# THE NAME OF THE MAIDEN

*Omi**

> I guarantee you that the first generation of women who grew up without scribbling "Mrs. Paul Newman" all over their notebooks "just to see what it looks like" is going to think we were mad. It is a very odd and radical idea indeed that a woman would nominally disappear just because she got married.[1]

Fifteen months ago, as I was preparing for marriage, I found myself face-to-face with a dilemma from which my future husband was spared — whether to keep my surname or to swap it for his. Mulling over this quandary, it soon occurred to me that the nature of my dilemma was not as it appeared; this was not a matter of choice between my name and my husband's. Closer examination revealed an optical illusion, a Hobson's choice,[2] for the alternative to choosing my husband's name was the retention, not of my own name, but instead of my father's name, which was lent to me as long as I was a maiden. This double bind secured a third catch. The corollary of the maiden name dilemma was that even if, as a woman marrying in the nineties, I had a right to choose between assuming my husband's name or retaining my father's, the result of choosing the latter would be to sever myself from my future progeny. Realistically, our sons and daughters would not carry my name, but the name of their father.[3] Viewed in this way,

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1. Ellen Goodman, *The Name of the Game*, BOSTON GLOBE, Sept. 24, 1974, at 30.

2. *See* John Stuart Mill, *The Subjection of Women*, *in* FEMINISM: THE ESSENTIAL HISTORICAL WRITINGS 173 (Miriam Schneir ed., 1972). A Hobson's choice is a situation in which there is no alternative to the thing offered: the woman is faced with the choice of the name of one man (her father), or of another man (her husband). *See id.*

3. One possible solution is the adoption of a hyphenated combination of both spouses' names, however, this solution fails when it comes to naming children, if only for practical reasons. *See* Phillip Martin, *The Equal Rights Amendment: An Overview*, 17 ST. LOUIS U. L.J. 1, 8 (1972) (mocking feminist opposition to "the traditional policy of a woman assuming her husband's name" on this count). *See also* Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1533 n.14 (1983) ("Some couples give their children a hyphenated last name composed of both the mother's and the father's surnames. This system would seem to be a considerable improvement over using just the father's surname. Of course, in seven generations someone could have a name composed of 128 surnames connected by 127 hyphens. The results after only three generations, however, might sound very digni-

the nature of my decision became one between the past and the future — a decision of enormous personal dimensions. However, in the larger perspective, my decision was incidental to the continuation of a patriarchal tradition in which my part was that of a link, albeit an indispensable one, between the generations. From this perspective, my decision was void of any intrinsic significance. It was simply a means to an end. Thus, while the role of women as daughters, wives and mothers has been acknowledged, indeed emphasized, the fact that they may never, at any stage, carry a permanent name of their own, nor pass it on to future generations, reflects more accurately society's attitude toward them. The problem of a woman's right to name her children closely resembles the problem of a woman's right to name herself. It is, in fact, the better half of the same difficulty — the same predicament by another name.

Recognizing this problem within my own family, I decided to delve into the law of names. I discovered that while a married woman is no longer expressly required or presumed to assume her husband's surname, this naming right attained by women is illusory because of the strong legal preclusion from naming our children.

In this paper, it is my aim to show how the denial of women's right to name ourselves, and the denial of women's right to name our children, constitute the same form of discrimination. This hypothesis is reflected in the opinions, the dicta and Freudian slips of the courts. I will begin in Part I with the women's movement's struggle to gain naming rights for themselves, concentrating on the activism during the 1960's and 1970's, and its culmination in apparent victory in the early 1980's. That victory, however, was incomplete. As I will show in Part II, the struggle continued in the realm of parents' naming rights. After a short glance at the court decisions in the 1980's, this paper will examine the decisions of this decade, which appear to confirm that naming is still considered a male prerogative. This paper does not purport to present a complete summary of the law of names; rather, the intention is to show the similarity between the struggles for the two naming rights.

## PART I: THE MAIDEN FIGHTS FOR HER NAME

### A. *Historical Background*

The controversy over names is not limited to the present time. Lucy Stone was perhaps the most famous married woman not to adopt her husband's surname. This nineteenth century suffragist and abolitionist did not change her name when she married Henry Blackwell in

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fied: Frances Elisabeth Olsen-Dige-Sorensen-Andersdatter-Hood-McIntyre-Licht-Pfeifer."). *But see* Beverly S. Seng, *Like Father, Like Child: The Rights of Parents in Their Children's Surnames*, 70 VA. L. REV. 1303, 1347 n.202 (1984) (arguing that a system which allows a child at the age of majority to select which syllables of his paternal and maternal last names to retain creates a workable solution).

1855. Prior to the ceremony, the couple jointly read a statement proclaiming their intention to pursue a marriage that would be "an equal and permanent partnership."[4] The courtroom became the forum for the century-long struggle over naming rights as early as 1881.[5] The Lucy Stone League and the National Woman's Party litigated the right of married women to use their own surnames with state and federal agencies.[6] The right was entered into the first Code of Federal Regulations in 1938.[7] Nonetheless, the vast majority of women continued to take on their husbands' names upon marriage. Even as women began to develop their own careers, etiquette held that while women could use their maiden names for professional purposes, it was socially unacceptable to use anything but their husbands' surnames in nonprofessional circumstances.[8]

The question then became: Why would women persist in perpetuating the patriarchal naming tradition? A few explanations have been posited. Most women were ignorant of their rights, and assumed the law required them to use their husbands' surnames.[9] While not illegal in many states, the retention of one's maiden name after marriage or the reversion to it upon divorce required a woman to undertake a major legal effort. A variety of state statutes and administrative provisions continued to reflect the legal presumption that upon marriage a

4. Julia C. Lamber, *A Married Woman's Surname: Is Custom Law?*, 1973 WASH. U. L.Q. 779, 794. Lucy Stone suffered many hardships attempting to use her maiden name. One public attempt to use her maiden name after marriage was her request to be listed in the program for a Women's Rights Convention in 1856. However, in that program she was listed as Blackwell. In 1879, she became eligible to vote in elections such as the Massachusetts school board elections. Lucy Stone's registration was annulled because she did not sign herself as Blackwell, which she vowed she would never do. As a result, she was consistently denied the right to vote. *See* Shirley Raissi Bysiewicz & Gloria Jeanne Stillson MacDonnell, *Married Women's Surnames*, 5 CONN. L. REV. 598, 601-02 (1975). *See also* Marija Matich Hughes, *And Then There Were Two*, 23 HASTINGS L.J. 233 (1971).

