women's ability to use a surname of their choice after their marriage had ended.[99]

As explained more fully in Part II, appellate courts slowly began to affirm naming autonomy principles for women in the 1970s. The force behind this legal reform (which occurred alongside political and social reform) is that marital naming generally follows common law practices, and common law naming autonomy persisted even in the few states that appeared to statutorily limit the common law rules. Very strong social and extralegal forces, however, have inhibited the reach of these ostensible legal protections and have moved the customary use of a marital surname into a gray area once a marriage ends. Hence, although extralegal factors drive the customary adoption of another person's surname in marriage, the law needs to clarify and protect the right to continue using that name after marriage if a woman so chooses.

II. Surname Use During a Marriage—Modern to Contemporary Framings

The historical backdrop of naming autonomy drapes a stage that, according to feminist studies scholars, still defaults to patriarchy in practice.[100] From language itself to how predominantly male lawmakers have shaped legal narratives, women have constantly fought for equality against a patriarchal backdrop.[101] Some states have laws that either reiterate

---

surname upon marriage has a rational basis and seeks to control an area where the state has a legitimate interest.").

98 "[A]fter reviewing the extensive authorities on the subject, we conclude that the common law of England on July 4, 1776, did not by operation of law engraft the husband's surname upon the wife." Davis v. Roos, 326 So. 2d 226, 229 (Fla. Dist. Ct. App. 1976).

99 > The common law rule that a married woman takes her husband's surname was based on immemorial custom and usage in England and in this country. As far as we know there has never been any such uniform custom and usage as would dictate a common law rule that a divorced woman is required to retain the name of her former husband against her wishes. Historically, some divorced women have retained their married surnames until remarriage or death; others have resumed their maiden names.

Walker v. Jackson, 391 F. Supp. 1395, 1402 (E.D. Ark. 1975).

100 *See generally* Betty Friedan, *The Problem That Has No Name*, *in* THE FEMININE MYSTIQUE 57 (2001 ed.).

101 Omi Morgenstern Leissner, *The Problem That Has No Name*, 4 CARDOZO WOMEN'S L.J. 321, 323 (1998).

the naming autonomy custom or slightly displace it.[102] Courts have tried to reinforce the notion that marriage and surname usage are distinct,[103] but the social reality leaves two standard choices upon marital dissolution: a person's birth or former (before the marriage) surname or their partner's surname. Beyond this—or perhaps because of it—the law is unclear as to whether any other alternative surname could be used during a marriage in all "legal" senses.[104] In an opposite-sex marriage, the woman almost always takes the man's surname.[105] Law, as an institution, often is an end to societal means, and legal regulation of naming (whether by legislatures or courts) is therefore powerful,[106] but law does not often intervene in marital naming. This presents a problem and potentially leaves a gap in rights when and if the marriage ends.

To be clear, in a culturally diverse society such as the United States, surname taking during (and potentially after) marriage does not always bend towards patrilineality. Many individuals follow surnaming practices with origins outside of the United States: some surnames are maternal, some are neither paternal nor maternal (but tell a story about the person), and some cultures have no surname at all.[107] While we should celebrate these diverse practices, the reality of the American legal system presupposes and seems to prefer

---

102 *See, e.g.*, LA. CIV. CODE ANN. art. 100 (Westlaw through 2024 1st Extr. Sess., 2d Extr. Sess., Reg., and 3d Extr. Sess.) ("Marriage does not change the name of either spouse. However, a married person may use the surname of either or both spouses as a surname."); N.D. CENT. CODE ANN. § 14-03-20.1(1)–(2) (West, Westlaw through Mar. 19, 2025, 2025 Reg. Sess.) ("Every person has the right to adopt any surname by which that person wishes to be known by using that surname consistently and without intent to defraud. A person's surname does not automatically change upon marriage.").

103 *See, e.g.*, *In re* Boardman, 166 A.3d 106, 111 (Me. 2017) ("[A]s a practical matter, given the variety of naming conventions in modern society, having the same last name no more indicates that a couple is married than having a different last name indicates that a couple is unmarried.").

104 With respect to the "blending" or merging of surnames (using letter combinations from each of the two individuals), four states statutorily allow blending (North Dakota, California, New York, and Kansas), and three states allow individuals entering into marriage to adopt *any* surname (Massachusetts, Iowa, and Minnesota), both of these possibilities without the necessity of a formal name change petition. Hannah Haksgaard, *Blending Surnames at Marriage*, 30 STAN. L. & POL'Y REV. 307, 309 (2019); Meegan Brooks, *For Nontraditional Names' Sake: A Call to Reform the Name-Change Process for Marrying Couples*, 47 U. MICH. J.L. REFORM 247, 258–59 (2019).

105 Studies vary, but approximately 80% of women in opposite-sex marriages take their husband's surname upon marriage, according to a 2023 Pew Research Center study. *See* Lin, *supra* note 35.

106 *See, e.g.*, Leissner, *supra* note 101, at 326 ("One area in which naming and the power to name are particularly important is law.").

107 Anthony, *A Spouse*, *supra* note 33, at 193.

patrilineal surnaming. So, at the borrowing spouse's option, a right to continue to use that name after marital dissolution, grounded in clear statutory guidance, should be available.

Our history is also marred by forcible surname practices aimed at specific populations, akin to government compulsion of women's surnames in the name of official recordkeeping.[108] Individuals subject to the institution of slavery were often forced to adopt a surname of their owners, which carried on through their descendants.[109] Some, in the interest of presumed financial opportunities, chose to go by other English surnames to "blend in with the dominant Anglo society, rejecting African names and the names of prominent slave holders or their former masters."[110] These cultural and historical facets of surnaming are important to a holistic view of how the law treats surname usage and can be reflected upon to more fully consider how current laws can shape the more traditional surname borrowing analysis that is the subject of this study.

This section first examines the extralegal forces still driving women to adopt and use their husbands' surnames in opposite-sex marriages. It then analyzes how those factors shaped the legal landscape and how courts and legislatures treat the "reputation" element of a marital surname—when, how long, and in what ways the name is used. Finally, it surveys how the law on marital surnaming has developed, starting with the women's rights movement of the 1970s through the judicial reform of the last fifty years, and how federal law may displace state law on naming.

A. Non-Legal Factors Leading a Woman to Adopt a Man's Surname During Marriage

Currently, no U.S. states mandate that an individual take their partner's surname in marriage. Women still, by a very large percentage, take the surname of men.[111] The

---

108 *See, e.g.*, *supra* notes 65–67 and accompanying text.

109 Anthony, *In the Name*, *supra* note 52, at 86.

110 Augustine-Adams, *supra* note 95, at 30.

111 Lin, *supra* note 35; Kim, *supra* note 17, at 895 (arguing that there exist "persistently gendered practices of 'marital naming,' by which women almost universally adopt their husbands' last names upon marriage, despite the formal freedom of women to retain their names and of men to adopt their wives' last names").

percentage of children born of a marriage that are given the father's last name is high as well.[112]

Studies consistently reveal that very high percentages of women decide to take their husband's surname in marriage, and this is more prevalent among women with the following characteristics: white; located in the Southern United States; without a four-year college education; who marry younger; in religious ceremonies.[113] Only a relatively small percentage of women decide to hyphenate their former surname with their husband's surname or replace their second given (middle) name with their former surname.[114] Although no comprehensive data is yet available, it is very likely that an equally small percentage of couples combine their two surnames into one blended surname.[115] An even smaller percentage of men take their wife's surname or hyphenate their name before their wife's name.[116]

Some social science researchers have hypothesized that increases in the rates of divorce and remarriage, single parenting, and same-sex couple parenting have resulted in a greater number of American households with members bearing different surnames.[117] Studies also suggest that when women and men cohabitate before marrying, women are more likely

---

112 David R. Johnson & Laurie K. Scheuble, *What Should We Call Our Kids? Choosing Children's Surnames When Parents' Last Names Differ*, 39 SOC. SCI. J. 419, 419–20 (2002) ("The norm of naming children after their father still operates strongly in society."); *see also* Colleen Nugent, *Children's Surnames, Moral Dilemmas: Accounting for the Predominance of Fathers' Surnames for Children*, 24 GENDER AND SOC'Y 499, 500 (2010).

113 As to race: Emens, *supra* note 59, at 788; Claudia Goldin & Maria Shim, *Making a Name: Women's Surnames at Marriage and Beyond*, 18 J. ECON. PERSP. 143, 152 (2004). As to education level: *id.* at 152. As to age: *id.* at 156 ("Brides in their mid-twenties had a much lower probability of 'keeping' [their formal surnames]."). As to geographic area of the United States: Laurie K. Scheuble, David R. Johnson & Katherine M. Johnson, *Marital Name Changing Attitudes and Plans of College Students: Comparing Change over Time and Across Regions*, 66 SEX ROLES 282, 285 (2012). As to religious or civil marriage ceremony: Goldin & Shim, *supra*, at 156.

114 *See, e.g.*, Suarez, *supra* note 4, at 239 (finding that approximately 5% of women hyphenate the names, and approximately 3% use their former surname as their middle name).

115 Haksgaard, *supra* note 104, at 309.

116 Lin, *supra* note 35; Kristin Kelley, *The Effect of Marital Name Choices on Heterosexual Women's and Men's Perceived Quality as Romantic Partners*, 9 SOCIUS 1, 1 (2023).

117 Johnson & Scheuble, *supra* note 112, at 419–20. Johnson and Scheuble point out that the relatively recent proliferation of these family models may operate to erode the strong patrilineal naming social norms that have existed for some time. Their work presented evidence that women who enter marriage committed to using their own surname or an otherwise "unconventional" surname choice (i.e., not the surname of their spouse)

to retain their birth surname.[118] Though research shows that women who marry later in life and after obtaining professional credentials, thereby likely establishing a professional identity in a former surname, tend to retain their former surnames,[119] some studies suggest a trend that even these populations are taking the surnames of their husbands.[120]

Though liberated in the law, in reality, a woman choosing a marital surname still operates under significant pressures, making her choice less free than it appears.[121] What forces are causing this, since courts since at least the 1970s have attempted to move toward a more egalitarian legal position on marital naming? Scholars point to a few factors, including social forces, a non-traditional sense of individualism, administrative and functional convenience, and predetermined, predictable naming conventions for children born of the marriage.

1. Social Forces

Although legally within the "private domain of individual choice,"[122] surname selection during marriage is subject to public perception, with attendant social judgment. Social pressures prevent many opposite-sex couples, even those committed to equal partnerships in marriage, from making related egalitarian marital naming decisions.[123]

Socially constructed gender-based stereotypes about women who retain their birth surnames after marriage remain, as do stereotypes about the perception of men with wives

---

often pass that surname on to the children born during the marriage as a second given name, or "middle name," though the norm of naming children with the father's surname still persists. *See id.* at 428.

118 Melanie MacEacheron, *North American Women's Marital Surname Change: Practices, Law, and Patrilineal Descent Reckoning*, 2 EVOL. PSYCH. SCI. 149, 156 (2016).

119 *See, e.g.*, Emens, *supra* note 59, at 787–88, 792; Goldin & Shim, *supra* note 113, at 156.

120 *See, e.g.*, Suarez, *supra* note 4, at 239 ("Some women are now arguing that they prefer to 'buck the feminist viewpoint' and choose for themselves their own tradition. These women are more likely to take their husbands' surnames.").

121 Emens, *supra* note 59, at 762 ("[W]omen are ostensibly choosing their marital names, but in fact they are choosing from a very limited decision set. . . . The formal legal default that both spouses keep their names reinforces this bind for women.").

122 Kim, *supra* note 17, at 910.

123 Kelley, *supra* note 116, at 12.

who do so.[124] Studies have shown that men perceive women who keep their birth surnames as "assertive and job-oriented" rather than "home[-] or family-oriented,"[125] or even as "less attractive and mak[ing] worse mothers."[126] Women who strongly identify with the surname used before marriage are also are more likely to pass their birth surname on to their children.[127] Sociological studies have shown a relationship between identity autonomy and name adoption variations, with women who choose to hyphenate their former surname with their husband's surname still signaling some agency, more so than removal of their surname for the man's.[128] That women who choose to retain their own surname are viewed as less committed and loving than women who adopt their husband's surname reflects the strength of normative gender roles.[129] These studies show a higher negative impact on women than men when traditional marital surnaming practices are broken.[130]

Oftentimes, legal protections create a "lag" for social practices by "carr[ying] implications for the law insofar as these practices force consideration of residual biases in the law as well as of the ways in which social practices themselves act as constraints in much the same fashion as formal law."[131] These residual biases are present when lower court judges exercise their discretion in naming matters by interpolating their own views

---

124 Rachael D. Robnett, Marielle Wertheimer & Harriet R. Tenenbaum, *Does a Woman's Marital Surname Choice Influence Perceptions of Her Husband? An Analysis Focusing on Gender-Typed Traits and Relationship Power Dynamics*, 79 SEX ROLES 59, 69 (2018).

125 MacEacheron, *supra* note 118, at 155.

126 *Id.*

127 Johnson & Scheuble, *supra* note 112, at 428.

128 Kelley, *supra* note 116, at 4.

129 *Id.* at 8 ("[N]ame-keeping women are viewed as 14 percent less committed and loving than name-changing women . . . and about 12 percent further from the ideal wife than name-changing women.").

130 *Id.* ("[B]reaking marital name norms had larger effects on evaluations of women than on evaluations of men. Being in an unconventional couple negatively affected evaluations of women and men, but the effects on women were more than twice the size of those on men.").

131 Kim, *supra* note 17, at 941.

on women's names.[132] Other actors in the legal system are largely driven by these social customs rather than by the letter of the law.[133]

Women also perceive social pressures from potential in-laws to use their husband's marital surname, and the desire to please future "legal" family and descendants of one's potential children are driving forces in deciding to use the man's surname as her own.[134] Scholars write about how this informs a psychological attachment to a hereditary, patrilineal surname: men are more psychologically tied to their surnames because society informs them it is more important than a woman's surname.[135] As a result, women's psychological ties to their birth surnames are often forgotten, and their identity as it relates to surnames is considered fleeting or transitory.[136]

2. Individualism and Romanticism

Under more recent feminist movements,[137] women are choosing to adopt their husband's surnames in marriage as a reflection of personal choice.[138] In a pervasive social media age, there appears to be "influencing" of a more holistic view of antiquated gender roles for

---

132 Kushner, *supra* note 46, at 319. Researchers have found that the lack of statutory guidance and ability to enforce common law rights in naming also influence "formal" name change requests. "[D]enials often appear to be influenced by personal opinion or governing social values." *Id.*

133 Emens, *supra* note 59, at 824 ("One of the most striking results of this inquiry into marital names was the degree to which federal, state, and local government clerks gave inaccurate, incomplete, contradictory, or normative responses to specific questions about legal options."). Professor Emens has a famous analysis of this known as "desk-clerk law," where judicial civil servants such as clerks of court staff often place "burdens informally" on women to avoid any marital naming practice different than the traditional taking of the husband's birth surname as her own last name. *Id.* at 764–65.

134 MacEacheron, *supra* note 118, at 157 ("To the extent their future in-laws will be pleased if these women's husbands are pleased, these women may choose to please both their husbands and in-laws, by signaling fidelity to their husband's (and therefore in-laws') line and the intention to add their future children to it.").

135 Anthony, *A Spouse*, *supra* note 33, at 196.

136 *Id.*

137 Some scholars argue that surges exist within "multiple waves" of feminism, producing "mini-narratives" within and between these waves. *See, e.g.*, Elizabeth Evans & Prudence Chamberlain, *Critical Waves: Exploring Feminist Identity, Discourse and Praxis in Western Feminism*, 14 SOC. MOVEMENT STUD. 396, 398 (2015). Surname selection in marriage appears to be a narrative of the third wave as a reaction to the equality movements of the 1970s and the second wave.

138 Kim, *supra* note 17, at 941.

women in marriage, which may include a renewed interest in gender-based marital surname practices.[139] This attitudinal shift is part of what scholars like Suzanne Kim identify as third-wave feminism, in which women express a more direct sense of individualism, including in marital naming choices, as a break with previous feminist movements that sought to categorically shun the institutional oppression of women.[140]

Research has shown that women's name choices, even in so-called egalitarian relationships where both parties confirm commitments to individual autonomy, have an effect on courtship rituals, and changing to the man's surname has been shown to signal stronger commitment to the relationship as well as familial commitment.[141] There is also sociological research that shows that "women and men are viewed as better romantic partners when they adhere to conventional, gendered marital name norms,"[142] even though these norms originate from legally sanctioned subjugation of women to men in coverture-like arrangements.[143] Related to this, though stemming from a more historical, customary image of naming union in the traditional marriage context, is the romanticized decision[144] to take another's surname.[145] Continued high rates of marital surname taking may reflect a view of history and custom as a statement of autonomy in a third-wave reaction to modernity.[146]

---

139 Jacqueline Beatty, *The Truth About the Past That 'Tradwives' Want to Revive*, TIME (Apr. 22, 2024), https://time.com/6962381/tradwives-history/ [https://perma.cc/5WCC-6NMD].

140 Kim, *supra* note 17, at 914.

141 Kelley, *supra* note 116, at 3.

142 *Id.* at 11.

143 Robnett et al., *supra* note 124, at 60 ("Although adherence to romantic relationship traditions may appear to be harmless, scholars have argued that many of these traditions are infused with power dynamics that afford men greater status and power than women. Indeed, the tradition of wives adopting their husbands' surnames originates from a time when women had few legal rights and were perceived as their husbands' property.").

144 *See, e.g.*, Michaela Bramwell, *21 Reasons Young Women Are Embracing the 'Tradwife' Phenomenon According to Gen Z'ers, and Honestly, Some of These Are Spot On*, BUZZFEED (Jan. 13, 2025), https://www.buzzfeed.com/michaelabramwell/gen-z-women-share-views-on-tradwife-phenomenon [https://perma.cc/8JJZ-E6RA].

145 Emens, *supra* note 59, at 796.

146 *Id.* at 814 ("[A]lthough some women may experience changing their names as a loss, more women may feel a loss at the idea of not becoming Mrs. His Name, to the extent that they grew up expecting to change their names at marriage, and even romanticizing it. . . . To depart from the convention might feel like the loss of something expected.").

3. Administrative/Functional Convenience in Shared Marital Names

Have we moved on from coverture's treatment of husbands as the legal head of household?[147] Women still feel significant pressure to take the surname of their husbands as part of becoming a single administrative unit. The sheer historical force of the marital surname custom almost exhausts the idea of naming autonomy for a woman in important tasks like obtaining a driver's license, receiving governmental benefits, considering tax benefits, registering children for school, organizing family travel, and completing a host of other societal chores. This panoply of civic activities seemed to inform the basis for a district court judge's reasoning in *Forbush v. Wallace*[148] that the state's interest in conveniently cataloging driver's licenses for married women outweighed the petitioner's interest in using her chosen name.[149] Although *Forbush*'s reasoning has been relegated to a corner of state law overriding marital naming autonomy, some shadow of that reasoning still exists outside of the law and in women's assumed decision to just make things easier by using her husband's surname. Ironically, despite the numerous logistical steps required to stamp a "formal" name change on some of the aforementioned documents, women still feel substantial administrative pressure to take their husband's surname.[150]

4. Surnames of Children Born of the Marriage

Just as U.S. laws no longer mandate what a woman's surname *must* be when she enters into marriage, most U.S. states do not directly mandate the surname of children born of the marriage.[151] Earlier state courts' decisions appeared to favor a naming autonomy approach

147 Weitzman, *supra* note 68, at 1177. Writing at a time when women's independence in marital rights was still being established, Weitzman recognized the existing legal structures of purported administrative convenience in coverture models: "In addition to domicile and surname, there are other areas in which the law still recognizes the husband as head of the household with his wife's identity subordinate to his." *Id.*

148 Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971).

149 *Id.* at 221–22 ("[A]dministrative convenience, if not a necessity, is an important consideration."). Though the wife did not prevail in *Forbush*, in the constitutional calculus applied by lower courts since, administrative convenience alone has been held insufficient when the challenged action involves a discriminatory classification.

150 *See, e.g.*, Emens, *supra* note 59, at 816–17 ("Any choice other than Keeping [a woman's former or birth surname] is costly. . . . Mrs. His Name, the choice that has as few, or fewer, costs than any other option, [is] a striking fact in light of just how many steps even that process seems to involve.").

151 A few states do have statutory schemes that mandate, or make it almost an irrebuttable presumptive option, that the surname of a child born during a woman's marriage to a man is to be the man's surname, favoring patrilineal naming. *See*, *e.g.*, LA. STAT. ANN. § 40:34.2(2)(a) (Westlaw through 2025 Reg. Sess.); TENN. CODE ANN. § 68-3-305(a)(1) (West, Westlaw through 2025 1st Reg. Sess. of the 114th Gen. Assemb.).

to an extent.[152] Almost all children born of a marriage, however, are given the father's surname by default.[153] Even in marriages where women retain their birth surname or hyphenate it with their husband's surname, children born of these marriages almost always have the father's (husband's) surname.[154] Studies show that women express an interest in their children's surname being predetermined and consistent as shown to the outside world. Social scientists have studied this patrilineal naming preference through several lenses.[155] One theory is that children would be more readily accepted in society as economic actors with a patrilineal descent, like marital naming generally, since social acceptance is driven substantially by customary and historical practice;[156] mothers do not want to isolate or ostracize their children outside of a social norm, even though it is legally permissible and society accepts marital partners with different surnames.

B. Surname Sharing in Same-Sex Marriages

Because names have been used historically to oppress marginalized populations,[157] these groups have attempted to use the law for naming practices to "reflect social power and identity."[158] Since the legalization of same-sex marriage as a constitutional matter in 2015,[159] there has not been much research on the surname selections of same-sex marital partners.[160] The little research that has been done indicates that same-sex couples do not consider name-sharing important.[161] As research on the *marriage* side of the matter is

---

152 Sec'y of Commonwealth. v. City Clerk of Lowell, 366 N.E.2d 717, 725 (Mass. 1977) ("We think the common law principle of freedom of choice in the matter of names extends to the name chosen by a married couple for their child.").

153 Johnson & Scheuble, *supra* note 112, at 419.

154 *Id.*

155 *See, e.g.*, MacEacheron, *supra* note 118, at 149.

156 *Id.*

157 *See supra* notes 56–59 and accompanying text.

158 Kim, *supra* note 17, at 900.

159 Obergefell v. Hodges, 576 U.S. 644, 665 (2015).

160 Cori Alonso-Yoder, *Making a Name for Themselves*, 74 RUTGERS U. L. REV. 911, 942 (2022) (pointing out that little research on naming rights in the United States has explored the perspective of LGBTQIA+ individuals, particularly in the context of customary marital surname borrowing).

161 Haksgaard, *supra* note 104, at 316.

not prevalent, naming prerogatives for *divorced* same-sex couples are consequentially understudied.

Because of the relatively recent declaration of the constitutional right to same-sex marriage, same-sex couples often resort to formal name change processes to honor the custom. Long before the Supreme Court ruled that state restrictions on same-sex marriages were unconstitutional in *Obergefell*, many states were working towards legitimation of same-sex unions by allowing name-sharing through formal name change procedures.[162] This included, *inter alia*, allowing name changes to hyphenated surnames of both partners.[163] Blending surnames of both individuals in a same-sex marriage has been noted as a possible avenue.[164] However, even after the constitutional decision, the logistical challenges of formalizing a same-sex marriage remained (e.g., listing "spouses" instead of "bride" and "groom" on an application for a marriage license, gendered references in statutes regarding marriage).[165] Many states have worked towards remedying these logistical hurdles to same-sex marriage recognition in the decade since *Obergefell*.[166]

C. The Law on Surnames During Marriage, from the 1970s to Today

The mainstay of modern law on marital surnames is that parties to a marriage do not lose their former name legally;[167] no source of law now requires a woman to assume the surname of her husband upon marriage.[168] However, state statutes recognize the custom of surname borrowing in marriage[169] coming from the English common law and permit marital surname borrowing in fact (custom) rather than in law.[170]

---

162 *In re* Bicknell, 771 N.E.2d 846, 849 (Ohio 2002).

163 *In re* Bacharach, 780 A.2d 579, 584 (N.J. Super. Ct. App. Div. 2001).

164 Haksgaard, *supra* note 104, at 316.

165 *Id.*

166 *Id.*

167 Davis v. Roos, 326 So. 2d 226, 228 (Fla. Dist. Ct. App. 1976); Levey v. Dijols, 990 So. 2d 688, 693 (Fla. Dist. Ct. App. 2008).

168 Malone v. Sullivan, 605 P.2d 447, 450 (Ariz. 1980) (en banc).

169 *In re* Natale, 527 S.W.2d 402, 404 (Mo. Ct. App. 1975); *Davis*, 326 So. 2d at 229; State v. Johnson, 690 S.E.2d 707, 709 (N.C. Ct. App. 2010).

170 State v. Taylor, 415 So. 2d 1043, 1047 (Ala. 1982) (citing Kruzel v. Podell, 226 N.W.2d 458 (Wis. 1975)).

1. When Is the Marital Surname "Yours"?—The "Repute" Conundrum

Does adoption of a partner's surname during marriage bear on the rights to the name at the end of the marriage? The steps an individual takes to announce to the world that they are adopting a new surname may determine how the rights to that name vest. This determination, socially and culturally, is contoured by what state law allows (or requires) for the surnames of individuals entering a marriage. Whether in jurisdictions infused with the civil law or the common law, marriage does not mandate a name change for either party.[171] However, the custom of changing one's name upon entering a marriage may impact what rights exist when the institution giving rise to the custom is terminated. In other words, does the public reputation or "repute" of a name solidify a right to use it? Justice Heffernan in the *Kruzel* case affirmed that "[b]y repute it could, of course, become a lawful name, though not a name legally compelled by marriage."[172] Many dimensions for consideration arise from this ruling: when an individual starts to use a name, the duration for which they used it, and in what capacity the name is used.

A few states recognize two individuals as married through their continuous, open, and transparent living as a married couple, with or without a ceremony or marriage license: a "common law marriage."[173] However, most states define by statute the requirements for marriage, disallowing such a possibility. In order for a name to be acknowledged by "repute," the recognition of surnames of the spouses is balanced with the finding of a marriage arrangement in the first place. Where a custom (of living as a married couple) does not solidify into a legally recognized union (i.e., a common law marriage), there is likely less of a right to a borrowed name. Recent case law has found, however, that the overriding naming autonomy principle can operate to allow a shared surname between unmarried individuals who hold themselves out in such a capacity, even in states that do not allow common law marriages.[174]

---

171 *Malone*, 605 P.2d at 450.

172 *Kruzel*, 226 N.W.2d at 461.

173 *Common Law Marriage*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 11, 2020), https://www.ncsl.org/human-services/common-law-marriage-by-state [https://perma.cc/6695-RN56] (Within certain restrictions, eight states (Colorado, Iowa, Kansas, Montana, New Hampshire, South Carolina, Texas, and Utah) allow what are known as "common law marriages" through statute; two other states (Rhode Island and Oklahoma) allow it by judicial interpretation).

174 *In re* Rohlik, 233 N.E.3d 80, 83 (Ohio Ct. App. 2023) ("[H]aving the same surname does not necessarily imply marriage," explaining that allowing a woman to change her surname to that of her domestic partner and finding that allowing such would not tacitly adopt common law marriage otherwise prohibited in Ohio).

a. Timing of Adoption and Length of Use

The Tennessee Supreme Court, in *Dunn v. Palermo*, held that a woman has freedom of choice to use her own surname or take her spouse's by custom.[175] In *Dunn*, the court also acknowledged that the woman would never lose the right to use her former surname if, at any time while married, she started using her husband's surname.[176] To the extent a customary right is created to use a marital surname by virtue of the marriage itself, is the opposite of the reasoning in *Dunn* also true? Can a person begin to use a marital surname at any point during (or even *after*) a marriage has commenced, even if it is some time after the wedding? Could one begin to use a marital surname at any time and reap benefits from that use, or would the right be framed by when it was initially used and for the duration thereafter?

Assuming a married woman takes her husband's name at the beginning of the marriage, does the length of the marriage (aligning with the length of time the marital name is used) bear any relevance or weight to a continued right of use? Courts have held that, under the common law right of naming, when one "had been known exclusively by the adopted name for a period of many years,"[177] there is a recognition by one's community of that name. Cases in the 1970s have held that a legal entitlement to a marital surname may arise for a married woman only if the surname of her husband would be "habitually used by her."[178] Other courts have articulated that "consistent" use may make a marital surname "legally" that of the borrowing spouse.[179]

There is little research in law or other social science disciplines investigating community perceptions of a divorced woman's association with a marital surname depending on the length of the marriage and the duration of the marital surname usage. The reliance on community understanding for a legal standard is questionable when communities are highly variable. As the Maine Supreme Judicial Court foreshadowed in the *Reben* case: how would community understanding function in an increasingly mobile and transient society, where

---

175 *Dunn*, 522 S.W.2d at 688.

176 *Id.* ("[T]he mere custom of married women adopting their husband's surname, does not necessarily imply a rejection of their own names. We are cited to no case where the non-user of a name works a forfeiture of the right to its use.").

177 *In re* Reben, 342 A.2d 688, 691 (Me. 1975).

178 *Kruzel*, 226 N.W.2d at 464.

179 Custer v. Bonadies, 318 A.2d 639, 644 (Conn. Super. Ct. 1974).

a new community is not aware of how long, and in what capacity, a particular surname has been or is being used?[180]

b. Capacity of Use (Professional vs. Personal and Public vs. Private)

Does the decision to use the marital surname in one dimension of married life but the birth or former surname in another have a bearing on the legal right to use the marital surname? French civil law scholar Marcel Planiol wrote in his *Treatise on the Civil Law* that although a woman retains her patronymic name upon marriage,[181] she may use her husband's name in any aspect of her life, "even . . . her commercial life."[182] He goes further to describe how a married woman may sign her name during marriage as a "right of enjoyment of her husband's name . . . as an avowal of her [marital] status."[183] When a woman decides to "change her name" without a modifier, it assumes she is using a new surname (that of her husband's) and "holding out to the world that the surname is the same as the husband's."[184] The name is hers to use in every aspect and in every way she would like, and confusion by friends in social circles or colleagues in her business life with respect to what surname she is using is a non-issue. Some women tend to use a marital surname on a "selective basis," choosing to use a former surname, for example, for business purposes and a spouse's surname for social or family purposes.[185]

Individuals may use pseudonyms, pen names, monikers, handles, stage names, or other nicknames beyond what is either recorded on their birth certificate, used "at home," or used in the social contexts of the marriage and family. The more regulated a name is by statute, the more troublesome it would be to determine in what different dimensions of life these types of aliases could be allowed as a matter of either custom or common law.[186] A woman

---

180 *Reben*, 342 A.2d at 691 ("It must have occurred to the Maine Legislature to wonder, as it does to us, how long the individual, especially the new arrival in town, would be required to use the new name before he and people dealing with him could feel assured that it had replaced his old one, had not been motivated by fraud, and had become his legal name, and to question the acceptability of such uncertainty as our social structure became more urban and more transient.").

181 MARCEL PLANIOL & GEORGE RIPERT, TREATISE ON THE CIVIL LAW 258 (12th ed. 2005).

182 *Id.* at 259.

183 *Id.* at 260.

184 *Kruzel*, 226 N.W.2d at 465.

185 ALAN D. SCHEINKMAN, NEW YORK LAW OF DOMESTIC RELATIONS § 2:26 (11th ed. 2025).

186 Kushner, *supra* note 46, at 326.

may use a marital surname in matters of children's education, family medical documents, home finances, and joint liabilities with her husband, but she may use her birth or former surname in her professional career. Courts have found that these dual-use instances "rarely cause confusion" and do not require resorting to formal name change procedures.[187] State laws governing regulation of professions and licensing also allow a person to change his or her surname unless the change operates to unfairly compete with someone else in the same field or mislead the public or the profession in which the surname is known.[188] Separate statutory protections, such as trademark, may prevent a spouse or former spouse from using a certain name, thus displacing naming law's grounding in the common law,[189] but generally the common law roots of naming flexibility predominate.

What if the woman, during marriage, vacillates in different dimensions of her life between the marital surname and her former surname? How would a court determine what her "legal" name would be and for what purpose? What would then, as referenced in *Kruzel*, constitute her being a "habitual user"[190] of a name? Some legal critics have alluded to the problem of not enshrining a statutory determinant of marital surnames as actually hindering a woman's right to choose the scope of name use in different dimensions of her life.[191]

2. 1970s Court Cases Laying the Groundwork for Today

States had little statutory law on the naming rights of married persons by the 1970s.[192] Lower courts of general jurisdiction tended to arbitrarily deny a married woman's naming autonomy rights by either mandating use of her husband's surname or denying a request to

---

187 *See, e.g.*, *In re* Mohlman, 216 S.E.2d 147, 151 (N.C. Ct. App. 1975).

188 *Kruzel*, 226 N.W.2d at 464.

189 *See, e.g.*, Dewberry Grp., Inc. v. Dewberry Eng'rs, Inc., 604 U.S. 321, 327 (2025).

190 *Kruzel*, 226 N.W.2d at 467 (Hansen, J., dissenting) ("If she blurs the situation by using both her maiden name and her married name, she will be hard put to qualify as an 'habitual user' under the new test.") (arguing that the majority created a new test of habitual use to determine whether the use of a marital surname rose to the level of legal protection).

191 *See, e.g.*, *id.* at 469 (Hansen, J., dissenting) ("[Recognizing a common law right to use whatever name] eliminates the married woman's prerogative to change her mind. Under the *Lane* option a married woman in this state could, at her option, use either her maiden name or her married name.").

192 *See, e.g.*, *Reben*, 342 A.2d at 689 ("There is a remarkable sparsity here of both decisional and statute law concerning the status of a married woman's name.").

resume using a former or birth surname without definable standards.[193] While tempered with an ostensible autonomy of naming, women still felt significant societal pressure to adopt the custom of taking a husband's surname, and a few courts determined that this custom had hardened into a legal requirement.[194] This was in large part due to the Alabama federal district court's pronouncement in *Forbush v. Wallace*[195] in 1971 and the tenuous assumption that a summary affirmance by the U.S. Supreme Court[196] settled the matter.[197] So, while many appellate courts held married women had a right to the name of their choosing and embraced naming autonomy, some still did not, choosing to stay with the interpretation of courts in the past like *Chapman*[198] emboldened by the procedural posturing of *Forbush*, that naming autonomy gave way to a legal requirement to take a man's surname during marriage. It would take a handful of state appellate court decisions to reject the idea that such a custom forcing women to take a marital surname had hardened into a legal mandate.

The freedom to choose one's name in marriage was re-emerging to promote liberal choice moving into the late twentieth century, originating from the reasoning in *Cowley*, the English House of Lords case decided seventy years earlier. Later state cases in Alabama openly disfavored the interpretation of the common law from *Forbush*.[199] Other states would follow, rejecting *Forbush*'s patrilineal marital presumption and favoring the *Cowley* interpretation. Cases such as *Kruzel* spurned other courts' encouragement of naming

---

193 *See, e.g.*, *Forbush*, 341 F.Supp. at 222; *Egner*, 337 A.2d at 47; *Kruzel*, 226 N.W.2d at 460.

194 Walker v. Jackson, 391 F. Supp. 1395, 1402 (E.D. Ark. 1975) ("We think it is fair to say that Arkansas, like Alabama, generally follows the common law rule that when a woman marries she takes the surname of her husband.").

195 341 F. Supp. 217, 217 (M.D. Ala. 1971) (holding that a requirement that a married woman use her husband's surname in her application for a state-issued driver's license did not violate the Equal Protection Clause and determining that the administrative requirements of the state Department of Motor Vehicles having accurate records was a rational reason for requiring a woman to use her husband's surname on a driver's license).

196 405 U.S. 970, 1197 (1972). Because the U.S. Supreme Court affirmed the decision of the district court without briefing or oral arguments, this summary disposition should have had no precedential value. Yet, litigants in favor of *Forbush*'s state-deferential reasoning readily used it as ostensible stare decisis to require women to use their husbands' surname during marriage. *See, e.g.*, *Walker*, 391 F. Supp. at 1402.

197 The U.S. Supreme Court has not yet taken up any other case asserting naming as a constitutionally protected liberty interest under substantive due process or the Equal Protection Clause.

198 *See supra* notes 76–77.

199 *See* State v. Taylor, 415 So. 2d 1043, 1047 (Ala. 1982) ("Our research has convinced us that *Forbush v. Wallace* does not accurately state the common law on names[.]").

autonomy and the relegation of the use of a spouse's surname to merely a non-legally enforceable social custom. As the women's rights movement pressed on, when presented with the straightforward question of whether it was mandatory that a married woman assume the name of her husband, appellate courts disagreed with lower courts often,[200] holding it not mandatory.[201] Any adult could adopt any name they chose, provided the use was not for "fraudulent or criminal purpose" and "that the name itself is [not] obscene or otherwise offensive."[202] It was only by custom that a woman would choose to adopt the surname of her husband.[203] That custom only holds if she uses the name, and there was no law requiring her to use it.[204]

Slowly, more and more state courts were recognizing the "common law right of any person, absent a statute to the contrary, to 'adopt any name by which he may become known and by which he may transact business and execute contracts and sue or be sued.'"[205] Where there were statutes, many state courts held that they were not intended to usurp or otherwise interfere with a common law naming autonomy prerogative.[206] Statutes regarding name changes or naming options were to be read consistent with that right, not in contravention

---

200 *In re* Natale, 527 S.W.2d 402, 405 (Mo. Ct. App. 1975) ("Our research had disclosed no appellate decision in any state which affirmed the trial court's denial of a married woman's name change petition on the ground of an ongoing marriage. . . . These cases hold that it is an abuse of discretion to deny a married woman her name change on grounds other than those specified in the statute or at common law[.]").

201 *See, e.g.*, Dunn v. Palermo, 522 S.W.2d 679 (Tenn. 1975) (holding that a woman is not required, under a state's compulsory voter registration law, to register using husband's surname and can register using her maiden name); Davis v. Roos, 326 So. 2d 226, 229 (Fla. Dist. Ct. App. 1976) (holding that a woman is not required to have her married surname on her state-issued driver's license and can have it issued in her maiden name). Crediting the lower courts' forward-thinking view in both of these cases, these appellate decisions were affirmances of those courts' decisions.

202 *See, e.g.*, Egner v. Egner, 337 A.2d 46, 48 (N.J. Super. Ct. App. Div. 1975); *supra* note 4.

203 *Dunn*, 522 S.W.2d at 680 (Tenn. 1975) ("The statute under consideration, standing alone, does not mandate a change of name by marriage. It merely recognizes the prevalence of the virtually universal custom under which a woman normally adopts the surname of her husband.").

204 *Kruzel*, 226 N.W.2d at 459; *see also Davis*, 326 So. 2d at 228 ("[A] woman upon marriage adopts the surname of her husband by thereafter customarily using that name, but no law required that she do so." (citing *Kruzel*, 226 N.W.2d at 458)).

205 *Dunn*, 522 S.W.2d at 686 (referencing Romans v. State, 16 A.2d 642, 646 (Md. 1940)).

206 Kushner, *supra* note 46, at 328–29.

of it[207] or to abrogate it,[208] only providing an "additional method"[209] to make the change or to codify the right into positive law.[210] Presumably, "official" government documents, procedures, and benefits (such as driver's licenses, passports and Social Security benefits) would need a record of an "official name,"[211] but contracts, property transfers, and other private legal transactions would not be invalidated if they were entered into using a surname other than a marital one.[212]

Naming autonomy cases allowed women either to revert to using their former surname (or "maiden name," as the courts often framed it) or, in rare instances, allowed wholly new names to be used. In the case of *In re Natale*,[213] a Missouri appeals court reversed a circuit court's decision to deny a woman a name change request from using her husband's surname to moving that name to her second given name and going by the surname "Montage." The stated purpose was for purposes of her "professional and personal identity and convenience to her husband and herself in carrying out their professional careers."[214]

---

207 *See, e.g.*, *Egner*, 337 A.2d at 48 (N.J. Super. Ct. App. Div. 1975); *supra* note 4.

208 *In re* Dengler, 246 N.W.2d 758, 762 (N.D. 1976).

209 *In re* Knight, 537 P.2d 1085, 1086 (Colo. App. 1975).

210 *In re* Reben, 342 A.2d 688, 693 (Me. 1975).

211 The purpose of a state statute requiring a formal name change procedure or naming certainty vis-à-vis the marriage institution, like the names required on a child's birth certificate, is for official recordation purposes. "[T]here are situations in which the public interest entitles the State to demand that a person identify himself by his true, legal name in connection with his performance of certain activities." *Id.* at 694.

212 "[W]e are aware of no law that will invalidate obligations and conveyances executed by and to her in her baptismal name, if she chooses to give or take them in that form." Lane v. Duchac, 41 N.W. 962, 965 (Wis. 1889), *cited with approval in Kruzel*, 226 N.W.2d at 462.

213 527 S.W.2d 402 (Mo. Ct. App. 1975).

214 *Id*. at 403. The shared professional reasons were interesting in this case: the husband, as a local St. Louis-area school administrator, did not want his home phone number listed publicly, but the wife, as an attorney starting a law practice, did want her name listed. She saw value in the Natale name's reputation, but also was mindful of her husband's concerns as a local school official.