5. *See, e.g.*, Chapman v. Phoenix Nat'l Bank, 85 N.Y. 437 (1881) (regarding the problem of obtaining dividends when a married woman purchased stock in her maiden name); Bacon v. Boston Elevated Ry., 152 N.E. 35 (Mass. 1926) (denying recovery to a married woman for damages to her car because it was registered in her maiden name and therefore not considered legally registered by the court); *In re* Kayaloff, 9 F. Supp. 176 (S.D.N.Y. 1934) (denying a request to have a certificate of naturalization issued in the applicant's maiden name, despite the fact that she was a professional musician well known under her maiden name); People *ex. rel.* Rago v. Lipsky, 63 N.E.2d 642 (Ill. App. Ct. 1945) (holding that a woman must re-register to vote after marriage because under custom and common law it was well settled that a woman abandons her maiden name and takes her husband's surname at marriage); Roberts v. Grayson, 173 So. 38 (Ala. 1937) (holding that a married woman need only use 'Mrs.' and her husband's name in order to have legal identity).

6. *See* Priscilla Ruth MacDougall, *The Right of Women to Name Their Children*, 3 LAW & INEQ. J. 91, 94 (1985).

7. 22 C.F.R. § 51.20 (1938).

8. *See* AMY VANDERBILT, AMY VANDERBILT'S ETIQUETTE: THE GUIDE TO GRACIOUS LIVING 324-25, 544-45 (rev. ed. 1972).

9. *See* Bysiewicz & MacDonnell, *supra* note 4, at 602.

woman would assume her husband's name. Several states expressly prohibited a married woman from having a surname different than that of her husband on their marriage license.[10] While some states allowed a divorced woman to simply reassume her maiden name,[11] most required special judicial proceedings.[12] Often the name change was conditioned on the consent of the husband[13] or left to judicial discretion.[14] Some states forbade restoration of the maiden name when minor children were involved.[15] Interestingly enough, some laws gave a husband the power to prohibit his ex-wife from using his name, allowing him absolute control over his name.[16]

The married name presumption was echoed in areas other than family law. Several states compelled the married woman to register to vote under her husband's name.[17] In other cases, a woman was required to hold her motor vehicle registration and driver's license in her husband's name.[18] These requirements served as a reminder of the myriad of restrictions imposed on women by law.[19]

Commentators have suggested that while these legal imperatives were restrictive, for the most part, women willingly complied with tradition.[20] Some women feared raising suspicions among neighbors and

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10. *See* Lamber, *supra* note 4, at 809-12 (citing HAW. REV. STAT. § 574-5 (1968); IOWA CODE ANN. § 674.1 (West Supp. 1973); KY. REV. STAT. ANN. § 401.010 (Michie 1969)).

11. *See* Bysiewicz & MacDonnell, *supra* note 4, at 603. *See also* Lamber, *supra* note 4, at 818 (citing WIS. STAT. ANN. § 296.36 (West 1958 & Supp. 1973)).

12. *See* Lamber, *supra* note 4, at 812 (citing IOWA CODE ANN. § 674.1 (West Supp. 1973)). However, note that many statutes specifically provide for the restoration of the maiden name in the divorce decree.

13. *See id.* at 809-12 (citing KY. REV. STAT. ANN. § 401.010 (Michie 1969); Haw. Rev. Stat. § 574-5 (1968); MICH. STAT. ANN. § 27.3178(561) (Law Co-op. 1978)).

14. *See id.* at 815 (citing N.Y. CIV. RIGHTS LAW § 60 (McKinney Supp. 1973)).

15. For example, the "New York statute gave discretion to courts in name changing petitions, however the New York Civil Liberties Union stated that it was customary practice in New York for state supreme courts to grant name change requests of divorced women without children." Joan S. Kohout, *The Right of Women to Use their Maiden Names*, 38 ALB. L. REV. 105, 117 (1973). However, "women with children were routinely denied these same requests and were summarily informed they must pursue independent actions to obtain such relief in Civil Court, under the change of name proceedings of Civil Rights Laws." *Id.* at 117 n.72.

16. *See* Lamber, *supra* note 4, at 809-12 (citing ALA. CODE § 278 (1959); N.J. REV. STAT. § 2A:52-1 (1952); KY. REV. STAT. ANN. § 401.010 (Michie 1969)). Some states deny a divorced woman the right to resume her maiden name. *See id.* (citing MINN. STAT. ANN. § 518.27 (Law Co-op. 1969); MONT. REV. CODE ANN. § 93-100-2 (Smith 1964)).

17. *See id.* at 811-16 (citing ILL. COMP. STAT. ANN. ch. 46, §§ 4-16, 5-23, 6-54 (West 1965 & Supp. 1973); OHIO REV. CODE ANN. §§ 3503.18-19 (Anderson 1972)).

18. *See* Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971) (per curium), *aff'd without opinion*, 405 U.S. 970 (1972).

19. *See* Linda J. Mead, *Married Woman's Right to her Maiden Name: The Possibilities for Change*, 23 BUFF. L. REV 243, 250 (1973-74).

20. *See* Kohout, *supra* note 15, at 105; LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 42 (1969).

acquaintances as to whether 'wife' and 'husband' were properly married, and the related questions of children's legitimacy.[21] In a society that considered the husband's achievements as primary, a practice that allowed women to symbolically merge with the reputation of their husbands was a "highly desirable state of affairs."[22] However, with the wave of "new consciousness" created by the women's liberation movement of the 1960's, women began to feel differently, and the issue of a woman's right to name herself came to the forefront of the movement.

### B. *The 1960's and 1970's*

In the 1960's and early 1970's, many women began consciously seeking ways to retain their maiden names. Many social factors contributed to this upsurge. More women began to establish themselves professionally prior to marriage and continued their careers during the marriage, often finding the maintenance of separate names to be complicated.[23] The consciousness of women was raised through the growth of the feminist movement. More women began to see it as a matter of principle that they would be an equal partner in marriage, buttressed by the implementation of employment discrimination legislation, the proposed Equal Rights Amendment (ERA), and sex discrimination litigation.[24]

In addition, feminists viewed the issue of women controlling their own names as important not only for individual women, but for all women.[25] Feminists regarded the requirement that married women take their husbands' names as more than another "unknowing," "unintended" or "anachronistic" discriminatory practice to perpetuate male dominance. It was regarded as an agent for preserving the present social structure.[26] For a woman to relinquish her former name, and therefore her former identity, implied a complete disassociation with her past. This break encouraged the young bride to take on the identity of her husband and his achievements instead of cultivating her own life. Maiden name retention was a way to encourage women to develop individually without relying on their husbands' reputations.[27]

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21. *See* KANOWITZ, *supra* note 20, at 41-42, 46.

22. Kohout, *supra* note 15, at 105. *See also* KANOWITZ, *supra* note 20, at 41-42, 46.

23. *See* Bysiewicz & MacDonnell, *supra* note 4, at 598; Roslyn Goodman Daum, *The Right of Married Women to Assert Their Own Surnames*, 8 J.L. REFORM 64 (1974).

24. *See* Lamber, *supra* note 4, at 779.

25. *See* Daum, *supra* note 23, at 65-66.

26. Commentators maintained that the law of surnames in regard to married woman had its origin in the common law disability of married woman and should have been overcome by the Married Woman's Property Act. *See* Lamber, *supra* note 4, at 779; Mead, *supra* note 19, at 262.

27. *See* Kohout, *supra* note 15, at 105; Lamber, *supra* note 4, at 807; Hughes, *supra* note 4, at 233.

Over time, a woman's use of her husband's name came to symbolize acquiescence to a culture that viewed women as accessories to men, devoid of independent dignity and status. Conversely, the recognition of married women's constitutional right to retain their maiden names would reflect the shedding of the shackles of ownership and dependence.[28] Recognition of this sought-after right would "represent a momentous advance in the struggle for [a woman's] separate identity."[29]

Feminist support for maiden-name rights was galvanized as a result of the 1971 ruling in *Forbush v. Wallace.*[30] In *Forbush,* a married woman brought a class action lawsuit challenging the constitutionality of an unwritten Alabama Department of Public Safety regulation which required a married woman's driver's license to be issued in her husband's name. The constitutionality of this mandatory use of the husband's name was upheld by a three-judge district court, and affirmed without opinion by the United States Supreme Court.[31] "In the wake of the widely publicized *Forbush* decision, women encountered difficulties using their own surnames throughout the country."[32]

The women's movement responded in full force. The Center for a Woman's Own Name was established,[33] and between 1973 and 1976, the Center and the American Civil Liberties Union led the movement advocating women's right to name themselves.[34] In other parts of the United States, women set up committees and lobbying groups and published fact sheets to promote the right of name choice for women.[35] The National Conference on Women and Law began offering workshops on women's naming rights in 1976.[36]

The name activists directed part of their efforts towards state legislatures. In the early 1970's, several bills were proposed: one would

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28. *See* Daum, *supra* note 23, at 65-66; Kohout, *supra* note 15, at 124.

29. Hughes, *supra* note 4, at 247. For a discussion of not only sexist, but also racist implications in the Western patriarchal naming system, see Yvonne M. Cherena Pacheco, *Latino Surnames: Formal and Informal Forces in the United States Affecting the Retention and Use of the Maternal Surname,* 18 T. MARSHALL L. REV. 1 (1992).

30. Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971) (per curium), *aff'd without opinion,* 405 U.S. 970 (1972).

31. *See id.*

32. MacDougall, *supra* note 6, at 94.

33. *See id.* at 94 n.5.

34. For example, the Center published and distributed a basic guide to the names issue. CENTER FOR A WOMAN'S NAME, BOOKLET FOR WOMEN WHO WISH TO DETERMINE THEIR OWN NAMES AFTER MARRIAGE (1974 & Supp. 1976). The idea was not to impose on women an obligation to retain their birth-given names, but rather to broaden their choices, and to ensure the choice was their own. As written in the 1976 supplement: "It is the position of the Center For a Woman's Own Name that the name(s) a woman chooses to use is her own name. It may be the name given her at birth, a named assumed at marriage, assumed at a previous marriage, a hyphenated name or a name made up by her self at any time." *Id.*

35. *See* MacDougall, *supra* note 6, at 94 n.5.

36. *See id.* at 95 n.5.

have created a legislative presumption of maiden name retention; others tried to give a married woman the option of retaining or resuming her maiden name without undergoing any legal procedures.[37] Most of these suggestions were initially rejected.[38] Other name activists hoped the Equal Rights Amendment would remove the statutory presumption that a married woman takes her husband's name.[39] At the same time, however, many activists were skeptical of the ability of the ERA to overcome the weight of past tradition.[40] Because legislative and constitutional efforts were not succeeding, activists turned to the courts.

### C. *The Courts: Common Law, Constitutional Law and State Justifications*

Beginning in 1961, there were several cases in which courts showed a greater sensitivity to women's demands.[41] Not all decisions were favorable, however, as the conservative *Forbush* decision clearly

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37. *See, e.g.,* Kohout, *supra* note 15, at 118 (discussing various legislative attempts); Daum, *supra* note 23, at 102; Bysiewicz & MacDonnell, *supra* note 4, at 619; Hughes, *supra* note 4, at 241. *See also* WISCONSIN LEGISLATIVE BUREAU, THE 1969 EXECUTIVE VETOES IN WISCONSIN 24 (1970) (discussing veto of Assembly Bill 70-3, dealing with name statutes).

38. *See* Kohout, *supra* note 15, at 118; Daum, *supra* note 23, at 102; Bysiewicz & MacDonnell, *supra* note 4, at 619; Hughes, *supra* note 4, at 241. In his message vetoing a bill that would have allowed a woman to retain her name at the time of the issuing of the marriage license, the governor of Wisconsin summarized many of the current objections to such proposals:

> To my knowledge, this legislation is unique. Both by custom and legally, since the time of Edward IV, the wife has taken her husband's surname as her own. . . . Our property, commercial and domestic relations law is based on this premise. The enactment of this legislation would necessitate alteration of law, legal forms, contracts and data processing procedures. It could lead to practical difficulties in landlord and tenant relations, service of papers, determination of claim of title and ability of law enforcement agencies to determine the whereabouts of individuals.

WISCONSIN LEGISLATIVE BUREAU, *supra* note 37, at 24 (discussing Assembly Bill No.70-3).

39. *See* Mead, *supra* note 19, at 260-261; Bysiewicz & MacDonnell, *supra* note 4, at 621.

40. *See* Mead, *supra* note 19, at 260-261.