3. Legislation: Modifying or Continuing the Common Law Standard?

a. Scarcity of State Statutory Guidance

Given the lack of judicial guidance on whether one's interest in a surname is property-based or not, and the void of any constitutional protection, states may feel the need to resort to statutory frameworks for clarity. But the majority of states do not have a statutory rule on the name that will be used or taken once an individual is married. Aside from formulaic requirements regarding information to be placed on an application for a marriage license, where the name listed on the license is the "legal" name at the time of application, states acquiesce almost exclusively in the custom of marital surname borrowing. As the Maine Supreme Judicial Court acknowledged in *Reben* in 1975, and as is still true today, there is simply not much statutory regulation over married individuals' names.[215] For those few states that do have statutes, the legislation indicates that marriage itself does not change a surname but allows the marital custom to be used. Louisiana's Civil Code, for example, affirmatively states that marriage does not change the name of either spouse, but a married person may use the name of the other spouse and/or their own as a surname.[216] Hawai'i's law expressly indicates that parties to a marriage are not required to have the same last name, but it does require the parties to list the names they intend to use once they are married, even though the parties can adopt "any middle or last name upon entering into a marriage or civil union."[217]

Only a handful of states' marriage license applications require the parties to affirmatively indicate the surname each intends to use upon entering the marriage,[218] whether it be the

---

215 *See* Kim, *supra* note 17.

216 LA. CIV. CODE ANN. art. 100 (Westlaw through 2024 1st Extr. Sess., 2d Extr. Sess., Reg., and 3d Extr. Sess.).

217 HAW. REV. STAT. ANN. § 574-1 (West, Westlaw through 2024 Reg. and 1st Spec. Sess.).

218 New York, as an example of one of the few, asks applicants for a marriage license to be notified of their rights regarding the adoption of surnames, including: (a) the right not to change a surname, (b) the right to adopt the surname of the other prospective spouse, (c) the right to adopt a single surname that is an amalgam of the parties' surnames, and (d) the right to adopt a combination separated by a hyphen. The parties are then required to file their choice so that selection can be entered upon the marriage license. Noticeably, New York also includes the reinforcement that marriage does not change a person's name legally. N.Y. DOM. REL. LAW § 15 (McKinney 2021, Westlaw through L. 2025 Chs. 1 to 49, 61 to 107); *see also* CAL. FAM. CODE § 306.5(b)(1) (West, Westlaw through Ch. 1 of 2023-24 Ex. Sess., and all laws through Ch. 1017 of 2024 Reg. Sess.); IOWA CODE ANN. § 595.5 (West, Westlaw through leg. effective Nov. 5, 2024 from the 2024 Reg. Sess. and Nov. 5, 2024 Gen. Elec.); KAN. STAT. ANN. § 23-2506 (West, Westlaw through 2024 Reg. Sess. and 1st Spec.

same as before the marriage or different. Statutory requirements of this nature may lend some support for a legal right to use a name after and if the marriage ends, since the intention to use a particular name is recorded by an official act.

b. Challenges to State Naming Laws under Federal Statutory Law

When looking at how the general common law right of naming autonomy interacts with state laws, one must also ask whether federal statutory law can displace states' legal interests in naming regulation.[219] Just as a potential constitutional question may be avoided when alleged in tandem with state common law name usage challenges, federal statutory law provides an arena where courts also may stop short of making constitutional determinations.[220] This has occurred in the area of determining whether state election laws and state motor vehicle laws violate federal statutory protections against discrimination by requiring a married woman to use her husband's surname.

In *Ball v. Brown*,[221] a federal district court in Ohio struck down action under a state statute[222] that cancelled the voting registration of women who married but failed to notify the local elections board of their name change as a violation of provisions of the Voting Rights

---

Sess.); MASS. GEN. LAWS ANN. ch. 46, § 1D (West, Westlaw through Ch. 341, 2024 2d Ann. Sess.); MINN. STAT. ANN. § 517.08 (West, Westlaw through Mar. 18, 2025, 2025 Reg. Sess.); N.D. CENT. CODE ANN. § 14-03-20 (West, Westlaw through Mar. 19, 2025, 2025 Reg. Sess.).

219 An analysis of federal law is necessary because of its preemptive effect over state law. Since the U.S. Supreme Court has not found a constitutional right in naming that would give either the individual or the state more freedom in regulating the field, federal regulation is ripe for analysis to determine the interests the federal government may assert, through statute, in naming regulation.

220 Generally speaking, if relief is afforded under a federal statute (that, for example, prevents discrimination), there is not a need to prove a constitutional violation if both are alleged. Allen v. Lovejoy, 553 F.2d 522, 524 (6th Cir. 1977) ("When such discrimination is found to exist, it is not necessary to prove a constitutional violation."). In addition, courts will often avoid interpreting statutes to have constitutional deficiencies when a constitutionally-legitimate interpretation is possible. *See generally, e.g.*, Panama Railroad Co. v. Johnson, 264 U.S. 375 (1924); F.C.C. v. Fox Television Stations, 556 U.S. 502 (2009).

221 450 F. Supp. 4 (N.D. Ohio 1977).

222 Here too, a constitutional challenge was asserted, but the district court declined to strike down the statute, only looking, rather, at how it was being used in this case and likely to be used in the future. "O.R.C. § 3503.18 is not so clearly and palpably unconstitutional on its face as to require the Court to strike it down. . . . The State of Ohio has a valid and compelling interest in the orderly operation of its election machinery. There is no constitutional barrier to the State requiring the disclosure of a voter's *correct* name." *Id.* at 9 (emphasis added).

Act of 1965.[223] The court reasoned that the board must determine whether the woman had *in fact* changed her name through marriage "prior to cancelling the registration form."[224] The court enjoined any further voter registration cancellations by the local elections board, when notified of a name change by marriage from the local probate court, without evidence that the person's name had actually been changed.[225] The "legal name" conundrum often comes up for married women who choose to use their birth or former surname in the context of voter registration or who vote under their married name without an updated a driver's license or passport. In the spirit of the *Ball* decision, several courts have held that voter registration requirements that mandate a married woman to register under a surname of her spouse either violate common law naming autonomy[226] or state and federal voting protection laws.[227] A bill initially introduced in the 118th Congress[228] and then reintroduced in the 119th Congress in January 2025[229] was ostensibly intended to secure voting protections only for United States citizens by requiring certain proof of citizenship documentation. The bill has been criticized as potentially impacting the voting rights of married women who may have taken their husband's surname when the regular use of that name may not match the surname the woman has listed on other proof of citizenship documents the bill mandates for voting identification.[230] One state, New Hampshire, has

---

223 42 U.S.C.A. § 1971, *transferred to* 52 U.S.C.A. § 10101 (West, Westlaw through P.L. 119-36).

224 *Ball*, 450 F. Supp. at 10. The court went on to say the change in name is not the same as a change in marital status, and premising the former automatically on the latter is a violation of federal voting law. *Id.*

225 *Id.* Although the court did not opine as to what type of evidence this would be, it is likely the observation that the married woman has openly and continuously adopted usage of the marital surname (from evidence such as changes on a state-issued driver's license and/or Social Security card).

226 If a married individual made exclusive, consistent, nonfraudulent use of a former name, they are entitled to use said name for voter registration unless a state statute speaks to the contrary. *See, e.g.*, Stuart v. Bd. of Supervisors of Elections for Howard Cnty., 295 A.2d 223, 227 (Md. 1972).

227 Thirty-six states have voter ID laws, twenty-one of them requiring photo identification. *Voter ID Laws*, NAT. CONF. STATE LEGISLATURES (July 2, 2025), https://www.ncsl.org/elections-and-campaigns/voter-id/ [https://perma.cc/H7TM-PM3D].

228 SAVE Act, S. 4292, 118th Cong. § 2 (as passed by House, July 10, 2024).

229 SAVE Act, H.R. 22 and S. 128, 119th Cong. § 1 (2025).

230 Sophie Clark, *Married Women Could Be Stopped from Voting Under the SAVE Act*, NEWSWEEK (Feb. 11, 2025) ("The SAVE Act does not include proof of name change or a marriage certificate as acceptable proof of identity. This could be vital for married women with a birth certificate that does not match their current legal name."), https://www.newsweek.com/married-women-stopped-voting-save-act-2029325/ [https://perma.cc/3PDK-WQE5].

a similarly restrictive provision,[231] already enacted as valid law and used for the first time in local elections in March 2025, where at least one divorced woman, going by her former spouse's surname, alleged barriers to voting because her identification for voting did not match the required citizenship documents, such as her birth certificate.[232]

In *Allen v. Lovejoy*,[233] the Sixth Circuit held that requiring a woman to sign employment forms in the name of her husband (for a job she held with a county health department before she was married) violated Title VII of the Civil Rights Act of 1964.[234] If validating a woman's right to use the name she regularly goes by—in this case, her birth or "maiden" surname—could be achieved through the federal statute, it would not be necessary to resort to a constitutional provision.[235] Basing protections against gender discrimination in statute, as opposed to the U.S. Constitution, appears to be a trend.[236] As the chasm between

---

231 N.H. REV. STAT. ANN. § 654:12 (Westlaw through Ch. 2 of the 2025 Reg. Sess.).

232 Todd Bookman & Josh Rogers, *NH's New ID Requirements Send Some Would-be Voters Home to Grab Passports, Birth Certificates*, N.H. PUB. RADIO (Mar. 11, 2025, at 17:24 ET), https://www.nhpr.org/nh-news/2025-03-11/nhs-new-id-requirements-send-some-would-be-voters-home-to-grab-passports-birth-certificates/ [https://perma.cc/FF2K-EAHR]. A divorced woman who voted in New Hampshire experienced a delay when the surname she uses regularly (that of her former husband) did not match the surname on her birth certificate. The voter was quoted as saying, "When I divorced, I kept my last name for consistency with my family[.] The idea that women have to prove their name change is profoundly sexist and limiting." *Id.*

233 553 F.2d 522 (6th Cir. 1977).

234 42 U.S.C. § 2000e-2(a)(1).

235 *See Allen*, 553 F.2d at 524 ("In the present case we are dealing with a specific congressional enactment designed to eliminate discrimination in employment. When such discrimination is found to exist, it is not necessary to prove a constitutional violation."). In light of the decision below, the Shelby County, Tennessee, Department of Health had changed the offending policy from requiring a married woman to use her husband's surname to requiring a married woman use the name listed on her Social Security card. *Id.* at 523. Since Anna Allen went by, and was known by, her birth surname (her prerogative under the established common law of Tennessee at the time), she never took any administrative "steps" to use a marital surname. Thus, "Allen" was the name on her Social Security card and there was no forward-looking injury to justify injunctive or declaratory relief. *Id.* at 525.

236 Consider, for example, the Supreme Court's landmark *statutory* determination that discrimination based on a person's sexual orientation or transgender status is prohibited by Title VII because it is discrimination "because of . . . sex" in the plain text of 42 U.S.C. § 2000e-2(a)(1). Bostock v. Clayton County, 590 U.S. 644, 658 (2020). The Court has not yet held, however, that gender identity discrimination is subject to intermediate scrutiny (as is sex discrimination under *Craig v. Boren*, 420 U.S. 190 (1976)), for purposes of an Equal Protection analysis. Aligning gender discrimination with naming discrimination, some intermediate appellate courts have found violations of the Equal Protection Clause in denials to amend birth certificate sex designations based on gender identity for transgender individuals. *See, e.g.*, Fowler v. Stitt, 104 F.4th 770, 771 (10th Cir. 2024).

statutory and constitutional interpretation widens, the chances of finding *any* liberty interest grounded in the U.S. Constitution for naming rights seem to be dwindling.

With respect to identification documents and standardized naming conventions, there are concerns about the impact of the federal REAL ID provisions.[237] The law's requirements could operate to formalize naming in such a way as to erode naming autonomy at the expense of both the individual and the state's ability to regulate naming.[238] The requirements imposed by the law for everyday activities, such as going through airport security and doing business in federal buildings,[239] could have the effect of federalizing a statutory regime on naming. While naming autonomy is often at odds with the government's interest in identification, courts have countered, in favor of naming autonomy, that other conventions—numerical and alpha-numerical—can be used by the government for identification of individuals.[240] Naming decisions thus often prevail in the face of government challenges that certain naming requests burden government recordkeeping or cataloging of government benefits and resources.

III. The Law of Surnames, in Divorce Actions and Beyond

The strength of the common law right to be named whatever one wishes carries over to the custom of marital surname borrowing. That "repute" continues from the inception and through the duration of the marital institution, as shown by the consistency of the naming autonomy case law of the 1970s. History has shown that there are elements of property rights in a surname emanating from the marital custom (i.e., a right to *retain* the use of a surname).[241] Whether that custom of usage ossifies into a legal right once a marriage is

---

237 *See* REAL ID Act of 2005, Pub. L. No. 109-13, § 202, 119 Stat. 231, 312 (2005). The Act requires states to include an individual's "full legal name" on applications for driver's licenses and identification cards but does not provide a definition of what constitutes legality. *Id.*

238 *See* Adam Candeub, *Privacy and Common Law Names: Sand in the Gears of Identification*, 68 FLA. L. REV. 467, 494 (2016).

239 *See About REAL ID*, DEP'T OF HOMELAND SEC., https://www.dhs.gov/real-id/about-real-id [https://perma.cc/T9T7-426B].

240 "Today's society does not use only names as a means of identification. Individuals are often identified through numbers: social security number, driver's license number, FBI or State Police criminal numbers for those charged with crimes, and account numbers supplied by individual businesses or financial institutions." *In re* Ferner, 685 A.2d 78, 82 (N.J. Super. Ct. Law Div. 1996).

241 "A woman on her marriage takes her husband's name, and she *retains* it although the marriage may have been dissolved by divorce unless she has so far obtained another name by Repute as to obliterate the

terminated should not be left to the whim of the common law; it should be solemnized in a statute. This is so because the law allows a presumption that a person does not intend to part with a name they have legally acquired,[242] whether through formal legal channels or by customary acclimation.

Unlike for surnames upon entering a marriage, most states *have* enacted statutes indicating what surnames can be used at or after a divorce.[243] These statutes seem to reflect the flexibility of the common law standard, since courts presume that state legislators are aware of all laws (including a state's adoption of common law standards) when enacting statutes. So, if these statutes do not expressly override common law principles, courts will interpret said statutes to align and coexist with the common law naming autonomy principle.[244] Moreover, as the analysis of this section will show, the language of post-divorce surname usage statutes is almost exclusively couched in terms of options to return to the use of a former surname or change to a new one, but not the affirmative right to continue using a marital one.

As seen in Table 1, state laws do not expressly address what a divorced woman can do with the *marital* surname after the marriage has ended. This may be because of the general common law maxim that one can use whatever name they choose provided such use does not commit fraud or cause confusion. It could also be an unstated assumption that the use of the marital surname continues beyond the end of the marital regime. English law imports to the United States tell us that "[h]aving assumed her husband's name [a woman] retains it, notwithstanding the dissolution of the marriage by decree of divorce or nullity."[245] However, it is curious that some statutes, if accepting the flexibility of that common law standard, *do* address the possibility of a woman returning to the use of her former surname, which under that same common law is her legal name anyway. If the common law standard is the rule and statutes are not meant to supplant this, why would this rule be specified in a

---

original name." Fendall v. Goldsmind, 2 P.D. 263, 264 [1877] (emphasis added), *cited with approval in* Dunn v. Palermo, 522 S.W.2d 679, 682 (Tenn. 1975).

242 *See, e.g.*, Mozzochi v. Luchs, 391 A.2d 738, 740 (Conn. Super. Ct. 1977); Carson v. Harris, 242 S.W.2d 777, 780 (Tex. Civ. App. 1951).

243 *See infra* Table 1.

244 *See, e.g.*, Raubar v. Raubar, 718 A.2d 705, 708 (N.J. Super. Ct. Law Div., Fam. Pt. 1998) ("The court presumes that the legislature is familiar with (1) existing judicial statutory interpretations, (2) its own enactments, (3) *our common law*, and (4) rules of grammar." (emphasis added)).

245 19 HALSBURY'S LAWS OF ENGLAND 829 (3d ed. 1957), *quoted in In re* Mohlman, 216 S.E.2d 147, 149 (N.C. App. 1975).

statute? The present statutory language is there likely to create a guideline for a divorced woman to return to using her former surname if she so chooses as a presumption in the law. But what if she chooses to continue using a marital surname? A name that, according to the common law and marital custom, is hers to use? Can she do so in every aspect of her life? Can she do so only in the capacities (if any) that the name was used during the marriage?

This section first describes the reality of divorce recordkeeping challenges. It then analyzes the statutory guidance provided by name-usage-upon-divorce statutes before turning to the still-concerning gender-lined language of some of the statutes. Finally, it examines the actual surnaming options in the statutes as well as the rights implied (or ignored) by what is *not* mentioned in most of them—retaining a marital surname.

A. Divorce Recordkeeping Challenges

As indicated above, few states mandate that the parties list the name they plan to use once married on a marriage license application.[246] States require their respective local governments to collect vital information, but there is a wide array of data points that are captured for marriage and divorce.[247] As between the marriage license application and the process for divorce, "it is more likely divorce information that is not obtained from the courts."[248] There is, simply, "more uniformity in what states collect regarding marrying couples than divorcing ones."[249] While it is very common for localities to report a woman's "maiden" name to the state, the surname to be used after divorce is rarely, if ever, reported. It is therefore difficult to determine a decreed or "legal" basis in surname usage for many divorcing individuals.

Generally speaking, compared with marriage information, fewer states collect divorce information at the state level.[250] With respect to surname changes specifically, less than one in five states report receiving requests for proof of name changes upon divorce (for

---

246 *See supra* Part II.C.3.a.

247 *See generally* THE LEWIN GRP., COLLECTION OF MARRIAGE & DIVORCE STATS. BY STATES 2 (2008) (prepared for the U.S. Department of Health and Human Services, Administration for Children and Families and Office of the Assistant Secretary for Evaluation and Planning).

248 *Id.* at 2.

249 *Id.*

250 *Id.* at 21.

example, from state revenue collection units).[251] In those states using a standard divorce certificate (as a cover sheet to a divorce petition, for example), the surname usage question is present. However, the certificate, if not incorporated into the terms of a final divorce decree, is not law between the parties, so it is possible that the surname issue may not be addressed as part of a judgment. Furthermore, if the decree is paper-based, localities may not transmit (to state registries) all adjudged information from the decree onto the certificate electronically submitted to the state registry. "Relative to marriage, however, there is less consistency in the types of information states require local areas to collect regarding divorcing couples."[252] Forty-one states require, in the standard divorce certificate, the full name of the divorcing spouses, but thirty-one require the "maiden" name of the wife to be listed.[253] To the extent the "full name" of the divorcing spouses is required on a standard divorce certificate, there can be occasion for the official decree or judgment to not reference either a conscious decision to retain a marital surname or to indicate that the spouse who desires to change their surname is taking action under the respective state statute.[254]

Records of surname decisions at divorce are difficult to analyze because of the dispersed, widespread nature (at the sub-state level, predominantly by county or similar government unit) of how such records are generated.[255] Aside from scattered datapoints counting the number of marriages and divorces (e.g., the divorce rate by state)[256] and though there are some registries for such information, centralized vital statistics on what surname individuals decide to use after a divorce are not readily available. While the Social Security Administration's (SSA) "Numerical Identification System" (or Numident) files record name changes upon divorce for purposes of that federal agency's programs and

---

251 *Id.* at 27.

252 *Id.* at 19.

253 *Id.* at 20.

254 *See infra* Table 1.

255 THE LEWIN GRP., *supra* note 247, at 1.

256 The National Center for Health Statistics keeps data, by state, on the rate of marriages and divorces, but actions incidental to those legal processes are not generally part of that government organization's statistics. *Marriages and Divorces*, NAT'L CTR. FOR HEALTH STAT. (Aug. 12, 2024), https://www.cdc.gov/nchs/nvss/marriage-divorce.htm#state_tables [https://perma.cc/LRZ3-2FD3].

benefits,[257] the SSA does not release public data on the frequency of surname changes upon divorce.[258]

In short, naming determinations following divorce are difficult to research. Also, state statutes on surname usage after divorce generally do not address the continued use of the surname of a marital partner taken during the marriage. As Table 1 reveals, state legislatures seem more concerned with establishing legal processes for returning to a former surname or adopting a totally new one. When one considers, among other matters, federalized uniformity in state naming conventions that may be coming online in 2025,[259] a more concrete state-level statutory right in a marital surname is all the more warranted.

B. Considerations Courts Use in Deciding Surnaming Requests Related to Divorce

Because of the lack of statutory rules regarding surname usage in marriage and the custom of continued usage of marital surnames after a marriage ends, cases considering a divorced woman's right to continue using a marital surname are few and far between. Some earlier decisions envisioned that a woman would not want to use the marital surname after divorce,[260] thus avoiding the legal questions posed by her continued use. The decision to continue use of a marital surname, as a result, has not been affirmatively acknowledged by

---

257 *RM 10212.060 — Evidence of Name Change Based on a Divorce, Dissolution, or Annulment*, SOC. SEC. ADMIN. (Oct. 24, 2011), https://secure.ssa.gov/apps10/poms.nsf/lnx/0110212060 [https://perma.cc/RY3D-VG6V]; *RM 10212.065 — Evidence Required to Process a Name Change on the SSN Based on Divorce, Dissolution, or Annulment*, SOC. SEC. ADMIN. (June 7, 2024), https://secure.ssa.gov/apps10/poms.nsf/lnx/0110212065 [https://perma.cc/N9MV-HJ9S].

258 SOC. SEC. ADMIN., Letter (Sep. 9, 2024), S9H: 2024-FOIA-01482. The author sought a Freedom of Information Act ("FOIA") request for the number of surname change requests based on divorce or annulment using a divorce decree or judgment in calendar year 2023 by state. The SSA stated that there were no records responsive to the request and that "FOIA does not require an agency to perform research or create a record to satisfy a request." *Id.*

259 *See supra* Part II.C.3.b; *see also supra* notes 237, 239 (the state "official documents" implication for interstate travel because of the requirements of the REAL ID Act as of May 2025).

260 Using the example of "Richard Roe" and "Jane Doe" or "Roe," the Massachusetts Supreme Judicial Court, in a case determining the limits of discretion for local town clerks in naming practices on marriage license applications (in the face of a state attorney general statement on the matter), said this: "[O]n divorce from Richard Roe, with or without a court order as to her name, Jane Roe may retain that name or resume the name Jane Doe as her maiden name or the name of a previous husband or she may assume a new name. . . . It seems unlikely that after divorce she would desire to retain the name Mrs. Richard Roe." Sec'y of Commonwealth v. City Clerk of Lowell, 366 N.E.2d 717, 724 (Mass. 1977).

a court as a legal right beyond this custom. Given the entrenched strength of the marital institution in American legal and social culture and the correlative naming practices intertwined with it, a woman's decision to use the name should not be automatically cast aside, nor should it be considered a capitulation to arcane social mores. She may want the name for herself, and the marriage has allowed her that possibility however the right may be grounded (as one in property, the common law, or otherwise).

Courts have intimated that a woman's decision to retain use of a marital surname or use another surname should have no bearing on other incidentals of divorce, such as interim and final periodic financial support awards, also known as alimony.[261] Naming concerns upon divorce only arise once the parties are no longer married, so they are not relevant during the period of "legal" separation (to the extent states still recognize this concept) or otherwise before a final divorce decree or judgment.[262] Further, a man may not compel his former wife through an annulment proceeding to revert to use of her former surname (from before the marriage) unless he can prove that the continued use of the marital surname has damaged him or has otherwise interfered with his rights.[263] At least one state court of last resort dismissed, for lack of jurisdiction, a former husband's appeal to vacate an order allowing his former wife to resume use of the marital surname[264] through the state's traditional name-change procedure,[265] indicating that the appropriate forum to contest the

---

261 *See, e.g.*, Horton v. Horton, 211 S.W.3d 35, 39 (Ark. Ct. App. 2005) (Baker, J., concurring) ("[W]here fraud or other illegal purpose is absent, I cannot conceive of a situation where it would not be an abuse of discretion to deny a name-change request in a divorce action. Certainly, a wife should not be forced to effectively 'purchase' her former name by foregoing the alimony to which she may be legally entitled, nor should her name be used as a bargaining chip in negotiations of monetary matters, as the decree [of the trial court] suggests.").

262 *See, e.g.*, Wilty v. Jefferson Par. Democratic Exec. Comm., 157 So. 2d 718, 721 (La. 1963) (wife's use of husband's first and last name in an election post-separation but before they were officially divorced).

263 Queen v. Queen, 135 N.Y.S.2d 536, 537 (N.Y. Sup. Ct. 1954).

264 *In re* Larson, 295 N.W.2d 733, 734–35 (N.D. 1980). The former wife had alleged that she was known professionally by the marital surname. *Id.* at 734. The thesis of this work was not implicated because she chose to initiate proceedings under the state's formal name change procedure, an avenue to which anyone may resort (subject to the common standards regarding fraud and avoiding confusion in name change statutes). *Id.*

265 "The order was granted on the basis that the appellee had the statutory right to petition for a change of name . . . and there was good cause for such change." *Id.* at 734.

considered use of the marital surname would be *during* the name change proceeding and not after or apart from it.[266]

In the realm of formal name change petitions,[267] judges have broad discretion. There are almost always separate statutes dedicated specifically to surname options at divorce,[268] and these statutes may modulate the discretion afforded in formal name-change statutory proceedings. The purpose of having statutes specifically for divorce is, in part, to bypass the sometimes-onerous requirements of a state's formal name-change process. Rarely do states address surname options upon divorce directly under their general change of name statute(s).[269] Maryland imports elements of formal name change into its divorce name use statute, allowing a requesting party to a divorce to return to either their birth surname or "any other former name the party wishes to use if . . . the purpose of the party is not illegal, fraudulent, or immoral."[270] In those few states without a specific surname-choice-upon-divorce statute, the onerous requirements of notice, publication, and sometimes a hearing used in general name changes may be suspended for divorce-related surname determinations.[271] The data in Table 1 bear out this scattershot array of language, forcing courts to look at the matter from several angles.

---

266 "[T]he opportunity for anyone to object at the hearing to a petitioner's change of name request stems from this general notice provision, and an objection will be not heard by way of posthearing means." *Id.* at 735.

267 Courts have disallowed certain requests for name changes, and many of their justifications have found their way into name change statutes. Examples include denying name change petitions when asking to change to a number, or to names that may be deemed offensive, cumbersome, or overly lengthy. *See, e.g.*, *In re* Dengler, 246 N.W.2d 758, 759–64 (N.D. 1976) (request to change name to a number); Petition of Variable for Change of Name v. Nash, 190 P.3d 354, 356 (N.M. Ct. App. 2008) (request to change name to "Fuck Censorship!").

268 *See infra* Table 1.

269 Some states allow for name changes at marital dissolution in line with their respective name change statutes. *See, e.g.*, TENN. CODE ANN. § 29-8-101(b)(4) (West, Westlaw through 2025 1st Reg. Sess. of the 114th Gen. Assemb.) (indicating, within the state's general name-change statute, that the prohibition on name changes for persons convicted of certain crimes does not apply to a name change as a result of marital dissolution). Illinois, for example, indicates that resorting to the state's general name-change statute is not required if the request for a certain surname is indicated in the judgment, reasoning *arguendo* that it is required if such a request is not in the divorce judgment. While Minnesota, as another example, has its own name-change-upon-divorce statute, the language of the statute incorporates elements of the state's general name-change statute more so than many other states. *See infra* Table 1.

270 MD. CODE ANN., FAM. LAW § 7-105(a) (West, Westlaw through 2025 Reg. Sess.).

271 For example, in New Mexico, § 40-8-2 of the general name change statute, which involved an onerous publication process, was repealed in 2023. 2023 N.M. Adv. Legis. Serv. 28. A hearing is still required under N.M. STAT. ANN. *§* 40-8-3 (West, Westlaw through chs. effective July 1, 2025 of the 2025 1st Reg. Sess.).

1. Children of Divorced Individuals and Divorce's Impact on Surname Choices

This work addresses the surnaming decisions of adults dissolving their marriage, not the potential surnames of children born of the marriage. However, a brief description of naming processes for children of dissolved marriages is warranted as a precursor to the divorcing parties' naming options themselves. A child is not necessarily required to be given the surname used by the parties during the marriage, and neither party to the marriage has a superior right to decide the surname legally.[272] When the parents disagree as to the child's surname, naming autonomy often gives way to a judicial standard, whether the parents are married or not, that a child's surname is determined by the best interests of the child.[273]

The historical pressure of the patriarchy was strong in mid-twentieth-century divorce cases involving issues of children's names. A New Jersey Superior Court decision held that a man could restrain his divorced wife from using her second husband's surname as his children's surname in school, since the children were filiated to him through his marriage with the wife.[274] However, in a later New Jersey case, which involved an abusive and neglectful father and a request by the divorced wife and mother of the child to use *her* former (pre-marital) surname, the court allowed the change of the child's surname from the father's to the mother's.[275] In more recent times, for changing a child's surname, courts have consistently held that name-changing standards for children are fundamentally different from those of adults and are part of the "best interest"[276] calculus used in many judicial decisions impacting children, such as custody and child support determinations.

---

272 Garling v. Spiering, 512 N.W.2d 12, 13 (Mich. Ct. App. 1993). Very few states still have patrilineal presumptions for surnames of children born during a marriage. *See supra* Part II.A.4; *supra* note 151.

273 "[A]s with other parental disputes concerning children, we are convinced that adoption of the 'best interest' test is the most rational way in which to resolve disputes between parents regarding a child's surname." *Garling*, 512 N.W.2d at 13.

274 Sobel v. Sobel, 134 A.2d 598, 599–600 (N.J. Super. Ct. Ch. Div. 1957).

275 *In re* Rossel, 481 A.2d 602, 603, 606 (N.J. Super. Ct. Law Div. 1984).

276 "In divorce proceedings and in custody disputes between parents, a trial court has the jurisdiction and legitimate authority to resolve disputes between parents regarding the proper name of a child. In doing so, the trial court is guided by the best interest of the child." Block v. Bartelt, 580 N.W.2d 152, 154 (S.D. 1998) (citing Keegan v. Gudahl, 525 N.W.2d 695, 696–97, 699 (S.D. 1994)).

The fact-specific nature of a child's name-change request also moves courts to decide it separately from the divorcing parties' naming concerns.[277]

As to the naming options of the divorcing individuals themselves, courts generally will not deny a woman's request to use a name other than the marital surname on the grounds that a woman's surname should match that of children born to the marriage.[278] This is true even if the children themselves express "discomfort" with the varying names when faced with their mother requesting her former surname or a new spouse's surname.[279] California does not prevent a divorced woman from returning to the use of her former surname even if there are children of the marriage with the surname of her former husband.[280] Similarly, Nebraska's statute allowing a party to return to a pre-marriage surname except for "good cause shown" states that children having a different surname from a divorced parent is not "good cause."[281] Texas expressly indicates that a court cannot deny a change of

---

277 [C]ourts have considered many factors, including the child's preference, taking into account the child's age and maturity; the length of time the child has used the surname; the effect of a surname change on the preservation and development of the child's relationship with each parent; whether the child might feel embarrassment or discomfort bearing a surname different from the rest of the family; whether any negative association or social stigma has attached to either the current or proposed name; the motives of the moving parent; and any other factor relevant to the child's best interest. Because the facts of each petition will differ, some of the factors may not be relevant in a particular case and should not be considered. The court has broad discretion in determining what is in the best interests of the children, and thus which factors the court considers is a matter of discretion.

In re Wilson, 648 A.2d 648, 651 (Vt. 1994) (citations omitted).

278 *See, e.g.*, Kim, *supra* note 17, at 921; Piotrowski v. Piotrowski, 247 N.W.2d 354, 356 (Mich. Ct. App. 1976).

279 *See, e.g.*, Leadingham *ex rel.* Smith v. Smith, 56 S.W.3d 420, 427 (Ky. Ct. App. 2001).

280 The California Family Code's chapter on the restoration of a wife's former name states that the request for a name change at divorce cannot be denied just because the requestor has custody of minor children or "for any other reason other than fraud." CAL. FAM. CODE § 2081 (Deering 2024). Section 2082 reiterates California's statutory alignment with the general common law right of name change, in that the statutory pronouncements must not be construed to abrogate common law naming autonomy. CAL. FAM. CODE § 2082 (Deering 2025). The same language also appears in CAL. FAM. CODE § 306.5 regarding name changes upon marriage and CAL. CIV. PROC. CODE § 1279.5 regarding general name change proceedings. CAL. FAM. CODE § 306.5(a)–(c) (Deering 2025); CAL. CIV. PROC. CODE § 1279.5(a)–(f) (Deering 2018).

281 NEB. REV. STAT. ANN. § 42-380(1) (West, Westlaw through 1st Reg. Sess. of the 109th Legis.).

name "solely to keep last names of family members the same."[282] Rhode Island allows a name change at divorce "notwithstanding that there may be children born of the marriage . . . ."[283] Contrast these with North Carolina and Kentucky's provisions: North Carolina's statute seems to limit a woman's ability to return to using the surname of a prior living husband, allowing it only if she has children who use that individual's surname.[284] The same restriction (i.e., having children with that surname) is not present for a prior deceased husband.[285] Kentucky allows its courts discretion to deny a woman the right to resume a former surname if there are children born of the marriage.[286]

2. Who Can Ask for the Surname Change? When Can It Be Requested?

Naming autonomy, as a personal right, usually requires only that the person whose name is to change assert the right to ask for a naming option at divorce.[287] The vast majority of jurisdictions allow only the individual affected directly (i.e., their own surname would be new or different) to request to have a different surname than one used during the marriage.[288] There have been only a few cases where courts have considered whether a divorced husband can demand his former wife stop using a marital surname. Courts have not allowed a plaintiff-husband to prevent his former wife from using the marital surname without her consent.[289] This pattern holds true when a man files for divorce, asking that his soon-to-be former wife discontinue using the marital surname, but the woman does not

---

282 TEX. FAM. CODE ANN. § 45.105(a) (West, Westlaw through 2025 Reg. and 2d Called Sess. of the 89th Legis.).

283 15 R.I. GEN. LAWS ANN. § 15-5-17 (West, Westlaw through Ch. 473 of the 2025 Reg. Sess.).

284 N.C. GEN. STAT. ANN. § 50-12(a) (West, Westlaw through S.L. 2025-70, S.L. 2025-72 to S.L. 2025-75, and S.L. 2025-77 to S.L. 2025-89 of the 2025 Reg. Sess.).

285 *Id.*

286 *See infra* Table 1.

287 *See, e.g.*, Newsom v. Newsom, 976 S.W.2d 33, 40 (Mo. Ct. App. 1998) ("Husband's request in his petition to restore Wife's maiden name to her was ineffective to raise the issue, as the common law and statutory rights to change her name belonged to Wife, and not to Husband.").

288 Well over 30 U.S. states allow only the individual requesting the name status (in most cases, the woman) to bring the action. *See infra* Table 1.

289 *See, e.g.*, Smithers v. Smithers, 804 So. 2d 489 (Fla. Dist. Ct. App. 2001), *reh'g denied*, (2002) (husband in an annulment proceeding cannot bar his putative wife from using his surname); Mueller v. Kamenesh, 864 So. 2d 38 (Fla. Dist. Ct. App. 2003), *reh'g denied*, (2004) (extending the same principle to a divorce proceeding).

respond to the suit.[290] Additionally, in at least one case, a former wife was unsuccessful in suing for the exclusive right to use her former husband's surname and to prevent his second wife from using the name.[291]

Eight states' statutes seem to allow a court, on its own motion, to decide the naming options of divorcing spouses.[292] Washington's statute does not seem to connect the right of the party whose name is being changed to the party requesting the change.[293] South Dakota expressly allows either party to the divorce to request the "restor[ation] to the woman [of] her maiden name or the name she legally bore prior to her marriage to the husband in the divorce suit."[294] Third parties, in rare instances, are contemplated directly in the statutes. Colorado's process requires the requesting party to attest "that the restoration of a prior full name is not detrimental to *any* person," and the judge's order will only issue, *inter alia*, upon such proof.[295] Alabama's law expressly gives a court discretion to enjoin a divorced woman from using her former husband's "given name or initials" upon "application of any interested party."[296] For most states, however, third parties who may have an interest in the naming of a divorcing individual may need to search court records for a divorce decree in order to request intervention, as they cannot directly petition to compel or refute another's surname adoption.[297]

---

290 *See* Warfield v. Warfield, 661 So. 2d 924 (Fla. Dist. Ct. App. 1995).

291 Weicker v. Weicker, 237 N.E.2d 876 (N.Y. 1968) (divorced woman cannot enjoin former husband's new wife from using his surname).

292 These states are Alaska, Arkansas, Massachusetts, New Hampshire, New Jersey, South Carolina, South Dakota, and Vermont. Five of them refer to "parties" or "spouses," but Arkansas and Massachusetts refer to changing the name of only "the wife" or "a woman," respectively. As a separate note, South Dakota allows either the court or a party to request the name change. *See infra* Table 1.

293 *See infra* Table 1.

294 *See infra* Table 1.

295 COLO. REV. STAT. ANN. § 14-10-120.2(2)(b), (3)(b) (West, Westlaw through legis. effective Mar. 24, 2025, 1st Reg. Sess., 75th Gen. Assemb. 2025) (emphasis added).

296 *See infra* Table 1. This would legally prevent, according to a judge's sole discretion, a woman from using a full title such as "Mrs. John Smith" but presumably wouldn't prevent her from using "Ms. Jane Smith" or even "Mrs. Jane Smith." The statute notably allows the injunction to be brought by not only the former husband but by "any interested party."

297 *See, e.g.*, Raubar v. Raubar, 718 A.2d 705, 712 (N.J. Super. Ct. Law Div. Fam. Pt. 1998) ("[T]hird parties contemplating new or different contractual relationships with either party [to a divorce proceeding] have already been placed on constructive notice through the filed [divorce] complaint . . . .").

The majority of states require that a naming option be requested as part of the divorce proceeding.[298] Maryland allows it then or "within 18 months after a final decree of absolute divorce is entered."[299] Five states expressly allow a post-divorce name change at any time after the divorce is finalized.[300] Of course, nothing would prevent a divorced individual from petitioning for a name change under a state's formal name-change law; the benefit, however, of changing a name under the divorce-specific statute is that it may dispense with the name-change statute's more onerous requirements (publication for notice, a hearing, etc.).[301]

C. Gender Lines in the Statutes

The social science literature reveals that women continue to adopt men's surnames in opposite-sex marriages.[302] That said, the law should reinforce the equality and liberty principles for which the women's movement of the 1970s fought so hard. And statutes that expressly create gender disparities with respect to surname choices at divorce seem vulnerable to constitutional challenges. Eight states still reference gender distinctions in their statutes on surname options at divorce by providing the name change options only to women.[303] Most states acknowledge the concern and have fairly recently changed their statutes to be gender neutral. Louisiana has recently moved away from gendered language in one statute,[304] but gendered language remains in another.[305] In Montana, gendered

---

298 *See infra* Table 1.

299 *See infra* Table 1.

300 These states are Colorado, Connecticut, Georgia, Kansas, and Pennsylvania. Georgia amended its statute in 2024 to include new subsection b allowing a former spouse to revert back to their birth surname by a petition filed at any time after the divorce; previously, the request for a name change had to accompany the divorce petition.

301 *See, e.g.*, Ogle v. Circuit Court, Tenth (now Sixth) Judicial Circuit, 227 N.W.2d 621, 623 (S.D. 1975) (a divorced woman may resume her maiden name after divorce without having requested it in the divorce proceeding and without showing cause under the general name-change statute).

302 *See, e.g.*, *supra* Part II.A; *supra* note 111.

303 Those states are Alabama, Arkansas, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, and South Dakota. *See infra* Table 1. Oklahoma and North Carolina both reference gender lines but have two sections, one dealing with a former wife's naming options and another dealing with a former husband's naming options.

304 LA. CODE CIV. PROC. ANN. art. 3947(B) (effective August 1, 2021).

305 LA. STAT. ANN. § 9:292 (West, Westlaw through 2024 1st Extr. Sess., 2d Extr. Sess., Reg., and 3d Extr. Sess.).

language referring to a "wife" was replaced with the gender-neutral term "party" in 2019; the phrase "maiden name" was retained, but "or birth" [name] was added.[306] Vermont's statute was made gender neutral in 2023.[307] Rhode Island's statute was made gender neutral in 2024, changing "woman" to "person" and "her" to "their."[308] Whether expressly gender referenced or attempting to move to a gender-neutral lexicon, twelve states still have the term "maiden" in their statutes.[309]

North Carolina's statute is noteworthy. It has two separate sections addressing name change options for women and men. Subsection a1 (for men) was added in 1994 to, ostensibly, make the statute gender-neutral,[310] but the separate classifications serve to accentuate historical norms and gender-lined differences. Although both sections seem to only allow returning to a prior surname, the language of the subsection regarding divorced men allows more options than the subsection for divorced women.[311] Women are not given the right to resume using the surname of a prior living husband with whom they do not have children.[312] There is no similar restriction for a divorced man who wishes to resume using the surname of a former spouse with whom the man does not have children.[313] To the extent this creates an unequal classification, there may be an equal protection problem.[314]

D. Limitations on *What* Surnames Can Be Used

Virtually all states have crafted divorce-related statutes to allow individuals to revert to pre-marriage surname use, and a handful also allow the opportunity to change to any

---

306 2019 Mont. Laws Ch. 180 (H.B. 274).