41. *See, e.g.,* Krupa v. Green, 177 N.E.2d 616 (Ohio Ct. App. 1961) (holding that a married woman is eligible to be on a ballot under her maiden name, noting that it was a "custom," and not compelling law that married women adopt their husband's surnames). For a discussion of two unusual cases, see Kohout, *supra* note 15, at 119 (discussing *In re* Hodes (N.J. Essex County Ct. 1971); and *In re* Nathanson, Civ. No. 731634 (Wash. Super. Ct. King County 1970)). One married woman was granted a name change simply because she wanted her own name. The court found that there was no reasonable objection, as proscribed by the NJ statute. *See id.* "Similarly, in the State of Washington a married woman was granted a name change because the use of her maiden name symbolized the kind of marital relationship she wanted, one which encouraged each of them to be individuals." *Id.* The special mention these two petitions received only emphasizes how great, and indeed how absurd, the discrimination against married women was.

proved. In the aftermath of *Forbush*, women brought petitions for name changes in trial courts across the nation.[42] Special National Organization of Women (NOW) task forces, law student organizations, legal services and human rights organizations supported these women through amicus briefs and publicity campaigns.[43] The subject also became a popular topic for law review articles.[44] In developing legal arguments supporting a woman's right to retain her name, feminists proposed two main solutions: (1) universal recognition of a woman's common law right to retain her surname, and (2) challenging restrictions against the maintenance of maiden names on constitutional grounds.

### 1. The Common Law

In *Forbush*, the court began its analysis by stating, "Alabama has adopted the common law rule that upon marriage the wife by operation of law takes the husband's surname."[45] In this case, the plaintiffs conceded that Alabama's common law required a change of name upon marriage.[46] The court held that the common law precedent was constitutional, and affirmed the name change requirement.[47] Was this a correct evaluation of the common law, or the imposition of a custom, based only on "choice, convenience and devotion to fiction?"[48]

Despite early holdings to the contrary, legal scholars, and later the courts, agreed that the common law recognized the right of women to choose their own surname.[49] 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.[50] Consistent with this rule, a woman has the right to adopt her husband's surname merely by using it, as most women traditionally did.[51] However, a woman also has the right not to change her

42. *See* MacDougall, *supra* note 6, at 94 n.4.

43. *See id.* at 94 n.5.

44. *See generally id.*; Daum, *supra* note 23; Margaret Eve Spencer, *A Woman's Right to Her Name*, 21 UCLA L. REV. 665 (1973); Mead, *supra* note 19; Lamber, *supra* note 4; Bysiewicz & MacDonnell, *supra* note 4.

45. Forbush v. Wallace, 341 F. Supp. 217, 222 (M.D. Ala. 1971).

46. *See id.*

47. *See id.*

48. Lamber, *supra* note 4, at 783. *See also* Bysiewicz & MacDonnell, *supra* note 4, at 613 n.62 (discussing the comment of Ruth Bader Ginsburg on behalf of the ACLU on the matter of limiting the potential harm of the *Forbush* decision).

49. *See* MacDougall, *supra* note 6, at 95-96 nn.8-9.

50. Under the common law, fraudulent purpose meant intent to conceal one's person to avoid being recognized. *See* Priscilla Ruth MacDougall, *Married Women's Common Law Right to Their Own Surnames*, 1 WOMEN'S RTS. L. REP. 2 (Fall/Winter 1972/73). Lamber lists a handful of scholars who adopted a different interpretation of the common law, noting however, "their disagreement can be traced primarily to a desire to emphasize the plight of women at the hands of arbitrary and discriminatory laws and to a misreading of the relevant cases." Lamber, *supra* note 4, at 783 n.16.

51. *See* MacDougall, *supra* note 50, at 4; Lamber, *supra* note 4, at 782-83.

name at marriage.[52] Similarly, a man has a right to change his name to that of his wife or to any other name.[53] Since a woman has the ability to retain her name through usage, it seemed to many feminists that courts should recognize this common law right as well.[54] Despite the clarity of this argument, by misstating precedent and overemphasizing the frequency with which the change occurs, many courts and officials transformed the woman's option of adopting her husband's surname into a legal requirement.[55] Constitutional solutions were sought as a final resort.

### 2. Constitutional Law:

In *Forbush*, the plaintiff argued that the driver's license regulations were a violation of equal protection rights because the regulations were based on the suspect classification of sex and this classification failed to bear a rational relation to a legitimate state purpose.[56] The court did not find this argument convincing. Critics of this decision argued that a much stricter standard of constitutional scrutiny should have been applied.[57]

Supreme Court decisions such as *Reed v. Reed*[58] and *Frontiero v. Richardson*[59] encouraged women's rights activists to believe that courts might still recognize sex discrimination in state naming regulations.[60] It was argued that the automatic imposition of the husband's name on a married woman by a governmental body "denies a woman a choice and provides no process at all, save the remedial one of a legal name change procedure,"[61] and should be viewed as a "deprivation of personal liberty."[62] Others also argued that the right to choose one's

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52. *See* MacDougall, *supra* note 50, at 4; Lamber, *supra* note 4, at 782-83.

53. Except for Louisiana, all states followed the English common law, which required that "one's first Christian name could be changed only at baptism, confirmation or royal decree." *See* MacDougall, *supra* note 6, at 102-09. *See also* Daum, *supra* note 23, at 102; Lamber, *supra* note 4, at 807-08; Mead, *supra* note 19, at 245. *See generally*, Patricia A. Felch, *The Common Law Right For an Adult to Assume A New Name Without Court Approval*, 8 WOMEN'S L. REP. 1 (1984).

54. *See* MacDougall, *supra* note 50, at 4; Lamber, *supra* note 4, at 782-83.

55. *See* Whitlow v. Hodges, 539 F.2d 582, 584-85 (6th Cir. 1976) (McCree, J., dissenting).

56. *See* Forbush v. Wallace, 341 F. Supp. 217, 219 (M.D. Ala. 1971).

57. *See* Lamber, *supra* note 4, at 800-03; Spencer, *supra* note 44, at 678-80; Mead, *supra* note 19, at 257-60.

58. Reed v. Reed, 404 U.S. 71 (1971) (concluding that the arbitrary preference for a male estate administrator over an equally qualified female violated the Equal Protection Clause of the Fourteenth Amendment).

59. Frontiero v. Richardson, 411 U.S. 677 (1973) (declaring discrimination based on sex to be inherently suspect and therefore subject to a heightened level of scrutiny).

60. *See* Lamber, *supra* note 4, at 801.

61. Hughes, *supra* note 4, at 678.

62. Mead, *supra* note 19, at 255.

name should be protected by the First Amendment's guarantee of freedom of expression.

The retention of a maiden name and its consistent public use was considered by many women to be a symbolic statement of their personality that could not be adequately expressed through more commonplace means. Feminists claimed that in light of the prevailing societal norms, women were likely to encounter opposition, hostility, social embarrassment or confusion as a result of their choice.

> One would assume, therefore, that the choice was not made lightly, but rather for a purpose she considers important, to make a symbolic statement of her personal philosophy. Such a choice should not be lightly regarded by the state, and such a statement, as symbolic speech, should be entitled to the protection of the first [sic] Amendment.[63]

Finally, commentators argued that one's own name is one of the most personal belongings of any individual, and that the right to maintain the integrity of that name should be recognized as within the bounds of the constitutional right to privacy.[64] Accordingly, if a woman chooses to retain her maiden name, a choice that in no way diminishes the liberty of others, the government should not interfere with that choice.[65]

### 3. State Justifications:

While discussing the basis of Alabama's name change regulations, the *Forbush* court listed a number of state interests used to justify these requirements. These may be divided into several major categories: 1) custom; 2) administrative convenience; 3) prevention of fraud; and 4) *de minimis* injury, due to the existence of statutory remedies. A fifth justification commonly invoked by states was the preservation of the family unit. As early as the 1970's, courts and commentators were beginning to reject the validity of these grounds.

#### (a) Custom and Uniformity

> Certainly the custom of the husband's surname denominating the wedded couple is one of long standing. While its origin is obscure, it suffices for our purposes to recognize that it is a tradition extending back into the heritage of most Western civilizations. It is a custom

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63. Spencer, *supra* note 44, at 684-85.

64. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feeling and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

65. *See* Spencer, *supra* note 44, at 681.

common to all 50 states in this union. Uniformity among the several states in this area is important.[66]

Feminists have responded that the use of custom to determine whether a practice is justifiable is both susceptible to manipulation and undemocratic as it rejects the notion of evolving social values.[67] To subject different groups to disparate treatment because society historically has done so undermines the very purpose of equal protection. Although retaining state regulations regarding the law of surnames of the married woman may be less disruptive to long-standing convention or to existing uniformity among the states, the mere longevity of an arbitrary or discriminatory practice should not serve as justification for its continuation.[68]

### (b) Administrative Efficiency

The *Forbush* court asserted that "administrative convenience, if not a necessity, is an important consideration."[69] Administrative convenience had always been asserted as a legitimate interest by state agencies.[70] However, during the early 1970's, some jurisdictions rejected this reasoning. The threat of inconvenience could easily be avoided by alternative means and no state interest was rationally assisted by requiring married women to assume their husbands' names.[71] Feminists of the 1970's asserted that after *Frontiero v. Richardson*,[72] administrative convenience could no longer be considered determinative in evaluating discriminatory classifications.[73]

### (c) Fraud

Fraud protection for creditors and other members of the public who rely on correct identification of people was cited as an important

66. Forbush v. Wallace, 341 F. Supp. 217, 222 (M.D. Ala. 1971).

67. *See* John Hart Ely, *On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 42 (1978).

68. *See* Bysiewicz & MacDonnell, *supra* note 4, at 598, 620; Hughes, *supra* note 4, at 241; Lamber, *supra* note 4, at 797-98.

69. *Forbush*, 341 F. Supp. at 222 ("The evidence in this case reflects that the state of Alabama's system of issuing drivers' licenses represents a considerable investment. . . . Confusion . . . could result if each driver were allowed to obtain licenses in any number of names he desired. . . .").

70. *See* People *ex. rel.* Rago v. Lipsky, 63 N.E.2d 642 (Ill. App. Ct. 1945) (regarding voter registration).

71. *See* Krupa v. Green, 177 N.E.2d 616 (Ohio Ct. App. 1961) (rejecting the argument that a woman who maintains her maiden name after marriage is required to list her husband's surname on her declaration of candidacy and nominating petition); *see also* Stuart v. Board of Supervisors of Elections, 295 A.2d 223 (Md. 1972). In any event, the "ultimate means of identification under the federal bureaucracy is the social security account number." Hughes, *supra* note 4, at 242.

72. Frontiero v. Richardson, 411 U.S. 677 (1973).

73. *See* Kohout, *supra* note 15, at 121; Mead, *supra* note 19, at 258-59; Seng, *supra* note 3, at 1327-28.

reason to require a name change upon marriage.[74] In response, feminists pointed out that common law name changes permitted by statute were occurring without substantial fraud.[75] Additionally, statutory remedies already existed to counter the possibility of fraud.[76]

(d) *De Minimis* Injury — The Existence of Statutory Remedies

Male-dominated courts and legislatures often dismissed the problem of names as trivial or non-existent. The *Forbush* court characterized the injury imposed by the licensing regulation as *de minimis*, because women in Alabama could undertake a name change through a simple, automatic and inexpensive statutory court procedure.[77] Feminists objected, stating that the matter of the name is not a *de minimis* injury and that this dismissive attitude ignored the function of names and vastly underestimated their impact.[78] Furthermore, the existence of name change statutes did not always provide a simple, automatic[79] or cheap[80] remedy. These statutes raised constitutional questions, as the procedures imposed additional requirements applicable only to women.[81] The name change process imposed by these statutes was also seen as symbolic of women's inferiority and powerlessness.[82] It was argued that since successful court action or the mere retention of a birth-given name yielded the same result — a married woman with a name different from her husband's — the state had no genuine interest in compelling a name change.[83]

(e) Preservation of the Family

Custom and statute dictated that the father had a natural right in having his child bear his surname, and that a child born out of wedlock was to be branded illegitimate by carrying its mother's name. Accordingly, courts found that married women's use of names different from those of their spouses and children would inevitably hasten the

74. *See, e.g., Rago*, 63 N.E.2d at 646.

75. *See* Hughes, *supra* note 4, at 241-43; Lamber, *supra* note 4, at 804.

76. *See* Daum, *supra* note 23, at 92-97; *see also In re* Miller, 243 S.E.2d 464 (Va. 1978).

77. *See* Forbush v. Wallace, 341 F. Supp. 217, 222 (M.D. Ala. 1971) (noting the procedure cost two dollars).

78. *See supra* notes 23-29 and accompanying text.