307 2023 Vt. Acts & Resolves No. 161, § 20 (Adj. Sess.) (effective June 6, 2024).

308 2024 R.I. Pub. Laws, ch. 163, § 2 (effective June 17, 2024).

309 These states are Delaware, Georgia, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Montana, North Carolina, Oklahoma, South Dakota, and Virginia. *See infra* Table 1.

310 1994 N.C. Sess. Laws ch. 565, § 1 (Reg. Sess.) (effective Oct. 1, 1994) (H.B. 1133).

311 *See infra* Table 1.

312 *See infra* Table 1.

313 *See infra* Table 1.

314 Recall that the U.S. Supreme Court has not yet heard a full case on the merits regarding the constitutionality of a right to use a particular surname. Its decision in *Forbush* was a summary affirmance of the district court's finding. *See supra* note 196.

(new) surname.[315] Some states handle the matter within the more general framework of their respective name-change statutes.[316] A handful of states address the matter in case law rather than by stand-alone statute or within their name-change statutes.[317] North Dakota and Hawai'i, as two of the few states that require marriage applicants to list the names they intend to use during the marriage on the marriage license, likely use their respective "at marriage" statutes as reference points for naming options at divorce along with common law naming autonomy principles.[318]

1. Returning to a "Former," "Prior," or "Birth" Surname

The vast majority of states' divorce-specific naming statutes only provide for returning to a former name.[319] States have a wide array of language evidencing this limitation, and some of that language is worth discussing. Most states refer to a "former," "previous," or "prior" name or the name of a "former spouse." These terms all have similar meanings and appear to permit a divorcing spouse to return to any surname used before the marriage. Some states, however, expressly include the option to return to use of a "birth name" or name on a birth certificate; this option exists alongside the option to return to a former

---

315 Adopting any new surname, as a more wide-open option, can be conditioned on some of the same types of restrictions as a state's name change statute (i.e., new name cannot be used to perpetrate fraud or cause confusion) including that statute's notice and publication provisions. *See, e.g.*, ALASKA STAT. ANN. § 25.24.165(b) (West, Westlaw through Ch. 2 of the 2025 1st Reg. Sess., 34th Legis.).

316 *See infra* Table 1. A handful of states do not have dedicated statutes to address the issue of surname usage upon divorce but rather address the matter as a subsumed component of the state's general name change statutory framework. These states include Florida, Mississippi, New Mexico, Tennessee, Utah, and Wyoming. Some states exempt divorce-related naming options from one or more of the onerous requirements of the more general name-change law (e.g., notice, publication); some do not.

317 Idaho, for example, does not have a statute on name changes upon divorce, either stand-alone or within its name-change law, but the Idaho Supreme Court has indicated that returning to a former surname is permitted if a party requests it in the divorce decree. Cook v. Arias, 435 P.3d 1086, 1090 (Idaho 2015). The same functional rule is true in Missouri. *See* Newsom v. Newsom, 976 S.W.2d 33, 41 (Mo. Ct. App. 1998).

318 *See infra* Table 1.

319 *See infra* Table 1. A variety of terms are used in this context with varying legal significance. For example, most statutes use "former" name (or tautologically similar terms like "prior" or "previous") either along with, or in lieu of, allowing return to a "maiden name" or "birth name." The first set allows the option to return to using a surname of another former spouse in a marriage before the one contemplated in a particular divorce action.

name in almost all instances where it is indicated.[320] The inclusion of a "birth name" is significant because it is a statutory pronouncement that could displace the common law option to adopt whatever name one wishes, thus limiting the names that could be used after a divorce. Georgia's statute, originally enacted in 1880, allows a party to request "restoration of a maiden or prior name."[321] A second subsection, added in 2024, may override that by limiting the options to just one—the birth surname.[322] Seven states—Georgia, Iowa, Michigan, Nevada, South Dakota, West Virginia, and Wisconsin—refer to a "legal name": Georgia to the aforementioned birth surname that appears on a birth certificate, West Virginia to the proof used to obtain a state driver's license or identification card, and the other five states to legal names in the abstract.

Of the well over thirty states with language that restricts post-divorce name usage to some name the individual used before the marriage, twenty-one limit judicial discretion by using the term "shall."[323] Fourteen provide discretion to the court by using the term "may." Two states, Georgia and Kentucky, have both mandatory and permissive language for different scenarios. Georgia's statute seems to contain a contradiction between the original 1880 portion of the statute (new subsection a) and a recent 2024 amendment (new subsection b).[324] Kentucky mandates the name change ("shall") for a divorced

320 *See infra* Table 1. As in the statutes for California, Connecticut, the District of Columbia, Georgia, Iowa, Louisiana, Maryland, Michigan, and Montana.

321 1880-81 Ga. Laws § 19-5-16(a), p. 121, § 1.

322 2024 Ga. Laws § 19-5-16(b), Laws 2024, Act 397, § 1 (effective April 22, 2024). The disparity between the old section (a) and new section (b) ostensibly prevents a twice-divorced woman from returning to a legally recognized use of a first spouse's surname after a divorce from a second spouse if she did not ask for that first surname to be restored in her first divorce. Georgia's restriction in this regard is atypical and possibly inadvertent.

323 *See, e.g.*, VT. STAT. ANN. tit. 15, § 558 (West, Westlaw through Reg. Sess., 2025–2026 Vt. Gen. Assemb., effective as of Mar. 5, 2025). In addition to amending the statute to make it gender neutral in 2023, Vermont also removed much of the trial court's discretion ("may" was changed to "shall" allow, but "good cause to the contrary" language still present) to deny an individual the right to resume a former surname. 2023 Vt. Acts & Resolves, Adj. Sess., No. 161, § 20 (effective June 6, 2024). The previous language read, "Upon granting a divorce to a woman, unless good cause is shown to the contrary, the court may allow her to resume her maiden name or the name of a former husband." *Id*.

324 Georgia's original statute indicates that the decree "*shall* specify and restore to the party the name so prayed (maiden or prior name) for in the pleadings." However, the 2024 amendment appears to vest discretion in the judge in the last sentence of subsection 2: "The court . . . *may* issue an order restoring the given surname shown on the movant's birth certificate . . . at any time after the filing of a motion." GA. CODE ANN. § 19-5-16 (West, Westlaw through Act 1, 2025 Reg. Sess.) (emphasis added); 2024 Ga. Laws § 19-5-16(b), Laws 2024, Act 397, § 1 (effective April 22, 2024) (emphasis added).

woman, if requested, when there are no children of the marriage. But Kentucky makes it permissible ("may") if there are children of the marriage.[325]

These statutory restrictions limit women's legal surname options upon divorce. Given that some of these statutes still use archaic gendered language or simply because of reasons outside the law,[326] women resort to these statutes much more often than men. The statutes purport to vindicate naming autonomy, but they constrain by design when stating that a woman may *only* return to a previous name. Common law naming autonomy says that divorced women should be free to be named whatever they choose, but some statutes facially restrict that choice to a pre-marital surname. Statutory language should clearly establish that remaining with the marital surname is an option. The law should give women certainty and solace in that decision, in addition to any other statutory naming options provided.

2. The (Additional) Option to Adopt *Any* New Surname?

Eight states appear to give a divorcing spouse the option to change their surname to any they choose.[327] Five of these include *both* the option to return to a former surname and for a spouse to take any new surname.[328] Four of those five (all but New Jersey), however, allow a judge more discretion to deny a name change if the individual requests a "new" name, as opposed to one used before the marriage.[329] These discretionary standards allow a judge to consider the factors under a state's general name change statute (e.g., fraud, confusion) but without some or all of the other legal requirements in that statute (e.g., notice, publication of the new name, and a hearing).

---

325 KY. REV. STAT. ANN. § 403.230(2) (West, Westlaw through laws effective Mar. 24, 2025 and the Nov. 5, 2024 election).

326 *See supra* Part II.A.

327 *See infra* Table 1. These eight states are Alaska, Kansas, Maine, Michigan, Minnesota, New Jersey, Rhode Island, and Washington.

328 *See infra* Table 1. These five states are Kansas, Maine, Michigan, New Jersey, and Washington.

329 Maine's statute, for example, indicates that the court *shall* change the surname of a requesting spouse if a former name is requested but *may* change the surname if "any *other* name [is] requested." ME. REV. STAT. ANN. tit. 19-A, § 1051 (West, Westlaw through 2023 2d Reg. Sess., 131st Legis.) (emphasis added). Washington's statute, as another example, reads, "Upon request of a party whose marriage or domestic partnership is dissolved or declared invalid, the court *shall* order a former name restored or the court *may*, in its discretion, order a change to another name." WASH. REV. CODE ANN. § 26.09.150(3) (West, Westlaw through 2024 Reg. Sess.) (emphasis added).

In the three states where taking any (ostensibly, "new") name is the only option listed, there is differing judicial discretion. In Minnesota[330] and Rhode Island,[331] the standard is mandatory, as the statutes use the term "shall," but both states' statutes seem to acknowledge the limited reasons a court could deny a request under a general change-of-name statute or rule (i.e., the fraud and confusion standards). This balances the naming autonomy principle of the common law with some element of traditional name-change laws. The standard appears to be permissive in the Alaska statute, as that law indicates that a court "*may* change the name of either of the parties."[332]

3. A Right or Interest in What Is *Not* Said?—Retaining the Marital Surname

What is curious about these statutes is that virtually all of them *do not* expressly affirm (or deny, as in the French Civil Code) an individual's right to retain a marital surname. As described above, the statutes speak in terms of reverting to former names or, to a lesser extent, using the divorce proceeding as an opportunity to change the surname to a new one. The omission of retaining the marital surname as an option is significant. Does it signal an acknowledgment of custom? Is the naming autonomy principle so obvious that a statute need not address it? Should we assume that if the issue is not raised at all, the woman leaves the marriage with a right to the marital surname unencumbered by any concerns of her former spouse? New York's statute, for example, does not expressly prohibit a divorcing individual from continuing to use the surname of the other individual, but by using the permissive "*may*" language (if a spouse requests to return to using a former surname), the statute implies an allowed continued use of a marital surname without restriction.[333]

---

330 In Minnesota, unless the party requesting the name change has a felony conviction, the court *must* change the name, subject only to the general change-of-name standards of denying a name change if there is a finding of "an intent to defraud or mislead." MINN. STAT. ANN. § 518.27 (West, Westlaw through Mar. 18, 2025, 2025 Reg. Sess.).

331 In Rhode Island, the language of the statute is passive and indicates that the person "shall, upon request, be authorized by the decree to change their name," with acknowledgment of the statute as suppletive to the common law standard. 15 R.I. GEN. LAWS ANN. § 15-5-17 (West, Westlaw through Ch. 457 of the 2024 Reg. Sess.).

332 ALASKA STAT. ANN. § 25.24.165(a) (West, Westlaw through Ch. 25 of the 2025 1st Reg. Sess. and Ch. 1 of the 1st Special Sess. of the 34th Leg.) (emphasis added).

333 *See* N.Y. DOM. REL. LAW § 240-a (McKinney, Westlaw through L. 2025 Chs. 1 to 503); ALAN D. SCHEINKMAN, NEW YORK LAW OF DOMESTIC RELATIONS § 2:26 (11th ed. 2025).

Given that a handful of these statutes also confirm the right to the use of a name if requested in a divorce decree (or thereafter in a few states), the divide between certainty in using whatever "new" surname comes out of this process and retaining a marital surname becomes wider. When this omission is coupled with the vast differences in language of these state statutes and the wide judicial discretion in naming decisions, a divorced woman may not be aware, with a reasonable degree of certainty, of her rights in the continued use of a marital surname.

Only three states' statutes speak to an individual's option to retain the marital surname after divorce. Illinois seems to be the only state that places an affirmative duty on a divorcing individual to ask to retain a marital surname by requiring the party to ask the court *not* to include a name change provision in the divorce decree.[334] Rhode Island's statute expressly states that a divorced individual who seeks to change their name is entitled "to the same rights and liabilities as if their name had not been changed."[335] This could imply that if a divorced woman did continue to use a marital surname, she could do so in all ways and in every aspect of her post-divorce life—private or public, for personal use or for commercial gain—as she could have done while married. Louisiana offers what seems to be the firmest legal protection in retaining use of the marital surname. Its statute affirmatively indicates that a divorced woman may retain the surname of the spouse from whom she is divorced, even if remarried.[336] An article in that state's Code of Civil Procedure grants a judge the authority to confirm an order authorizing the use of a certain name, including presumably maintaining a marital surname after a divorce.[337]

So, by default, if nothing is requested in the divorce petition and/or ultimately adjudged in the divorce decree, the divorced woman's surname remains the one she may have held out and used continuously during the marriage. The Alaska Supreme Court has held that it is not a legal error when a court decrees a divorcing woman as continuing to use the marital surname even if she did not request the court to do so otherwise.[338] The right to retain use of

334 *See infra* Table 1; 750 ILL. COMP. STAT. ANN. 5/413(c) (Westlaw through P.A. 103-1082, 2024 Reg. Sess.). This could be to formally request to maintain the marital surname, or it could simply be a matter of privacy requested in the name to be used after the divorce.

335 15 R.I. GEN. LAWS ANN. § 15-5-17 (West, Westlaw through Ch. 457 of the 2024 Reg. Sess.).

336 LA. STAT. ANN. § 9:292 (Westlaw through 2024 1st Extr. Sess., 2d Extr. Sess., Reg., and 3d Extr. Sess.).

337 LA. CODE CIV. PROC. ANN. art. 3947(B) (Westlaw through 2024 1st Extr. Sess., 2d Extr. Sess., Reg., and 3d Extr. Sess.).

338 Helen S.K. v. Samuel M.K., 288 P.3d 463, 480 (Alaska 2012). Helen S.K. argued that a superior court's finding, in her divorce action, that she "shall retain her married name" was in error, causing her expenses and

the name exists not only because of the systematic, continuous, and open use of a marital surname, but also by the rights that both custom and common law naming autonomy provide her to use that name. A comprehensive statute that states can use involving the existing name change options upon divorce but *expressly including* rights in the continued use of a marital surname is proposed in the next section.

IV. Model Law on Post-Divorce Surname Usage

Statutes are passed by legislatures as the will and intent of a people.[339] In both common law and civil law systems, statutes override inconsistent judicial pronouncements.[340] The common law is formed, in significant ways, from custom:[341] the pervasive practices that are generally accepted parts of a society and its social institutions. Statutes override the common law, providing additional certainty and predictability. The seminal House of Lords case of *Cowley* summarizes it best: "[T]he Sovereign can at any moment confer on the Countess the privilege of using the name, style, and title which the Earl complains of her using."[342]

The law has facilitated the marital custom of surname taking, even in divorce. Repeated, consistent, and pervasive use in both the private and public spheres appears to create a new legal moniker under which rights and obligations should be protected and defended. Courts, as far back as fifty years ago, saw the potential danger in letting this custom harden

---

time delays. The supreme court acknowledged that Helen S.K. never asked the superior court to change her name back to her former surname and found no legal error. The supreme court did reference her ability to be granted relief from the divorce judgment under Alaska R. Civ. Pro. 60(b) and potentially amend the judgment (or go through Alaska's traditional name-change statutory process) to go by the name she wanted to go by, her former name.

339 *See, e.g.*, LA. CIV. CODE ANN. art. 2 (Westlaw through 2024 1st Extr. Sess., 2d Extr. Sess., Reg., and 3d Extr. Sess.) ("Legislation is a solemn expression of legislative will.").

340 Martin Krygier, *The Traditionality of Statutes*, 1 RATIO JURIS 20, 24 (1988). Civil law systems have some measure of "common law" in their courts' pronouncements through the use of a doctrine known as *jurisprudence constante* or a series of several cases, all reasoning in a consistent manner.

341 *See, e.g.*, LA. CIV. CODE ANN. art. 3 (Westlaw through 2024 1st Extr. Sess., 2d Extr. Sess., Reg., and 3d Extr. Sess.) ("Custom results from practice repeated for a long time and generally accepted as having acquired the force of law. Custom may not abrogate legislation.").

342 Cowley (Earl) v. Cowley (Countess) [1901] AC (HL) 450, 461.

into law but remain unwritten.[343] If not only to protect the judiciary from allegations of inconsistency, statutory protections for marital surname use post-divorce would create certainty for the parties, as well as third parties dealing with the formerly married persons.

The formal name change process, by statute in almost all United States jurisdictions, includes a hearing or appearance process requiring the petitioner asking for a name change to aver, *inter alia*, that the new name will not be used for fraudulent purposes. The derivatives of that common "no fraud" promise include a range of consumer-protection-like phrases, such as preventing confusion and "substantially interfer[ing] with the rights of others."[344] Any varying use of a name could be considered confusing or deceptive, so courts probe further by applying a subjective intent standard to fraudulent name use.[345] Some courts have interpreted the standard to mean that the new name cannot be "detrimental to the interests of *any* other person."[346] What would these scenarios look like? How would they be investigated? By a factfinder or a judge, and by what burden of proof and why? How would these concerns weigh on the retention of a marital surname after a marriage ends?

Statutes that address name change or name reversion options upon divorce should include express permission for a divorced person to continue using a marital surname. The marital regime's historic importance is so foundational in the law[347] that we allow the custom of surname adoption while *in* marriage with minimal formal process; because such customary usage often renders the surname central to a woman's identity, her rights to the surname should not be hindered following the marriage. Legislation should provide certainty and predictability in name usage for *all* the options (former surname, any surname, continuing the marital surname) available to a divorced woman. The common law provides flexibility, and flexibility lends itself to autonomy (and individual liberty). However, predictability is also necessary, especially in an increasingly bureaucratic society. The

---

343 "With the rapid increase of divorces and remarriages in America today, with attendant name changes, we may reach the point of having to forbid a change of name by marriage in order to bring about stability, reduce confusion and preserve the identity of women who acquire a different name from each successive husband." Dunn v. Palermo, 522 S.W.2d 679, 688 (Tenn. 1975).

344 *In re* Reben, 342 A.2d 688, 695 (Me. 1975).

345 Ellen Jean Dannin, *Proposal for a Model Name Act*, 10 U. MICH. J.L. REFORM 153, 159 (1976).

346 *In re* Knight, 537 P.2d 1085, 1086 (Colo. App. 1975) (citing COLO. REV. STAT. ANN. § 13-15-101(2)(a) (2025)).

347 "The State has a well-defined interest in the continuance of the marriage relationship as the relationship has been maintained from the days of the common law to the present time on the grounds of public policy." *Reben*, 342 A.2d at 701 (Dufresne, C.J., dissenting).

trend towards administrative name uniformity[348] requires statutory affirmance of naming rights to avoid costly litigation and provide trial and probate judges with a "clear and stable reference."[349] Without certainty in a name, legal rights are less protected.[350] It should be, as one court put it, that "one can secure [a status of] a change of name through legal procedure with a provision for proper recordation thereof among the public records."[351] This would be "desirable and far less objectionable than the common law provision."[352]

A. Language of a Model Act, Borrowing from the Model Marriage and Divorce Act

The National Conference of Commissioners on Uniform State Laws drafted a Model Marriage and Divorce Act ("MMDA") in 1970, with amendments in 1971 and 1973.[353] Unlike other model laws such as the Uniform Probate Code and the wildly popular Uniform Commercial Code, only six states have adopted the relevant provision as a template for their naming options upon divorce.[354] The provision on surname usage post-divorce of the MMDA reads as follows:

> Upon request by a wife whose marriage is dissolved or declared invalid, the court may, and if there are no children of the parties shall, order her maiden name or a former name restored.[355]

---

348 *See, e.g.*, Real ID Act of 2005, Pub. L. 109-113, Title II, H.R. 1268; *see supra* Part II.C.3.b; *supra* notes 237, 239.

349 Dannin, *supra* note 345, at 153.

350 *Id.* at 157.

351 *In re* Mohlman, 216 S.E.2d 147, 151 (N.C. Ct. App. 1975).

352 *Id.*

353 MODEL MARRIAGE AND DIVORCE ACT § 314(d) (UNIF. LAW COMM'N 1973). The designation was changed from "uniform" to "model" by the Conference in 1996.

354 Those six states are Arizona, Colorado, Georgia, Minnesota, Montana, and Washington. *Marriage and Divorce Act*, UNIF. LS. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=c5a9ecec-095f-4e07-a106-2e6df459d0af [https://perma.cc/5T69-4HMU].

355 *Id.*

To reflect the research in this article and modernize the language, a model law to serve as a foundation for surname certainty in rights of use after divorce could look like this:[356]

(1) Upon request by an individual named as a party in the petition or answer for dissolution or declaration of nullity of the marriage, ~~a wife whose marriage is dissolved or declared invalid~~ or at any time, upon motion by the individual, within thirty-six months after a final decree of dissolution by divorce or declaration of nullity of that same marriage, the court ~~may~~, ~~and if there are no children of the parties~~ shall~~,~~ order that individual's surname to be any of the following, subject to the provisions in section (2) below: ~~her maiden name or a former name restored.~~

(a) Any of the individual's surnames used before the marriage.

(b) The individual's surname used during the marriage if different from (1)(a) above and was the same surname used by the individual's former spouse during the marriage.

(c) Any other surname.

(2)

(a) If the individual elects to use a surname under (1)(a), no hearing or evidence as to the reasons for the use of the surname is necessary, and the surname can be used for all purposes.

(b) If the individual elects to use a surname under (1)(b):

(i) The surname can be used for all private and public purposes, except for purposes as set forth in (2)(b)(ii). The purposes can include, but are not limited to, all matters involving children of the marriage. No hearing or evidence as to the reasons for the use of the surname under this subsection is necessary.

(ii) If the surname is used for any business-related public purpose, the individual's former spouse who regularly and consistently used

---

356 Note that all text after this new proposed section (1) (based on the MODEL MARRIAGE AND DIVORCE ACT § 314(d) (UNIF. LAW COMM'N 1973)) is new proposed provisions of a model act.

the same surname, in the same or a substantially similar business endeavor, during the marriage to the individual, may challenge the use. The court may deny the surname usage only for this limited business-related public purpose if the former spouse can prove, by clear and convincing evidence, that the use or intended use by the individual is being done in a way that is fraudulent and reasonably likely to misrepresent the surname's usage by causing public confusion.

(A) An action under this subsection shall not be available to the former spouse if the individual used the surname for this business-related purpose during the marriage, either individually or in a joint business enterprise with the former spouse.

(B) This standard is only considered when both the former spouse and the individual are involved, post-divorce, in the same or a substantially similar business endeavor and use of the surname would cause confusion for the customers, clients, or persons engaging with the former spouse and/or the individual in the context of the business-related public purpose. If the individual commences their business before the former spouse, it shall be an irrebuttable presumption that the use of the surname will not cause public confusion.

(iii) No other person, except for the former spouse who regularly and consistently used the surname during the marriage to the individual, may challenge a surname elected under (1)(b).

(iv) An action by the former spouse under this subsection must be brought within six months of the court's final determination that the individual's request to use the surname in (1)(b) is granted.

(c) If the individual elects to use a surname under (1)(c), the court hearing the request or motion may ask for a hearing where any interested person may participate. The court may also ask for evidence as to whether the surname requested under (1)(c) is or may be used for purposes that could be considered fraudulent, reasonably likely to misrepresent the surname's usage, or otherwise cause public confusion.

(3) Nothing in this section should be construed to deny or otherwise infringe upon a person's right to seek redress under other laws regarding a name's usage.

(4) Nothing in this section should be construed to deny or prevent an individual from seeking a formal change of name under the state's general change-of-name law, nor should this section be interpreted in such a way as to infringe naming rights available under the common law of this state.

B. Components Discussed

The first section of the proposed model act above (hereinafter "the Act") is based loosely upon subsection 314(d) of the MMDA. It gives a general overview of who can request a post-divorce naming option, when such options can be requested, and the granting court's discretion. The Act provides three post-divorce surname options: any surname used before the marriage, retaining the marital surname, or changing to any other surname. This first section modernizes language from subsection 314(d) of the MMDA by using gender-neutral terms and making the action available to either party to the divorce action. It allows a timeframe of three years after the divorce for a party to petition for such a naming option decree. This timeframe borrows from Maryland's statute[357] but extends it by doubling the 18-month time frame. This is primarily to allow the individual bringing the action time to determine whether there is commercial value in seeking to retain the marital surname (e.g., starting a small business where the individual may be well-known in a community by their married name). The action remains viable even with the death of one of the parties.[358] However, it is not unlimited, acknowledging some potential property-based rights of the former spouse who brought the surname into the marriage and who may also seek to exploit its recognition in business after the dissolution of the marriage. The first section removes a trial or probate court's discretion in granting the name declaration with respect to children born of the marriage who may or may not have the same surname as the party petitioning for a naming declaration.

---

357 MD. CODE ANN. FAM. § 7-105(a) (West, Westlaw through 2024 Reg. Sess., Gen. Assemb.).

358 At least one court has held, in the context of an action by a woman in a divorce to revert to the use of her former surname, that the death of her spouse after the filing of the divorce petition but before the decree of final divorce did not defeat her request. Hesson v. Hesson, 919 A.2d 907 (N.J. Super. Ct. Ch. Div. 2007).

Section two of the Act establishes proof standards for courts, borrowing commonly used standards in name-change statutes.[359] Most states have incorporated the common law standard for name change statutes, requiring a showing of fraud or misrepresentation akin to fraud in order to deny a change of name.[360] The notice requirement in traditional name-change statutes is satisfied here by the judicial filing feature of the statute's provisions—either directly within a divorce proceeding or by subsequent motion. Courts have found that form requirements of name-change statutes, if different or more onerous than those related to the incidentals of a divorce proceeding, are not grounds to deny a name change connected to dissolution of marriage. The judicial filing feature puts third parties on notice of a potential name change or declaration of retention of a particular surname, and subsection (2)(b)(iii) prevents anyone except the former spouse from challenging a post-marital-dissolution name change.

The Act preserves all other law-based naming options, including resorting to a state's formal name-change process and using general common law naming autonomy. The purpose of the Act is to provide a layer of certainty in the use of a particular surname while balancing the rigidity of the name-change process and the liberality of naming autonomy. The first naming option, in subsection (1)(a) and (2)(a), simply recognizes an individual's right to revert to a former name. This subsection follows the traditional evidentiary norms of many of the statutes in Table 1 and dispenses with many of the evidentiary and procedural burdens of name-change statutes. It only sets aside a potential public use of the name for business purposes, addressed in subsections (1)(b) and (2)(b).

With respect to the standards in subsection (2)(b) referencing the naming option in subsection (1)(b), the statutory language will operate to protect the right of continued use of the marital surname. The Act allows this even in instances when the divorced individual chooses to continue use of the marital surname in only one arena of their life, such as in business using an eponymous branding, trade name, D/B/A, or pen/stage name. This would be in line with the traditional understanding that, during a marriage, a person can use the marital surname in some contexts (e.g., personal, familial) and their birth/former surname in others (professional, business, etc.).[361] Recall that in its 1975 decision in *Kruzel*, the Wisconsin Supreme Court held that changing a name in a professional or licensed context

---

359 Subsection (2)(c), referencing the ability to change to any surname other than one used before or during the marriage (option in subsection (1)(c)) simply restates typical state law name-change standards, including a judge's discretion in applying these factors.

360 Kruzel v. Podell, 226 N.W.2d 458, 466 (Wis. 1975).

361 *See, e.g.*, *In re* Mohlman, 216 S.E.2d 147, 151 (N.C. App. 1975).

does not prevent the person from continuing to carry on their trade or business, subject to the same fraud and misrepresentation standards of a name-change statute.[362] So, if a woman named Mary Watson became known as a bestselling author during her marriage to John Smith and sold books under the pen name "Mary Smith," but later divorced John Smith, she could continue to be known professionally as Mary Smith whether or not she remarried or decided to revert to her birth or former surname in other settings.[363]

Similarly, naming autonomy, while analyzed almost exclusively in the context of natural persons' rights, is also potentially a right of non-natural or juridical persons such as corporations, partnerships and other forms of business entities. That common law right has been discussed in some cases.[364] Under the Act, a divorced woman should have the necessary derivative right to use the marital surname of her former marriage even in business enterprises where she uses the name as part of a registered name in a D/B/A or other formal business capacity. Registering the business' name with the appropriate state or local authority would put all parties on notice of the name's use, and a statutory protection of the continued right to use a marital surname post-divorce would put a woman's business on firmer legal ground than relying on common law naming autonomy or name-sharing custom.[365] Assuming the standard of avoiding fraud or confusion is in place, there should be

---

362 *Kruzel*, 226 N.W.2d at 464. The Court further explained that the name use could be challenged if it "operates to compete unfairly with another practitioner or misleads the public to its detriment or to the detriment of a profession." *Id.*

363 "A woman on her marriage takes her husband's name, and she retains it although the marriage may have been dissolved by divorce unless she has so far obtained another name by Repute as to obliterate the original name." Dunn v. Palermo, 522 S.W.2d 679, 682 (Tenn. 1975). This standard should apply irrespective of when the woman started using the marital surname while still married; whether she begins using the surname in a professional context after the marriage but having never used the surname in any way during the marriage is potentially actionable under the procedures explained in the statute (i.e., the standard for fraud as confusion or possibility of misleading use) if the name is being used in a specific market and context relative to a similar business enterprise of her former spouse and within a defined geographic area and only after the marriage has ended.

364 *See, e.g.*, *In re* Reben, 342 A.2d 688, 696 (Me. 1975) (Dufresne, C.J., dissenting) ("This Court has recognized an ancient common law right in individuals, partnerships and corporations, in the absence of statute, to adopt any name under which legitimate business transactions may be carried on, and contracts so entered into under an assumed name are valid and binding upon the contractual parties if unaffected by fraud.").

365 Doing business under a pseudonym or name not clearly connected to the names of the person or persons doing business may be subject to criminal sanction or criminal penalty. *See, e.g.*, *In re* Natale, 527 S.W.2d 402, 404 (Mo. Ct. App. 1975). To the extent the law requires a business to complete certain registration and accounting procedures, such an omission, under the standards of the statute, could potentially be used as evidence of fraud or misrepresentation in a challenge to a particular surname's use. Statutory confirmation of

no distinction between Mary Smith and Mary Smith Booksellers, Inc. A person is allowed to have a single name to carry on a business (as well as their own legally recognized name) in the interest of the holistic simplicity of personal and business affairs.[366]

The Act allows a former spouse to challenge the continued use of a marital surname only in a very limited circumstance, with an elevated burden of proof and within a very short window of time (six months). It allows the action only if the surname would be used in a business context and then only when the intended use by the individual is within the same business domain of the former spouse, who used the name in the same or similar context during the marriage.[367] The action cannot be used by a spouse who began using the name in that business area after the marriage. It likewise cannot be used against a spouse who engaged in the business area during the marriage, either alone or jointly with the former spouse.

The difficulty of demonstrating fraud would also very likely allow an individual to continue using the marital surname even if she began using it after the divorce and after the former spouse began using it. The Act requires that the challenging former spouse show evidence of intent to misrepresent *and* that the misrepresentation would cause public (not just private, between the parties, or social) confusion. This is likely more onerous than the formal name-change statutory standard, and the heightened protections are meant to allow wide latitude for a divorced woman to develop a business under the marital surname. Continued use of a marital surname would not be denied to a divorced woman because of simple public recognition of that name, even if any notoriety or value in such recognition is only by virtue of the former husband's efforts during the marriage. There is case law supporting the imposition of such a heightened threshold and the necessity of determining the mindset of an individual seeking to use a particular name for allegedly

---

a continued right in the use of a marital surname, post-divorce, "avoids any risk of prosecution for use of an unregistered, fictitious name . . . by using the statutory rather than the common law method." *Id.* at 405.

366 *See, e.g.*, *In re* Ferner, 685 A.2d 78, 80 (N.J. Super. Ct. Law Div. 1996).

367 It would be hoped that courts would interpret "business domains" in such a way so as to allow the individual (most likely a divorced woman) the ability to use the marital surname in her business endeavors. Language in subsection (2)(b)(ii) is provided to give guidance to courts to delineate what types of business activities would be considered in an action by a former spouse against an individual seeking use of a marital surname certainty declaration.

fraudulent purposes.[368] A court is unlikely to find such "harm" in a woman's continued use of a surname which she had already employed during the marriage.

Section three indicates that rights under the Act are not exclusive, and relief under other laws is allowed.[369] Either party may separately attempt to trademark the business use of the surname, but the U.S. Supreme Court has said that trademarking a surname to prevent others with the same surname from using it can be challenging.[370] In sum, this subsection seeks to reach a compromise between: (1) deference to the societal support and encouragement of the institution of marriage and (2) acknowledging a divorced woman's discretion to use a marital surname in her own right, acknowledging her commitment to the former marriage.

Finally, section four indicates the Act is not the only avenue permitted for post-marital-dissolution naming. General common law naming autonomy on one end and formal name changes by judicial process on the other remain options for naming divorced individuals.

CONCLUSION

Although the law supports naming autonomy and naming independence, it is still very common for a woman to take a man's surname in an opposite-sex marriage. This is because of a host of reasons outside of the law, such as social factors, custom, and children born of the marriage. However, "[i]t is hard to justify giving courts such discretion when the petitioner's personal identity is at stake and the state's interests are very limited."[371] It is also equally common for the matter not to even be addressed in divorce proceedings.

Because of the uncertainty of the rights in a marital surname, trial and probate courts have had little guidance, whether expressly in state statutes or in consistent common law

---

368 *See, e.g.*, *supra* note 9; *In re* Serpentfoot, 646 S.E.2d 267 (Ga. Ct. App. 2007), *reconsideration denied*, *cert. denied*, (Ga. 2007).

369 As indicated above, this would likely be either trademark law or a right of publicity claim in tort law. *See supra* Introduction; *supra* notes 27–29.

370 Brown Chemical Co. v. Meyer, 139 U.S. 540, 542 (1891) ("It is hardly necessary to say that an ordinary surname cannot be appropriated as a trade-mark by any one person as against others of the same name, who are using it for a legitimate purpose; although cases are not wanting of injunctions issued to restrain the use even of one's own name where a fraud upon another is manifestly intended, or where he has assigned or parted with his right to use it.").

371 Alexander, *supra* note 1, at 75.

precedent, on how to deal with the issue. This lack of guidance exacerbates the concerns regarding the close to unbridled discretion of lower court judges in naming matters and the very real concern of solidifying the rights in *any* naming choice.[372] Divorced women deserve the right to predictable outcomes when they choose to continue using a marital surname, including the right to commodify the name's use. Given the very high percentage of women who continue to take men's surnames in marriage, what then of the vestiges of the feminist movement from the 1970s in this modern era? Is there a space in the fourth wave of feminism to further formalize the notion that one (of many) roads to financial independence after divorce is to begin with an asset that could potentially generate wealth, even if that asset was not "originally" hers?

As explained above, social factors mean that women who choose to take a man's name during marriage are likely to retain said surname after the marriage has ended. They may have committed a large amount of time and energy to raising children, managed a household, and assisted in increasing the accrued wealth of their former husbands. Such contributions to the marriage weigh in favor of according women a concrete interest in the surname.

States should create explicit, clear protections for the continued use of a marital surname by a divorced woman. Many divorced women who wish to continue using a marital surname and, say, start a small business with it, will not possess the resources to seek legal advice to protect the use of a marital surname, nor is it clear that trademark law would unequivocally protect her interest in the continued use of the surname. A statutory provision authorizing judicial recognition of her right to utilize the name would provide predictability in the use of the surname publicly, allowing her to rebuild after a divorce. Only under very limited circumstances (as spelled out in the model act) could her former husband challenge her use of the name, diminish or condition said use, or have any rights to the fruits or revenues that she may generate from that name's post-divorce usage.

Until we have a determination by the U.S. Supreme Court that a name, the very thing at the core of our identity, has constitutional attributes as a liberty interest, state statutory protection is the necessary vehicle for beginning on the long road to gender equality in this space.

---

372 Kushner, *supra* note 46, at 319.

Table 1: State Laws on Options for Surnames at Divorce[373]

Alabama – ALA. CODE § 30-2-11 (Westlaw through 2025 Reg. Sess.).	After divorce from the bonds of matrimony and within the discretion of the circuit court of the county in which the divorced wife resides and upon application of any interested party, the divorced wife may be enjoined from the use of the given name or initials of the divorced husband.
Alaska – ALASKA STAT. ANN. § 25.24.165(a) & (b) (West, Westlaw through Ch. 25 of the 2025 1st Reg. Sess. and Ch. 1 of the 1st Special Sess. of the 34th Leg.).	(a) In a judgment in an action for divorce or action declaring a marriage void, the court may change the name of either of the parties. (b) If a party seeks a change of name to a name other than a prior name, the court shall set a date for hearing not less than 40 days after filing of the action. Notice of the application for a change of name to a name other than a prior name and the date of the hearing shall be published once each week for four consecutive calendar weeks before the hearing in a newspaper of general circulation in the judicial district. The court may also require posting of the notice at locations it considers appropriate. The court shall by judgment authorize the party to assume the new name not less than 30 days after issuance of the judgment, if the court is satisfied that no reasonable objection exists to assumption of the new name. Within 10 days after issuance of the judgment the party shall publish notice of the approval of the name change in a newspaper of general circulation in the

373 Text of applicable statutes are in regular print. Where particular states do not have a statute specific to options for surnames upon divorce, explanations as to where in a respective state's law those options may be found are in italics.

	judicial district. The court may also require the posting of a copy of the judgment.
Arizona – ARIZ. REV. STAT. ANN. § 25-325(c) (Westlaw through 1st Reg. Sess. of the 75th Leg. 2025).	On request by a party at any time before the signing of the decree of dissolution or annulment by the court, the court shall order that the party's requested former name be restored.
Arkansas – ARK. CODE ANN. § 9-12-318 (West, Westlaw through 2025 Reg. Sess.).	In all cases when the court finds that either party is entitled to a divorce, the court may restore the wife to the name that she bore previous to the marriage dissolved.
California – CAL. FAM. CODE § 2080 (West, Westlaw through Ch. 764 of the 2025 Reg. Sess.).	In a proceeding for dissolution of marriage or for nullity of marriage, but not in a proceeding for legal separation of the parties, the court, upon the request of a party, shall restore the birth name or former name of that party, regardless of whether or not a request for restoration of the name was included in the petition.
Colorado – COLO. REV. STAT. ANN. § 14-10-120.2 (West, Westlaw through 1st Reg. and Extr. Sess. 2025).	(1) Pursuant to the provisions of this section, at any time after the entry of a decree of dissolution or legal separation, a party to the action may request restoration of a prior full name.[374]
Connecticut – CONN. GEN. STAT. ANN. § 46b-63 (West, Westlaw through 2025 Reg. Sess.).	(a) At the time of entering a decree dissolving a marriage, the court, upon request of either spouse, shall restore the birth name or former name of such spouse. (b) At any time after entering a decree dissolving a marriage, the court, upon motion of either spouse, shall modify such judgment and restore the birth name or former name of such spouse. The court shall rule on any motion filed

374 The statute also allows a divorced person, at any time after the divorce decree, to request returning to a former surname provided that the former name's use "is not detrimental to any person."

	by such spouse to have his or her birth name or former name restored without a hearing.
Delaware – DEL. CODE ANN. tit. 13 § 1514 (West, Westlaw through Ch. 229 of the 153rd Gen. Assemb. 2025-2026).	The Court, upon the request of a party by pleading or motion, may order that such party resume a maiden or former name.
District of Columbia – D.C. CODE ANN. § 16-915 (West, Westlaw through July 21, 2025).	Upon divorce from the bond of marriage, the court shall, on request of a party who assumed a new name on marriage and desires to discontinue using it, state in the decree of divorce either the birth-given or other previous name which such person desires to use.
Florida – FLA. STAT. ANN. § 68.07(9) (West, Westlaw through 2024 2d Reg. Sess.).	*Florida does not have a separate, specific statutory provision regarding formal law on name changes at divorce; it is part of the state's general name change statute in FLA. STAT. ANN. § 68.07. Name changes at divorce are exempted from the requirements of the name change statute, such as listing previous employment and obtaining a fingerprint card for a criminal background check.*
Georgia – GA. CODE ANN. § 19-5-16 (West, Westlaw through Act 1, 2025 Reg. Sess.).	(a) In all divorce actions, a party may pray in his or her pleadings for the restoration of a maiden or prior name. When a divorce is granted, the judgment or decree shall specify and restore to the party the name so prayed for in the pleadings. (b) (1) After entry of a judgment and decree of divorce, a former spouse may petition the court by motion ex parte to restore his or her legal surname to the given surname as shown on his or her birth certificate. (2) Notwithstanding any other provision of law or order of court requiring a request to be filed or made prior to the entry of judgment and decree of divorce or within the term of

	court of such entry of such judgment and decree, and notwithstanding that the requested restoration was not previously specified in the movant's pleadings in the original divorce action, the motion provided for in paragraph (1) of this subsection may be filed at any time after the judgment and decree of divorce was entered. No publication in any legal organ shall be required. The court with or without a hearing may issue an order restoring the given surname shown on the movant's birth certificate in chambers at any time after the filing of a motion. (3) This subsection shall apply to motions filed on or after May 1, 2024.
Hawai'i – HAW. REV. STAT. ANN. § 574-5(a)(2)(B)(i) (West, Westlaw through 2024 Reg. and 1st Spec. Sess.).[375]	It shall be unlawful to change any name adopted or conferred under this chapter, except: By a final order, decree, or judgment of the family court issued as follows: When in a divorce proceeding either party to the proceeding requests to: Resume the middle name or names and the last name used by the party prior to the marriage or civil union or a middle name or names and last name declared and used during any prior marriage or civil union and the court includes the change of names in the divorce decree.

375 This provision is Included in Hawai'i's general name-change procedure statute, HAW. REV. STAT. ANN. § 574-5, administered by the Office of the Lieutenant Governor. Hawai'i requires the intended name to be placed on a marriage license or application from a series of statutory options. If an individual does so to take the surname of their spouse at the inception of marriage but does not then seek relief under this specific section of the name-change statute, (a)(2)(B)(i), upon dissolution of marriage, the presumption is that the marital name remains their legal name after divorce. *See* HAW. REV. STAT. ANN. § 574-1 (West, Westlaw through 2024 Reg. and 1st Spec. Sess.).

Idaho	*No statute changing a spouse's name upon marriage, but reverting to a former surname is allowed if asked for by the party seeking it in the divorce decree*. See Cook v. Arias*, 435 P.3d 1086 (Idaho 2015).*
Illinois – 750 ILL. COMP. STAT. ANN. 5/413(c) (Westlaw through P.A. 104-433, 2025 Reg. Sess.).	Unless the person whose marriage is dissolved or declared invalid requests otherwise, the judgment under this Section shall contain a provision authorizing the person to resume the use of his or her former or maiden name, should he or she choose to do so, at any time he or she chooses to do so. If a judgment contains such a provision, the person resuming the use of his or her former or maiden name is not required to file a petition for a change of name under Article XXI of the Code of Civil Procedure.[376]
Indiana – IND. CODE ANN. § 31-15-2-18(b) (West, Westlaw through 2024 2d Reg. Sess., 123d Gen. Assemb.).[377]	A woman who desires the restoration of her maiden or previous married name must set out the name she desires to be restored to her in her petition for dissolution as part of the relief sought. The court shall grant the name change upon entering the decree of dissolution.

376 This refers to Illinois' change of name statutes in its Code of Civil Procedure, 735 ILCS § 5/21-101 *et seq.* (Westlaw through P.A. 104-433, 2025 Reg. Sess.).

377 Subsection b is new, following reorganization in 2019. The new subsection a of this statute indicates that subsection b does not apply to "a lifetime sex or violent offender."

Iowa – IOWA CODE ANN. § 674.13 (West, Westlaw through leg. effective Nov. 5, 2024 from the 2024 Reg. Sess. and Nov. 5, 2024 Gen. Elec.).	A person shall not change the person's name more than once under this chapter unless just cause is shown. However, in a decree dissolving a person's marriage, the person's name may be changed back to the name appearing on the person's original birth certificate or to a legal name previously acquired in a former marriage.
Kansas – KAN. STAT. ANN. § 23-2716(a) & (b) (West, Westlaw through 2024 Reg. Sess. and 1st Spec. Sess.).[378]	(a) Upon the request of a spouse, the court shall order the restoration of that spouse's former name. The court shall have jurisdiction to restore the spouse's former name at or after the time the decree of divorce becomes final. (b) Upon the request of a spouse, the court may order such spouse's name be changed to a name that is different than such spouse's former name. The court shall have jurisdiction to change the spouse's name at or after the time the decree of divorce becomes final.
Kentucky – KY. REV. STAT. ANN. § 403.230(2) (West, Westlaw through laws effective Mar. 24, 2025 and Nov. 5, 2024 election).	Upon request by a wife whose marriage is dissolved or declared invalid, the court may, and if there are no children of the parties shall, order her maiden name or a former name restored.

378 Subsection b was recently added to the statute. 2023 Kansas Laws Ch. 39 (H.B. 2065). That recent bill also removed the term "maiden" from what is now subsection a. Subsection c of this statute (the third of three) calls for a "simple, concise and direct" form to be created to facilitate the options in subsections a and b.

Louisiana (1) – LA. CODE CIV. PROC. ANN. art. 3947(B) (West, Westlaw through 2024 1st Extr. Sess., 2d Extr. Sess., Reg., and 3d Extr. Sess.).	The court may enter an order confirming the name of a spouse in a divorce proceeding, whether the person is the plaintiff or defendant, which confirmation shall be limited to the name that the person was using at the time of the marriage, or the name of the person's minor children, or the person's surname on the birth certificate, without complying with the provisions of R.S. 13:4751 through 4755. This Article shall not be construed to allow an amendment to a birth certificate with the Bureau of Vital Statistics.
Louisiana (2) – LA. STAT. ANN. § 9:292 (West, Westlaw through 2024 1st Extraordinary Sess., 2d Extr. Sess., Reg., and 3d Extr. Sess.).	Notwithstanding any other law to the contrary, a woman, at her option, may use her maiden name, her present spouse's name, or a hyphenated combination thereof. If widowed, divorced, or remarried, a woman may use her maiden name, the surname of her deceased or former spouse, the surname of her present spouse, or any combination thereof.
Maine – ME. REV. STAT. ANN. tit. 19-A, § 1051 (Westlaw through 2025 Reg. and 1st Spec. Sess. of the 132nd Leg.).	Upon the request of either spouse to change that person's own name, the court, when entering judgment for divorce: (1) Shall change the name of that spouse to a former name requested; or (2) May change the name of that spouse to any other name requested.

Maryland – MD. CODE ANN. FAM. LAW § 7-105(a) (West, Westlaw through 2024 Reg. Sess., Gen. Assemb.).	In granting a decree of absolute divorce or on motion of a party filed within 18 months after a final decree of absolute divorce is entered, the court shall change the name of the requesting party to either the name given the party at birth or any other former name the party wishes to use if: (1) the party took a new name on marriage and no longer wishes to use it; (2) the party asks for the change of name; and (3) the purpose of the party is not illegal, fraudulent, or immoral.
Massachusetts – MASS. GEN. LAWS ANN. ch. 208, § 23 (West, Westlaw through Ch. 341, 2024 2d Ann. Sess.).	The court granting a divorce may allow a woman to resume her maiden name or that of a former husband.
Michigan – MICH. COMP. LAWS ANN. § 552.391 (West, Westlaw through P.A. 2025, No. 2, 2025 Reg. Sess., 103d Leg.).	The circuit courts of this state, whenever a decree of divorce is granted, may, at the instance of the woman, whether complainant or defendant, decree to restore to her birth name, or the surname she legally bore prior to her marriage to the husband in the divorce action, or allow her to adopt another surname if the change is not sought with any fraudulent or evil intent.

Minnesota – MINN. STAT. ANN. § 518.27 (West, Westlaw through 2025 Reg. Sess. and 1st Spec. Sess.).[379]	Except as provided in section 259.13, in the final decree of dissolution or legal separation the court shall, if requested by a party, change the name of that party to another name as the party requests. The court shall grant a request unless it finds that there is an intent to defraud or mislead, unless the name change is subject to section 259.13, in which case the requirements of that section apply. The court shall notify the parties that use of a different surname after dissolution or legal separation without complying with section 259.13, if applicable, is a gross misdemeanor. The party's new name shall be so designated in the final decree.
Mississippi[380]	*No state statute expressly addresses the issue of name changes at divorce; the relevant statute considered by a court would be the general name-change statute in MISS. CODE ANN. § 93-17-1(1). The state seems to embrace the common law naming autonomy principle*—see Marshall v. Marshall*, 93 So. 2d 822 (Miss. 1957).*[381]

379 The statute repeatedly refers to MINN. STAT. ANN. § 259.13. That statute addresses standards for name changes of persons with felony convictions. *See* MINN. STAT. ANN. § 259.13 (West, Westlaw through Mar. 18, 2025, 2025 Reg. Sess.).

380 State regulations reference the matter for name changes on state-issued identifications and driver's licenses. *See, e.g.*, 31 Miss. Admin. Code Pt. 1, R. 4.2(3). ("For females changing their married name, the examiner will accept the divorce decree even if it does not state the female is changing back to her maiden name. Then the examiner must see the certified birth certificate to add the maiden name. If the applicant wishes to add another name, such as a previous married name, the examiner must see that certified document.")

381 The author graciously thanks Prof. Debbie Bell and Maggie Crain (J.D. 2025), both from the University of Mississippi School of Law, for assistance in isolating the likely rule.

Missouri[382]	*The statute describing the requirements for a petition for divorce does not expressly address naming options, but reverting to a former surname is allowed if asked for by the party seeking it in the divorce decree—see* Newsom v. Newsom*, 976 S.W.2d 33, 40 (Mo. App. 1998).*
Montana – MONT. CODE ANN. § 40-4-108(5) (West, Westlaw through chs. effective Mar. 4, 2025).	Upon request by a party whose marriage is dissolved or declared invalid, the court shall order the party's maiden or birth name or a former name restored.
Nebraska – NEB. REV. STAT. ANN. § 42-380(1) (West, Westlaw through legis. effective Mar. 12, 2025, 1st Reg. Sess., 109th Legis., 2025).	When a pleading is filed pursuant to section 42-353 or pursuant to an action for annulment as authorized by section 42-373, either the plaintiff or the defendant may include a request to restore his or her former name. The court shall grant such request except for good cause shown. The mere fact that a parent and child may have different surnames following a dissolution of marriage or annulment shall not be sufficient to constitute good cause. The decree of dissolution or declaration of annulment shall specifically provide for the name change, giving both the old name and the name as it will be after the decree or declaration. A change of name granted pursuant to this section shall become effective on the same date that the decree of dissolution or declaration of annulment, as the case may be, is entered. The requirements of sections 25-21,270 to 25-21,273 shall not apply to this section.

382 Newsom v. Newsom, 976 S.W.2d 33, 40 (Mo. App. 1998) (referencing the court's decision that the action to change a surname in a divorce petition is the type of "relief sought" allowed in a divorce proceeding under MO. REV. STAT. § 452.310(8), acknowledging that requesting a name change as a type of "relief" is not expressly provided for in the statute.).

Nevada – NEV. REV. STAT. ANN. § 125.130(4) (West, Westlaw through legis. of the 83d Reg. Sess. effective through Feb. 13, 2025).	In all suits for divorce, if a divorce is granted, the court may, for just and reasonable cause and by an appropriate order embodied in its decree, change the name of either party to any former name which he or she has legally borne.
New Hampshire – N.H. REV. STAT. ANN. § 458:24 (Westlaw through Ch. 2 of the 2025 Reg. Sess.).	In any proceeding under this chapter, except an action for legal separation, the court may, when a decree of divorce or nullity is made, restore a former name of the spouse, regardless of whether a request therefor had been included in the petition.
New Jersey – N.J. STAT. ANN. § 2A:34-21 (West, Westlaw through L. 2025, Ch. 146 and J.R. 10).[383]	The court, upon or after granting a divorce from the bonds of matrimony to either spouse or dissolution of a civil union to either partner in a civil union couple, may allow either spouse or partner in a civil union couple to resume any name used by the spouse or partner in a civil union couple before marriage or civil union, or to assume any surname.
New Mexico	*There is no statute in New Mexico dealing directly with name status at divorce. A person may request a name change at the time of divorce. If they do not, they would have to later follow the general civil change of name statute in N.M. STAT. ANN. § 40-8-1 (West, Westlaw through chs. effective July 1, 2025 of the 2025 1st Reg. Sess.).*

383 The statute once included language that allowed the court discretion to "order the wife to refrain from using the surname of the husband as her name." That language was removed by a 1988 amendment to the statute. 1988 N.J. Sess. Law Serv. 153, § 2 (West).

New York – N.Y. DOM. REL. LAW § 240-a (McKinney, Westlaw through L. 2025 Chs. 1 to 503).[384]	In any action or proceeding brought under the provisions of this chapter wherein all or part of the relief granted is divorce or annulment of a marriage any interlocutory or final judgment or decree shall contain, as a part thereof, the social security numbers of the named parties in the action or proceeding, as well as a provision that each party may resume the use of his or her premarriage surname or any other former surname.
North Carolina – N.C. GEN. STAT. ANN. § 50-12(a), (a1), (c) & (d) (West, Westlaw through end of 2024 Reg. Sess., Gen. Assemb.).	(a) Any woman whose marriage is dissolved by a decree of absolute divorce may, upon application to the clerk of court of the county in which she resides or where the divorce was granted setting forth her intention to do so, change her name to any of the following: (1) Her maiden name; or (2) The surname of a prior deceased husband; or (3) The surname of a prior living husband if she has children who have the husband's surname. (a1) A man whose marriage is dissolved by decree of absolute divorce may, upon application to the clerk of court of the county in which he resides or where the divorce was granted setting forth his intention to do so, change the surname he took upon marriage to his premarriage surname.

384 This statute, in the Domestic Relations Code of New York, is referenced by a section in the general name change law of the state, though the notice and other formalities of the general name change law need not be adhered to for a name change because of divorce under § 240-a in the Domestic Relations Code. *See* N.Y. CIV. RIGHTS LAW § 65(2) (McKinney, Westlaw through L. 2025 Chs. 1 to 503): "Any person may, upon divorce or annulment, elect to resume the use of a former surname or middle name according to the provisions of section two hundred forty-a of the domestic relations law." The effect is to require that the person be recognized by the surname change indicated by the divorce order. N.Y. CIV. RIGHTS LAW § 64.

	(c) If an applicant, since the divorce, has adopted one of the surnames listed in subsection (a) or (a1) of this section, the applicant's use and adoption of that name is validated. (d) In the complaint, or counterclaim for divorce filed by any person in this State, the person may petition the court to adopt any surname as provided by this section, and the court is authorized to incorporate in the divorce decree an order authorizing the person to adopt that surname.
North Dakota – N.D. CENT. CODE ANN. § 14-03-20.1(1)–(5) (West, Westlaw through Mar. 19, 2025, 2025 Reg. Sess.).	*North Dakota does not have a statute that expressly addresses divorcing individuals' surname options, so the matter may be contemplated under the statute that addresses surname options of married individuals. N.D. CENT. CODE ANN. § 14-03-20.1* (*That statute's first section reinforces the general common law precept that a person may go by any name they choose so long as the use is not meant to defraud. Subsequent parts of the statute allow individuals entering into marriage to indicate the surname they intend to use on the application for a marriage license; the combination of the common law custom and this intention seems to create a strong presumption that the name listed can be used beyond the duration of the marriage (subject to the same prohibitions of the change-of-name standard—no intent to defraud or cause confusion or harm to others).*

Ohio – OHIO REV. CODE ANN. § 3105.16 (West, Westlaw through File 25 of the 136th Gen. Assemb. and 2025 Statewide Issue 2).	When a divorce is granted the court of common pleas shall, if the person so desires, restore any name that the person had before the marriage.
Oklahoma – OKLA. STAT. ANN. tit. 43, § 121(A) (West, Westlaw through 1st Reg. Sess. of the 60th Leg. 2025).[385]	When a dissolution of marriage is granted, the decree shall restore: (1) To the wife her maiden or former name, if her name was changed as a result of the marriage and if she so desires; (2) To the husband his former name, if his name was changed as a result of the marriage and if he so desires.
Oregon – OR. REV. STAT. ANN. § 107.105(1)(h) (West, Westlaw through 2025 Reg. Sess.).	Whenever the court renders a judgment of marital annulment, dissolution or separation, the court may provide in the judgment: (h) To change the name of either spouse to a name the spouse held before the marriage. The court shall order a change if it is requested by the affected party.
Pennsylvania – 54 PA. STAT. AND CONS. STAT. ANN. § 704(a) (West, Westlaw through Act 39 of the 2025 Reg. Sess.).	Any person who is a party in a divorce action may, at any time prior to or subsequent to the entry of the divorce decree, resume any prior surname used by him or her by filing a written notice to such effect in the office of the prothonotary of the county in which the divorce action was filed or the decree of divorce was entered, showing the caption and docket number of the proceeding in divorce.

385 By including a statute about naming options at divorce *and also* statutes requiring parties to a marriage to list the name they intend to use during the marriage, Oklahoma seems to have abrogated the general common law right to use whatever name one would like and restricts name changes at divorce. OKLA. STAT. tit. 43 §§ 5–8 (West, Westlaw through 1st Reg. Sess. of the 60th Leg. 2025). Compare this to North Dakota's arrangement, without a naming-option-upon-divorce statute but an express protection of common law naming autonomy coupled with a marriage license intention naming provision.

Rhode Island – 15 R.I. GEN. LAWS ANN. § 15-5-17 (West, Westlaw through Ch. 457 of the 2024 Reg. Sess., R.I. Leg.).	Any person, to whom a divorce from the bond of marriage is decreed, shall, upon request, be authorized by the decree to change their name, notwithstanding that there may be children born of the marriage, and subject to the same rights and liabilities as if their name had not been changed. This statute is in addition to, and not in abrogation of, the common law.
South Carolina – S.C. CODE ANN. § 20-3-180 (West, Westlaw through 2024 Gen. Assemb. Sess.).	The court, upon the granting of final judgment of divorce or an order of separate maintenance, may allow a party to resume a former surname or the surname of a former spouse.
South Dakota – S.D. CODIFIED LAWS § 25-4-47 (West, Westlaw through 2025 Reg. Sess. effective Mar. 17, 2025).	Whenever a decree of divorce is granted, the trial court may, in its discretion or upon the application of either party by the terms of the decree, restore to the woman her maiden name or the name she legally bore prior to her marriage to the husband in the divorce suit. All decrees of divorce previously entered restoring to the divorced woman her former name under this section are declared legal and valid and effective from their date of entry.

Tennessee	*Tennessee has a state constitutional provision that restricts the legislature's ability to pass name-change laws; the state legislature can, by passing general laws, allow courts to do so. Tenn. Const. Art. XI, § 6. Statutorily, name changes by divorce are addressed directly only in the context of allowing name changes upon divorce for individuals convicted of certain crimes.* See *TENN. CODE ANN. § 29-8-101(b)(4) (West, Westlaw through 2025 1st Reg. Sess. of the 114th Gen. Assemb.).* *It is worth mentioning that one of the very few seminal cases on divorce and marital names comes from Tennessee in* Dunn v. Palermo.[386]
Texas – TEX. FAM. CODE ANN. § 45.105(a) (West, Westlaw through 2023 Reg., 2d, 3d, and 4th Called Sess., 88th Leg. and Nov. 7, 2023 Gen. Elec.).	On the final disposition of a suit for divorce, for annulment, or to declare a marriage void, the court shall enter a decree changing the name of a party specially praying for the change to a prior used name unless the court states in the decree a reason for denying the change of name. The court may not deny a change of name solely to keep last names of family members the same.

386 "A woman on her marriage takes her husband's name, and she retains it although the marriage may have been dissolved by divorce unless she has so far obtained another name by Repute as to obliterate the original name." Dunn v. Palermo, 522 S.W.2d 679, 682 (Tenn. 1975).

Utah	*Utah follows the spirit of the common law rule regarding name use when considering name changes under* UTAH CODE ANN. *§ 42-1-1 et seq. (West, Westlaw through 2025 Gen. Sess. and Chs. 1 to 2 of the 2025 1st Special Sess.).* See, e.g.*,* Matter of Childers-Gray*, 487 P.3d 96 (Utah 2021). However, the state requires certain documentation for divorce-related name changes on official government-issued documents like driver's licenses.* UTAH CODE ANN. *§ 53-3-216(2)(d) & (e).*
Vermont – VT. STAT. ANN. tit. 15, § 558 (West, Westlaw through Reg. Sess., 2025-2026 Vt. Gen. Assemb., effective as of Mar. 5, 2025).	Upon granting a divorce, unless good cause is shown to the contrary, the court shall allow a spouse to resume the spouse's prior name or the name of a former spouse.
Virginia – VA. CODE ANN. § 20-121.4 (West, Westlaw through 2024 Reg. Sess., 2024 Spec. Session I, and 2025 Reg. Sess. cc. 6, 20, 85, 147, and 157).[387]	Upon decreeing a divorce from the bond of matrimony the court shall, on motion of a party who changed his or her name by reason of the marriage, restore such party's former name or maiden name by separate order meeting the requirements of VA. CODE ANN. § 8.01-217.
Washington – WASH. REV. CODE ANN. § 26.09.150(3) (West, Westlaw through 2024 Reg. Sess. of the Wash. Leg.).	Upon request of a party whose marriage or domestic partnership is dissolved or declared invalid, the court shall order a former name restored or the court may, in its discretion, order a change to another name.

387 The ability to revert to a former name is conditioned upon the requirements of Virginia's general name change statute, including an application under oath and that the name reversion is not "sought for a fraudulent purpose or would otherwise infringe upon the rights of others." VA. CODE ANN. § 8.01-217(B)(C).

West Virginia – W. VA. CODE ANN. § 48-5-613 (West, Westlaw through legis. of the 2025 Reg. Sess., approved through Mar. 20, 2025).	The court, upon ordering a divorce, shall if requested to do so by either party, allow such party to resume the name used prior to his or her marriage without the necessity of filing a separate petition pursuant to section one hundred one, article twenty-five, chapter forty-eight of this code. If a name change is requested, the court shall also issue a certificate of divorce reflecting that change in name. The certificate shall be no longer than one page. For purpose of confidentiality, the certificate shall not be considered an order. The certificate shall include the style of the divorce case, the name on the birth certificate of the party requesting the name change, that party's date of birth, that party's social security number, the date on which the name change is effective, and the new name of that party. In order to be valid, the certificate shall be certified by a clerk of the court. The certified certificate may be used by that person for all lawful purposes, including as a proof of legal name change for driver licensing purposes or state identification card at the Division of Motor Vehicles.

Wisconsin – WIS. STAT. ANN. § 767.395 (West, Westlaw through 2023 Act 272, pub. Apr. 10, 2024).[388]	Except as provided in § 301.47, the court, upon granting a divorce, shall allow either spouse, upon request, to resume a former legal surname, if any.[389]
Wyoming	*There is no statute expressly for change of names in the laws on divorce, but those laws do indicate that the divorce action, and relief as part of it, is conducted as a civil action that presumably includes that title's name change laws, WYO. STAT. ANN. §§ 1-25-101 et seq. (West, Westlaw through 2025 Gen. Sess.)*[390]

388 In 1975, a state trial court judge denied a petition by a married woman to revert back to the use of her former surname. In interpreting a historical version of this statute, he reasoned that the language permitted a woman, upon divorce, under some circumstances, to "resume" her maiden name; the judge determined the facts of this case and the basis of this couple's divorce did not allow the woman to revert back to the use of a surname before the marriage, even though she never held herself out as using the married surname. The Wisconsin Supreme Court vacated that judgment, holding that a woman's name is unchanged by marriage, and as a result, her legal name was her maiden name, so she could use it at any time. Kruzel v. Podell, 226 N.W.2d 458, 459 (Wis. 1975), *referencing* WIS. STAT. ANN. § 247.20, *renumbered as* WIS. STAT. ANN. § 767.395 *by* 2005 Act 443, § 78 (effective Jan. 1, 2007).

389 The other statute referenced here is the statute prohibiting name changes for sex offenders.

390 The "petition" for a name change referenced in § 1-25-101 is satisfied by the request for name change relief in a petitioner's complaint for divorce or a defendant's counterclaim thereto. *See Family Law Information and Instructions*, WYO. JUD. BRANCH 3 (July 2014), https://www.courts.state.wy.us/wp-content/uploads/2017/04/DNCD03.pdf [https://perma.cc/K67X-76RP] ("Restoration of Wife's previous name: The Wife should state whether or not she would like to resume her prior name in either the *Complaint for Divorce* if she is the Plaintiff, or a *Counterclaim* if she is the Defendant. This is the Wife's choice ONLY; the Husband cannot demand that his Wife's name be changed." (emphasis in original)).

LABORATORIES OF REPRODUCTIVE JUSTICE: STATE AMENDMENTS AND THE RIGHT TO PAID FAMILY LEAVE

PAMELA CHEN*

Abstract

This Note proposes legal strategies for recognizing paid family leave as a constitutional entitlement under state law. Long viewed as laboratories for democratic experimentation, states can play a central role in areas where federal protections remain limited. In the aftermath of *Dobbs v. Jackson Women's Health Organization*, several states—including Maryland, Michigan, Missouri, Montana, Ohio, and Vermont—amended their constitutions to guarantee a right to "reproductive freedom." This Note argues that these amendments create fertile ground for rights development and should be read to include an affirmative right to paid family leave. Drawing on a reproductive justice framework, which defines reproductive autonomy as the ability to have children, not have children, and parent children in safe and sustainable conditions, this Note analyzes the text of these amendments and the historical landscape of state positive-rights jurisprudence.

INTRODUCTION

In 2022, several Michigan advocacy groups[1] formed a coalition called the Reproductive Justice Work Group to place Proposal 3—otherwise known as the Reproductive Freedom

© 2025 Chen. This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits the user to copy, distribute, and transmit the work provided that the original author and source are credited.

* J.D. 2025, Columbia Law School; B.A. 2022, Northwestern University. I would like to extend my sincere thanks to Professor Kate Andrias for her insightful guidance and feedback as my note advisor. I am also grateful to the *Columbia Journal of Gender and Law* for making the publication of this Note possible.

1 These groups included the ACLU of Michigan, Planned Parenthood of Michigan, Planned Parenthood Advocates of Michigan, and Michigan Voices. *See* Allison R. Donahue, *Abortion Rights Coalition Files Record-Breaking Number of Signatures to Get on Nov. Ballot*, MICH. ADVANCE (July 11, 2022), https://michiganadvance.com/2022/07/11/coalition-to-protect-abortion-rights-files-record-breaking-number-of-signatures [https://perma.cc/M47L-HHY5].

for All Amendment—on Michigan's midterm election ballot.[2] This campaign secured 753,759 petition signatures, marking the most signatures ever collected for a Michigan public ballot referendum.[3] That November, voters approved Proposal 3 as the Michigan Constitution's 28th Amendment, formally enshrining a right to "reproductive freedom."[4]

That same year, Vermont voters similarly passed the Right to Personal Reproductive Autonomy Amendment.[5] In 2023, Ohio voters ratified the Right to Reproductive Freedom with Protections for Health and Safety Amendment.[6] Most recently, in 2024, Missouri,[7] Maryland,[8] and Montana[9] voters followed suit, adopting their own constitutional amendments to protect reproductive rights.

These amendments arose in the wake of *Dobbs v. Jackson Women's Health Organization*, in which the U.S. Supreme Court declared that the 14th Amendment to the U.S. Constitution did not affirmatively protect the right to abortion.[10] As a result, "the

---

2 *See* Eva Lopez, *How Michiganders Showed Up for Reproductive Freedom and Won*, ACLU (July 14, 2023), https://www.aclu.org/news/reproductive-freedom/how-michiganders-showed-up-for-reproductive-freedom-and-won [https://perma.cc/CZ7M-BSU9].

3 Donahue, *supra* note 1.

4 MICH. CONST. art. I, § 28; *see also* Yue Stella Yu & Robin Erb, *Michigan Proposal 3 Supporting Abortion Rights Wins Big*, BRIDGE MICH. (Nov. 9, 2022), https://www.bridgemi.com/michigan-government/michigan-proposal-3-supporting-abortion-rights-wins-big [https://perma.cc/P2CK-54MX].

5 VT. CONST. art. 22; *see also* Mikaela Lefrak, *Vermont Votes to Protect Abortion Rights in State Constitution*, NPR (Nov. 9, 2022), https://www.npr.org/2022/11/09/1134832172/vermont-votes-abortion-constitution-midterms-results [https://perma.cc/U2AT-8SNL].

6 OHIO CONST. art. I, § 22; *see also* Jo Ingles, *Ohio Votes in Favor of Amending the State Constitution to Enshrine Abortion Rights*, NPR (Nov. 7, 2023), https://www.npr.org/2023/11/07/1209092670/2023-results-key-ohio-elections [https://perma.cc/TZ6H-RPL3].

7 MO. CONST. art. I, § 36; *see also* Summer Ballentine, *Missouri Voters Enshrine Abortion Rights in a State That Has a Near-Total Abortion Ban*, ASSOC. PRESS (Nov. 6, 2024), https://apnews.com/article/abortion-missouri-amendment-ballot-election-f114445b087e77d0cc786d3eeb2eb615 [https://perma.cc/U9GQ-VBKC].

8 MD. CONST. art. 48; *see also* Scott Maucione, *Abortion Will Be Protected in the Maryland State Constitution*, NPR (Nov. 5, 2024), https://www.npr.org/2024/11/05/g-s1-32723/abortion-will-be-protected-in-the-maryland-state-constitution [https://perma.cc/R67E-N2R3].

9 MONT. CONST. art. II, § 36; *see also* Shaylee Ragar, *Montanans Vote to Codify Abortion Access in the State Constitution*, NPR (Nov. 6, 2024), https://www.npr.org/2024/11/06/g-s1-32997/montana-abortion-results [https://perma.cc/Q3LU-5PWH].

10 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 259 (2022).

people and their elected representatives" were free to regulate it as they saw fit.[11] Some states quickly enacted sweeping restrictions on abortion and other reproductive rights, with several even invoking pre-existing state constitutional amendments or trigger laws to immediately ban abortion altogether.[12] Meanwhile, other states seized the opportunity to safeguard, establish, or even strengthen reproductive rights.[13] Michigan, Ohio, Vermont, Missouri, Maryland, and Montana chose to enshrine reproductive rights protections through state constitutional amendments.

These states' amendments are especially significant because voters ratified them directly through ballot initiatives, empowering the amendments with a stronger democratic mandate than ordinary legislative or executive actions.[14] Generally, constitutional amendments also afford these rights greater resistance against temporary political realignments. Perhaps most importantly, these amendments do not merely protect *abortion* rights; rather, they broadly affirm fundamental rights to "reproductive freedom" or "reproductive liberty."

These terms are imbued with untapped legal potential: what exactly does "reproductive freedom" mean? At a minimum, it likely includes the right to an abortion, given these amendments' origins in the aftermath of *Dobbs*. However, the definition of reproductive freedom could extend much further to cover prenatal healthcare, access to contraception, or postpartum care. The theoretical framework of reproductive justice argues that it must.

Reproductive justice asserts that true reproductive freedom requires the ability to freely make decisions about having children, not having children, and raising children in safe environments.[15] A reproductive justice approach seeks to address the needs of vulnerable populations—particularly women of color and low-income individuals—who disproportionately bear the economic and social burdens of inadequate reproductive

---

11 *Id.*

12 *See* Allison McCann & Amy Schoenfeld Walker, *Tracking Abortion Bans Across the Country*, N.Y. TIMES (Sep. 8, 2025), https://www.nytimes.com/interactive/2024/us/abortion-laws-roe-v-wade.html [https://perma.cc/G9F5-9TXM].

13 *See id.*

14 *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 884–85 (2021).

15 *See Reproductive Justice*, IN OUR OWN VOICE: NAT'L BLACK WOMEN'S REPROD. JUST. AGENDA (2025), https://blackrj.org/our-causes/reproductive-justice/ [https://perma.cc/43T3-ACRY]. See also *infra* Part II.A for a further discussion of the history and core tenets of reproductive justice.

policies.[16] And for many of these amendments, drafters intentionally crafted the constitutional language with theories of reproductive justice in mind.[17]

This Note focuses on one critical—yet often overlooked—component of reproductive freedom: paid family leave.[18] While the wider discourse surrounding reproductive rights frequently centers on abortion access, true reproductive freedom must protect individuals' rights to parent with dignity and economic security.[19] Post-birth welfare policies like paid family leave are essential to achieving these amendments' mandates of reproductive freedom. Without policies that guarantee parents leave to recover from pregnancy or care for newborns (or newly adopted children) without risking their livelihoods, the promise of reproductive freedom remains incomplete. This precarious moment in reproductive rights should inspire advocates to drive meaningful, radical progress at the state level by leveraging the unique legal potential of these amendments. This Note proposes that courts interpret "reproductive freedom" protections in state constitutions expansively to include paid family leave as a fundamental right.

Part I of this Note provides background on state-driven, positive constitutional rights, highlighting how states have historically played a key role in the expansion of constitutional rights. Part II.A provides a primer on reproductive justice, explaining its origins and goals. Part II.B explains how paid family leave fits into the reproductive justice movement, and Part II.C analyzes the current landscape of paid family leave in the United States. Part III.A explores how other countries have expanded their own legal understandings of reproductive justice. Part III.B analyzes the language of Michigan, Ohio, Vermont, Missouri, Maryland, and Montana's reproductive freedom amendments and considers various legal strategies that could expand their reach to include paid family leave. Part III.C contemplates what these paid family leave policies might look like in practice. Finally, Part III.D addresses potential counterarguments.

---

16 *See generally Reproductive Justice*, *supra* note 15; *infra* Part II.A.

17 *See* Lopez, *supra* note 2 ("The language in Proposal 3 was developed by our partners who made it really clear they didn't want something that just talked about abortion because that wasn't enough for them and for their communities. We wanted to center our work around reproductive justice.").

18 Generally, "paid family leave" policies can include leave for caring for sick family members or the employee's own illness in addition to maternity/paternity benefits. *See* discussion *infra* Part II.C.1. However, for the purposes of this Note, the term "paid family leave" will exclusively refer to parental leave related to the birth or adoption of a child.

19 *See, e.g.*, Kimala Price, *What Is Reproductive Justice? How Women of Color Activists Are Redefining the Pro-Choice Paradigm*, 10 MERIDIANS: FEMINISM, RACE, TRANSNATIONALISM 42, 43 (2010).

I. Background on State-Driven Rights

The majority opinion in Dobbs[20] reaffirmed core principles of federalism: that some powers must be reserved for the states.[21] Accordingly, in the wake of *Dobbs*, the state-by-state abortion landscape varied wildly; some states made bold moves to erect near-total abortion bans[22] just as other states hurried to pass abortion protections.[23] This colorful variation among states is emblematic of the long-standing belief that states have the prerogative to experiment with policies within their own constitutions and bodies of law—i.e., states are our laboratories of democracy.[24] Such prerogatives may, and should, inspire adoption of successful or popular policies at the national level.

Indeed, there is extensive legal scholarship analyzing the ways in which states have filled in gaps where the federal government has been silent, particularly when it comes to positive rights.[25] Generally, positive rights are affirmative in nature, in that they obligate the state to provide rights-holders with entitlements.[26] States' duties to provide their citizens

---

20 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 256, 221 (2022) ("But the people of the various States may evaluate those interests differently. The Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated.") ("Given that procuring an abortion is not a fundamental constitutional right, it follows that the States may regulate abortion for legitimate reasons . . . .").

21 *See* THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people . . . .").

22 *See* McCann & Schoenfeld Walker, *supra* note 12.

23 *See id.*

24 *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

25 *See generally* Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855 (2023); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Dustin Coffman, *Pathways to Justice: Positive Rights, State Constitutions, and Untapped Potential*, 24 MARQ. BENEFITS & SOC. WELFARE L. REV. 181 (2023); Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALA. L. REV. 1459 (2010).

26 *See generally* Jorge M. Farinacci-Fernos, *Looking Beyond the Positive-Negative Rights Distinction: Analyzing Constitutional Rights According to their Nature, Effect, and Reach*, 41 HASTINGS INT'L & COMP. L. REV. 31 (2018.). *But see id.* at 45–46 (discussing how the distinction between positive and negative rights can be blurry or oversimplistic).

with clean water or public schooling are examples of positive rights. They stand in contrast to negative rights, which exist as liberties from government interference.[27] Common examples include the right to speech (freedom from censorship) or the right to privacy (freedom from surveillance). Negative rights do not impose any burden upon the state to provide or act; rather, they restrain intervention.

The U.S. Constitution is often referred to as a "charter of negative liberties."[28] Yet, it would be inaccurate to say that the Constitution features no positive rights, though they are few; see, for example, Congress's obligation to conduct a census,[29] the Sixth Amendment right to counsel,[30] or the executive branch's responsibility to protect citizens from invasion.[31] It would also be inaccurate to say that the federal government has completely absolved itself from serving its citizens in a positive fashion; Congress has passed landmark welfare schemes like Social Security[32] and Temporary Assistance for Needy Families (TANF),[33] created public services like the U.S. Postal Service,[34] and established departments ensuring citizens access to clean water[35] and higher education loans.[36] Still, the key distinction is that, while Congress has the power to provide for its citizens, it is usually not constitutionally obligated to do so. Just as Congress has the power to grant access to programs like Medicare, so too does it reserve the power to take such programs away.

---

27 *See id.* at 42.

28 Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) ("[T]he Constitution is a charter of negative rather than positive liberties."). *See generally, e.g.*, David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

29 U.S. CONST. art. I, § 2 ("Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years . . . .").

30 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.").

31 U.S. CONST. art. IV, § 4. ("The United States . . . shall protect each of [the States in this Union] against Invasion . . . .").

32 Social Security Act, 42 U.S.C. §§ 301–1397mm.

33 Block Grants to States for Temporary Assistance for Needy Families, 42 U.S.C. §§ 601–619.

34 Postal Service Act, 39 U.S.C. § 101.

35 National Environmental Policy Act, 42 U.S.C. § 4331.

36 Department of Education Organization Act, 20 U.S.C. § 3411.

The Supreme Court has repeatedly rejected interpretations of the 14th Amendment that attempt to confer positive rights, especially where the constitutional protections in question are not explicit or obvious.[37] The United States is an outlier in this regard, as many foreign constitutions contain robust positive rights provisions.[38] However, the Founding Fathers were primarily concerned with protecting citizens from unchecked federal tyranny—not with permanently inscribing affirmative welfare benefits.[39]

State constitutions, on the other hand, are more likely to feature positive rights or, at a minimum, have been interpreted by state courts to afford greater protections than identical provisions in the federal constitution.[40] The Nevada Constitution explicitly guarantees all workers a minimum wage.[41] New York courts read into its constitution's "care and

---

37 *See, e.g.*, DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) (affirming that the 14th Amendment's Due Process Clause was "a limitation on the State's power to act, not . . . a guarantee of certain minimal levels of safety and security."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35–37 (1973) (finding no constitutional right to education). *But see* Currie, *supra* note 28, at 886–87 ("From the beginning there have been cases in which the Supreme Court, sometimes very persuasively, has found in negatively phrased provisions constitutional duties that can be in some sense be described as positive . . . [I]t would be dangerous to read too much, even at the theoretical level, into the generally valid principle that our [Constitution] . . . is a Constitution of negative rather than positive liberties.").

38 *See generally* Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees*, 56 SYRACUSE L. REV. 1 (2005); Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution?*, 10 AM. U. J. INT'L L. & POL'Y 1233 (1995); Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT'L L. REV. 35 (2006); Currie, *supra* note 28 (examining how German courts have interpreted their constitution to confer positive rights in a manner unlike U.S. courts).

39 *See, e.g.*, *Jackson*, 715 F.2d at 1203 ("The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them."); Currie, *supra* note 28, at 864–65 nn.8–10 and accompanying text.

40 *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (recognizing that states have a "sovereign right to adopt in [their] own Constitution[s] individual liberties more expansive than those conferred by the Federal Constitution"). *See generally, e.g.*, EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013); Brennan, *supra* note 25 (examining how state constitutions can confer greater rights than the federal constitution); Robert K. Fitzpatrick, *Neither Icarus Nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833 (2004) (discussing judicial federalism); Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PENN. L. REV. 853 (2022) (exploring how state constitutional amendments fundamentally differ from federal constitutional amendments).

41 *See* NEV. CONST. art. 15, § 16.

support of the needy" language an obligation to provide housing for the homeless.[42] Public education is perhaps the most successfully litigated positive rights claim amongst all the states.[43] In fact, all fifty states[44] include public education language in their constitutions, and most state courts have interpreted such language as establishing a fundamental right to education.[45]

However, many obstacles stand in the way of positive rights expansion through litigation. Legal scholarship has documented state courts' reluctance to involve the judiciary in positive rights development, instead preferring to leave wide policy discretion to the legislature.[46] Michigan courts, for example, have declined to read the state's constitutional

42 N.Y. CONST. art. XVII, § 1; Tucker v. Toia, 371 N.E.2d 449, 451–52 (N.Y. 1977). *But see* Bernstein v. Toia, 43 N.Y.2d 437, 448 (1977) ("We do not read this declaration and precept as a mandate that public assistance must be granted on an individual basis in every instance, . . . or indeed as commanding that, in carrying out the constitutional duty to provide aid, care and support of the needy, the State must always meet in full measure all the legitimate needs of each recipient.").

43 *See, e.g.*, Seattle Sch. Dist. v. Washington, 585 P.2d 71, 99 (Wash. 1978) (requiring the state to increase school funding as education was "the paramount duty of the state," per the state constitution); McDuffy v. Sec'y of the Exec. Off. of Education, 615 N.E.2d 516 (Mass. 1993) (holding that the state's unequal school-financing system violated a state constitutional right to education). *See generally* Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1 (1997).

44 *See* EDUC. COMM'N OF THE STATES, 50-STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION (2016), https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1-1.pdf [https://perma.cc/5LX9-3P4K].

45 *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 108 (2008) ("[A right to public education] may be at least one very fundamental positive-law entitlement that all Americans have long possessed."). However, not all state courts have held that these education clauses actually confer enforceable education rights. *See* SCHOOLFUNDING.INFO, *School-Funding Court Decisions by State*, https://cee.tc.columbia.edu/schoolfundinginfo/ [https://perma.cc/R3PS-DQ9G] (documenting fifteen states that have denied a legally enforceable right to education despite constitutional language ostensibly conferring one).