79. Many judges construed statutory name change procedures as granting them broad discretion. *See* Kohout, *supra* note 15, at 117.

80. For example, in Wisconsin the cost was $125. *See In re* MacDougall, No. 135463 (Wis. Cir. Ct. Dane County 1972) (accepting, *inter alia*, the argument that the high price prevented women from changing names). *See also* Kohout, *supra* note 15, at 113 (discussing California's name change petition, making retention of one's name a luxury for those women who are aware of the law and who could afford the $43 fee).

81. *See* Lamber, *supra* note 4, at 806.

82. *See* Kohout, *supra* note 15, at 105; Lamber, *supra* note 4, at 807; Spencer, *supra* note 44, at 686.

83. *See* Lamber, *supra* note 4, at 806.

deterioration of family life.[84] With little empirical data to back them up, name activists were reluctant to reject this argument outright. However, the same absence of empirical data caused skepticism as to the effects of the retention of the custom of paternal family names on the increasing rate of divorce and single-parenthood.

In theory, feminists appeared to recognize that the requirement that children carry their father's name was "deeply entwined with the customary adoption of the husband's surname upon marriage."[85] However, in practice, they tended to treat the matter as a secondary problem rather than an intrinsic part of the right of a woman to control her own name.

The underlying fear of the stigma of illegitimacy was regarded as an anachronism or a "non-issue."[86] As it became more difficult to ascertain whether a child was illegitimate merely by comparing the surnames of father and child, the concern regarding a stigma of illegitimacy would most likely diminish.[87] This view echoed the words of Charlotte Perkins Gilman who wrote in 1913 that "[a]s to illegitimate children, the term will disappear from the language. . . . When women have names of their own, names not obliterated by marriage . . . there will be no way of labeling a child at once, as legitimate or otherwise."[88]

Just as the nineteenth century Lucy Stone League had expressly decided not to take on the issue of women's rights to name children, the women's movement of the civil rights era did not take up the cause of a woman's right to name her children in any significant way.[89] The fact that the identical problem had reemerged generations later should have served as a warning to the campaigners.

### D. *The Results of the 1970's Activism*

The nation-wide effort of the women's movement regarding names gained eventual success. In the judicial sphere, during the ten years following *Forbush*, many cases were successfully litigated. *Stuart v. Board of Supervisors of Elections*, decided in 1973, was the forerunner of a long line of cases reaffirming the right of a woman not to change her name upon marriage.[90] Finally, in 1982, marking exactly one century of courtroom battles, the Alabama Supreme Court, in an unani-

84. *See, e.g.*, Lamber, *supra* note 4, at 805 n.106 (citing Petitioner's Brief, *In Re* MacDougall, No. 135463 (Wis. Cir. Ct. Dane County 1972)).

85. Bysiewicz & MacDonnell, *supra* note 4, at 616; *see also* Hughes, *supra* note 4, at 245.

86. Lamber, *supra* note 4, at 805 ("Since there are several alternatives in naming a child, this is really a non-issue as long as the state's interest is in correctly identifying the child and nothing more.").

87. *See* Daum, *supra* note 23, at 99.

88. MacDougall, *supra* note 6, at 152 (quoting Charlotte Perkins Gilman, *Illegitimate Children*, 4 THE FORERUNNER 295, 297 (1913)).

89. *See id.* at 95.

90. *See* Stuart v. Board of Supervisors of Elections, 295 A.2d 223, 228 (Md. 1972).

mous decision, repudiated the *Forbush* decision as inaccurately representing the common law of Alabama.[91] Similar successes were attained in the legislative and executive branches of various states. By statute, state attorney general opinion, and formal and informal agency regulation or memorandum, all states now recognize a woman's right to retain her maiden name when she marries or to resume it thereafter, and recognize the right of a married couple to adopt a combination of names.[92] The right no longer depends upon a husband's or ex-husband's consent or acquiescence. A woman's right to resume her pre-marriage name on divorce has been affirmed, and obstacles such as legal procedure or minor children with another name have been declared insufficient to overcome that right.[93] Voting and licensing regulations also have been amended. Some states have even enacted laws expressly prohibiting discrimination against women because of their surnames, for example, in granting credit,[94] doing business[95] or employment.[96] Satisfied with these accomplishments, the women's movement turned its attention to other battles.

And yet, a generation later, in the 1990's, although the desire to scribble "Mrs. Paul Newman" might have abated, a maiden who slips on a wedding ring will still, most probably, simultaneously slip out of her name.[97] Thus, it appears that one commentator's remark, made in 1969, that "American women are not clamoring for the right to be known by their maiden names after marriage,"[98] is just as relevant almost thirty years later. A century after Lucy Stone, a married woman's choice to retain her maiden surname may still be considered "a polit-

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91. *See* State v. Taylor, 415 So. 2d. 1043 (Ala. 1982) (following Kruzel v. Podel, 226 N.W.2d 458 (Wis. 1975)). Even after the case, the Alabama Department of Public Safety refused to acknowledge the ruling, and further litigation ensued over the next few years. *See* MacDougall, *supra* note 6, at 95 n.8.

92. *See* MacDougall, *supra* note 6, at 98 n.9.

93. *See id.*

94. *See, e.g.,* MINN. STAT. § 325G.041 (1985) (stating that the refusal to issue a financial transaction card to a married woman in the surname she chooses, either her maiden name or her husband's surname, is discriminatory); 12 C.F.R. § 202.7(b) (1982) (interpreting the federal Equal Credit Opportunity Act); 15 U.S.C. § 69 (1982) (prohibiting creditors from refusing to open or maintain a person's account in his or her birth-given first name and a surname that is the applicant's birth-given surname, the spouse's surname or a combined surname).

95. *See, e.g.,* CAL. CIV. PROC. CODE §1279.6 (West 1995-96) (stating that no person engaged in any trade or business of any kind whatsoever shall refuse to do business with any woman regardless of her marital status, because she has chosen to use or regularly uses her birth name or former name).

96. *See, e.g.,* Allen v. Lovejoy, 553 F.2d 522, 524 (6th Cir. 1977) (holding that a requirement that a woman change her surname to that of her husband on employment records when she marries, in absence of a corresponding requirement for men, violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-2(a)(1)).

97. Evidence as to the large magnitude of this phenomena may be gleaned from the nature of cases before the courts. *See supra* Part II.