46 *See, e.g.*, Usman, *supra* note 25, at 1497–1500, 1502–05 (discussing how some state courts have either refused to hear state constitutional rights arguments because of the political question doctrine, or have recognized a state constitutional right but leave extraordinary deference to the legislature); Schwartz, *supra* note 38, at 1237–38 ("By what authority does a court tell a legislature that it must create a health care or education system, a welfare program, or some other kind of benefit system? This certainly raises issues relating to budgetary priorities, separation of powers, judicial authority, and competence."); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1136–37 (1999) [hereinafter *Positive Rights*] (discussing how most state courts adopt the "trend of post-*Lochner* federal constitutional law and accord great deference to legislative decisions" when interpreting the scope of state constitutional rights). *See generally* Helen Hershkoff & Stephen Loffredo, *State Courts and*

guarantee of a "free public education" to also require equal funding among different school districts.[47] Kansas courts have held that the state's constitutional provisions to provide for the "needy" did not obligate the state to do so on an individual basis.[48] Even where courts may recognize a citizen's fundamental constitutional right, it is often difficult to figure out an appropriate judicial remedy that does not breach basic principles of separation of powers. In the case of state education litigation, courts have struggled to identify when existing legislation is "adequate" to meet constitutional standards.[49] However, education litigation remains a promising model for bringing positive reproductive freedom arguments, as several state courts have recognized the judicial power to "command [positive] legal compliance" from the legislature with constitutional education rights.[50]

Another major obstacle is whether a state's constitutional provision is self-executory.[51] When a section is self-executory, no further legislative action is needed to make the law

---

Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis, 115 PENN ST. L. REV. 923 (2011) [hereinafter *Underutilization Thesis*]; Jensen, *supra* note 43; Matthias Klatt, *Positive Rights: Who Decides? Judicial Review in Balance*, 13 INT'L J. CONST. L. 354 (2015).

47 *See* E. Jackson Pub. Schs. v. State, 348 N.W.2d 303, 305–06 (Mich. Ct. App. 1984); *see also* SCHOOLFUNDING.INFO, *supra* note 45.

48 *See* Bullock v. Whiteman, 865 P.2d 197, 205–06 (Kan. 1993).

49 *See, e.g.*, Josh Kagan, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2243 (2003) ("Asked to define the reach of state constitutions' education clauses, state supreme courts have reacted differently. Some pull definitions out of the air, and some ask other branches of government to define adequacy." (citations omitted)); *see also* Jensen, *supra* note 43, at 4–5, 40–42 (discussing how many state education litigation claims depend on "quality" clauses in the amendments, e.g., the right to an "efficient" school system, but many courts have still ordered educational reforms under amendments with no quality language).

50 *See, e.g.*, Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1058–59 (1993) (discussing *Englewood Ind. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989), where the Texas Supreme Court ordered the legislature to create new funding laws for Texas schools, or else all state education spending would be enjoined).

51 *See generally* W. L. O., *Constitutional Amendments, Self-Executing and Otherwise, Providing for the Initiative and Referendum*, 15 MICH. L. REV. 334, 335 (1917) ("A terse way of summing up the distinction between self-executing provisions and those which are not, is to say that self-executing provisions are addressed to the courts while those that are not are addressed to the legislatures. . . . Constitutional provisions are 'self-executing where it is the manifest intention that they should go into effect and no ancillary legislation is necessary to the enjoyment of a right given or the enforcement of a duty or liability imposed.' . . . However, if merely general principles are laid down, and the legislature must supplement the constitutional provision by

enforceable.[52] When a section is non-self-executory, implementing legislation is required to make the law effective.[53] Non-self-executory provisions are akin to mission statements, general principles, or broad mandates for the legislature to take into consideration, and they do not create any self-enforcing rights.[54] Prior literature has studied how the self-execution test has been a major roadblock for environmental rights advocacy in particular.[55] A state constitution may proclaim a right to a clean and healthy environment, but if a state court deems the clause merely declaratory, those provisions amount to nothing more than a proclamation. They would neither mandate further legislative action nor provide citizens with grounds to bring further enforcement actions.

Uniquely, Montana state courts have recognized a self-executing and enforceable right to a clean environment.[56] Article IX, § 1 of Montana's state constitution obligates the state to "maintain and improve a clean and healthful environment" for future generations.[57] Most recently, in *Held v. State*, the Montana Supreme Court acknowledged that the right to a clean and healthful environment is "forward-looking and preventative" and emphasized that there is no requirement for "the Framers to have specifically envisioned an issue [such as restrictions on pollutants that had not existed at the time of the amendment's enactment] for it to be included in the rights enshrined in the Montana Constitution" or for citizens to bring a direct enforceable action.[58] The case is seminal, as it marks the "first time in which

---

passing laws to effectuate its purpose, then it is not self-executing." (citations omitted)); Hershkoff & Loffredo, *Underutilization Thesis*, *supra* note 46.

52 *See* W. L. O., *supra* note 51.

53 *See id.*

54 *See id.*

55 *See, e.g.*, Tammy Wyatt-Shaw, *The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: 'They Mean Something'*, 15 PUB. LAND L. REV. 219, 221–27 (1994). *See generally* Oliver A. Pollard, *A Promise Unfulfilled: Environmental Provisions in State Constitutions and the Self-Execution Question*, 5 VA. J. NAT. RES. L. 351 (1986).

56 *See* Cape-France Enters. v. Est. of Peed, 29 P.3d 1011, 1016–17 (Mont. 2001) (rescinding a private contract whose performance required substantial environmental degradation "not in accord with the guarantees and mandates of Montana's Constitution").

57 MONT. CONST. art. IX, § 1. Article II, Section 3 of the Montana Constitution also establishes Montanan citizens' "right to a clean and healthful environment." MONT. CONST. art. II, § 3.

58 Held v. State, 560 P.3d 1235, 1248 (Mont. 2024) (quoting Park Cnty. Env't Council v. Mont. Dep't of Env't Quality, 477 P.3d 288, 304 (Mont. 2020)); *id.* at 1248; *id.* at 1249 (citing Mont. Env't Info. Ctr. v. Dep't of Env't Quality, 988 P.2d 1236, 1241 (Mont. 1999)).

an American court decided on the merits that a law promoting the use and consumption of fossil fuels infringed upon constitutional rights."[59]

While this type of constitutional jurisprudence is uncommon, it nevertheless reaffirms the critical role of state constitutions in progressive rights expansion. The laboratories of democracy concept traditionally applies to state legislatures' ability to pass novel policy through legislation or state constitutional amendments, but it can just as readily apply to state courts.[60] Justice Brennan's dissent in *Michigan v. Mosley* urged state courts to fully appreciate judicial federalism:

> Each state has power to impose higher standards . . . under state law than is required by the Federal Constitution. . . . State courts . . . are . . . increasingly according protections once provided as federal rights but now increasingly depreciated by decisions of this Court.[61]

Moreover, Montana's bold recognition of positive rights could have significant implications for other states with comparable constitutional provisions for environmental protection.[62] State courts frequently look to sister states for developments in interpretation and precedent.[63]

No state has yet implemented explicit constitutional protections for paid family leave. It remains an issue that legislators prefer to address through ordinary legislation, as further discussed *infra* Part II. This is not necessarily the case abroad. Several European

---

59 Recent Case, Held v. State, 137 HARV. L. REV. 1491, 1495 (2024).

60 *See* Gerald S. Dickinson, *The New Laboratories of Democracy*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 261, 261–62 (2023).

61 Michigan v. Mosley, 423 U.S. 96, 120–21 (1975) (Brennan, J., dissenting); *see also* Brennan, *supra* note 25, at 489, 502.

62 New York and Pennsylvania also have environmental protections in their constitutions. *See* N.Y. CONST. art. I, § 19 ("Each person shall have a right to clean air and water, and a healthful environment."); PA. CONST. art. I, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment.").

63 *See, e.g.*, Hershkoff, *supra* note 46, at 1139 nn.41–42 and accompanying text ("[S]tate constitutional interpretation takes place in the context of a 'universe of constitutions,' in which state judges actively rely on precedent from other jurisdictions." (quoting G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 199–200 (1998))).

constitutions—including those of Germany,[64] Ireland,[65] Switzerland,[66] and Poland[67]—contain protections for maternity leave. The recent rise of reproductive freedom amendments in several U.S. states suggests a growing willingness to address policy through concrete, durable constitutional provisions.[68] As this trend progresses, it becomes more salient to interrogate precisely what rights these provisions do—and do not—protect.

II. Reproductive Justice and Paid Family Leave in a Post-Dobbs Era

A. Primer on Reproductive Justice

In 1994, the Black Women's Caucus created the "reproductive justice" framework in direct response to dominant strains of reproductive advocacy that overemphasized choice rhetoric.[69] Where mainstream reproductive *rights* advocacy focuses almost exclusively on the nominal "right to an abortion," the reproductive *justice* movement reflects a "fundamentally different approach to social change" that recognizes "'reproductive choice' does not occur in a vacuum, but in the context of all other facets of a woman's life, including barriers that stem from poverty, racism, immigration status, sexual orientation, and disability."[70] The Caucus defined reproductive justice as bearing three main tenets: "(1) the right to have children; (2) the right to not have children; and (3) the right to

---

64 GRUNDGESETZ [GG] [CONSTITUTION] art. 6, § 4 (Ger.) ("Every mother shall be entitled to the protection and care of the community . . . .").

65 CONSTITUTION OF IRELAND 1937 art. 41, § 2.2 (Ir.) ("The State shall therefore endeavor to ensure that mothers shall not be obliged by economic necessity to engage in labor to the neglect of their duties in the home.").

66 BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101., art. 41, § 2 (Switz.) ("The Confederation and Cantons shall endeavor to ensure that every person is protected against the economic consequences of . . . maternity . . . ."). *But see id.* at § 4 ("No direct right to state benefits may be established on the basis of these social objectives.").

67 CONSTITUTION OF THE REPUBLIC OF POLAND art. 71, § 2 (Pol.) ("A mother, before and after birth, shall have the right to special assistance from public authorities to the extent specified by statute . . . .").

68 Relatedly, see generally Emily Zackin & Mila Versteeg, *De-judicialization Strategies*, 133 YALE L.J. F. 228 (2023), for a discussion of the historical background and re-emerging trend of states employing their constitutions to "de-judicialize" policy, specifically in legal areas of labor rights, debtor rights, and, most recently, abortion rights.

69 *See Reproductive Justice*, *supra* note 15.

70 Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 BERKELEY J. AFR.-AM. L. & POL'Y 71, 72, 77 (2011).

nurture the children we have in a safe and healthy environment."[71] Reproductive justice broadens the scope of the reproductive rights movement by adopting a holistic approach that integrates social and economic justice.

Pivoting from an abortion-oriented framework to a holistic reproductive justice framework is critical. Centering reproductive rights advocacy only on the right to "choose" ignores the full reality of what it means to *freely and meaningfully* choose whether to have a child. Extensive literature has analyzed how choice rhetoric fails to address the fact that low-income women, disabled women, and women of color face a uniquely harsh reproductive policy landscape.[72] For example, the Hyde Amendment excludes most abortions from Medicaid funding,[73] so even low-income pregnant people in states that permit abortion may have a nominal "right" to an abortion but no substantive *access to* an abortion. The disturbing legacies of forced procreation and sterilization policies have stripped reproductive autonomy away from Black women,[74] disabled people,[75] and immigrant women in detention centers.[76] A framework centered on the "right to an abortion" spares the state from having to provide the resources before, during, and after pregnancy which make true reproductive freedom possible. That is, abortion rights and the absence of a welfare state can exist without contradiction.

Reproductive justice, on the other hand, calls on the state to provide citizens with positive rights, including "the complete economic, social, and political power and resources

---

71 *Reproductive Justice*, *supra* note 15.

72 *See, e.g.*, London, *supra* note 70, at 77, 79–80; Cynthia Soohoo, *Reproductive Justice and Transformative Constitutionalism*, 42 CARDOZO L. REV. 819, 821, 823–24 (2021). *See generally* Elizabeth Tobin-Tyler, *Putting Your Money Where Your Mouth Is: Maternal Health Policy After Dobbs*, 53 SETON HALL L. REV. 1577 (2023).

73 ACLU, ACCESS DENIED: ORIGINS OF THE HYDE AMENDMENT AND OTHER RESTRICTIONS ON PUBLIC FUNDING FOR ABORTION (1994), https://www.aclu.org/documents/access-denied-origins-hyde-amendment-and-other-restrictions-public-funding-abortion [https://perma.cc/SC7C-3HC2].

74 *See* Brief for Howard U. Sch. of L. Hum. & C.R. Clinic as Amici Curiae Supporting Respondents at 11, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392) (detailing the U.S. government's control over enslaved women's reproductive autonomy and the forced sterilization of an estimated 150,000 Black women post-slavery).

75 *See, e.g.*, Buck v. Bell, 274 U.S. 200 (1927) (upholding the constitutionality of a Virginia law permitting the forced sterilization of patients in state mental institutions).

76 *See* Consolidated Second Amended Class Action Complaint for Declaratory and Injunctive Relief and for Damages, Oldaker v. McMiller, 724 F. Supp. 3d 1315 (M.D. Ga. 2024) (No. 7:20-cv-00224-WLS-MSH) (lawsuit alleging immigrant women were forcibly sterilized while detained).

to make health decisions about [their] bodies, [their] families, and [their] communities in all areas of [their] lives."[77] As a framework, reproductive justice directly challenges the United States' deep history of liberalism when it comes to reproductive rights. Martha Fineman's research on privatized dependency explains this schema very well: the state absolves itself of providing any positive rights to parents by adopting a laissez-faire approach that relies almost entirely on private actors to support reproduction.[78] "Family goods, like others, are best distributed by the 'invisible hand of the market' rather than the state. Families are presumed to be self-supporting, with no need for more robust, affirmative social supports."[79] Reproductive justice rejects the notion that the state's role in reproduction is merely that of a passive observer; instead, the state must do its part in providing positive rights to families. Thus, a reproductive justice framework is necessary to achieve true reproductive freedom for all individuals.

B. The Importance of Paid Family Leave as a Component of Reproductive Justice

Paid family leave, as a policy mechanism, enables parents to raise their children in safe and healthy environments and thus furthers the goals of reproductive justice.

Research shows that access to paid family leave produces significant benefits for the health of both parents and children. For example, paid family leave policies are linked to "decreased low-birth-weight births and infant mortality, increased breastfeeding, and improved maternal mental health."[80] These benefits are especially critical in the United States, which currently ranks thirty-second out of the thirty-five wealthiest nations for infant mortality rates[81] and severely lags behind its peers for maternal mortality.[82] In 2022,

77 *Id.*

78 *See generally* Martha L. A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181 (1995).

79 Meredith Johnson Harbach, *Childcare, Vulnerability, and Resilience*, 37 YALE L. & POL'Y REV. 459, 472 (2019).

80 Julia M. Goodman et al., *Racial/Ethnic Inequities in Paid Parental Leave Access*, 5 HEALTH EQUITY 738, 739 (2021).

81 Linda Villarosa, *Why America's Black Mothers and Babies Are in a Life-or-Death Crisis*, N.Y. TIMES MAG. (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/magazine/black-mothers-babies-death-maternal-mortality.html [https://perma.cc/SC7C-3HC2].

82 *See* MUNIRA Z. GUNJA ET AL., INSIGHTS INTO THE U.S. MATERNAL MORTALITY CRISIS: AN INTERNATIONAL COMPARISON (2024), https://www.commonwealthfund.org/publications/issue-briefs/2024/jun/insights-us-

the U.S. maternal mortality rate was 22 per 100,000 live births, with the rates being over twice as high for Black mothers.[83] Two-thirds of these maternal deaths occur during the postpartum period, from one day after giving birth to a full year later, which means paid leave policies that allow postpartum recovery are critical.[84] Additionally, standard medical advice suggests new mothers should take at least twelve weeks of postpartum rest to fully recover.[85]

Notably, it is specifically paid leave—not unpaid leave—that drives improved outcomes. One literature review found that paid leave reduced the maternal rehospitalization rate by 51% more and the infant rehospitalization rate by 47% more than unpaid or no leave.[86] Paid leave is also associated with reduced rates of postpartum depression.[87]

Paid family leave also confers critical economic benefits, enabling parents to choose when to have a child and ensuring they have the resources to take care of that child. Paid leave provides families with increased incomes and a decreased risk of poverty, especially "among less-educated and low-income single mothers."[88] Many parents postpone reproduction because of the high financial burden it imposes.[89] The economic benefits of paid leave are particularly relevant in the wake of *Dobbs*, where a rise in unplanned pregnancies carried to term will logically lead to more precarious financial situations for many expecting and new families.

---

maternal-mortality-crisis-international-comparison [https://perma.cc/26XD-VZXF].

83 *Id.*

84 *See id.*

85 *See, e.g.*, Katelin R. Kornfeind & Heather L. Sipsma, *Exploring the Link between Maternity Leave and Postpartum Depression*, 28 WOMEN'S HEALTH ISSUES 321, 321 (2018), https://pubmed.ncbi.nlm.nih.gov/29729837/ [https://perma.cc/4K92-NPE7].

86 *See* SARAH COOMBS, PAID LEAVE IS ESSENTIAL FOR HEALTHY MOMS AND BABIES 2 (Jorge Morales ed., 2021), https://nationalpartnership.org/wp-content/uploads/2023/02/paid-leave-is-essential-for-healthy-moms-and-babies.pdf [https://perma.cc/NF6L-ERDE].

87 *See* DARCIA C. GRAYER ET AL., PAID LEAVE: A HEALTH JUSTICE IMPERATIVE FOR MATERNAL MENTAL HEALTH (2022), https://www.aamchealthjustice.org/news/policy/paid-leave [https://perma.cc/Q3ZY-VK3U].

88 Alexandra Boyle Stanczyk, *Does Paid Family Leave Improve Household Economic Security Following a Birth? Evidence from California*, 93 SOC. SERV. REV. 262, 262 (2019).

89 *See* NAT'L P'SHIP FOR WOMEN & FAMS., VOTERS' VIEWS ON PAID FAMILY AND MEDICAL LEAVE 9 (2018), https://nationalpartnership.org/wp-content/uploads/2023/02/voters-views-on-paid-family-medical-leave-survey-findings-august-2018.pdf [https://perma.cc/25HK-48PB].

Socially, paid family leave offers one pathway to break down patriarchal systems of oppression, including the gender wage gap and traditional, gendered parenting roles. Historically, women have shouldered the majority of child-rearing responsibilities, a burden that has persisted even as women's participation in the labor force has steadily climbed upwards.[90] In many two-parent, heterosexual families, it is far less common for fathers to assume the role of a stay-at-home parent.[91] This dynamic perpetuates the gender wage gap: when women must pause or leave their careers, they lose out on professional advances and promotions that men, who remain in the workforce, continue to accumulate.[92] Paid family leave has the potential to alleviate these social and economic inequities because women may fulfill their caregiving responsibilities without permanently leaving the workforce. Moreover, when paid family leave programs distribute benefits equally between parents regardless of gender, they can equalize the share of caregiving among parents.

C. Federal and State Disparities in Paid Family Leave

1. The Federal Paid Family Leave Landscape

In 1919, the International Labor Organization adopted the Maternity Protection Convention, recommending that countries provide their citizens with a minimum of twelve weeks of paid maternity leave (later extended to fourteen weeks in 1952[93]) as both a medical necessity and a social right.[94] Nations across the globe began adopting the convention, for reasons ranging from a fundamental belief in their welfare obligations to

---

90 *See, e.g.*, Jill E. Yavorsky et al., *The Production of Inequality: The Gender Division of Labor Across the Transition to Parenthood*, 77 J. MARRIAGE & FAM. 662, 674 (2015).

91 *See, e.g.*, *id.*; Laura Sanchez & Elizabeth Thomson, *Becoming Mothers and Fathers: Parenthood, Gender, and the Division of Labor*, 11 GENDER & SOC. 747, 757 (1997); *see also* Leah Ruppanner et al., *Norms, Childcare Costs, and Maternal Employment*, 35 GENDER & SOC. 910, 933 (2021) (finding that "[m]aternal employment suffers when childcare is expensive and gender norms traditional").

92 *See, e.g.*, PAID LEAVE WILL HELP CLOSE THE GENDER WAGE GAP, NAT'L P'SHIP FOR WOMEN & FAMS. 1 (2024), https://nationalpartnership.org/wp-content/uploads/2023/02/paid-leave-will-help-close-gender-wage-gap.pdf [https://perma.cc/Z724-FP5E] ("The lifetime effects of this lost income are stark. By the time they reach retirement age, women typically receive about 20 percent less in Social Security retirement benefits than men, and simultaneously have lower private retirement savings, leaving them more likely to live in poverty and making Social Security a vital source of retirement income.").

93 *See* Maternity Protection Convention, Nov. 29, 1919, ILO Convention No. 3, 38 U.N.T.S. 53.

94 *See* Convention (No. 103) Concerning Maternity Protection (Revised 1952), June 28, 1952, ILO Convention No. 103, 214 U.N.T.S. 322.

practical adaptations to gender demographic shifts in post-World War I labor markets.[95] In stark contrast, the United States has long treated paid family leave benefits "as a privilege rather than a right," leaving many workers dependent on the generosity of their individual employers.[96]

More than seven decades later, in 1993, Congress passed the Family and Medical Leave Act (FMLA), which marked the United States' most significant step in addressing family leave needs to date.[97] The FMLA guarantees twelve weeks of unpaid leave for employees working for public agencies or private companies with fifty or more workers.[98] It covers leave for the birth or adoption of a child, the care of a seriously ill family member, personal medical needs, and family emergencies related to active military service.[99] However, the FMLA is still far from comprehensive. Despite its broad application, only 56% of the workforce qualifies for unpaid leave under the FMLA, with the remaining 44% of workers—often low-income, younger, or less educated[100]—uncovered.[101] Furthermore, while the FMLA ensures job protection, it fails to provide any financial assistance during the leave period. The lack of paid leave creates significant financial strain for many workers, with a majority of workers reporting that taking unpaid leave would result in "serious financial hardship."[102] Unfortunately, many workers, unable to afford time off, must return to work before they are physically or emotionally ready.

---

95 Mona L. Siegel, Opinion, *The Forgotten Origins of Paid Family Leave*, N.Y. TIMES (Nov. 29, 2019), https://www.nytimes.com/2019/11/29/opinion/mothers-paid-family-leave.html [https://perma.cc/QBL4-SU6N].

96 *Id.* at 9.

97 Family and Medical Leave Act, 29 U.S.C. § 2612.

98 *See id.*

99 *See id.*

100 HELENE JORGENSEN & EILEEN APPELBAUM, EXPANDING FEDERAL FAMILY AND MEDICAL LEAVE COVERAGE: WHO BENEFITS FROM CHANGES IN ELIGIBILITY REQUIREMENTS? 5 (2014), https://cepr.net/documents/fmla-eligibility-2014-01.pdf [https://perma.cc/B4WC-N7UK].

101 *See* ABT ASSOC., EMPLOYEE AND WORKSITE PERSPECTIVES OF THE FAMILY AND MEDICAL LEAVE ACT: RESULTS FROM THE 2018 SURVEYS 3 (2020), https://www.dol.gov/resource-library/employee-and-worksite-perspectives-family-and-medical-leave-act-results-2018 [https://perma.cc/JH6C-KYA4].

102 NAT'L P'SHIP FOR WOMEN & FAM., VOTERS' VIEWS ON PAID FAMILY AND MEDICAL LEAVE: FINDINGS FROM A NATIONAL SURVEY 11 (2018), https://nationalpartnership.org/wp-content/uploads/2023/02/voters-views-on-paid-family-medical-leave-survey-findings-august-2018.pdf [https://perma.cc/N4LJ-AU97]; *see also* THEA GARON ET AL., UNPAID AND UNPROTECTED: HOW THE LACK OF PAID LEAVE FOR MEDICAL AND CAREGIVING

In 2020, Congress passed the Federal Employee Paid Leave Act, which allows federal workers to receive payment during their twelve weeks of FMLA leave.[103] However, this only covers the roughly two million Americans employed by the government, and the vast majority of the American workforce remains unsupported.[104] Laws like the 1978 Pregnancy Discrimination Act and the 2023 Pregnant Workers Fairness Act provide essential workplace protections for pregnant workers, but they do not provide any financial support, leaving a significant gap in welfare benefits for working parents.[105]

2. The State Paid Family Leave Landscape

Paid family leave varies widely across states, especially with respect to length, wage replacement rate, and employee eligibility criteria.[106] Thirteen states and the District of Columbia[107] have passed mandatory paid family leave policies via statute: California,[108]

PURPOSES IMPACTS FINANCIAL HEALTH 2 (2021), https://finhealthnetwork.org/wp-content/uploads/2021/11/PulsePaidLeave_UnpaidUnprotected.pdf [https://perma.cc/4Z4G-59Z5].

103 Federal Employee Paid Leave Act, 5 U.S.C. § 6382 (2019).

104 *See* CONG. RSCH. SERV., THE FEDERAL EMPLOYEE PAID PARENTAL LEAVE BENEFIT (2023), https://www.congress.gov/crs_external_products/IF/PDF/IF12420/IF12420.2.pdf [https://perma.cc/45XE-TKB2]; U.S. OFF. OF PERS. MGMT., REPORT ON THE USE OF THE FEDERAL EMPLOYEE PAID PARENTAL LEAVE BENEFIT 14 n.2 (2024), https://www.opm.gov/about-us/reports-publications/agency-reports/paid-parental-leave-report.pdf [https://perma.cc/A2UV-6RTR].

105 Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978); Pregnant Workers Fairness Act, 42 U.S.C. § 2000gg (2023).

106 *See generally Overview of Paid Family and Medical Leave Laws in the United States*, A BETTER BALANCE, https://www.abetterbalance.org/family-leave-laws/ [https://perma.cc/8SBG-Z8SB].

107 *See* D.C. CODE ANN. §§ 32-541.01–32-541.12 (West, Westlaw through July 21, 2025) (providing twelve weeks of paid leave at a 50–90% wage replacement rate, with a weekly cap adjusted based on inflation).

108 *See* CAL. UNEMP. INS. CODE §§ 3300–3308 (West, Westlaw through Ch. 764 of the 2025 Reg. Sess.) (providing eight weeks of paid leave to part- and full-time employees, who meet a minimum earnings requirement, at a 70–90% wage replacement rate, capped weekly at the statewide average weekly wage).

Colorado,[109] Connecticut,[110] Delaware,[111] Maine,[112] Massachusetts,[113] Maryland,[114]

109 *See* COLO. REV. STAT. ANN. §§ 8-13.3-501–8-13.3-524 (West, Westlaw through 1st Reg. and Extr. Sess. 2025) (providing twelve weeks of paid leave to all workers that meet a minimum earnings requirement at a 50–90% progressive wage replacement rate, capped at 90% of the state's average weekly wage).

110 *See* CONN. GEN. STAT. ANN. §§ 31-57r–31-57w (West, Westlaw through 2025 Reg. Sess.) (providing twelve weeks to workers who meet a minimum income requirement at a 60–95% wage replacement rate, capped weekly at 60 times the state minimum wage).

111 *See* DEL. CODE ANN. tit. 19, §§ 3701–3724 (West, Westlaw through Ch. 231 of the 153rd Gen. Assemb. 2025–26) (providing twelve weeks of paid leave, beginning January 2026, to all workers who have worked at least 1,250 hours and whose employers have at least 10 employees at an 80% wage replacement rate, with a weekly cap adjusted based on inflation).

112 *See* ME. REV. STAT. ANN. tit. 26, §§ 850-A–850-R (Westlaw through 2025 Reg. and 1st Spec. Sess. of the 132nd Leg.) (providing twelve weeks of paid leave, beginning January 2026, to workers who meet a minimum earnings requirement at a 66%–90% wage replacement rate, capped weekly at the state average weekly wage).

113 *See* MASS. GEN. LAWS ANN. ch. 175M, §§ 1–11 (West, Westlaw through Ch. 13 of the 2025 1st Annual Sess.) (generously providing up to 26 weeks of paid leave at a 50%–80% wage replacement rate, capped weekly at 64% of the state average weekly wage, to workers who meet a minimum earnings requirement; the 26-week maximum period is comprised of 12 weeks maximum family leave for bonding with a newborn and 20 weeks maximum medical leave for one's own health).

114 *See* MD. CODE ANN., LAB. & EMPL. §§ 8.3-101–8.3-1001 (West, Westlaw through 2025 Reg. Sess.) (providing twelve weeks of paid leave, beginning January 3, 2028, to all workers who have worked at least 680 hours within the last year at a 50%–90% wage replacement rate, with a weekly cap adjusted based on inflation).

Minnesota,[115] New Jersey,[116] New York,[117] Oregon,[118] Rhode Island,[119] and Washington.[120] With the exception of New York, these states' policies generally operate through employer- or employee-funded payroll taxes that pool into a statewide social insurance fund, similar to how Social Security operates.[121] New York instead mandates that employers purchase a paid family leave plan from private insurance companies.[122]

Ten states have opted for voluntary policies (also through statute) by permitting private insurance companies to provide paid family leave benefits: Alabama,[123] Arkansas,[124]

---

115 *See* MINN. STAT. ANN. §§ 268B.01–268B.30 (West, Westlaw through 2025 Reg. Sess. and 1st Spec. Sess.) (providing twelve weeks of paid leave, beginning January 2026, to all workers who meet a minimum earnings requirement at a 50%–90% wage replacement rate, capped weekly at the statewide average weekly wage).

116 *See* N.J. STAT. ANN. §§ 34:11B-1–34:11B-16 (West, Westlaw through L. 2025, Ch. 146 and J.R. 10) (providing twelve weeks of paid leave to all employees who meet minimum earnings requirements, at an 85% wage replacement rate capped weekly at 70% of the state average weekly wage).

117 *See* N.Y. WORKERS' COMP. LAW §§ 200–242 (McKinney, Westlaw through L. 2025 Chs. 1 to 525) (creating a mandatory private insurance system, overseen and regulated by the New York Government, and providing up to twelve weeks of paid leave to private employees who meet a minimum hour requirement, and self-employed workers, at a 67% wage replacement rate, capped weekly at 67% of the state average weekly wage).

118 *See* OR. REV. STAT. ANN. §§ 657B.005–657B.925 (West, Westlaw through 2025 Reg. Sess.) (providing twelve weeks of paid leave to all workers who meet a minimum earnings requirement at a 50%–100% wage replacement rate, capped weekly at 120% of the state average weekly wage).

119 *See* 28 R.I. GEN. LAWS ANN. §§ 28-39-1–28-39-41 (West, Westlaw through Ch. 473 of the 2025 Reg. Sess.) (providing seven weeks of paid leave to part- and full-time workers that meet minimum earnings requirements at an approximately 60% wage replacement rate, with further increases in the duration and wage replacement rate as the program phases in, and a weekly cap of 85% of the state average weekly wage).

120 *See* WASH. REV. CODE ANN. §§ 50A.05–50A.50 (West, Westlaw through 2025 Reg. Sess.) (providing twelve weeks of paid leave to those who have worked at least 820 hours within the last year at a 90% wage replacement rate, with a weekly cap of 90% of the state average weekly wage).

121 *See* SARAH A. DONOVAN, PAID FAMILY AND MEDICAL LEAVE IN THE UNITED STATES 9 (2023), https://sgp.fas.org/crs/misc/R44835.pdf [https://perma.cc/TAP2-M528].

122 *See* N.Y. WORKERS' COMP. LAW § 211 (McKinney, Westlaw through L. 2025 Chs. 1 to 525).

123 ALA. CODE §§ 27-19-150–27-19-160 (Westlaw through 2025 Reg. Sess.).

124 ARK. CODE ANN. § 23-62-112 (West, Westlaw through 2025 Reg. Sess.).

Florida,[125] Kentucky,[126] New Hampshire,[127] South Carolina,[128] Tennessee,[129] Texas,[130] Vermont,[131] and Virginia.[132] Of these voluntary-mechanism states, New Hampshire contracts with a single insurance carrier to provide a base plan for the entire state.[133]

The most generous state-mandated paid family leave policy in the United States is twenty-six weeks long,[134] and the average length is roughly twelve weeks; in contrast, the global averages for paid maternity and paternity leave are twenty-nine and sixteen weeks, respectively.[135]

It would be remiss to not mention that some smaller localities offer public paid family leave programs. For example, Chicago has its own city-run paid family leave program.[136]

---

125 FLA. STAT. ANN. § 627.445 (West, Westlaw through 2025 Spec. Sess. and July 1 of the 2025 1st Reg. Sess.).

126 KY. REV. STAT. ANN. §§ 304.53-010–304.53-070 (West, Westlaw through 2025 Reg. Sess.).

127 N.H. REV. STAT. ANN. §§ 21-I:99–21-I:111 (Westlaw through Ch. 304 of the 2025 Reg. Sess.).

128 S.C. CODE ANN. §§ 38-103-10–38-103-90 (Westlaw through 2025 Act 94).

129 TENN. CODE ANN. §§ 56-7-3601–56-7-3605 (West, Westlaw through 2025 1st Reg. Sess.).

130 TEX. INS. CODE ANN. §§ 1255.001–1255.108 (West, Westlaw through 2025 Reg. and 2d Called Sess.).

131 *See Governor Phil Scott Launches Voluntary Paid Family and Medical Leave Program*, OFF. OF GOV. PHIL SCOTT (Dec. 6, 2022), https://governor.vermont.gov/press-release/governor-phil-scott-launches-voluntary-paid-family-and-medical-leave-program [https://perma.cc/3WGL-QWTU]; *Request for Proposals: Voluntary Paid Family and Medical Leave Insurance (FMLI) Administrator*, VT. BUS. REGISTRY (July 2022), http://www.vermontbusinessregistry.com/BidPreview.aspx?BidID=56122 [https://web.archive.org/web/20230603233315/http://www.vermontbusinessregistry.com/BidPreview.aspx?BidID=56122].

132 VA. CODE ANN. § 38.2-107.2 (West, Westlaw through 2025 Reg. Sess. and Reconvened Sess.).

133 N.H. REV. STAT. ANN. § 21-I:105 (Westlaw through Ch. 304 of the 2025 Reg. Sess.); DONOVAN, *supra* note 121, at 10.

134 Massachusetts generously provides 26 weeks of paid leave. *See* MASS. GEN. LAWS ANN. ch. 175M, § 2(c)(1) (West, Westlaw through Ch. 13 of the 2025 1st Ann. Sess.).

135 Claire Cain Miller, *The World 'Has Found a Way to Do This': The U.S. Lags on Paid Leave*, N.Y. TIMES (Oct. 25, 2021), https://www.nytimes.com/2021/10/25/upshot/paid-leave-democrats.html [https://perma.cc/K8TA-5DJ8].

136 Chicago Paid Leave and Paid Sick and Safe Leave Ordinances, MUNICIPAL CODE OF CHICAGO ch. 6-130.

However, many states preempt cities from having their own paid leave policies.[137] For example, Dallas attempted to pass a paid sick leave ordinance, but a Texas federal district court determined that the Texas Minimum Wage Act preempted any city benefits and enjoined the ordinance.[138]

3. The Private Employer Paid Family Leave Landscape

Some employers elect to provide their employees with paid family leave, but this is uncommon. In fact, many employers have rolled out changes to shorten the length of the paid leave benefits they offer to their employees.[139] Currently, only 27% of private sector workers have access to paid family leave.[140] Those employees are also more likely to be working in full-time, high-paying occupations at large companies.[141] For example, 39% of workers in management and professional industries have access to paid leave benefits, compared to only 16% of workers in the service industry.[142] It follows that richer workers typically have better benefits. Among the lowest 10% of earners, only 6% (one in twenty) have access to paid family leave, whereas among the top 10% of earners, 43% have access to paid family leave.[143] Unfortunately, this means that those who need paid family leave the most—vulnerable low-income workers that cannot afford unpaid leave—have the least amount of coverage.

There are also racial disparities in the paid family leave landscape—white workers have greater access to paid family leave than Asian, Black, and Hispanic workers, even

---

137 *See* Jennifer L. Pomeranz & Mark Pertschuk, *State Preemption: A Significant and Quiet Threat to Public Health in the United States*, 107 AM. J. PUB. HEALTH 900, 901 (2017).

138 *See* ESI/Employee Sols., L.P. v. City of Dallas, 531 F. Supp. 3d 1181 (E.D. Tex. 2021).

139 *See* Kathryn Dill & Angela Yang, *Companies Are Cutting Back on Maternity and Paternity Leave*, WALL ST. J. (Aug. 22, 2022) ("New data show that the share of employers offering paid maternity leave . . . dropped to 35% this year . . . ."), https://www.wsj.com/articles/the-surprising-benefit-some-companies-are-taking-awayparental-leave-11661125605 [https://perma.cc/QV77-6TPD].

140 *See What Data Does the BLS Publish on Family Leave?*, U.S. BUREAU LAB. STAT. (Sep. 21, 2023), https://www.bls.gov/ebs/factsheets/family-leave-benefits-fact-sheet.htm [https://perma.cc/5RTM-CBTY].

141 *See* DONOVAN, *supra* note 121, at 4.

142 *See* U.S. BUREAU LAB. STAT., *supra* note 140.

143 *See id.*

when controlling for job characteristics.[144] It is important to remember that these disparities contribute to worse Black maternal mortality and postpartum depression rates.[145] Biological sex disparities also exist—some employers' paid parental leave benefits differ depending on whether the employee physically gave birth to a child.[146]

This patchwork of family leave policies causes millions of Americans to slip through the cracks. Pregnant workers that cannot find coverage through their employers must rely on an amalgamation of saved-up paid vacation hours, paid sick leave hours, and temporary claims for disability insurance. In turn, this reliance precludes workers from using sick leave and vacation time for their intended purposes.

III. Integrating Paid Family Leave into State Constitutional Protections

A. International Legal Understandings of "Reproductive Freedom"

Reproductive freedom amendments are a new legal phenomenon in the United States, so it is useful to briefly examine how foreign jurisdictions have approached comparable constitutional rights. That being said, it is distinctly challenging to find analogous foreign precedent for paid family leave because most nations have enacted paid leave through statutory frameworks. While some countries have incorporated paid family leave provisions into their constitutions, as mentioned in Part I, these provisions are typically enacted alongside or after statutory paid leave programs. This leaves little room for individuals to initiate lawsuits compelling legislatures to create a new welfare regime.

A more relevant comparison may be found in lawsuits involving foreign countries' Equal Rights Amendments (ERAs). These amendments usually declare sweeping guarantees of equal protection but do not explicitly mandate the creation of statutory programs. For example, in Germany, the legislature invoked its ERA to enact the Federal Parental Benefit

---

144 *See* Julia M. Goodman et al., *Racial and Ethnic Inequities in Paid Family and Medical Leave: United States, 2011 and 2017-2018*, 112 AM. J. PUB. HEALTH 1050, 1050–58 (2022).

145 *See* Grayer, *supra* note 87.

146 There have been a few successful lawsuits against employers that distinguished paid leave benefits on the basis of gender. *See, e.g.*, Rotondo v. J.P. Morgan Chase Bank, No. 2:19-CV-2328, 2019 U.S. Dist. LEXIS 201616 (S.D. Ohio Nov. 20, 2019); EEOC v. Estée Lauder Cos., No. 2:17-CV-03897-JP (E.D. Pa. Aug. 30, 2017); *see also* Dill & Yang, *supra* note 139 ("The share of employers giving paternity time off fell to 27%" compared to 35% of employers offering maternity leave.").

and Parental Leave Law.[147] This invocation demonstrates a legislative acknowledgment that women's equality and liberty are intrinsically linked to access to paid leave during and after pregnancy. In contrast, the French judiciary rejected a constitutional argument that the ERA conferred enforceable individual rights.[148] Instead, it held that the ERA merely reflected foundational republican principles and did not impose any state obligations to pass gender equality legislation.[149] This differing approach suggests the importance of prioritizing legal challenges in U.S. states where the reproductive freedom amendments are more obviously self-executory and provide stronger grounds for judicial intervention.

Specifically, within the context of reproductive freedom, the Inter-American Court of Human Rights interpreted the American Convention on Human Rights' provisions for a right to "a private life" and a right to "reproductive autonomy" as imposing a positive obligation upon the Costa Rican government to provide in vitro fertilization (IVF) services to all its citizens.[150] This case demonstrates a judicial acknowledgment that reproductive autonomy is an expansive concept, extending beyond traditional negative rights to abortion or contraception, and it can provide a rational basis for positive entitlements.[151] As a result, the court ordered Costa Rica to incorporate IVF coverage into its national health insurance system.[152] U.S. state courts could reasonably adopt a similar approach with respect to paid leave, such as mandating that employers incorporate coverage of paid leave into existing employee health insurance benefits.

B. State Amendment Language

Currently, six states have passed constitutional amendments enshrining "reproductive freedom" or "reproductive liberty": Michigan, Vermont, Missouri, Maryland, Montana,

---

147 *See* Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 YALE J.L. & FEMINISM 381, 416 (2017).

148 *See id.* at 429.

149 *See id.*

150 The Court found that "the right to have access to scientific progress" was necessary "to exercise reproductive autonomy," and thus gave rise to a right "to have access to the best health care services in assisted reproduction techniques." Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, 46 (Nov. 28, 2012).

151 *See id.* at 42–45.

152 *See id.* at 97.

and Ohio.[153] Of course, the specific language of these amendments varies significantly across states, which will affect their scopes of enforceability. This section will provide an overview of the similarities and differences between these amendments before focusing more closely on Michigan and Maryland. Michigan's amendment is particularly noteworthy due to its breadth, its specificity in coverage, and its inclusion of a self-executory clause,[154] which makes it one of the amendments most conducive to potential litigation expanding the scope of protections. Maryland's amendment is more imprecise in its protections and does not feature a self-executory clause, but it is worth analyzing in detail because it is the only state in this group that has an existing statutory paid family leave program.[155]

1. Defining Reproductive Freedom

Some of the states' amendments explicitly outline examples of reproductive rights. Michigan and Missouri both specify that reproductive freedom includes decisions related to prenatal care, childbirth, contraception, abortion care, and miscarriage care.[156] Michigan extends these protections to sterilization and infertility care,[157] while Missouri uniquely includes the right to "respectful birthing conditions."[158] Ohio similarly provides examples of reproductive freedom but overall adopts a narrower scope, only naming contraception, fertility treatment, "continuing one's pregnancy," miscarriage care, and abortion.[159] Michigan and Missouri's references to postpartum care suggest a recognition that the ability to recover from childbirth and care for a newborn is a fundamental component of reproductive freedom. Ohio's lack of parallel language and narrower examples, on the other hand, may signal less sympathy for a paid family leave argument.

In contrast, Maryland, Montana, and Vermont offer very minimal definitions of reproductive freedom in their amendments. Maryland merely references the "ability to make and effectuate decisions to prevent, continue, or end one's pregnancy" without

---

153 The full texts of these amendments are located in the Appendix.

154 *See* MICH. CONST. art. I, § 28(5).

155 *See* MD. CONST. art. 48.

156 *See* MICH. CONST. art. I, § 28(1); MO. CONST. art. I, § 36(2).

157 *See* MICH. CONST. art. I, § 28(1).

158 MO. CONST. art. I, § 36(2).

159 OHIO CONST. art. I, § 22(A).

further elaboration.[160] Montana similarly provides for the "right to make and carry out decisions about one's own pregnancy" without elaboration, and does not use the phrases "reproductive freedom" or "reproductive liberty" anywhere in the amendment or its title.[161] Vermont's amendment is perhaps the vaguest of all, merely declaring a broad "right to personal reproductive autonomy" and leaving its interpretation entirely open.[162] Although these amendments are less explicit in their protections, the broad recognition of the concept of "reproductive liberty" or "decisions about one's . . . pregnancy" could actually leave *more* room for arguments that the amendments encompass the social supports necessary to exercise such rights.[163] In the same vein, Vermont's ambiguous language may be preferable to Maryland and Montana's focus on "pregnancy," as opponents could argue that the amendments' protections should end at childbirth (the biological conclusion of pregnancy).

2. Negative Versus Positive Rights

A unifying feature of the amendments is their use of negative strict scrutiny language, requiring the state to justify any limitation on reproductive freedom with a compelling state interest achieved by the least restrictive means. However, Michigan and Missouri go even further by restricting the definition of a "compelling" state interest to solely the "limited purpose" or "limited effect" of "protecting" or "improving or maintain[ing] the health of an individual seeking care, consistent with accepted clinical practice and evidence-based medicine, and [not] infring[ing] on that individual's autonomous decision-making."[164] Ohio and Montana set similar parameters "to advance the individual's health in accordance with widely accepted and evidence-based standards of care" and "address[] a medically acknowledged, bona fide health risk to a pregnant patient," respectively.[165] Maryland and Ohio also specify that the government is prohibited from engaging in both "direct[] or indirect[]" actions that limit reproductive freedom.[166] These provisions significantly curtail acceptable state action, and they notably require third-party input (e.g., from the medical community). This is favorable in the context of paid family leave, given the wealth of

160 MD. CONST. art. 48.

161 MONT. CONST. art. II, § 36(1).

162 VT. CONST. art. 22.

163 MD. CONST. art. 48; MONT. CONST. art. II, § 36(1); VT. CONST. art. 22.

164 MICH. CONST. art. I, § 28(1)–(4); MO. CONST. art. I, § 36(3).

165 OHIO CONST. art. I, § 22(B); MONT. CONST. art. II, § 36(4)(a).

166 MD. CONST. art. 48; OHIO CONST. art. I, § 22(B).

evidence demonstrating the health benefits of paid parental leave, as discussed *supra* Part II.B.

The amendments reflect varying degrees of positive rights language. Michigan, Ohio, Maryland, and Montana appear to establish a distinct, fundamental right to reproductive freedom in the first sentence of their amendments before beginning a separate sentence outlining standards for constitutional review.[167] This structure suggests that individuals possess a right to reproductive freedom independent of state interference—that is, they have a right to an abortion and other necessary reproductive benefits, not merely a right to be free from government obstruction in exercising reproductive choices. Syntactically, the first clause thus establishes positive rights to reproductive freedom, while the second clause outlines negative rights against state infringement. This language raises the possibility that individuals in Michigan, Ohio, Maryland, and Montana could bring a claim against non-state actors, such as employers who infringe upon or burden their rights.

Conversely, Missouri frames its entire amendment in traditional negative rights language by beginning with a directive prohibiting the government from "deny[ing] or infring[ing]" reproductive freedom.[168] Missouri's amendment language is otherwise nearly identical to Michigan's; this syntactical distinction suggests that Missouri intentionally altered its language in a recognition that Michigan's approach *does* confer positive rights. Missouri even has a section defining who exactly qualifies as the "government," again limiting the scope of the amendment.[169] Of course, this poses significant challenges for arguments that Missouri intended to guarantee any positive rights to reproductive freedom. Vermont's amendment occupies a middle ground—it declares a right to reproductive freedom but, unlike Michigan, Ohio, Maryland, and Montana, continues into negative rights language within the same sentence without clear separation.[170] This again raises uncertainty about whether Vermont courts would interpret the amendment as conferring positive rights.

---

167 *See* MICH. CONST. art. I, § 28(1); OHIO. CONST. art. I, § 22(A); MD. CONST. art. 48; MONT. CONST. art. II, § 36(1).

168 MO. CONST. art. I, § 36(2) ("The Government shall not deny or infringe upon a person's fundamental right to reproductive freedom . . . .").

169 *Id.* § 36(8)(2) (defining the term government as "a. the state of Missouri; or b. any municipality, city, town, village, township, district, authority, public subdivision or public corporation having the power to tax or regulate, or any portion of two or more such entities within the state of Missouri.").

170 *See* VT. CONST. art. 22.

Maryland and Vermont also notably ground their right to reproductive freedom in existing rights. Vermont's amendment says that the "individual right to personal reproductive autonomy" is "central to the liberty and dignity to determine one's own life course."[171] Maryland's amendment similarly describes the "fundamental right to reproductive freedom" as a "central component of an individual's rights to liberty and equality."[172] These references to liberty—traditionally understood as a negative right—may suggest that reproductive freedom is not an independent, positive right but rather a derivative right dependent on the broader principles of liberty and equality. This could further limit the scope and enforceability of these amendments' reproductive freedom guarantees.

3. Enforceability

Michigan and Ohio are the only states whose amendments include a self-executing clause, which has significant practical implications.[173] The amendments in Missouri, Maryland, Montana, and Vermont are silent on self-execution, making it more challenging to assert that these amendments are directly enforceable in court. As discussed *supra* Part I, self-executing clauses enable citizens to bring legal actions to remedy infringements of their rights without waiting for legislative action. As a result, plaintiffs in Michigan and Ohio likely have a better chance of successfully claiming that their rights have been violated than those in Missouri, Maryland, Montana, or Vermont. In the latter group of states, courts may interpret the amendments as merely declaratory, moral mandates for the legislature to decide to act upon rather than providing any independent, enforceable right to reproductive freedom. The outcomes of such cases will likely depend on a state's self-execution doctrine. For example, as discussed *supra* Part II, Montana courts have recognized that the state's environmental protection amendment was self-executing despite the absence of an explicit clause saying so;[174] Montana courts could adopt a similar approach to reproductive rights.

4. Case Study: Michigan

Michigan's reproductive freedom amendment reads, in relevant part:

---

171 *Id.*

172 MD. CONST. art. 48.

173 *See* MICH. CONST. art. I, § 28(1) ("This section shall be self-executing."); OHIO CONST. art. I, § 22(D) ("This Section is self-executing.").

174 *See* Cape-France Enters v. Est. of Peed, 29 P.3d 1011, 1016–17 (Mont. 2001).

> (1) Every individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care. An individual's right to reproductive freedom shall not be denied, burdened, nor infringed upon unless justified by a compelling state interest achieved by the least restrictive means. . . (4) For the purposes of this section: A state interest is "compelling" only if it is for the limited purpose of protecting the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine, and does not infringe on that individual's autonomous decision-making. . . . (5) This section shall be self-executing.[175]

The language of Michigan's amendment aligns closely with the core concepts of reproductive justice, and Michigan plaintiffs may have an easier time establishing the amendment's commitment to reproductive justice than plaintiffs in states where constitutional protections are vaguer, like Montana. The amendment reflects reproductive justice's support of both having a child and not having a child by explicitly protecting prenatal care, childbirth, contraception, sterilization, abortion care, miscarriage care, and infertility care. Arguably, the amendment also recognizes reproductive justice's third tenet, supporting a person's ability to raise a child in safe conditions, by covering "postpartum care." Because the amendment acknowledges that reproductive health extends beyond pregnancy, it is a natural and persuasive argument that the amendment should cover policies like paid family leave that support individuals' recovery post-birth.

As discussed *supra* Part III.B.3, a key feature of Michigan's amendment is its self-executing clause, which empowers citizens to bring actions in court to remedy infringements of their reproductive freedoms. This clause distinguishes Michigan's amendment from other states' amendments and increases the likelihood that Michigan courts will directly enforce reproductive rights rather than dismissing the amendment as a non-enforceable legislative mandate.

For litigants, it will be crucial to demonstrate the difference between the amendment's first clause, which establishes a positive right to reproductive freedom, and the second clause, which affirms citizens' negative rights by prohibiting state interference. Reading the first sentence as creating a separate positive right would allow courts to extend reproductive

---

175 MICH. CONST. art. I, § 28(1), (4)–(5).

freedom protections against non-state actors. For example, a private workplace policy that offers no paid maternity or paternity leave could be construed as imposing a burden on reproductive freedom.

However, even the negative rights language in the second sentence is significant for expanding access to paid family leave. In 2015, Michigan's state legislature passed H.B. 4052, which, *inter alia*, prohibited local governments from "adopt[ing], enforc[ing], or administer[ing] an ordinance, local policy, or local resolution requiring an employer to provide to an employee paid or unpaid leave time."[176] In other words, the statute preempted all Michigan cities from passing their own paid leave policies. Michigan's reproductive freedom amendment could provide grounds for a constitutional challenge to H.B. 4052; by banning local paid leave policies (such as one passed by city ordinance), the state has acted to burden an individual's right to reproductive freedom. Plaintiffs would then argue H.B. 4052 fails strict scrutiny, given the amendment's narrow definition of a "compelling state interest" as protecting health "consistent with accepted clinical standards of practice and evidence-based medicine."[177] As discussed *supra* Part II.B, paid family leave is widely accepted as improving maternal and infant outcomes.

5. Case Study: Maryland

Maryland's reproductive freedom amendment reads, in relevant part:

> That every person, as a central component of an individual's rights to liberty and equality, has the fundamental right to reproductive freedom, including but not limited to the ability to make and effectuate decisions to prevent, continue, or end one's own pregnancy. The state may not, directly or indirectly, deny, burden, or abridge the right unless justified by a compelling state interest achieved by the least restrictive means.[178]

Maryland's amendment presents some significant challenges for framing a positive right to paid family leave. It grounds the right to reproductive freedom in the broader, existing rights to liberty and equality, which suggests that reproductive freedom may merely be a derivative of existing negative rights. Furthermore, the amendment generally

176 Codified at MICH. COMP. LAWS ANN. § 123.1388 (West, Westlaw through P.A. 2025, No. 30, 2025 Reg. Sess., 103d Leg.).

177 MICH. CONST. art. I, § 28(4).

178 MD. CONST. art. 48.

characterizes reproductive freedom as decisions about "pregnancy" without addressing reproductive decisions such as post-birth recovery. This makes it harder to argue the amendment explicitly protects rights related to parental leave. Additionally, the absence of a self-executory clause could allow courts to dismiss the amendment's promises as non-enforceable or declaratory. Nevertheless, there remains some room for flexible interpretation. Plaintiffs could argue that individuals cannot fully exercise their right to make decisions about pregnancy if the lack of parental leave effectively forces them to choose between having a child and maintaining financial stability.

However, beginning July 1, 2026, Maryland will offer its citizens paid family leave through the Maryland Family and Medical Leave Insurance (FAMLI) system.[179] FAMLI is a joint employer- and employee-funded, state-run insurance system that provides part-time and full-time workers with a wage replacement of up to $1,000 a week for up to twelve weeks per year.[180] The creation of the FAMLI system shifts the strategic focus for paid family leave advocates. Rather than arguing for the establishment of a paid family leave program at all, the issue may become whether the state's existing benefit system is inadequate and indirectly abridges an individual's reproductive freedom. FAMLI ties benefits to employment and other eligibility requirements, such as a minimum of 680 hours worked.[181] This excludes a significant portion of the population, including self-employed individuals, newly employed workers, independent contractors, and the unemployed. Plaintiffs could argue that these eligibility restrictions infringe upon the right to reproductive freedom and should be relaxed or eliminated altogether. Alternatively, plaintiffs could argue that FAMLI benefits are insufficient for meaningful postpartum recovery because the available time off should be longer than twelve weeks or the wage replacement rate should be higher than $1,000 per week.

C. Potential Judicial Remedies

Even if courts were receptive to interpreting reproductive freedom amendments as conferring positive rights, there remains an open question of what exactly a court-ordered paid family leave program would look like in practice. The most common model, as discussed *supra* Part II.C, involves joint employer and employee-funded payroll taxes that pool into a general welfare system. New York offers an alternative approach by requiring employers to purchase paid leave insurance. Courts could also take a more unconventional

179 *See* MD. CODE ANN., LAB. & EMPL. §§ 8.3-101–8.3-1001 (West, Westlaw through 2025 Reg. Sess.).

180 *See id.*

181 *See id.*

path, like mandating lump-sum welfare payments that are independent of employment status or wage replacement. In those cases, states could consider implementing means testing to ensure the allocation of benefits to the most vulnerable populations.

The more likely scenario, however, is that courts will refrain from defining the specific contours of a paid leave policy for fear of overstepping into the realm of legislative authority.[182] Courts may issue broad directives requiring legislatures to "establish" a paid family leave program in compliance with the reproductive freedom amendments, but they would likely stop short of dictating nuanced criteria such as funding mechanisms. For states with existing paid leave programs, like Maryland, courts may have greater flexibility to identify inadequacies in the current system because doing so implicates less legislative power than does drafting an entire welfare schema. In a state education case, the Ohio Supreme Court ordered the legislature to create a new school funding system because the existing scheme was inadequate to fulfill the promises of the state's constitutional education amendment.[183] The court did not give precise instructions on what the new system had to look like, but they did highlight broad areas of concern, like adopting strict academic guidelines or funding through local property taxes.[184] State courts may adopt a similar approach in the context of reproductive freedom amendments, exercising a considerable amount of judicial power but also remaining cognizant of overstepping into legislative territory with unduly prescriptive orders.[185]

From a strategic standpoint, legal advocates for paid family leave and reproductive justice should push for the broadest and most comprehensive protections possible, framing a robust paid family leave system as an essential component of reproductive freedom and emphasizing how inadequate policies disproportionately harm marginalized communities. Even a meager court-mandated policy could provide a crucial starting point for broader reforms by signaling judicial acknowledgment of the link between reproductive freedom and paid leave. It could also inspire other beneficial policy changes, such as universal

---

182 *See generally* Yeju Hwang, *Silent Today, Conversant Tomorrow: Education Adequacy as a Political Question*, 118 NW. U. L. REV. 1663 (2024), for an overview of how courts frequently refrain from specificity in education litigation remedies. *Infra* Part III.D and *infra* note 189 also discuss the separation of powers concerns that courts may have.

183 *See* DeRolph I, 78 Ohio St.3d 193, 212–13 (Ohio 1997).

184 *See* DeRolph II, 89 Ohio St.3d 1, 35–38 (Ohio 2000).

185 *See infra* Part III.D and *infra* note 196 for further discussion on how courts may avoid separation of powers problems.

daycare or generous child tax credits, that would similarly further the goals of reproductive justice.

D. Addressing Counterarguments

Paid family leave garners wide bipartisan support in American politics,[186] yet it consistently fails to lodge a foothold in the federal welfare scheme—largely due to congressional gridlock over policy details.[187] Even among states that have implemented paid family leave, there is no one-size-fits-all policy structure.[188] This Note has proposed that one solution for solving the paid leave crisis may be turning away from the legislature and instead towards the courts through constitutional amendment arguments. However, several potential counterarguments may complicate the achievement of paid family leave through state constitutional litigation.

First, a court challenge for constitutional paid family leave might face roadblocks similar to a traditional legislative route. Many legal scholars have cited political question concerns about the expansion of positive economic and social rights, such as the dangers of judicial overreach into legislative policymaking.[189] However, the rebuttal to these separation of powers critiques is that, *à la Marbury*,[190] one of the core responsibilities

---

186 *See* BRYAN BENNETT, NAVIGATOR, AMERICANS OVERWHELMINGLY SUPPORT PAID FAMILY AND MEDICAL LEAVE (2022), https://navigatorresearch.org/americans-overwhelmingly-support-paid-family-and-medical-leave/ [https://perma.cc/RS9U-53UW] ("Overwhelming and bipartisan majorities support the creation of [a paid family leave] program, including more than three in four independents (76%) and seven in ten Republicans (70%) . . . .").

187 *See, e.g.*, Jonathan Weisman, *Why Paid Family Leave's Demise This Time Could Fuel It Later*, N.Y. TIMES (Oct. 31, 2021), https://www.nytimes.com/2021/10/31/us/politics/paid-family-leave.html [https://perma.cc/M2XK-BJRB] (detailing how recent Republican- and Democrat-backed paid leave bills consistently failed in Congress).

188 *See* discussion *supra* Part II.C.2.

189 *See, e.g.*, *Positive Rights*, *supra* note 46, at 1135 n.10 (citing a multitude of legal scholars' apprehension towards federal judicial enforcement of welfare rights); Usman, *supra* note 25, at 1498–1500. *See generally* Cass R. Sunstein, *Against Positive Rights*, 2 E. EUR. CONST. REV. 35 (1993) (arguing against proposals for integrating positive rights into European constitutions due, in part, to the difficulties around judicial enforceability); Nat Stern, *Don't Answer That: Revisiting the Political Question Doctrine in State Courts*, 21 U. PA. J. CONST. L. 153 (2018) (surveying how some state courts have dismissed state constitutional rights cases on political question grounds); Wiles, *supra* note 38 (exploring the range of socio-economic rights enforcement abroad).

190 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

of the judiciary is to interpret the constitution; if the constitution imposes some positive guarantee, then "the judiciary is the branch best able to define its parameters."[191] In one Kentucky education litigation case, the court wrote: "To avoid deciding the case because of 'legislative discretion,' 'legislative function,' etc., would be a denigration of our own constitutional duty. To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable."[192] Moreover, a state's separation of powers doctrine need not mirror the federal political question doctrine;[193] in fact, most states' approaches to analogous constitutional education rights cases do not.[194] Helen Hershkoff provides a compelling reframing:

> The presence of a positive right in a state constitution should . . . be understood as constraining the legislature's otherwise unfettered discretion to choose from among competing policy alternatives. The legislature can choose the means to carry out a constitutional goal, but it cannot claim to meet its constitutional duty if the means chosen evade, undermine, or fail to carry out the prescribed end.[195]

Determining, as a threshold issue, whether these amendments confer a responsibility on the legislature to meaningfully protect citizens' reproductive freedoms need not trigger

---

191 Feldman, *supra* note 50, at 1061.

192 Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 209 (Ky. 1989) (cited in Alabama Coalition for Equity, Inc. v. Hunt, 624 So.2d 107 (Ala. 1993)) (citing Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 87 (Wash. 1978)); *see also* Jensen, *supra* note 43, at 36 ("[I]t is a judicial not legislative duty to interpret the state constitution.").

193 *See* Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 DUKE L.J. 545, 626–29 (2023) (explaining how state separation of powers doctrine differs from its federal counterpart and thus state courts should "avoid reliance on tropes about checks and balances or formalistic articulations of executive, judicial, or legislative power," instead "apply[ing] text even in the face of outcomes that appear to imbalance power between branches" especially in order to affirm citizens' political preferences in constitutional amendment ballot initiatives); Hwang, *supra* note 182, at 1696 ("The reality is that the foundations of justiciability—thus, the political question doctrine—are tethered to Article III of the federal Constitution and the federal courts. This creates an absurdity when the political question doctrine appears in state courts; the principles of justiciability that these state courts raise are ones to which they have no obligation to be faithful."). *See generally* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1834 (2001) (arguing that state courts take a different approach to justiciability than federal courts).

194 *See* Stern, *supra* note 189, at 192–94 (surveying many state courts' willingness to confront constitutional education rights arguments and rejecting justiciability challenges); Usman, *supra* note 25, at 1506–08.

195 Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 FORDHAM L. REV. 1403, 1414 (1999).

justiciability concerns. Courts can avoid judicial overreach by limiting the specificity or scope of their remedies.[196] Alternatively, suits against private employers may not even raise these concerns at all; a court could determine that a private employer's leave policy burdens an employee's fundamental reproductive freedom rights and provide judicial remedies without mandating legislative action.

Second, as discussed *supra* Part I, courts may view these amendments as insufficiently explicit to mandate paid leave and reject an enforceable positive rights argument altogether.[197] However, enforceable state rights have derived from constitutional provisions that were not explicitly self-executory; see, for example, Montana's recognition of enforceable environmental rights and many state courts' recognition of enforceable education rights. The success of legal challenges may depend on existing state self-executory doctrine or explicit self-execution provisions, but if there are any places to attempt to advance radical legal arguments in the United States, it is at the state constitutional level. Rights expansion has happened before, and it can happen again with strategic legal arguments and legislative drafting.

A third challenge is that some critics may question whether paid family leave is best framed as an issue of reproductive rights. Is paid leave solely within the realm of economic and/or employment policy, given its effect on workforce participation and income stability? This criticism overlooks the interconnectedness of economic security and reproductive justice, which implores a holistic approach to reproductive rights that considers how economic conditions may have undue influence on reproductive freedom. Access to paid leave directly impacts an individual's ability to make family planning decisions, and its potential effects on long-term gender parity in the workplace should not be understated.

Finally, a more radical critique may probe whether we should be relying on an employment-based system for welfare benefits at all. By tying paid leave to employment, we may exclude independent contractors and anyone outside of the labor market. Why not implement a no-strings-attached lump-sum payment, akin to universal basic income?

---

196 *See* Wiles, *supra* note 38, at 47 ("[J]udicial review of a socio-economic right does not necessarily involve the determination of a particular level of resources to be spent by the state or the exact way they are to be spent; a judgment can simply consist of pointing out where a violation has occurred, and instructing that it should be remedied in which ever way the public authority deems most appropriate, or simply that an appropriate inquiry should be instigated.").

197 *See also* Usman, *supra* note 25, at 1500–02. *See generally* José L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENV'T. L. REV. 333 (1993) (explaining the roadblocks that self-execution doctrine might present to rights enforcement).

This could be a more equitable solution that avoids reinforcement of notions that one must "earn" their welfare benefits. While this critique raises valid points, it would certainly face several political and practical challenges: the unfortunate reality is that programs tied to employment are more palatable to both lawmakers and voters.[198] An employment-based paid leave policy, though imperfect, is likely the most politically viable starting point.

CONCLUSION

Although this Note focuses on paid family leave, these constitutional arguments are equally applicable to other aspects of reproductive justice. For example, public funding for abortions or even IVF care may present a more legally intuitive and straightforward path to positive reproductive rights protections. Court rulings incorporating abortion care into insurance coverage would likely face less political and legal resistance than establishing an entirely new welfare system. Of course, reproductive rights advocates should not overlook these opportunities.

However, the integration of paid family leave into the umbrella of reproductive freedom presents a unique opportunity to reshape the discourse around workers' rights. By pushing for robust paid family leave supports, activists can illuminate the deep connections between employment law and an individual's ability to exercise reproductive freedom beyond the workplace. Paid family leave is not just an employment issue—it intersects with race, gender, disability, healthcare, and bodily autonomy. The reproductive justice framework urges us to think beyond mainstream advocacy, which has so often left behind individuals at the margins, particularly Black women, disabled people, and low-income individuals.

---

198 Indeed, data shows that over two-thirds of Americans support tying welfare to work requirements. *See* Linley Sanders, *How Americans Evaluate Social Security, Medicare, and Six Other Entitlement Programs* YOUGOV (Feb. 8, 2023), https://today.yougov.com/politics/articles/45187-americans-evaluate-social-security-medicare-poll [https://perma.cc/HM8Z-Q3NV]; *see also, e.g.*, Clyde Haberman, *20 Years Later, Welfare Overhaul Resonates for Families and Candidates*, N.Y. TIMES (May 1, 2016), https://www.nytimes.com/2016/05/02/us/20-years-later-welfare-overhaul-resonates-for-families-and-candidates.html [https://perma.cc/7W65-VX6B] (detailing how New Deal welfare backlash culminated in the late 90s as Aid to Families with Dependent Children was overturned, replaced with employment-tied TANF, and "'entitlement' became a dirty word, certainly among conservative Republicans but also among many centrist Democrats. Americans on welfare, hardly a powerful political force, found themselves routinely characterized as loafers and cheats."). *See generally* Nick Burns, *Welfare Queens and Work Requirements: The Power of Narrative and Counter-Narrative*, 10 TENN. J. RACE, GENDER, & SOC. JUST. 29 (2020) (discussing the power of the welfare queen narrative in American politics).

Broadly, states should embrace their role in leading the movement for reproductive justice, whether it be through legal challenges in state courts or state constitutional reforms. When states implement paid family leave policies and other reproductive protections, they lay the foundation for similar expansions at the federal level. Reproductive freedom cannot exist as a theoretical right alone. It requires material policies that empower all individuals to make meaningful choices about their bodies, families, and futures.

APPENDIX

APPENDIX 1 – CONSTITUTION OF MICHIGAN OF 1963 (EXCERPT)

§ 28 Right to reproductive freedom.

(1) Every individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.

An individual's right to reproductive freedom shall not be denied, burdened, nor infringed upon unless justified by a compelling state interest achieved by the least restrictive means.

Notwithstanding the above, the state may regulate the provision of abortion care after fetal viability, provided that in no circumstance shall the state prohibit an abortion that, in the professional judgment of an attending health care professional, is medically indicated to protect the life or physical or mental health of the pregnant individual.

(2) The state shall not discriminate in the protection or enforcement of this fundamental right.

(3) The state shall not penalize, prosecute, or otherwise take adverse action against an individual based on their actual, potential, perceived, or alleged pregnancy outcomes, including but not limited to miscarriage, stillbirth, or abortion. Nor shall the state penalize, prosecute, or otherwise take adverse action against someone for aiding or assisting a pregnant individual in exercising their right to reproductive freedom with their voluntary consent.

(4) For the purposes of this section:

A state interest is "compelling" only if it is for the limited purpose of protecting the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine, and does not infringe on that individual's autonomous decision-making.

"Fetal viability" means: the point in pregnancy when, in the professional judgment of an attending health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures.

(5) This section shall be self-executing. Any provision of this section held invalid shall be severable from the remaining portions of this section.

APPENDIX 2 – CONSTITUTION OF MISSOURI (EXCERPT)

Article I, § 36 Right to Reproductive Freedom Initiative

1. This Section shall be known as "The Right to Reproductive Freedom Initiative."

2. The Government shall not deny or infringe upon a person's fundamental right to reproductive freedom, which is the right to make and carry out decisions about all matters relating to reproductive health care, including but not limited to prenatal care, childbirth, postpartum care, birth control, abortion care, miscarriage care, and respectful birthing conditions.

3. The right to reproductive freedom shall not be denied, interfered with, delayed, or otherwise restricted unless the Government demonstrates that such action is justified by a compelling governmental interest achieved by the least restrictive means. Any denial, interference, delay, or restriction of the right to reproductive freedom shall be presumed invalid. For purposes of this Section, a governmental interest is compelling only if it is for the limited purpose and has the limited effect of improving or maintain the health of a person seeking care, is consistent with widely accepted clinical standards of practice and evidence-based medicine, and does not infringe on that person's autonomous decision-making.

4. Notwithstanding subsection 3 of this Section, the general assembly may enact laws that regulate the provision of abortion after Fetal Viability provided that under no circumstance shall the Government deny, interfere with, delay, or otherwise restrict an abortion that in the good faith judgment of a treating health care professional is needed to protect the life or physical r mental health of the pregnant person.

5. No person shall be penalized, prosecuted, or otherwise subjected to adverse action based on their actual, potential, perceived, or alleged pregnancy outcomes, including but not limited to miscarriage, stillbirth, or abortion. Nor shall any person assisting a person in exercising their right to reproductive freedom with that person's consent be penalized, prosecuted, or otherwise subjected to adverse action for doing so.

6. The Government shall not discriminate against persons providing or obtaining reproductive health care or assisting another person in doing so.

7. If any provision of this Section or the application thereof to anyone or to any circumstance is held invalid, the remainder of those provisions and the application of such provisions to others or other circumstances shall not be affected thereby.

8. For purposes of this Section, the following terms mean:

(1) "Fetal Viability", the point in pregnancy when, in the good faith judgment of a treating health care professional and based on the particular facts of the case, there is

a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures.

(2) "Government",

a. the state of Missouri; or

b. any municipality, city, town, village, township, district, authority, public subdivision or public corporation having the power to tax or regulate, or any portion of two or more such entities within the state of Missouri.

APPENDIX 3 – CONSTITUTION OF MARYLAND (EXCERPT)

Article 48.

That every person, as a central component of an individual's rights to liberty and equality, has the fundamental right to reproductive freedom, including but not limited to the ability to make and effectuate decisions to prevent, continue, or end one's own pregnancy. The State may not, directly or indirectly, deny, burden, or abridge the right unless justified by a compelling State interest achieved by the least restrictive means.

APPENDIX 4 – CONSTITUTION OF OHIO (EXCERPT)

Article I, § 22. The Right to Reproductive Freedom with Protections for Health and Safety.

A. Every individual has a right to make and carry out one's own reproductive decisions, including but not limited to decisions on:

1. contraception;
2. fertility treatment;
3. continuing one's own pregnancy;
4. miscarriage care; and
5. abortion.

B. The State shall not, directly or indirectly, burden, penalize, prohibit, interfere with, or discriminate against either:

1. An individual's voluntary exercise of this right or
2. A person or entity that assists an individual exercising this right, unless the State demonstrates that it is using the least restrictive means to advance the individual's health in accordance with widely accepted and evidence-based standards of care.

However, abortion may be prohibited after fetal viability. But in no case may such an abortion be prohibited if in the professional judgment of the pregnant patient's treating physician it is necessary to protect the pregnant patient's life or health.

C. As used in this Section:

1. "Fetal viability" means "the point in a pregnancy when, in the professional judgment of the pregnant patient's treating physician, the fetus has a significant likelihood of survival outside the uterus with reasonable measures. This is determined on a case-by-case basis."
2. "State" includes any governmental entity and any political subdivision.

D. This Section is self-executing.

APPENDIX 5 – CONSTITUTION OF MONTANA (EXCERPT)

Article II, § 36. Right to make decisions about pregnancy.

(1) There is a right to make and carry out decisions about one's own pregnancy, including the right to abortion. This right shall not be denied or burdened unless justified by a compelling government interest achieved by the least restrictive means.

(2) The government may regulate the provision of abortion care after fetal viability provided that in no circumstance shall the government deny or burden access to an abortion that, in the good faith judgment of a treating health care professional, is medically indicated to protect the life or health of the pregnant patient.

(3) The government shall not penalize, prosecute, or otherwise take adverse action against a person based on the person's actual, potential, perceived, or alleged pregnancy outcomes. The government shall not penalize, prosecute, or otherwise take adverse action against a person for aiding or assisting another person in exercising their right to make and carry out decisions about their pregnancy with their voluntary consent.

(4) For purposes of this section:

(a) A government interest is "compelling" only if it clearly and convincingly addresses a medically acknowledged, bona fide health risk to a pregnant patient and does not infringe on the patient's autonomous decision making.

(b) "Fetal viability" means the point in pregnancy when, in the good faith judgment of a treating health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures.

APPENDIX 6 – CONSTITUTION OF VERMONT (EXCERPT)

Article 22. Personal reproductive liberty.

That an individual's right to personal reproductive autonomy is central to the liberty and dignity to determine one's own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means.

DISCERNING ONE PRIMARY PURPOSE FROM TWO: THE INCONSISTENT TREATMENT OF SEXUAL ASSAULT NURSE EXAMINER TESTIMONY UNDER THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE

TESSA DEFRANCO*

Abstract

Survivors of sexual assault and domestic violence often play a critical role in the criminal prosecutions of their abusers. The cyclical dynamics of abuse and corresponding prevalence of factors such as trauma, intimidation, and coercion, however, mean that survivors are often unavailable or unwilling to testify at trial. In these instances, a victim's prior out-of-court statements may nonetheless be admissible if they satisfy the Sixth Amendment's Confrontation Clause. This Note explores Confrontation Clause jurisprudence in the context of victim statements made during Sexual Assault Nurse Examiner (SANE) examinations and demonstrates how the divergent approaches taken by courts around the country have left defendants, law enforcement, SANEs, and victims without a coherent framework governing the admissibility of these statements at trial. Part I details the responsibilities of SANEs and the significant role they play in the provision of both medical care and evidentiary support in subsequent criminal prosecutions. Part II lays out the evolution of the U.S. Supreme Court's Confrontation Clause jurisprudence, from its longstanding focus on reliability to its modern-day primary purpose analysis. Part III explicates how courts throughout the United States analyze the testimonial nature of statements made by victims of sexual assault in the context of SANE examinations. Finally, Part IV recommends solutions to create a more consistent framework for analyzing SANE testimony when a victim is unavailable come trial, including practical changes to SANE programs as well as doctrinal changes to Confrontation Clause jurisprudence. Ultimately, this Note advocates for a declarant-centered approach due to the unique nature of domestic violence and sexual

© 2025 DeFranco. This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits the user to copy, distribute, and transmit the work provided that the original author and source are credited.

* J.D. 2025, Columbia Law School; B.A. 2021, Bowdoin College. I am incredibly grateful to Professor Philip Genty for his guidance and support as my advisor for this Note. Additionally, I would like to thank Sarah Geller, Pamela Chen, and the entire staff of the *Columbia Journal of Gender and Law* for their edits and recommendations, all of which made the publication of this piece possible.

assault prosecutions, including the high rate of unavailable witnesses, the vulnerability involved in a sexual assault examination, and the likelihood of re-traumatization.

INTRODUCTION

Emergency rooms are often the first institutional contact for victims of sexual assault.[1] That was the case for K.E.H.,[2] who arrived at Tacoma General Hospital's emergency room at 1:24 a.m. on July 3, 2009, after she was raped in a nearby park.[3] At the hospital, K.E.H. spoke with a social worker who subsequently contacted the police to report the rape.[4] When the police arrived, K.E.H. provided officers with details of the assault, including the location of the incident and a description of her attacker.[5] Later that morning, K.E.H. was treated by a physician and medically cleared for discharge, but she decided to wait for Kay Frey, a Sexual Assault Nurse Examiner (SANE), to examine her.[6] At about 4:00 p.m. that afternoon, SANE Frey conducted a sexual assault forensic examination on K.E.H.[7] She performed a physical examination, collected biological samples that could contain DNA evidence, and gathered K.E.H.'s medical history, which included a description of the assault.[8]

The DNA evidence collected by SANE Frey during the forensic evaluation ultimately led to the apprehension of Ronald Delester Burke.[9] By the time Burke was arrested and

---

1 *SANE Certification: What's the Scoop?*, INT'L ASS'N OF FORENSIC NURSES (2025), https://www.forensicnurses.org/sane-certification-whats-the-scoop/ [https://perma.cc/H7C3-NRM4].

2 In cases involving sexual assault, limited identifiers such as a victim's initials, first name, or pseudonym may be used in place of their full name to preserve their privacy. U.S. DEP'T OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, FRAMEWORK FOR PROSECUTORS TO STRENGTHEN OUR NATIONAL RESPONSE TO SEXUAL ASSAULT & DOMESTIC VIOLENCE INVOLVING ADULT VICTIMS 18 (2024), https://www.justice.gov/ovw/media/1352371/dl?inline [https://perma.cc/7NVV-XRJQ]; *see also* United States v. Daskal, No. 21-CR-110, 2023 WL 9424080, at *3–5 (E.D.N.Y. July 12, 2023).

3 State v. Burke, 431 P.3d 1109, 1111 (Wash. Ct. App. 2018), *rev'd*, 478 P.3d 1096 (Wash. 2021).

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.* At trial, Frey testified that the history was "'like any medical history' and was a personal statement about what happened." *Id.*

9 *Id.*

prosecuted for the assault, however, K.E.H. had passed away from an unrelated illness.[10] Because K.E.H. was unable to testify, the State of Washington moved to admit her statements to SANE Frey under the state's medical exception to the hearsay rule.[11] The prosecution sought to have SANE Frey read verbatim the portion of her report that included K.E.H.'s narrative description of the incident.[12]

Burke objected to the admission of SANE Frey's testimony under the Confrontation Clause,[13] a constitutional safeguard meant to protect the right of criminal defendants to cross-examine their accusers in court even when their accusers' out-of-court statements fall under a hearsay exception.[14] The Confrontation Clause's ultimate goal is "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."[15] In practice, the clause creates an additional, constitutional layer of protection to assess the reliability of hearsay evidence against criminal defendants by requiring testimony to be subject to "the crucible of cross-examination."[16] To that end, the clause bars the admission of an absent witness' testimonial statements at trial[17]—"however trustworthy a judge might think them—unless the witness is unavailable and the defendant had a prior chance to subject her to cross-examination."[18]

---

10 *Id.* at 1111–12.

11 *Id.* at 1112.

12 *Id.* at 1114.

13 *Id.*

14 Crawford v. Washington, 541 U.S. 36, 50 (2004) ("[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused . . . *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers would certainly not have condoned them."); U.S. CONST. amend. VI. The Fourteenth Amendment extended this right to state courts. Pointer v. Texas, 380 U.S. 400, 403 (1965).

15 *Crawford*, 541 U.S. at 74 (quoting Maryland v. Craig, 497 U.S. 836, 845 (1990)).

16 *Id.* at 61.

17 Determining whether out-of-court statements are testimonial or not involves ascertaining the "'primary purpose of the interrogation' by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs." Michigan v. Bryant, 562 U.S. 344, 370 (2011) (quoting Davis v. Washington, 547 U.S. 813, 822 (2006)). See *infra* Part II.A for a further explication of the meaning of "testimonial" in the context of the Confrontation Clause.

18 Smith v. Arizona, 602 U.S. 779, 784 (2024).

After a hearing on the motion, the court overruled Burke's Confrontation Clause objection and allowed SANE Frey to read K.E.H.'s narrative statement describing the incident and her assailant, which SANE Frey had collected during the forensic examination.[19] The jury then convicted Burke of second-degree rape.[20]

Burke subsequently appealed, arguing that his Sixth Amendment rights under the Confrontation Clause had been violated by the admission of K.E.H.'s statements to Nurse Frey.[21] Under the Supreme Court's Confrontation Clause jurisprudence, Burke's challenge hinged on whether the court determined K.E.H.'s out-of-court statements to be of "testimonial" character.[22] The Washington Court of Appeals adopted the primary purpose test established twelve years earlier in *Davis v. Washington*,[23] requiring a determination of whether the circumstances of the examination objectively demonstrate that its primary purpose was to provide evidence for a future criminal prosecution.[24] The court reversed Burke's conviction after finding that the State had not met its burden in establishing that K.E.H.'s statements to Nurse Frey were *non*testimonial.[25]

The State appealed this holding to Washington's highest court.[26] In its decision, the Supreme Court of Washington grappled with the dual purposes of Nurse Frey's role as a SANE: collecting evidence and providing medical care.[27] Under the *Davis* test, statements

---

19 *Burke*, 431 P.3d at 1114.

20 *Id.* at 1115.

21 *Id.*

22 *Id.* ("The [C]onfrontation [C]lause prohibits the 'introduction of testimonial statements by a nontestifying witness, unless the witness is unavailable to testify, and the defendant had a prior opportunity for cross-examination.'" (internal quotation marks omitted) (quoting Ohio v. Clark, 576 U.S. 237, 243 (2015))).

23 Davis v. Washington, 547 U.S. 813, 822 (2006) ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.").

24 *Burke*, 431 P.3d at 1118.

25 *Id.* at 1120.