98. KANOWITZ, *supra* note 20, at 46.

ical act."[99] The question of why women still fail to exercise their hard-earned right to name themselves has gone unanswered.

Even as they sought solutions, the feminists of the civil rights movement recognized the enormous problems involved in attempting to overturn such an entrenched custom. They acknowledged that equality in name would not be achieved until equality within the institution of marriage was attained. They realized that "[c]hoice between her and her husband's surname [was] not likely to become available to the married woman until society changes its view of woman and encourages them [sic] to assert their [sic] individuality."[100] The persistence of this custom after the removal of legal obstacles may be attributed to social inequality. However, it is also possible that all legal barriers have not been removed.

In the narrow sphere of the married woman's name, the activists of 1970's achieved real success. However, by maintaining a narrow focus, they failed to notice the existence of the virtually irrefutable male prerogative to name marital children, as well as the greater implications of this prerogative for women's naming rights. This enduring tradition of patrilineal naming, and the failure of the women's movement to provide a viable alternative, is the major, if not the sole reason for women's persistence in adopting their husbands' names upon marriage. The next part of this article will briefly review some of the important feminist implications of women's control over the naming of their children. A discussion of the caselaw will follow.

## PART II: THE NAME OF THE MAIDEN AND THE NAME OF HER CHILD

### A. *The Importance of Children's Names*

The tradition of naming marital children after the father indirectly influences women to relinquish their own names in favor of their husbands'. Women who might have found the strength to forgo being branded "the wife of . . ." find it more difficult to give up being "the mother of . . . ." Unwilling to bear a different name than their children, these women submit to custom and accept their husbands' names. Thus, the ability to name their children also has direct implications for women's interest in their "own very personal label."[101]

Because of the long-standing custom whereby men have dictated control over family names, women have been viewed as having less of an investment in nominal identity and their preferences have never

99. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 387 (1991) ("Like the wearing of Afro or braided hairstyles, a married woman's choice to retain her unmarried surname may [still today] be considered a political act.").

100. Kohout, *supra* note 15, at 124; *see also* Bysiewicz & MacDonnell, *supra* note 4, at 618, 621 (suggesting that the "key seems to be in increasing the social acceptability of retention of the maiden name").

101. Jech v. Burch, 466 F. Supp. 714, 719 (D. Haw. 1979).

elicited the respect accorded to men's.[102] Devaluing women's names is a short step from the devaluation of women as a whole.[103] This devaluation is particularly clear with regard to a woman's heritage. When a man has no sons, we speak of the family or the lineage as "dying out," but what we mean is the cessation of the *father's* lineage. We neglect to notice that the line of any matriarch is similarly cut short, usually at the moment of marriage, even if children are born.[104] Giving the maternal surname to a child would be a declaration that the mother is part of that child's family heritage. On a personal level, the maternal surname would demonstrate recognition of a woman's desire to have her children perpetuate her name.[105]

The tradition of patrilineal naming colors a child's attitude towards women's inferior social status. Children's surnames represent their family identity. When that identity is exclusively that of their fathers, it "tells children that their mother's importance remains secondary to that of their fathers even after their parents are divorced."[106] The father, on the other hand, is set up as the natural and single supporter of the child, the "head of household," or "master of the house."[107] In fact, many trace the historical antecedents of the paternal naming preference to the notion of a father's ownership of his child.[108] Courts have historically encouraged this view by explicitly conditioning a father's right to determine his child's surname on the father's financial contribution to the child's upbringing.[109]

Thus, giving a child a maternal surname is a symbolic declaration of emancipation to the world at large. Maternal naming strongly asserts that the mother is not the mere caretaker of chattel belonging to someone else. This declaration shows society that women are free

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102. *See* Cynthia Blevins Doll, *Harmonizing Filial and Parental Rights in Names: Progress, Pitfalls, and Constitutional Problems,* 35 How. L.J. 227, 231 (1992).

103. *See In re* Iverson, 786 P.2d 1, 3 (Mont. 1990) (Barz, J., dissenting) (arguing that a paternal preference is a "subtle form of discrimination against women").

104. Furthermore, the patrimonial tradition encourages a preference for sons and a hatred for daughters, since, by her very birth, a daughter may "doom her father's house to die." Seng, *supra* note 3, at 1345 n.193 (quoting J. TEICHMAN, ILLEGITIMACY: A PHILOSOPHICAL EXAMINATION 95 (1982)).

105. *See* Seng, *supra* note 3, at 1344; Laura Ann Foggan, *Parents' Selection of Children's Surnames,* 51 GEO. WASH. L. REV. 583, 588 n.42 (1983).

106. MacDougall, *supra* note 6, at 99.

107. Seng, *supra* note 3, at 1330-32.

108. For instance, slaves traditionally took on their master's surnames. *See* Foggan, *supra* note 105, at 599 n.42; Seng, *supra* note 3, at 1342. An interesting related notion is the economic advantages of the father's right to choose whether or not to recognize his child. *See* Kenneth Karst, *The Freedom of Intimate Association,* 89 YALE L.J. 624, 678 (1980).

109. *See infra* Part II.B.3(d) (iv). *Cf.* Kathleen A. Ryan Carlsson, *Surnames of Women and Legitimate Children,* 17 N.Y.L.F. 552, 557 (1971) (suggesting that the courts maintained the right of the father to name his children on the basis of a "head of household" test, or because he has the duty to support his children, and consequently, when courts realized that women may equally contribute to the economic support of the family, the father's exclusive right to name his children will vanish).

from the yoke of male supremacy and from the property rights that lie behind the male-oriented naming system. Finally, some may claim that a presumption of the father's name prevents any arguments over naming between the spouses; however, while the "automatic establishment of the father's name obviously removes a serious potential conflict between the father and the mother [it] does so at the cost of the mother's identity."[110]

> It is, however, a fundamental feminist concern that society and its courts respect women for wanting to pass their surnames onto their children or to give them surnames which differ from those of the children's fathers. It is a fundamental women's issue that women should and must have a legally recognized and enforceable right to name their children on an equal basis to men. Further, it is a fundamental women's concern that women who are custodial parents have the same legally recognized decision-making power respecting their children's names as they have over other aspects of their children's lives.[111]

One commentator, Priscilla Ruth MacDougall, who had been involved in advancing the right of women to name themselves during the 1970's, also recognized the fundamental importance of the right of women to name their children. In 1985, MacDougall called upon both feminist and civil rights activists to give this right the attention it deserved. MacDougall asserted that the right of women to name their children was an issue in need of a carefully planned strategy to bring about the necessary legal reform.[112]

MacDougall's call for action twelve years ago has gone unanswered. Unlike the right of women to name themselves, the right of women to name their children has never become a major feminist battle. Few feminists have dealt directly and consistently with the matter, and no effective, unified strategy ever developed.[113]

This battle over the right of women to name their children is almost identical to the 1970's struggle for a woman's right to retain her

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110. *In re* Rossell, 481 A.2d 602, 605 (N.J. Super. Ct. Law Div. 1984).