26 *See* State v. Burke, 478 P.3d 1096, 1109–10 (Wash. 2021), *cert. denied*, Burke v. Washington, 142 S. Ct. 182 (Wash. 2021).

27 *Id.* at 1108–09 ("Though documenting and collecting evidence are some of the critical responsibilities of a sexual assault nurse examiner, so is providing medical care. Sexual assault nurse examiners provide medical

made for the primary purpose of receiving medical care are considered nontestimonial and thus can be admitted over a Confrontation Clause objection so long as they fall under a state or federal exception to the hearsay rule.[28] If the court found that any of K.E.H.'s statements were instead made for some other primary purpose, such as identifying her assailant or creating a record for trial, Burke could invoke the Confrontation Clause to prevent them from being admitted.[29] En banc, the court held that the majority of K.E.H.'s statements to Nurse Frey did not implicate the Confrontation Clause.[30] In making this determination, the court relied on the role of SANEs generally,[31] Nurse Frey's own description of her role,[32] the nature of Nurse Frey's employer,[33] the lack of law enforcement involvement,[34] and the circumstances surrounding K.E.H.'s statements.[35] The court did hold that one statement—K.E.H.'s description of her assailant—was testimonial, and thus inadmissible under the Confrontation Clause, because it served no medical purpose in K.E.H.'s treatment.[36]

State v. Burke represents an intuitive understanding of Confrontation Clause jurisprudence. When a victim is unavailable to testify at the subsequent criminal trial, their out-of-court statements are only admissible if they are made for a nontestimonial purpose, that is, a purpose other than preserving evidence for prosecution. In *Burke*, the court considered SANEs' forensic duties to be a supplement to their medical responsibilities,

---

care specific to sexual assault regardless of whether or not the patient wishes to report the crime to police.").

28 *Id.* at 1114.

29 *Id.* at 1106–08.

30 *Id.* at 1102, 1110–12.

31 *Id.* at 1108.

32 *Id.* at 1110 ("She explained that, according to her medical training, taking the patient's history is the 'most important thing' for treating patients—including 'sexual assault patients'—because it guides the medical provider in determining where to look for injuries and what medication is appropriate.").

33 *Id.* ("[A]lthough the exam itself was paid for by state and federal crime victims' compensation funds, Nurse Frey was employed and paid by a health care organization; she was not paid with governmental funds.").

34 *Id.* ("Nurse Frey followed protocols to collect and preserve physical samples, but she did not take any direction from law enforcement regarding the steps she should take in the exam, and no member of law enforcement was present during the exam.").

35 *Id.* at 1111. The relevant circumstances included that the statements were made in a medical examination room in a hospital, that K.E.H. required medical attention from Nurse Frey, that K.E.H. did in fact receive medical care from Nurse Frey, and the confidential nature of the examination's medical records. *Id.*

36 *Id.* at 1112–13.

rendering most patient statements made to them during a sexual assault examination nontestimonial for purposes of the Confrontation Clause.[37] In contrast, directly inculpatory statements that have no connection to medical treatment can easily be excluded as testimonial.[38] A survey of cases across jurisdictions makes clear, however, that this intuitive understanding is not an accurate reflection of Confrontation Clause jurisprudence in the context of SANE testimony. Myriad factors are weighed differently by courts, sometimes in directly contradictory ways. The lack of clarity provided by the Supreme Court's "primary purpose" test has resulted in a remarkably inconsistent legal landscape.

Sexual assault and domestic violence often bear no witnesses and yet are incredibly prevalent across the United States. In the United States, nearly half a million people are raped or sexually assaulted each year, and over one in three women and one in four men will experience rape, physical violence, or stalking by an intimate partner in their lifetime.[39] If a victim of sexual assault is unavailable to testify at trial, admitting their statements made to SANEs can significantly impact the outcome of the accused's criminal prosecution. Like K.E.H., some victims may be unavailable to testify because they are no longer alive. More broadly, however, the prevalence of factors such as trauma, intimidation, coercion, and the cyclical dynamics of abuse can all contribute to a victim's unavailability under the standards of the Confrontation Clause.[40] The pervasiveness of these issues warrants a clearer framework for assessing the testimonial nature of SANE testimony to enable a more consistent application of the Confrontation Clause across the country.

This Note examines the unique posture of SANEs' factual testimony in American Confrontation Clause jurisprudence and suggests analytical parameters to decrease the impact that jurisdictional differences have on case outcomes. Part I details the advent and evolution of SANE programs and describes the role of Sexual Assault Nurse Examiners today. Part II outlines the development of the Supreme Court's Confrontation Clause jurisprudence. Part III highlights the problematic application of the "primary purpose" test to SANE testimony and synthesizes the current treatment of SANE testimony across the myriad factors that make up courts' Confrontation Clause analysis. Finally, Part IV

---

37 *Id.* at 1110.

38 *Id.* at 1112–13.

39 *Victims of Sexual Violence: Statistics*, RAINN (Aug. 28, 2025), https://www.rainn.org/statistics/victims-sexual-violence [https://perma.cc/LR2F-8AQ6]; *Domestic Violence Statistics*, NAT'L DOMESTIC VIOLENCE HOTLINE, https://www.thehotline.org/stakeholders/domestic-violence-statistics/#:~:text=Over%201%20in%203%20women,intimate%20partner%20in%20their%20lifetime [https://perma.cc/MJU9-XPAL].

40 *See infra* Part III.

proposes a more consistent framework for evaluating the admissibility of SANE testimony and advocates for a declarant-centered approach.

I. The Role and Responsibilities of Sexual Assault Nurse Examiners

Sexual Assault Nurse Examiner (SANE) programs began to develop in the 1970s in response to the inadequacy of emergency services provided to victims[41] of sexual assault.[42] Because most sexual assault survivors are not suffering from acute medical emergencies when they enter a hospital, the traditional emergency room department model left many waiting hours for treatment.[43] By the time they did get care, many victims were retraumatized by hurried and invasive examinations by emergency room staff without extensive training on how to conduct forensic examinations with the patience and sensitivity appropriate for patients who have recently experienced sexual trauma.[44] Some physicians were reluctant to participate in rape forensic evidence collection at all.[45] If evidence was collected from a survivor, hospital staff were rarely available to participate in the prosecution of the sexual assault case.[46] These gaps in patient care spurred the development of SANE programs, whose founding goal was often to "increase the consistency with which victims receive[] information about and treatment for injuries, pregnancy concerns, [sexually-

---

41 Throughout this Note, the terms "victim" and "survivor" are used interchangeably to acknowledge and respect the range of experiences and preferences of people who have experienced sexual assault.

42 Rebecca Campbell, Debra Patterson & Lauren F. Lichty, *The Effectiveness of Sexual Assault Nurse Examiner (SANE) Programs: A Review of Psychological, Medical, Legal, and Community Outcomes*, 6 TRAUMA, VIOLENCE, & ABUSE 313, 315 (2005) [hereinafter *Effectiveness of SANE Programs*].

43 Cari Caruso, *The Forensic Sexual Assault Medical Legal Examination: The SANE Exam*, *in* HANDBOOK OF SEXUAL ASSAULT AND SEXUAL ASSAULT PREVENTION 609, 612 (William T. O'Donohue & Paul A. Schewe eds., 2019) ("Very few (fewer than 2–3%) sexual assault patients need emergency medical care."); *see also* Courtney E. Ahrens et al., *Sexual Assault Nurse Examiner (SANE) Programs: Alternative Systems for Service Delivery for Sexual Assault Victims*, 15 J. INTERPERSONAL VIOLENCE 921, 922–24 (2000). This is not meant to minimize the fact that many victims may have medical needs after experiencing sexual violence in addition to requiring information about attendant risks such as pregnancy and STI prevention.

44 Campbell et al., *Effectiveness of SANE Programs*, *supra* note 42, at 315.

45 *Id.* (noting that many emergency department physicians do not think that rape kits are medical procedures that "require their expertise" and "even ED physicians with forensic training usually do not perform forensic exams frequently enough to maintain their proficiency").

46 Linda A. Hutson, *Development of Sexual Assault Nurse Examiner Programs*, 37 NURSING CLINICS N. AM. 79, 70 (2002).

transmitted diseases (STDs)], crisis intervention and support, and follow-up care."[47] In 1992, seventy-two nurses created the International Association of Forensic Nurses and, by 1995, the American Nurses Association recognized forensic nursing as a distinct nursing subspecialty.[48]

Today, most SANE programs are affiliated with hospital emergency departments. As the first institutional contact for many survivors of sexual violence, the provision of quality medical care geared towards survivor-specific experiences and needs in emergency room environments is critical.[49] SANEs are trained to offer comprehensive, holistic services, remaining mindful of the principles of trauma-informed care.[50] To become a board-certified SANE nurse, a registered nurse with at least two years of experience must undergo additional training to develop the knowledge and skills to: (1) provide trauma-informed care, including the provision of forensic examinations; (2) assess patients for non-acute healthcare concerns such as pregnancy risk and STDs; and (3) be able to collaborate with law enforcement, lawyers, and other advocates.[51] Emergency departments with SANE programs are associated with greater quality of care for sexual assault victims including shorter waiting times, proper completion of and greater comfort with forensic examinations, lower incidence of survivors having to repeat their story, and greater availability of post-discharge resources.[52] However, despite their benefits, only 17–20% of American hospitals employ SANEs as of 2022.[53]

---

47 Rebecca Campbell et al., *Responding to Sexual Assault Victims' Medical and Emotional Needs: A National Study of the Services Provided by SANE Programs*, 29 RSCH. NURSING & HEALTH 384, 385 (2006) [hereinafter *National Study*].

48 Kathleen Maguire & Marisa Raso, *Reflections on Forensic Nursing: An Interview with Virginia A. Lynch*, 13 J. FORENSIC NURSING 210, 211 (2017).

49 Campbell et al., *Effectiveness of SANE Programs*, *supra* note 42, at 315 (estimating that 10–25% of SANE programs are located outside of hospitals, such as in rape crises centers or medical office buildings).

50 Alba Fernandez-Collantes, Cristian Martin-Vasquez & Maria Cristina Martinez-Fernandez, *Patient and Healthcare Provider Satisfaction with Sexual Assault Nurse Examiners (SANEs): A Systematic Review*, 12 HEALTHCARE 1, 2 (2024).

51 INT'L ASS'N OF FORENSIC NURSES, SEXUAL ASSAULT NURSE EXAMINERS (SANE) EDUCATION GUIDELINES 1, 2 (2018), https://kbn.ky.gov/KBN%20Documents/mir-201-KAR-20-411-sane-education-guidelines.pdf [https://perma.cc/8UVX-7ZMW].

52 Kristen Chalmers et al., *Emergency Department Preparedness to Care for Sexual Assault Survivors: A Nationwide Study*, 24 W. J. EMERGENCY MED. 629, 633 (2023).

53 *Congress Moves to Address Critical Shortage of Sexual Assault Nurse Examiners; RAINN Partners on Bipartisan Legislation*, RAINN (Feb. 15, 2022), https://www.rainn.org/news/congress-moves-address-critical-

In September 2024, the Department of Justice (DOJ) published its third edition of A National Protocol for Sexual Assault Medical Forensic Examinations.[54] Although the structure of SANE programs differs depending on the jurisdiction, the DOJ protocol is designed to serve as a normative guide for practitioners who serve victims of sexual assault.[55] According to the DOJ protocol, before beginning their forensic examination, SANEs must first ensure that patients are treated for any acute medical needs.[56] Afterward, SANEs transition to collecting a patient's medical forensic history to guide their subsequent forensic examination and collection of evidence.[57] With the consent of the patient, SANEs then photograph any injuries, conduct a physical examination, and collect a variety of biological samples.[58] Finally, SANEs address issues related to medical discharge and follow-up care.[59] This includes STD testing, providing referrals for mental-health care or other community services that patients might benefit from, and helping patients plan for

---

shortage-sexual-assault-nurse-examiners-rainn-partners [https://perma.cc/X7EH-GCCL].

54 U.S. DEP'T OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS (3d ed. 2024) [hereinafter NATIONAL PROTOCOL], https://www.justice.gov/ovw/media/1367191/dl?inline [https://perma.cc/XM9F-PFXA].

55 *Id.* at 11–12. It is important to note that following the start of President Donald Trump's second term in office, the Department of Justice's Office for Victims of Crime took down its online guide to building trauma-informed SANE programs. *See* U.S. DEP'T OF JUST., OFF. FOR VICTIMS OF CRIME, PREPARING YOUR PROGRAM TO MEET THE UNIQUE NEEDS OF SURVIVORS, https://www.ovcttac.gov/saneguide/building-a-patient-centered-trauma-informed-sane-program/preparing-your-program-to-meet-the-unique-needs-of-survivors/ [https://perma.cc/LS2H-WDCD]. Although these guidelines served as recommendations rather than mandates, and thus it is unclear how large of an effect simply removing this information will have on SANE programs, President Trump has threatened massive cuts to Medicaid, which, if implemented, could have drastic consequences on the provision of hospital care, including SANE examinations. *See* FREDRIC BLAVIN ET AL., HEALTH CARE PROVIDERS WOULD EXPERIENCE SIGNIFICANT REVENUE LOSSES AND UNCOMPENSATED CARE INCREASES IN THE FACE OF REDUCED FEDERAL SUPPORT FOR MEDICAID EXPANSION 8 (Mar. 11, 2025), https://www.urban.org/research/publication/health-care-providers-would-experience-significant-revenue-losses-and-uncompensated-care-increases-in-the-face-of-reduced-federal-support-for-medicaid-expansion [https://perma.cc/XT2Q-K7RM].

56 NATIONAL PROTOCOL, *supra* note 54, at 86.

57 *Id.* at 93, 96–97. Relevant information includes the date, time, and location of the assault; pertinent medical history; recent consensual sexual activity; post-assault activities of patients; and offender information (limited to "that which will guide the exam and sample collection"). *Id.* at 96–97.

58 *Id.* at 100–17.

59 *Id.* at 118–37.

their "physical safety and emotional well-being," including ensuring that victims are not being released back to their abusers.[60]

In addition to conducting examinations, SANEs are regularly asked to testify at criminal trials prosecuting their patients' alleged assailants.[61] As explained *infra*, because sexual assault victims are often unavailable to testify at trial, the admissibility of SANE testimony has important implications for the prosecution of sexual crimes. And because SANE examinations serve a dual medico-legal purpose, a victim's statements made over the course of such an examination occupy a somewhat precarious evidentiary position in the criminal legal system under current Confrontation Clause jurisprudence.[62]

II. The Confrontation Clause and the Advent of the "Primary Purpose" Test

If a victim of sexual assault is unavailable to testify against their alleged assaulter at trial, admitting out-of-court statements they made to SANEs can have profound impacts on the case. Courts are divided on the questions of whether and when to admit such statements in the face of the Confrontation Clause.[63] This Note details the Supreme Court's evolving Confrontation Clause jurisprudence before analyzing how courts across the country discern when SANE testimony should be admitted against a criminal defendant.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[64] Termed the Confrontation Clause, this provision has long been recognized as a vital procedural safeguard for criminal defendants that applies at the state and federal level.[65] In 1895, the Supreme Court described the significance of the right to confront witnesses as:

> [A]n opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with

---

60 *Id.*

61 Linda A. Hutson, *Development of Sexual Assault Nurse Examiner Programs*, 37 NURSING CLINICS N. AM. 79, 86–87 (2002).

62 Julia Chapman, *Nursing the Truth: Developing a Framework for Admission of SANE Testimony Under the Medical Treatment Hearsay Exception and the Confrontation Clause*, 50 AM. CRIM. L. REV. 277, 281 (2013).

63 *Id.*

64 U.S. CONST. amend. VI.

65 Crawford v. Washington, 541 U.S. 36, 42 (2004).

> the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[66]

Reconciling the need for the testimony of a deceased witness with the importance of cross-examination's truth-finding function, the Court in *Mattox v. United States* held that the Confrontation Clause permits the introduction of an unavailable declarant's out-of-court statements against a criminal defendant *only if* the defendant had a prior opportunity to cross-examine the witness.[67] *Mattox* recognized that strict adherence to the rights afforded by the Confrontation Clause would not always be in the best interest of public policy,[68] and over time, the Court has weighed the right to confrontation with competing interests that arise when a witness is shown to be unavailable to testify at trial. Since *Mattox*, the standards by which courts evaluate whether the circumstances warrant admitting statements by unavailable out-of-court declarants have evolved.

From 1980 until 2004, the Supreme Court applied the confrontation standard established in *Ohio v. Roberts*, "conflat[ing] the analysis of the right to confrontation with the reliability analysis for hearsay" to determine when an out-of-court statement would be permitted to come in for its truth.[69] Hearsay—which consists of statements made out of court and introduced for their truth[70]—is generally inadmissible in court, though many exceptions exist at the state and federal levels.[71] These exceptions permit the introduction of hearsay statements in court proceedings even when the declarant is not available to testify and generally reflect common law understandings of reliability and trustworthiness.[72] The

---

66 Mattox v. United States, 156 U.S. 237, 242–43 (1895).

67 *Id.* at 244.

68 *Id.* at 243 ("To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.").

69 Chapman, *supra* note 62, at 284. *See generally* Ohio v. Roberts, 448 U.S. 56 (1980).

70 FED. R. EVID. 801 (defining hearsay as a statement that a declarant makes outside of the current trial or hearing and that is offered to prove the truth of the matter asserted within the statement).

71 *See* FED. R. EVID. 803–804 (laying out exceptions to the rule against hearsay including statements made for medical diagnosis or treatment).

72 *Id.*; Anoosha Rouhanian, *A Call for Change: The Detrimental Impacts of Crawford v. Washington on Domestic Violence and Rape Prosecutions*, 37 B.C. J.L. & SOC. JUST. 1, 3–4 (2017).

Confrontation Clause, in contrast, is a constitutional protection that requires declarants be available for cross-examination in order for their hearsay statements to be admissible, even if such statements fall under a hearsay exception.[73]

Under *Roberts*, an unavailable declarant's out-of-court statement was nonetheless admissible under the Confrontation Clause if "it [bore] adequate indicia of reliability," either because it fell "within a firmly rooted hearsay exception" or otherwise bore "particular guarantees of trustworthiness."[74] By largely converging the practical application of the Confrontation Clause with the hearsay exceptions, *Roberts* departed from the historical understanding of the clause's purpose and created a test that resulted in constitutional scrutiny both too broad[75] and too narrow.[76] For instance, by allowing courts to infer the reliability of an out-of-court statement so long as the evidence fell within a firmly rooted hearsay exception, the *Roberts* framework failed to include any analysis of whether a statement could be considered testimonial, thus subjecting a much wider range of statements to Confrontation Clause scrutiny.[77] On the other hand, the Court later described the *Roberts* framework as "so unpredictable that it fail[ed] to provide meaningful protection from even core confrontation violations."[78] By giving judges extensive leeway in determining whether a statement was sufficiently reliable—including which factors to consider and how heavily

---

73 *Crawford*, 541 U.S. at 54–56.

74 *Roberts*, 448 U.S. at 67.

75 *Crawford*, 541 U.S. at 60 ("[The *Roberts* test] applies the same mode of analysis whether or not the hearsay consists of *ex parte* testimony . . . often result[ing] in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause.").

76 *Id.* ("[The *Roberts* test] admits statements that *do* consist of *ex parte* testimony upon a mere finding of reliability . . . often fail[ing] to protect against paradigmatic confrontation violations.").

77 *Id.*

78 *Id.* at 63.

to weigh them—the *Roberts* test diminished assurances of reliability.[79] Discretion and lack of guidance ultimately resulted in conflicting decisions across jurisdictions.[80]

A. Crawford's Sea Change

In an effort to bring more clarity and consistency to Confrontation Clause jurisprudence, the Court overruled *Roberts* in 2004.[81] In *Crawford v. Washington*, the Court criticized the standard of reliability to be applied by judges under *Roberts* as "an amorphous, if not entirely subjective, concept" that is "*inherently*, and therefore *permanently*, unpredictable."[82] In its place, the Court imposed a new analysis centered on whether a statement was "testimonial," that is, "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[83]

Taking a more literal understanding of the Sixth Amendment, *Crawford* held that out-of-court statements of an unavailable declarant would only raise Confrontation Clause issues if a court determined them to be testimonial.[84] Based on the historical context surrounding the ratification of the Sixth Amendment, the Court defined "testimony" as "[a] solemn

---

79 Rouhanian, *supra* note 72, at 5–6; *see also* Michael D. Cicchini, *Judicial (In)Discretion: How Courts Circumvent the Confrontation Clause Under Crawford and Davis*, 75 TENN. L. REV. 753, 762–63 (detailing that "[i]n one [Colorado] case, the court found a statement reliable and therefore admissible in large part because it was made immediately after the alleged crime[, but i]n another case, the same court found a statement reliable and therefore admissible in large part because it was made two years after the alleged crime," and describing how this "contradiction offends not only the Constitution, but also the fundamental concepts of consistency and logic").

80 *Crawford*, 541 U.S. at 63 ("[t]here are countless factors bearing on whether a statement is reliable"); Cicchini, *supra* note 79, at 757–61 (describing how the amorphous reliability standard resulted in both inter– and intra–state inconsistencies). *Compare* People v. Farrell, 34 P.3d 401, 406–07 (Colo. 2001) (finding a statement more reliable because it was "detailed" and given "immediately after" the relevant events), *with* U.S. v. Photogrammetric Data Servs., Inc., 259 F.3d 229, 245 (4th Cir. 2001) (finding a statement more reliable because it was "fleeting"), *and* Stevens v. People, 29 P.3d 305, 316 (Colo. 2001) (finding a statement more reliable because two years had passed since the relevant events).

81 *See Crawford*, 541 U.S. at 63.

82 *Id.* at 68 n.10 (emphasis in original).

83 *Id.* at 52 (quoting Brief for National Ass'n of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner at 3, Crawford v. Washington, 541 U.S. 36 (2004) (No. 02-9410)).

84 *Id.* at 51 ("The text of the Confrontation Clause . . . applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" (citing 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828))).

declaration or affirmation made for the purpose of establishing or proving some fact"[85] and discerned that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[86] In other words, only a declarant who made statements of a testimonial nature would be considered a "witness" within the meaning of the Confrontation Clause.[87] Although the Court declined to offer a "comprehensive definition" of testimonial, it laid out that, at a minimum, the term covers affidavits; custodial examinations; prior testimony given at a preliminary hearing, before a grand jury, or at another trial; and statements given to police officers during interrogations.[88] A statement deemed to be testimonial would only then be admissible if (a) the declarant was unavailable, and (b) the defendant had a prior opportunity to cross-examine the declarant.[89] The Court carved out an exception, however, for statements determined to be testimonial that would have been admissible at the time of the founding.[90]

Over the past two decades, the Supreme Court has further honed the meaning of "testimonial" in the confrontation context. Two years after *Crawford*, the Court consolidated two cases—*Davis v. Washington* and *Hammon v. Indiana*[91]—and created what some scholars refer to as "an emergency exception to the confrontation right."[92] The cases were factually similar—both involved a victim of domestic violence reporting incidents of abuse to agents of law enforcement.[93] In *Davis*, the victim called 911 and frantically relayed to the operator that her former boyfriend had just assaulted her and was now fleeing

---

85 *Id.* (citing 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

86 *Id.*

87 *Id.*

88 *Id.* at 51–52, 68.

89 *Id.* at 53–54.

90 *Id.* at 54. Elaborating on this exception in *Giles v. California*, the Court noted that forfeiture by wrongdoing, whereby the defendant caused the witness' absence to prevent the witness from testifying, was a founding-era exception to the confrontation right that would thus make testimonial statements nonetheless admissible. 554 U.S. 353, 359 (2008).

91 Davis v. Washington, 547 U.S. 813 (2006).

92 Paul F. Rothstein, *Ambiguous-Purpose Statements of Children and Other Victims of Abuse under the Confrontation Clause*, 44 SW. L. REV. 508, 515 (2015).

93 *Davis*, 547 U.S. at 817–21.

the scene.[94] In *Hammon*, police responded to a reported domestic dispute at the home the defendant shared with his wife.[95] Mrs. Hammon spoke to the police, initially telling them that nothing was wrong.[96] Police entered the home and separated the spouses at which point Mrs. Hammon told the officers that her husband had just physically assaulted her and her daughter.[97] Despite their similarities, the Court held that only the statement in *Hammon* was testimonial, whereas the statement in *Davis* was not.[98]

The Court assessed the primary purpose of each interrogation to distinguish between the testimonial nature of the statements made by the two victims.[99] The Court held that statements are nontestimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," while statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[100]

In making the first determination, the Court relied on the situational factors of *Davis*, including that the declarant was relaying real-time information about an ongoing emergency to an agent of the police, the statements were made in order to resolve the emergency, and the circumstances surrounding the interrogation were frantic and potentially unsafe.[101] The Court found that "the circumstances of [the declarant's] interrogation objectively indicate that its primary purpose was to enable police assistance to meet an ongoing emergency . . . [and that the declarant] was not acting as a witness or testifying."[102] Even so, the Court acknowledged that there came a point when the ongoing emergency appeared to have ended and the operator began asking more pointed questions about the battery such that the

---

94 *Id.* at 817–18.

95 *Id.* at 819–20.

96 *Id.*

97 *Id.*

98 *Id.* at 814.

99 *Id.* at 822.

100 *Id.*

101 *Id.* at 814, 827.

102 *Id.* at 814.

declarant's responses became testimonial.[103] Rather than negate the nontestimonial nature of the earlier statements, however, the Court held that trial courts must simply recognize the point at which statements in response to questioning become testimonial and accordingly redact the testimonial portions through *in limine* procedures.[104]

In contrast, the interrogation that led to the determination in *Hammon* took place after police responded to a report of domestic violence, at which time no ongoing encounter was taking place and the victim was able to detail the abuse she had just endured in a sworn, handwritten affidavit while her husband was kept in a separate room by police.[105] Based on these circumstances, the Court concluded that the primary purpose of the declarant's statements was "to establish or prove past events potentially relevant to later criminal prosecution," and the statements were thus testimonial.[106]

Although *Davis* cabined the ongoing emergency rule and the "primary purpose" test to relatively specific scenarios involving police interrogations, lower court decisions in the years following exemplified that *Davis* left judges with as much, if not more, discretion than *Roberts* had to decide which evidence would implicate the Confrontation Clause.[107] Five years later in *Michigan v. Bryant*, the Court analyzed the limits of *Davis*' application.[108] In *Bryant*, police were called to a gas station to assist a man who had been shot.[109] Lying on the ground and struggling to speak, the victim responded to police questioning regarding "what had happened, who had shot him, and where the shooting had occurred" and described being shot by Richard Bryant outside Bryant's house before driving himself to the lot.[110] The Court held that the victim's statements were made for the primary purpose of assisting police in meeting an ongoing emergency—providing "important context for the

---

103 *Id.* at 828–29.

104 *Id.* at 829.

105 *Id.* at 819–20.

106 *Id.* at 822, 829–30.

107 Cicchini, *supra* note 79, at 786.

108 Michigan v. Bryant, 562 U.S. 344, 354 (2011).

109 *Id.* at 348.

110 *Id.* at 349 (quoting People v. Bryant, 768 N.W.2d 65, 71 (Mich. 2009), *vacated*, 562 U.S. 344 (2011)).

first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public"—and thus were not testimonial.[111]

In an opinion by Justice Sotomayor, *Bryant* clarified how to make the "primary purpose" determination, explaining that a court must "objectively evaluate the circumstances in which the encounter [between the individual and the police] occurs" as well as "the statements and actions of the parties."[112] Both of these inquiries are objective, the former including the location of the encounter and whether a statement is made during an ongoing emergency, and the latter being assessed by considering "the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred."[113] The Court highlighted that the formality of the encounter is an important consideration in the "primary purpose" analysis.[114] The question of whether there is an ongoing emergency remained crucial to the analysis, but only as one facet of the Court's totality-of-the-circumstances test.[115] Finally, the Court revived the reliability considerations of *Roberts*, adding that in "making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant."[116]

The Supreme Court applied *Bryant*'s expanded "primary purpose" test in *Ohio v. Clark*.[117] Up until 2015, all the major Confrontation Clause cases decided by the Court involved statements made to law enforcement.[118] *Clark* was novel in this respect. In the case, the Court analyzed the potential testimonial nature of statements made by a three-year-old to his preschool teacher.[119] The Court determined that statements made to people other than law enforcement, while much less likely to be testimonial, are not

---

111 *Id.* at 365.

112 *Id.* at 359.

113 *Id*. at 360.

114 *Id.*

115 *Id.* at 366.

116 *Id.* at 358–59.

117 Ohio v. Clark, 576 U.S. 237, 246 (2015).

118 Andrew Lentz, *The "Primary Purpose" of Children's Advocacy Centers: How* Ohio v. Clark *Revolutionized Children's Hearsay*, 23 ROGER WILLIAMS U. L. REV. 265, 272 (2018).

119 *Clark*, 576 U.S. at 237.

categorically exempted from Confrontation Clause challenges.[120] In applying the totality-of-the-circumstances test from *Bryant* to determine the primary purpose of the child's statement, the Court explicitly rejected contentions that the teacher's mandatory reporting obligations or their "natural tendency to result in Clark's prosecution" made the child's statements inherently testimonial.[121] Ultimately, the court held that the child's statements were nontestimonial, emphasizing that the teacher's objective purpose was to ensure the child's safety, that the child's young age precluded any intent for his statements to be used by police or prosecutors, as well as the informal setting of a preschool lunchroom.[122]

III. The Significance of the "Primary Purpose" Test in the Context of Sexual Assault and SANE Testimony

As exemplified by *Clark*, a court's determination of the primary purpose of a declarant's statement is central to the statement's admissibility. When a declarant is unavailable to testify at a criminal trial, the out-of-court statement is only admissible if it is nontestimonial or the defendant had a prior opportunity to cross-examine the declarant.[123] This framework, at least in theory, bolsters reliability and accuracy in the court system, serving as "a mechanism to allow a jury to get as close to the truth as possible by testing the veracity of an incriminating remark."[124] The importance of the Confrontation Clause in restraining prosecutorial overreach and helping ensure fair trials for criminal defendants cannot be overstated. However, in cases of domestic violence or sexual assault—crimes that are "notoriously susceptible to intimidation or coercion of the victim to ensure that

120 *Id.* at 245.

121 *Id.* at 250.

122 *Id.* at 247–48.

123 When a declarant appears for cross-examination at trial, the Confrontation Clause does not bar the introduction of any of her prior statements. Crawford v. Washington, 541 U.S. 36, 68 (2004). Additionally, the Confrontation Clause guarantees only an opportunity for cross-examination and does not guarantee that cross-examination actually be effective to the defendant's satisfaction. U.S. v. Owens, 484 U.S. 554, 559 (1988) ("[T]he Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (quoting Kentucky v. Stincer, 482 U.S. 730, 739 (1987))); Paul F. Rothstein & Ronald J. Coleman, *Confronting Memory Loss*, 55 GA. L. REV. 95, 120–21 (2020) (assuming that, even though *U.S. v. Owens* pre-dated *Crawford*, the Court would still consider *Owens* binding post-*Crawford* because Justice Scalia authored both opinions and "likely would have anticipated that they could be interpreted consistently").

124 Dave Gordon, *Is There an Accuser in the House: Evaluating Statements Made to Physicians and Other Medical Personnel in the Wake of* Crawford v. Washington *and* Davis v. Washington, 38 N.M. L. REV. 529, 556 (2008).

she does not testify at trial"[125]—the courts need to apply a consistent "primary purpose" framework.

Victims of domestic violence are regularly unwilling to cooperate with prosecutors and thus "unavailable" to testify at trial for two main reasons:

> (1) the abuser exercises control over the victim by using intimidation, coercion (including economic coercion), psychological pain, or physical violence to scare or guilt the victim from appearing at a trial proceeding, or (2) the volatile and cyclical nature of a domestic violence relationship makes it possible that the victim has succumbed to the honeymoon phase of the cycle of violence, which involves feelings of love, self-blame, and forgiveness, and thus regrets ever having made any implicating statements.[126]

Neither of these explanations for a witness' unavailability should justify a decision not to prosecute an alleged incident of domestic violence or sexual assault. But without the live testimony of a victim at trial, prosecutors are often left with the victim's hearsay statements as their primary evidence, which may or may not be barred under the rules of hearsay or the Confrontation Clause.[127] This uncertainty, in turn, leads many prosecutors to drop charges in these cases and may even result in fewer referrals to prosecutors by police investigating alleged assault when there is no corresponding direct evidence.[128]

---

125 Davis v. Washington, 547 U.S. 813, 832–33 (2006).

126 Rouhanian, *supra* note 72, at 22–23.

127 *Id.* at 23 (noting that "because domestic violence cases often turn on the admissibility of hearsay statements, these cases become 'particularly susceptible to the negative consequences' of *Crawford*" (quoting Robert P. Mosteller, Crawford*'s Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK. L. REV. 411, 426 (2005))).

128 *Id.* at 27–28. As noted in *supra* note 90, courts have recognized that the doctrine of forfeiture by wrongdoing, which applies when a defendant causes the unavailability of a witness with the intention of preventing them from testifying, makes admissible a testimonial statement that otherwise would have been precluded by *Crawford* and its progeny. *See* Giles v. California, 554 U.S. 353, 359 (2008). Although forfeiture by wrongdoing is only relevant when it is possible to prove a subsequent act of violence *and* the defendant's requisite intention in inflicting such violence on their victim, the *Giles* Court noted that evidence of past abuse or threats of abuse intended to dissuade the victim from seeking help would be relevant to the intent inquiry. *Id.* at 368, 377. Thus, the doctrine provides one, albeit narrow, avenue through which prosecutors can get statements made by unavailable victims of domestic violence into court.

A. The Current State of the "Primary Purpose" Test

As discussed *supra* in Part II, the "primary purpose" test first outlined in *Davis*, and further developed in *Bryant*, informs the analysis of whether statements are testimonial for purposes of the Confrontation Clause. *Davis* established that a statement is testimonial where there is no ongoing emergency and the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[129] *Bryant* clarified that, in making this determination, courts should consider the formality of the interrogation, the objective purposes of the interrogator and the declarant, and the circumstances in which the interrogation took place.[130]

In so holding, *Davis* and *Bryant* failed to adequately address two significant issues: (1) whether the intent of declarant or that of the interrogator is given more weight when a statement is made,[131] and (2) how courts should analyze statements in which witnesses or interrogators have more than one motivation behind their words. The latter shortcoming was a main concern of Justice Thomas' concurrence in *Davis*, which emphasized that law enforcement regularly operates with dual purposes—responding to an emergency *and* gathering evidence.[132] In *Bryant* and *Clark*, the Court filled in some of the gaps left by *Davis* by developing an objective, multifactor framework to determine a statement's primary purpose and applying the test outside of the law enforcement context. But neither majority satisfactorily addressed the mixed-motives problem—that is, how a court should evaluate the primary purpose of a statement if the interrogator, declarant, or both have more than one motive. The *Bryant* Court claimed that its totality-of-the-circumstances analysis would ameliorate problems that could arise when participants have mixed motives,[133] but cases following *Bryant* illuminate the persistence of inconsistencies in courts' determinations of which statements count as testimonial when multiple motives underlie a single statement.[134]

---

129 *Davis*, 547 U.S. at 822.

130 Michigan v. Bryant, 562 U.S. 344, 360, 366 (2011).

131 *See* Rouhanian, *supra* note 72, at 11–12.

132 *Davis*, 547 U.S. at 839 (Thomas, J., dissenting).

133 *Bryant*, 562 U.S. at 369–70 ("'[T]he identity of an interrogator, and the content and tenor of his questions' . . . can illuminate the 'primary purpose of the interrogation.' . . . Simpler is not always better, and courts making a 'primary purpose' assessment should not be unjustifiably restrained from consulting all relevant information, including the statements and actions of interrogators." (quoting *Bryant*, 562 U.S. at 382 (Scalia, J., dissenting))).

134 *See infra* Part III.C–F.

B. The Dual Purpose of SANE Examinations

These inconsistencies are especially apparent in cases involving domestic violence and the use of SANEs. SANEs are regularly called to testify in court as fact or expert witnesses,[135] but the Supreme Court has not addressed whether a patient's statement made to a SANE is testimonial for purposes of the Confrontation Clause.[136] Throughout forensic examinations, both SANEs and patients may act with more than one objective.[137] When SANEs conduct examinations on patients, they perform their duties with two purposes in mind: (1) providing medical care to the victim, and (2) collecting forensic evidence for a criminal investigation.[138] So too with victims—the desire to provide an accurate account of the incident that led to their hospitalization may stem from the very real need for medical treatment, including testing for pregnancy and STDs, but also from an assumption that their descriptions of their assaults may be used in a future prosecution.

Under the "primary purpose" test, which of these motivations is determined to be foremost has critical implications for a statement's admissibility. But with respect to any particular statement, the purpose of the SANE may differ from the purpose of the victim. Beyond consideration of the motivations of the SANE and the victim, many factors have played into lower courts' determinations of whether patients' statements to SANEs are testimonial or not. Although some courts parse out individual statements within one SANE examination that may carry different purposes,[139] other courts deem forensic examinations

---

135 *See* NATIONAL PROTOCOL, *supra* note 54, at 138 ("Clinicians should expect to testify in court as fact and/or expert witnesses and should therefore complete each medical forensic examination with the understanding that they may have to testify about it.").

136 Dorsey v. Cook, 677 F. App'x 265, 267 (6th Cir. 2017) (per curiam) ("The Supreme Court has not addressed whether a statement is testimonial when it is made for the dual purpose of obtaining medical care and providing evidence for later criminal prosecution.").

137 *See* State v. Romanis-Beltran, No. A-1-CA-41730, 2025 LX 307902, at *28 (N.M. Ct. App. Sep. 11, 2025) ("The dual role [of SANEs] means that we must analyze 'which role [was] more present in eliciting' each contested statement, while bearing in mind that this factor 'is likely to change multiple times' during the examination." (quoting State v. Tsosie, 516 P.3d 1116, 1135–36 (N.M. 2022))).

138 NATIONAL PROTOCOL, *supra* note 54, at 104.

139 *See* State v. McDowell, No. 2022AP164-CR, 2022 WL 4372780, at *2 (Wis. Ct. App. Sep. 22, 2022) (remanding to enable the parties to submit specific statements they think should or should not be classified as testimonial after rejecting the contention that either all or none of the statements to a SANE are admissible); State v. Alvarez-Valencia, No. 2013AP2657–CR, 2015 WL 13122796, at *1 (Wis. Ct. App. June 8, 2015) (noting that the circuit court excluded only some of the victim's statements to the SANE, while admitting others).

by SANEs as conducted for either a medical or prosecutorial purpose and treat that classification as dispositive for a Confrontation Clause analysis.[140]

It is not always obvious that statements describing an assault or identifying an assailant during a SANE examination are testimonial. SANEs need to understand what the victim went through in order to provide the most thorough and appropriate treatment.[141] Details of an assault, including the name of the alleged perpetrator, serve multiple purposes: informing how a SANE conducts a physical examination, including testing for pregnancy and STDs; determining whether a patient's hospital stay should be kept confidential; evaluating a victim's injuries; determining what referrals may be necessary; and formulating safety and discharge plans.[142] In cases involving children, statements pertaining to the circumstances

140 Rothstein, *Ambiguous-Purpose Statements*, *supra* note 92, at 546 (describing how most cases conduct the testimonial inquiry on a "general characterization of the functions of SANEs," rather than on more specific circumstantial details). *Compare* State v. Slater, 939 A.2d 1105, 1119 (Conn. 2008) (finding that even when a victim is brought to the hospital by police, her primary purpose for doing so is getting medical attention, rather than providing a factual record for use in a later prosecution), *and* State v. Hill, 336 P.3d 1283, 1288 (Ariz. Ct. App. 2014) (rejecting assertion that statements to forensic medical professionals are testimonial as a matter of law), *with* Hartsfield v. Commonwealth, 277 S.W.3d 239, 244 (Ky. 2009) (determining that under Kentucky law, the fact that a SANE nurse must act upon request of a peace officer or prosecuting attorney, indicates that SANE interviews are invariably the "functional equivalent" of police questioning), *and* Combs v. State, No. 19A-CR-2231, 2020 WL 944189, at *2 (Ind. Feb. 27, 2020) (concluding that the unique nature of cases involving child abuse, sexual assault, or domestic violence, statements identifying the alleged perpetrator are nontestimonial). *But see* State v. Burke, 478 P.3d 1096, 1108–09, 1112–13 (Wash. 2021) (en banc) (acknowledging that SANE duties include both the provision of medical care and the collection of evidence, and rejecting that SANEs are "principally charged with uncovering and prosecuting criminal behavior," but still parsing out one statement to the SANE as testimonial (quoting Ohio v. Clark, 576 U.S. 237, 249 (2015))).

141 *See, e.g.*, NATIONAL PROTOCOL, *supra* note 54, at 96 (describing a variety of types of medical care that could be influenced by knowing the date and time of the sexual assault, including HIV prophylaxis and emergency contraception); *Romanis-Beltran*, 2025 LX 307902, at *31–32 ("[D]isclosure of historical allegations allowed [SANE] Chavez to assess the need for medical care . . . [T]he age of a victim at the time that the abuse occurred is relevant to personality formation and worldview and also allow[s SANEs] to evaluate the potential for current injury and infection. Importantly [SANE] Chavez testified that delayed disclosure increases psychological risks, including 'worthlessness and guilt' and 'anxiety, depression, suicide, poor relationships, [and] hypersexuality.' By asking questions that encouraged Victim to disclose, [SANE] Chavez explained that she was assessing the risk that the abuse would continue as well as suicide and negative psychological effects 'down the line.'").

142 As one forensic nurse explained, a victim's "resources and safety plan would be a lot different, for instance, if [she is] attacked by a stranger, an unknown person in a parking garage, let's say, downtown, versus somebody who might be a family member or someone [she is] living with. If there is a common child, if [the victim and abuser] share a child, because there might be visitation, custody issues. So it's critically important that [the forensic nurse] can find out who that person is." Ward v. State, 50 N.E.3d 752, 762 (Ind. 2016); *see also* Pham v. Kirkpatrick, 711 F. App'x 67, 69 (2d Cir. 2018); State v. Slater, 939 A.2d 1105, 1118

of abuse are relevant to ensuring they are not discharged back into the custody of their abuser.[143] Even open-ended questions such as, "Why are you here?" that elicit incriminatory statements may be considered a standard practice of any medical examination and thus objectively classified as furthering the primary purpose of providing medical treatment, at least from the provider's point of view.[144]

Due in part to the dual purposes of SANEs and the continued discretion afforded to judges under *Bryant*'s totality-of-the-circumstances test, lower courts have interpreted a variety of factors in their analysis of the primary purpose of a SANE examination. Courts weigh the same or similar circumstances differently, and in some instances, use the same factor to reach opposite conclusions. The following sections highlight the inconsistent approaches courts have taken with respect to applying the Confrontation Clause in the context of SANE examinations, including the treatment of certain factual indicia such as the SANE's purpose in asking a question, the victim's purpose in providing a statement, the involvement of law enforcement, the incriminating nature of the victim's statement, and the circumstances of the examination itself.

C. Per Se Classifications of SANEs

Davis made clear that courts must "recognize . . . point[s] at which, for Sixth Amendment purposes, statements in response to interrogations" take on a testimonial character.[145] In the context of a SANE examination, this delineation can be especially

---

(Conn. 2008); Murphy v. Warden of Attica Corr. Facility, No. 20 Civ. 3076, 2022 WL 1145050, at *14 (S.D.N.Y. Apr. 19, 2022); Plater v. Hope, No. CIV-21-1092-HE, 2023 WL 3491048, at *8 (W.D. Okla. Apr. 6, 2023).

143 *See* Ohio v. Clark, 576 U.S. 237, 246–47 (2015); U.S. v. Barker, 820 F.3d 167, 171 (5th Cir. 2016) ("The primary purpose of the conversation between [the SANE] and [the adolescent patient, A.M.,] was to medically evaluate and treat the young girl. Moreover, the child's statements pertaining to the circumstances of the abuse were relevant to ensuring that A.M. would not be discharged into the custody of a sexual abuser."); People v. Hansson, 79 N.Y.S.3d 341, 346 (N.Y. App. Div. 2018) ("[T]he victim's statement at Westchester Medical Center was relevant to treatment inasmuch as the hospital was aware that this was an incident involving child abuse and, therefore, it was necessary for hospital staff to create a discharge plan for the victim that would, among other things, ensure his safety and provide for any psychological and counseling services that he might require.").

144 As one forensic nurse testified, "[I]f you go to a physician and you have a sore throat, you actually have to tell the physician or physician assistant or the nurse why you're there. You don't just go in a room and sit and they have to wonder why you're there. . . . It is the same thing with my patients, they come in and tell me why they are there, so that I can treat them." *Hill*, 336 P.3d at 1289.

145 *Davis*, 547 U.S. at 828–29.

complicated. The process of conducting a forensic examination and the dual role of SANEs mean that "*which* of the dual roles is *more* present is likely to change multiple times over the course of a SANE examination, as a typical SANE examination is not partitioned into one medical care component and one forensic component."[146] Some courts nonetheless assign a presumption that a victim's statements made in the course of a SANE examination are either testimonial or not. In *Combs v. State*, for example, the court concluded that because the identity of the abuser impacts treatment in cases involving child abuse, sexual abuse, and domestic violence, statements, including those that identify the attacker, serve a primarily medical, rather than testimonial, purpose.[147] In *Hartsfield v. Commonwealth*, on the other hand, the court concluded that the close relationship between SANE nurses and law enforcement, particularly the fact that a SANE nurse must act upon the request of a peace officer or prosecuting attorney, rendered SANE interviews the "functional equivalent of police questioning."[148] Thus, the *Hartsfield* court applied the factors enumerated in *Davis*, including that the interview involved past events, was not in the midst of an ongoing emergency, and took the nature of a formal interview, to conclude that the victim's statements during the SANE interview were testimonial.[149]

Other courts have taken a middle-ground, more indeterminate approach. In *State v. Tsosie*, the Supreme Court of New Mexico refused to "indulge either testimonial or nontestimonial presumptions based on the identity of a SANE nurse regarding the primary purpose of statements made in the course of a SANE exam."[150] Similarly, the Arizona Court of Appeals refused to recognize that victims' statements to SANEs are testimonial

---

146 State v. Tsosie, 516 P.3d 1116, 1135 (N.M. 2022) (emphasis in original).

147 Combs v. State, No. 19A-CR-2231, 2020 WL 944189, at *2 (Ind. Ct. App. Feb. 27, 2020); *see also Barker*, 820 F.3d at 172 (comparing the SANE examination of an adolescent to the context of *Clark* and concluding that even though a hospital emergency room is a more formal setting than a preschool lunchroom, it is "far different from the law enforcement interrogation that has been found to raise Confrontation Clause problems in other cases," and that "[t]o conclude otherwise would ignore the reality that the relationship between a nurse and patient is very different from that between a citizen and the police" (internal quotation marks omitted)).

148 277 S.W.3d 239, 244 (Ky. 2009); *see also* People v. Spangler, 774 N.W.2d 702, 709 (Mich. Ct. App. 2009) ("A majority of state courts that have considered this issue have determined that statements by a sexual abuse victim to a SANE, or similar examiner, were testimonial in nature and barred by the Confrontation Clause.").

149 *Id.* at 245.

150 *Tsosie*, 516 P.3d at 1135–36.

as a matter of law.[151] Courts that do not recognize a blanket presumption of the testimonial nature of SANE examinations analyze the specific features of the individual SANE examination at issue in order to determine its primary purpose.[152] However, even after doing so, some courts discern one primary purpose for the entire examination, while others parse out which statements should be classified as testimonial.[153] Determining which statements should then be redacted also varies, as explored in further detail in the sections that follow.

D. Whose Primary Purpose Matters?

In the confrontation context, the purposes of both the SANE and the victim matter.[154] But how should courts evaluate the primary purpose of a forensic examination when the objective purposes of the SANE and the victims differ? Complicating this analysis further is the dual medico-legal role of SANEs and the likelihood that the testimonial nature of a victim's statements may change over the course of an examination.[155]

---

151 *Hill*, 336 P.3d at 1288 ("Because forensic medical examinations often have two purposes—to gather evidence for a criminal investigation and to provide medical care to the victim—whether a victim's statement in response to a question by the examiner is testimonial for purposes of the Confrontation Clause turns on whether the surrounding circumstances, objectively viewed, show that the primary purpose of the exchange at issue was to provide medical care or to gather evidence.").

152 *See, e.g.*, State v. Romanis-Beltran, No. A-1-CA-41730, 2025 LX 307902, at *17–18 (N.M. Ct. App. Sep. 11, 2025) ("Following *Tsosie's* example, therefore, we begin the highly context-dependent inquiry with objective analysis of the circumstances in which Victim and [SANE] Chavez interacted, and then conduct an objective and combined inquiry into their statements and actions." (internal quotation marks omitted)).

153 *See, e.g.*, Commonwealth v. Bailey, No. 14–P–641, 2016 WL 192053, at *2 (Mass. App. Ct. Jan. 15, 2016) (holding that a victim's statements made in the course of a SANE examination were admissible if they were made for treating purpose, but would have to be redacted if they were "ultimate conclusions" concerning the alleged crime); U.S. v. Norwood, 982 F.3d 1032, 1033, 1051 (7th Cir. 2020) (redacting the statements indicating location and identity after finding them unnecessary for medical purposes, leaving only the descriptions of what happened and when, which were held to have been made for the primary purpose of medical treatment).

154 Michigan v. Bryant, 562 U.S. 344, 371 (2011) ("Objectively ascertaining the primary purpose of the interrogation by examining the statements and actions of all participants is . . . the approach most consistent with our past holdings.").

155 *See, e.g.*, State v. Romanis-Beltran, 2025 LX 307902, at *35 ("The historical and immediate statements reported events that occurred both the previous night and repeatedly for more than a decade, which supports [that a reasonable person in the victim's position would have] a nontestimonial primary purpose for the immediate statements and a testimonial primary purpose for the historical statements."). *See generally* NATIONAL PROTOCOL, *supra* note 54; *SART Toolkit Section 2.1: Learn about SARTs*, NAT'L SEXUAL VIOLENCE RES. CTR, https://www.nsvrc.org/sarts/toolkit/2-1 [https://perma.cc/G9L9-YGR4].

Many courts give controlling weight to the SANEs' understanding of their role. For example, in *Garrett v. State*, the Indiana Court of Appeals recounted the forensic nurse's trial testimony about the purpose of the patient interview during an examination and the importance of discerning the identity of a victim's alleged abuser.[156] From this testimony, the court concluded that the SANE needed to know how the victim sustained her injuries in order to treat her and create a safe discharge plan, and therefore held that the victim's statements to the nurse were nontestimonial.[157] The court did not ask any questions or make any observations about the victim's primary purpose in making inculpatory statements to the nurse.[158] Similarly, the Nevada Supreme Court in *Vega v. State* concluded, without explicitly considering other factors, that because "a medical professional conducting such an examination would reasonably believe that his or her report and findings regarding the examination would be available for use at a later trial," the report documenting the findings of the examination is testimonial.[159]

Additionally, in *Green v. State*, the Maryland Court of Special Appeals framed the question as "whether the *preparer* of the report, objectively speaking, would have believed that at the time the report was prepared that the statements made in the report would be available for use at a later trial."[160] The court's analysis centered on the fact that police officers ordered the forensic examination "for the purpose of examining and collecting evidence for" the case as well as the duties of a SANE nurse as laid out in the Code of Maryland Regulation.[161] Though it focused its analysis on the SANE's understanding of the

---

156 Garrett v. State, No. 21A-CR-70, 2021 WL 4057706, at *3–4 (Ind. Ct. App. Sep. 7, 2021).

157 *Id.*

158 *See id.*

159 Vega v. State, 236 P.3d 632, 638 (Nev. 2010).

160 Green v. State, 22 A.3d 941, 954 (Md. Ct. Spec. App. 2011) (emphasis added).

161 *Id.* at 950. The Code of Maryland Regulations specify the duties of SANEs as follows:

> (1) Perform forensic evidentiary examinations on the victims and alleged perpetrators in connection with physical, sexual, or domestic assaults, whether chronic or acute; (2) Before the forensic evidentiary examination, obtain consent from the individual being examined, from the parent or guardian of a minor individual, or from the proper authority for photographing and evidence collection; (3) Prepare and document the assault history interview; (4) Perform the forensic evidentiary physical assessment; (5) Complete the physical evidence kit provided by law enforcement; (6) Gather, preserve, handle, document, and label forensic evidence, including but not limited to: (a) Labeling evidence collection containers with the patient's identification factors including police complaint

examination's purpose, the court ultimately concluded that the SANE nurse wrote the report "under circumstances that would lead an objective witness to believe that the statement in the report would be available for use at trial," muddying whether its holding was premised on the objective perspective of the SANE, the patient, or some other extraneous reasonable person.[162]

In some cases, however, courts consider only how the circumstances of the examination would influence a reasonable *victim*'s understanding of the examination's primary purpose. In *Padilla v. State*, for example, the Maryland Court of Special Appeals considered relevant the nine-year-old victim's young age, the fact that the examination was conducted in a typical medical examination room, the lack of a police presence during the examination, and that the nurse was wearing clothing typical of a medical provider.[163] The court concluded that a reasonable person in the victim's position would believe that the primary purpose of the examination was to receive medical treatment, rather than to collect evidence.[164]

In another case involving a four-year-old victim, the Kansas Supreme Court evaluated the victim's primary purpose from the statements and actions of her mother.[165] Considering that the parent of a young child who reported abuse would objectively seek a physical examination to determine whether the child needed any medical treatment, as well as the fact that the police had already conducted interviews before the SANE examination, the

---

> number; (b) Placing evidence in the evidence collection container and sealing the container; (C) Signing the evidence collection container as the collector of the evidence; (d) Taking photographs; and (e) Obtaining swabs, smears, and hair and body samples; (7) Maintain the chain of custody; (8) Provide immediate health interventions using clinical practice guidelines; (9) Obtain consultations and make referrals to health care personnel and community agencies; (10) Provide immediate crisis intervention at the time of the examination; (11) Provide discharge instructions; (12) Participate in forensic proceedings including courtroom testimony; (13) Interface with law enforcement officials, crime labs, and State attorney's offices; and (14) Assist the licensed physician in performing a forensic evidentiary examination.

MD. CODE REGS. 10.27.21.04A (2003) (amended 2017).

162 *Green*, 22 A.3d at 956.

163 Padilla v. State, No. 02061, 2018 WL 4628624, at *7 (Md. Ct. Spec. App. Sep. 26, 2018).

164 *Id.* at *7–8 (distinguishing State v. Snowden, 867 A.2d 314, 84, 88 (Md. 2005), in which an interview held to be testimonial was initiated by police, conducted at a state facility dedicated to interviewing sexually abused children, done in the presence of police, and began with the investigator holding the police report).

165 State v. Miller, 264 P.3d 461, 489 (Kan. 2011).

court concluded that the purpose of the four-year-old victim and her mother in answering questions during the examination was to direct the SANE to the victim's injuries.[166]

On the other hand, when victims make explicit that they understand their answers will be used in a future prosecution, courts seem less likely to view their statements as nontestimonial.[167] Additionally, the timing of the statements and actual need for medical care also serve as indicators of a victim's primary purpose in pursuing the examination.[168]

In other cases, courts have explicitly considered what the primary purpose of a reasonable person in the victim's position would be in addition to considering the purpose of the examination from the SANE's perspective. For example, in *State v. Tsosie*, the Supreme Court of New Mexico credited a SANE's testimony about the medical purposes underlying eight examination forms challenged as testimonial by the defendant.[169] Acknowledging that a SANE's role may shift during the course of an examination, the court used the SANE's testimony about the relevance of the examination forms to determine what a reasonable SANE's purpose would be.[170] After concluding that the SANE's objective purpose in filling

---

166 *Id.*

167 *See* State v. Smith, No. 2021AP72-CR, 2022 WL 4349801, at *5 (Wis. Ct. App. Sep. 20, 2022) (finding the victim's statements to SANE were testimonial in part because the victim was evaluated by medical personnel three separate times in one day and told the SANE that she returned for a forensic examination "to have evidence collected and report to police" and that the victim wanted the police to be contacted prior to the examination to "speed up [the] process").

168 People v. Garland, 777 N.W.2d 732, 736 (Mich. Ct. App. 2009) (using the fact that the victim went to the hospital the morning of the assault to support the finding that her primary purpose was for medical treatment); State v. Tsosie, 516 P.3d 1116, 1140 (N.M. 2022) (holding that "the close proximity in time of the SANE examination to the alleged predicate assault weighs toward a nontestimonial primary purpose" and distinguishing cases in which several weeks passed between the assault and the examination because after that much time has elapsed, it is less likely there is any medical treatment needed); *In re* J.C., No. 14-0357, 2015 WL 2089363, at *4 n.2 (Iowa Ct. App. May 6, 2015), *aff'd*, 877 N.W.2d. 447 (Iowa 2016) ("The fact that the physical examination did not show any physical injuries or the need for further medical treatment should not be considered as diminishing the medical treatment reasons for the examination and the taking of a history as part of the examination."); Bowers v. Ames, No. 20-0625, 2022 WL 123507, at *10 (W. Va. Ct. App. Jan. 12, 2022) (using the fact that the victim required stitches to support the finding that the victim's statements were necessary for medical care); Holiday v. Stephens, No. H–11–1696, 2013 WL 3480384, at *13 (S.D. Tex. July 10, 2013) (including the victim's "still-fresh injuries" and the fact that the SANE provided medical care as factors weighing in favor of a nontestimonial classification); Pham v. Kirkpatrick, 711 F. App'x 67, 69 (2d Cir. 2018) (noting that the victim actually did receive care in its totality-of-the-circumstances analysis).

169 *Tsosie*, 516 P.3d at 1142–46.

170 *Id.* at 1142.

out the forms was to provide medical treatment, the court incorporated this determination of the SANE's role as part of its analysis of the victim's primary purpose.[171] The court found that "[l]ogically, in the absence of contrary evidence, [the SANE's] medical care role was more present in conveying those questions than was her forensic role."[172] The court also deduced the nontestimonial nature of certain statements based on whether or not they provided information that was important to the provision of medical care.[173]

Additionally, in *United States v. Norwood*, the Seventh Circuit reasoned that the "identity and tenor of [the SANE's] questions" would inform the objective observer's perception of the examination.[174] But the court also considered the SANE's description of her role and the information she needed to conduct a thorough examination to determine which statements were testimonial.[175] And in *Bowers v. Ames*, the West Virginia Supreme Court's totality-of-the-circumstances analysis included SANE testimony that the victim's statement was necessary for care as well as evidence that the victim did not express any belief that her statements to the SANE were for prosecutorial purposes.[176]

Other cases seem to have little relation to the traditional understanding of the "primary purpose" test. In *Ward v. State*, for example, the court discerned that the primary purpose of the entire forensic examination was the provision of medical treatment from the International Association of Forensic Nurses' definition: "'[f]orensic nurses are nurses first and foremost,' even though they are also specially trained in injury identification, evaluation, and documentation."[177]

---

171 *Id.* at 1145.

172 *Id.* at 1145.

173 *Id.*

174 United States v. Norwood, 982 F.3d 1032, 1050 (7th Cir. 2020).

175 *Id.* at 1051; *cf.* State v. Romanis-Beltran, No. A-1-CA-41730, 2025 LX 307902, at *39 (N.M. Ct. App. Sep. 11, 2025) (remarking that certain information—including how the sexual assault examination was described to the victim or for what specific services (beyond the physical examination) the victim gave her consent—was absent from the record and that the evidence did not indicate that the SANE's medical purpose in asking the questions was communicated to the victim).

176 Bowers v. Ames, No. 20-0625, 2022 WL 123507, at *10 (W. Va. Jan. 12, 2022).

177 Ward v. State, 50 N.E.3d 752, 762 (Ind. 2016).

E. Law Enforcement Involvement

An additional factor to be considered in applying the "primary purpose" test is the connection between SANE programs and law enforcement, which varies by jurisdiction. Some SANEs operate with mandatory reporting requirements, giving them no choice but to report assaults to law enforcement, even against a patient's wishes.[178] Some jurisdictions operate sexual assault response teams (SARTs) which bring together different stakeholders in response to sexual assault.[179] These stakeholders often include police and prosecutors, and while some SARTs are organized around relatively informal information sharing amongst stakeholders, others are highly formalized, requiring coordination among institutional players.[180] Other SANEs work in clinical settings specifically geared toward making the patient relaxed and comfortable while providing trauma-informed medical treatment.[181] These different situational factors can affect how courts assess SANE examinations, but even when programs share similar features, courts have reached opposing conclusions.

One key facet of courts' "primary purpose" analysis has centered on the role law enforcement officers play in the SANE examination. Common considerations include (1) the presence of police during the examination;[182] (2) mandatory reporting requirements;[183] (3) consent forms;[184] (4) who initiated the examination;[185] and (5) whether the SANE

178 NATIONAL PROTOCOL, *supra* note 54, at 14.

179 Megan R. Greeson & Rebecca Campbell, *Sexual Assault Response Teams (SARTs): An Empirical Review of Their Effectiveness and Challenges to Successful Implementation*, 14 TRAUMA, VIOLENCE, & ABUSE 83, 84 (2012).

180 *Id.*

181 *Tsosie*, 516 P.3d at 1141.

182 *See, e.g.*, Thompson v. State, 438 P.3d 373, 377–78 (Okla. Crim. App. 2019); State v. Fausto, No. 1 CA-CR 16-0356, 2017 WL 2242854, at *3 (Ariz. Ct. App. May 23, 2017) ("Although the victim was transported to the center by police, and the officer ostensibly referred to the center as 'our office,' no law enforcement officers were present for the examination.").

183 *See, e.g.*, State v. Smith, No. A18-0985, 2019 WL 3000705, at *3 (Minn. Ct. App. July 1, 2019) (citing Ohio v. Clark, 576 U.S. 237, 244 (2015) for the proposition that a nurse's mandatory reporting requirements do not turn an otherwise nontestimonial statement into a testimonial one).

184 *See, e.g.*, Pham v. Kirkpatrick, 711 F. App'x 67, 69 (2d Cir. 2018) (noting that a consent form permitting the hospital to provide evidence to law enforcement does not *itself* determine the correct objective characterization of the interview).

185 *See, e.g.*, Hernandez v. State, 946 So. 2d 1270, 1271, 1281–82 (Fla. Dist. Ct. App. 2007) (finding the nurse's questions to be the functional equivalent of police interrogation in part because deputies arranged for

examination takes place before or after the police interview. When SANE programs do not have any direct connections to law enforcement agencies and law enforcement does not play a significant role in a particular SANE examination, courts are likely to find statements made during examinations to be nontestimonial.[186] When the connections are less attenuated, however, courts are less consistent in their analyses.

In *State v. Tsosie*, the New Mexico Supreme Court found that the degree of law enforcement involvement in a SANE examination did not weigh in favor of finding a testimonial primary purpose.[187] In so concluding, the court noted that the only significant involvement of law enforcement was the transport of the victim to the SANE clinic by police.[188] Police did not instigate the examination and were not present during the exam.[189] The Family Advocacy Center, where the SANE examination took place, though located in the same building as law enforcement, occupied a distinct space "conducive to providing trauma-informed medical treatment."[190] Finally, the court found that although the victim's consent to the release of evidence to law enforcement was "noteworthy," a reasonable victim in the same position would not have understood the release form as rendering the primary purpose of the statements to be the creation of evidence for future prosecution.[191] In a more recent New Mexico case, the court found that law enforcement involvement did not support the conclusion that a reasonable person in the victim's position would understand their statements to have a primarily testimonial purpose even where detectives arranged the appointment for the SANE examination.[192] In so concluding, the court reiterated that, "absent some evidence that the police were attempting to manipulate the examination, [the

---

the sexual assault examination and escorted the child and her parents to the location of the examination and back home).

186 *See* State v. Hilson, No. 10–0665, 2013 Iowa App. LEXIS 195, at *3–4 (Iowa Ct. App. Feb. 13, 2013) (finding that statements to a SANE were not testimonial where the court found no indication of any relationship between the SANE and the police, the police did not participate, and the SANE was not investigating for the police); *see also* State v. Miller, 264 P.3d 461, 487 (Kan. 2011).

187 *Tsosie*, 516 P.3d at 1141–42.

188 *Id.* at 1141.

189 *Id.*

190 *Id.*

191 *Tsosie*, 516 P.3d at 1141–42; *see also Pham*, 711 F. App'x at 69 (finding that the victim's signing a consent form to release evidence to law enforcement did not, in itself, change the primary purpose of the examination).

192 State v. Romanis-Beltran, No. A-1-CA-41730, 2025 LX 307902, at *26–27 (N.M. Ct. App. Sep. 11, 2025).

court] would not place dispositive weight on their presence on the premises or even in the examination room."[193]

Similarly, in *Cody v. Commonwealth*, the Virginia Court of Appeals held that notable connections to law enforcement did not change the primary purpose of the examination.[194] The court acknowledged that other factors to be considered were that the victim went to the hospital upon law enforcement's request and that the "Medical/Legal report contain[ed] a disclaimer informing the patient that the report 'ha[d] been created for the express purpose of facilitating state laws pertaining to the reporting and examination of abuse and/or neglect.'"[195] The court found the victim's statements to be nontestimonial after considering the location of the examination (a hospital), the SANE's characterization of the examination (as part of an ongoing police investigation but conducted for the goal of providing medical treatment), and the SANE's testimony regarding the importance of understanding a patient's injuries and their cause.[196]

In *State v. Hill*, the court found that a state-issued report similar to the one in *Cody* as well as the collection of DNA intended for use by law enforcement did not fundamentally change the primary medical purpose of the question, "Tell me why you're here."[197] By contrast, the Kansas Supreme Court in *State v. Bennington* held that statements made in response to a SANE reading off questions from a Kansas Bureau of Investigation (KBI) sexual assault evidence kit were testimonial.[198] The kit included questions "asking about the nature of the assault, the specific time of the assault, the name of the perpetrator, and a description of the perpetrator" and were asked in compliance with the procedures established by the KBI and the Kansas Department of Health and Environment.[199] The court found the victim's answers to be testimonial even though the evidence kit collected information pertaining to the assault that other courts have held to be relevant for medical treatment, and therefore nontestimonial, including recent sexual history and details of

193 *Id.* (quoting State v. Mendez, 242 P.3d 328, 339 (N.M. 2010)).

194 Cody v. Commonwealth, 812 S.E.2d 466, 477 (Va. Ct. App. 2018).

195 *Id.*

196 *Id.*

197 State v. Hill, 336 P.3d 1283, 1289–90 (Ariz. Ct. App. 2014).

198 State v. Bennington, 264 P.3d 440, 453 (Kan. 2011).

199 *Id.* at 452.

the assault.[200] The court found that because the SANE was complying with the protocol established by law enforcement agents, the responses of the victim were testimonial.[201]

Courts are also less consistent in their treatment of examinations when SANEs closely collaborate with police. As noted *supra*, the Kentucky Supreme Court in *Hartsfield* found that the state protocol requiring SANE nurses to act upon the request of police and prosecutors, and their subsequent role in collecting evidence, made the entire SANE interview testimonial.[202] By contrast, the Minnesota Court of Appeals found similar statements to be nontestimonial, despite mandatory reporting requirements, due to the fact that the examination was initiated by law enforcement and the fact that police escorted the patient to the SANE.[203] Further, even when police are present during the SANE examination, courts have held that inculpatory statements to SANEs are not testimonial.[204]

F. The Identity of the Assailant

Finally, one of the Confrontation Clause issues that courts grapple with most frequently arises when victims make directly inculpatory statements identifying their assailant. *Davis* and *Bryant* make clear that "statements that identify or accuse a defendant of specific criminal acts may nonetheless be rendered nontestimonial by virtue of a primary purpose that 'focuses the participants on something other than proving past events potentially relevant to later criminal prosecution,'" such as medical treatment.[205] While some courts accept carte blanche that the victim's statements identifying the defendant are necessary to ensure safe discharge and thus relevant to medical treatment,[206] others reach the opposite

---

200 *Id.* at 455 ("[W]hen a SANE—even one who is a non-State actor—follows the procedures for gathering evidence pursuant to K.S.A. 2010 Supp. 65–448 and asks questions prepared by the KBI, the SANE acts as an agent of law enforcement."); *see also Miller*, 264 P.3d at 488 (concluding SANE was acting as an arm of law enforcement when collecting evidence and performing the KBI sexual assault evidence collection kit).

201 *Bennington*, 264 P.3d at 455; *see also* Hernandez v. State, 946 So.2d 1270, 1280 (Fla. Dist. Ct. App. 2007) ("Ms. Shulman's use of a standardized questionnaire to inquire of the child concerning the incident adds a structured aspect to her examination that causes it to more closely resemble a police interrogation.").

202 Hartsfield v. Commonwealth, 277 S.W.3d 239, 244 (Ky. 2009).

203 State v. Smith, No. A18-0985, 2019 WL 3000705, at *5 (Minn. Ct. App. July 1, 2019).

204 *See, e.g.*, Plater v. Harpe, No. CIV-21-1092-HE, 2023 WL 3491048, at *7 (W.D. Okla. Apr. 6, 2023).

205 *Tsosie*, 516 P.3d at 1145 (quoting Michigan v. Bryant, 562 U.S. 344, 361 (2011)).

206 *See* Ward v. State, 50 N.E.3d 752, 763 (Ind. 2016); Jackson v. State, No. 14-24-00241-CR, 2025 Tex. App. LEXIS 4955, at *14–15 (Tex. Ct. App. July 15, 2025) ("Numerous courts of appeals, including

conclusion[207] or at least qualify the inculpatory statement based on the identity of the alleged assailant.[208] In *Burke*, as discussed in the Introduction, the only statement K.E.H. made to Nurse Frey that the court judged to be testimonial was K.E.H.'s description of the assailant's appearance and clothing.[209] The court acknowledged that Nurse Frey's question seeking the description could provide guidance for medical treatment by eliciting answers designed to address K.E.H.'s safety, "rather than information that would assist police in investigating or prosecuting a crime," but concluded that because K.E.H. did not know her attacker, her description had no bearing on her medical treatment.[210] This conclusion suggests that the testimonial determination hinges in part on the actual identity of the alleged assailants and their relationship to the victims.

In a different vein, the Kansas Supreme Court in *State v. Bennington* analyzed the relevance of identifying the assailant from the objective patient's point of view.[211] The court concluded that even when a victim does not give explicit consent for the information gathered in a forensic examination to be provided to law enforcement, a reasonable patient would understand questions pertaining to the physical appearance of the perpetrator, and other similar information, to be for a use other than the provision of medical care.[212] In *Plater v. Harpe*, however, the Oklahoma federal district court concluded that the SANE examination had the primary purpose of providing medical care and, as a result, found that the victim's statements identifying the defendant as her attacker were not testimonial.[213]

---

this court, have concluded that a patient's verbal history to a SANE or other medical professional during a sexual assault exam for purposes of receiving medical treatment is not testimonial, and its admission therefore does not violate the Confrontation Clause . . . because a person undergoing a SANE exam provides a verbal history to a medical professional for the primary purpose of obtaining medical treatment, whether or not the person intends to report the sexual assault to the police and even though the exam creates evidence that might be used in a prosecution." (internal quotation marks omitted)).

207 *See* United States v. Norwood, 982 F.3d 1032, 1051 (7th Cir. 2020) (holding that identity statements and details about the location of an assault are rarely for the primary purpose of medical treatment).

208 *See* People v. Maisonette, 144 N.Y.S.3d 752, 758 (N.Y. App. Div. 2021) (stating that details of abuse, including the perpetrator's identity, can be relevant to diagnosis and treatment).

209 State v. Burke, 478 P.3d 1096, 1112 (Wash. 2021).

210 *Id.* at 1112–13.

211 State v. Bennington, 264 P.3d 440, 455 (Kan. 2011).

212 *Id.*

213 Plater v. Harpe, No. CIV-21-1092-HE, 2023 WL 3491048, at *7 (W.D. Okla. Apr. 6, 2023).

IV. Creating a More Consistent Framework for Analyzing SANE Testimony

As the preceding discussion shows, Confrontation Clause challenges are highly fact- and context-specific, making it difficult to distill a general rule from the large body of case law. The inconsistency in state and federal court decisions demonstrates the unpredictable nature of Confrontation Clause analyses in the context of SANE testimony. Developing a more consistent framework for analyzing SANE testimony is necessary to empower criminal defendants, by enabling their attorneys to more cogently apply *Davis* in the context of a sexual assault case; law enforcement, by clarifying how their involvement in the SANE examination will impact the admissibility of evidence at trial; and SANEs, who will be able to more accurately explain to their patients how the results of their exams and any requisite statements may be used in future prosecutions, thereby also empowering victims. Finally, establishing clear guidelines for evaluating statements made to SANEs in court can help restore a measure of autonomy to survivors. This clarity can also disrupt the harmful cyclical patterns of domestic violence by increasing the likelihood that an abuser will be held accountable, even when the survivor is unwilling or unable to testify.

A. How SANE Programs Can Help

A few trends emerge from the case law that can inform a more predictable application of the "primary purpose" test in the context of SANE testimony. First, as explained in *Bryant*, the relevant inquiry in discerning the primary purpose of an interrogation is the objective understanding of the interrogation's purpose from the viewpoint of a reasonable person, *not* the actual participants' subjective purposes.[214] Most courts give credence to SANEs' own understanding of their role. When SANEs testify that information relating to the circumstances of the assault is necessary to provide medical care, courts are inclined to agree.[215] In contrast, when SANEs testify that their primary purpose is to collect forensic evidence or aid the police in an ongoing investigation, courts are more likely to interpret the primary purpose of the examination as collecting evidence for future prosecution.[216] SANE programs should therefore train nurses to understand that their primary purpose is to provide medical care and that they should state this purpose explicitly in their reports and

214 Michigan v. Bryant, 562 U.S. 344, 367 (2011).

215 United States v. Norwood, 982 F.3d 1032, 1048 (7th Cir. 2020).

216 *Id.*

testimony.[217] It is equally important for SANEs to be able to testify as to the importance of the information contained in inculpatory statements for patient care. For example, a SANE can explain to the court how the identity of an assailant (even if the admitted statement only includes the assailant's relationship to the victim and not their name) can impact how a victim is classified while in the hospital and the formulation of safety and discharge plans. If a victim personally knows their assailant, classifying them as a "no information" patient can help protect them: for "no information" patients, hospitals will only grant information to a list of specific people identified by the patient.[218] Further, and especially if the victim is a minor, identifying the assailant can be critical for the safe discharge of the patient.

Courts also tend to classify a SANE examination as medical if the SANE presents any consent form for the release of forensic evidence to police *after* the SANE has conducted the examination. In jurisdictions without mandatory reporting requirements, presenting the form prior to the examination tends to support a finding that the primary purpose of the examination was to preserve evidence for future prosecution. Thus, SANE programs that don't have mandatory reporting requirements should present a consent form only once an entire examination is completed. Although the most significant responsibility for establishing a more consistent legal landscape lies with the courts, these components of SANE testimony can contribute to a more consistent application of the Confrontation Clause in cases involving sexual assault.

Finally, based on the analysis of courts' treatment of law enforcement involvement with SANE examinations, SANE programs should ensure that, even where institutional relationships exist between law enforcement and SANE programs, the actual examinations of patients take place free of police interference. Law enforcement officers should never be in the examination room or partake in questioning.[219] As seen in *State v. Bennington*,

---

217 *See* Rouhanian, *supra* note 72, at 71 ("[C]ourts commonly, though incorrectly and inconsistently, consider domestic violence and rape victims' statements testimonial despite the fact that these cases are characterized by lasting psychological effects, whether through the cyclical and manipulative nature of domestic violence or the vivid post-traumatic flashbacks of rapes, that create an ongoing state of emergency long after a 911 telephone call is placed.").

218 *See, e.g.*, Ward v. State, 50 N.E.3d 752, 754 (Ind. 2016) (testimony of SANE that such a classification can prevent people (specifically the attacker) from learning of the victim's whereabouts).

219 Though not the focus of this Note, it is important to mention that the presence of police can have severe implications beyond the admissibility of SANE testimony, replicating many of the systemic issues with policing on the street. Ji Seon Song, *Policing the Emergency Room*, 134 HARV. L. REV. 2646, 2647 (2021) ("The ER is where people go when they are vulnerable and injured. ER's play a critical 'safety-net' function for those who do not have access to other types of medical care. Yet courts have interpreted the ER as an extension of the

officers asking questions during the examination can alter the objective circumstances and constitute the basis for finding that the primary purpose of the examination was for potential use in a subsequent prosecution.[220]

B. Doctrinal Changes

In addition to these adjustments to the testimony provided by SANEs, this Note suggests that, in evaluating the Sixth Amendment implications of a victim's statements to a SANE nurse, courts should focus on the primary purpose of the declarant—namely, the survivor. This is a substantive change to the current framework developed by *Crawford* and its progeny, which instructs courts to consider the objective purposes of *both* the interrogator *and* the declarant, as well as the circumstances in which the interrogation took place.[221] As detailed in *supra* Part III.D, courts already inconsistently apply this standard—some base their analysis solely on the perspective of a reasonable victim, others on that of a reasonable SANE nurse or an objective witness, and still others on both. Given the unique nature of domestic violence and sexual assault prosecutions, including the high rate of unavailable witnesses, the vulnerability involved in a sexual assault examination, and the likelihood of re-traumatization, courts should focus primarily on what the reasonable victim would understand the primary purpose of the examination to be.[222] This approach should still consider many of the circumstances envisioned, including how the SANE presents the purpose, location, and timing of the examination. However, unless police take an active role in the examination, courts should presume that a reasonable person in the victim's place would consider the primary purpose of the examination to be the provision of medical care.[223] By shifting the doctrinal focus to survivors, courts can more

---

public street, generally permitting the police to engage in highly intrusive searches and questioning there . . . rais[ing] the same concerns of racialized street policing because of the convergence of police and marginalized groups in safety-net emergency rooms.").

220 State v. Bennington, 264 P.3d 440, 454 (Kan. 2011).

221 Michigan v. Bryant, 562 U.S. 344, 367–68 (2011).

222 *See generally* NATIONAL PROTOCOL, *supra* note 54.

223 While there are many valid critiques related to the application of a reasonable person standard, this Note suggests that courts apply a consistent presumption that a reasonable person in a victim's situation would consider the primary purpose of the examination to be the provision of medical care. For an analysis of the drawbacks of the reasonable person standard, see Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1275 (2010) ("Examining the many appearances of the reasonable person reveals the extent to which the rhetorical unity of the standard actually obscures very considerable differences."). For evidence that the reasonable person standard is not consistently

closely adhere to the proper analysis under the Confrontation Clause: determining whether a statement is testimonial in nature. This approach not only honors the constitutional framework established in *Crawford* but also ensures that survivors' statements are assessed in the context most relevant to confrontation; namely, whether they were *made* with the primary purpose of preserving evidence for later use at trial.

Finally, a declarant-centered approach is especially appropriate when the victim is a child. Even considering contextual factors that courts have used in analyzing whether a statement to a SANE is testimonial or not, including the primary purpose of the SANE, the SANE's description of their role, the location of the exam, and the involvement of law enforcement, it is unlikely that a reasonable child would understand the purpose of their statements to be for use in a further prosecution. Courts should extrapolate from *Ohio v. Clark*'s finding that "[s]tatements by very young children will rarely, if ever, implicate the [C]onfrontation [C]lause,"[224] to extend beyond preschool children because "unless children are explicitly told that what they say will be shared with the police, they are unlikely to believe that their statements will lead to criminal punishment."[225]

V. Conclusion

Crawford and its progeny have left unanswered critical questions relevant to the application of the "primary purpose" test. Without clearer rules guiding the analysis of statements made with multiple purposes, or clarifying whether the intent of the declarant or the interrogator is more significant, lower courts have created a legal patchwork that leaves victims, prosecutors, and defendants unsure about the treatment of SANEs' testimony at trial.

In sexual assault prosecutions, the complex and often cyclical dynamics of sexual and domestic violence cause many survivors to refuse to testify or even to recant their accounts.[226] As a result, these survivors—often the only witness to their own attack or

---

applied across courtrooms, see Ed Cohen, *A Heated Argument Over the 'Reasonable Person'*, THE NAT'L JUD. COLL. (May 11, 2021), https://www.judges.org/news-and-info/a-heated-argument-over-what-is-reasonable/ [https://perma.cc/99JX-7T6D].

224 Ohio v. Clark, 576 U.S. 237, 247–48 (2015).

225 Brief for American Professional Society on the Abuse of Children as Amicus Curiae Supporting Petitioner at 19, Ohio v. Clark, 576 U.S. 237 (2015) (No. 13-1352).

226 Geetanjli Malhotra, Note, *Resolving the Ambiguity Behind the Bright-Line Rule: The Effect of* Crawford v. Washington *on the Admissibility of 911 Calls in Evidence-Based Domestic Violence Prosecutions*, 2006 U.

abuse—are left facing the harsh reality that their attacker is less likely to be held accountable. Permitting the use of statements made during SANE examinations can help address and mitigate some of the systemic barriers to justice in these cases.[227] During these invasive and emotionally sensitive examinations, victims may provide information with the primary goal of receiving medical care, unaware that some questions are intended to elicit evidence for potential criminal prosecution. By excluding such out-of-court statements absent consistent analysis of the context in which they were made, current Confrontation Clause jurisprudence effectively denies some of society's most vulnerable individuals access to critical evidence needed to support prosecution.

Without creating a more predictable framework, the "primary purpose" test will continue to raise the exact concern the *Crawford* court sought to address—providing meaningful protection of the right to confrontation.[228] Focusing courts' "primary purpose" analysis on the declarant's understanding of the situation will create the conditions for a more consistent application of the Confrontation Clause to SANE testimony and more just outcomes for victims of sexual violence.

ILL. L. REV. 205, 213–14 (2006); Rouhanian, *supra* note 72, at 21 (describing the choice victims face between "testifying and confronting their attacker or facing the probability that their attacker may not be incarcerated . . . [which leaves victims] essentially re-victimized regardless of the choice they make because *Crawford* asks them to either re-live their trauma in a public trial or be responsible for making prosecution of their attacked much more difficult").

227 *Id.*

228 Crawford v. Washington, 541 U.S. 36, 63 (2004).