111. MacDougall, *supra* note 6, at 99-100.

112. *See id.* at 157.

113. Foggan criticizes the fact that commentators have largely ignored the child-rearing implications of parents' selection of a child's name, focusing instead on the parents' and child's interest in the name itself. *See* Foggan, *supra* note 105, at 590 n.50. My criticism is the failure to focus on the women's rights aspect of the problem. A few of the solutions proposed include: 1) a custodial parent presumption, *see* MacDougall, *supra* note 6, at 154-55; Foggan, *supra* note 105, at 596-98; *but see* Seng, *supra* note 3, at 1347 (criticizing this solution because it is likely to make custody battles more bitter and creates a possible opportunity for blackmail); 2) a dual surname, *see* Seng, *supra* note 3, at 1348; 3) personal choice for older children, *see* Seng, *supra* note 3, at 1351; and 4) a rule whereby daughters take their mothers' names and sons their fathers', *see* Ellen Jean Dannin, *Proposal For A Model Name Act*, 10 MICH. J.L. REFORM 153, 173 (1976); *but see* Note, *Bill 28 — An Act to Amend the Change of Name Act: A Married Woman's Surname: A Matter of Choice*, 41 SASK. L. REV. 177, 190 (1976-77) (criticizing this proposal as dividing the family along sexual lines).

maiden name. The following section will show how the courts' reluctance to relinquish the male prerogative in naming persists. To clearly demonstrate the parallels between the two struggles, court decisions will be analyzed according to the arguments made by the states, as well as courts, to justify the retention of the paternal naming prerogative. These justifications parallel those offered by the same institutions years earlier in the effort to coerce married women to adopt their husbands' names. While this article does place an emphasis on the more non-progressive decisions, including the most neoconservative of dissents, the fact that such arguments are still offered today without hesitation justifies such emphasis.

### B. *The Courts and Parents' Naming Rights*

#### Introduction

During the 1970's and 1980's, an increasing number of conflicts regarding the naming of children began to surface in the courts. A review of the caselaw reveals that the issues disputed largely parallel those discussed in the 1970's cases regarding a married woman's right to retain or resume her maiden name. This new battle, however, was even more formidable. The arguments made in favor of women's right to name themselves, although not always effective, were at least bolstered by the common law. Litigation concerning children's names, however, was preceded by a virtually unblemished history of judicial encouragement of the patrilineal naming system. Courts began to frame men's right to oppose women's right to name children in gender-neutral terms as women began to use constitutional arguments in child-naming litigation. Grandiose and vague standards such as "the child's best interest" served as a guise for maintaining discriminatory traditions. While a few progressive opinions were voiced, mainly during the 1980's, overall progress in women's rights to name children was slow and fraught with setbacks. In most jurisdictions, the paternal bias prevailed. Many courts still adhered strictly to the theory of the father's primary right, often after paying lip service to the concept of equal parental rights.[114]

Moreover, even where progress was made away from statutory articulations of a patrilineal preference, public awareness remained minimal and couples continued to assume that their children must receive the father's surname. In addition, this second generation of naming issues was accompanied by vigorous social pressures.[115] Under

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114. There were major setbacks in awarding divorced women the right to name children over the fathers' objections. Doll reports that out of the fourteen cases in which divorced women sought modification of their marital children's names, only six succeeded. *See* Doll, *supra* note 102, at 246 n.129.

115. *See* MacDougall, *supra* note 6, at 101-02 ("Women have generally been hesitant to express and assert their desires and their rights to name their children over their husband's and families' expectations. Such hesitation is based in part on the

these circumstances, and in light of the spoken and unspoken fear that women will, as men have, impose their surnames on children irrespective of the children's best interests, judicial and legislative reform seemed unlikely. Therefore, it is not a surprise that in the 1990's, despite some enlightened cases, the response to women asserting their right to name their children has been rulings "that can only be described as reactionary."[116]

### 1. The Common Law

A major controversy originally surrounding the question of a married woman's right to retain her maiden name was whether these laws were mandatory legal burdens placed on women, or customs so entrenched that they were mistaken for law.[117] The problem regarding the naming of children is similar. In this arena, there were several cases in which the courts denied a mother's request to name her children on grounds of common law doctrine.[118] However, this doctrine was fraught with misinterpretation. Just as English common law never technically required a married woman to adopt her husband's name, neither did it impose a legal requirement that parents name marital children after the father.[119] Nonetheless, judges historically gave fathers the power to name marital children in parental disputes.[120]

The custom of hereditary paternal surnames arose in England as a response to the Norman-imposed system of feudal land tenure and primogeniture.[121] However, even primogeniture did not make the paternal surname universal. Exceptions did occur, as many sons and daughters adopted their mothers' surnames when succeeding to their mothers' estates.[122]

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individual women's resistance to appear as if they are only fighting domestic matters in public.").

116. Doll, *supra* note 102, at 244. This 1991 comment seems all the more accurate now. Another adjective for these reactionary decisions is "neo-conservative."

117. *See supra* Part I.C.1.

118. *See In re* Trower, 66 Cal. Rptr. 873, 875 (Ct. App. 1968) (denying the mother's request to add the surname of her present husband to her child's name because the father had an interest in having his child retain his surname); *In re* Tubbs, 620 P.2d 384 (Okla. 1980) (requiring that a father must be given personal notice of a mother's attempt to change the child's name where the father's location was ascertainable and his paternal rights were intact); Laks v. Laks, 540 P.2d 1277, 1279 (Ariz. Ct. App. 1975) (sustaining the father's injunctive relief against the mother's attempt to add her maiden name to their children's names after divorce).

119. *See* Seng, *supra* note 3, at 1307; MacDougall, *supra* note 6, at 108 (asserting that the California Supreme Court, in *In re Schiffman,* made the misleading statement that Henry VIII "required recordation of legitimate births in the name of the father. Thence the naming of children after the fathers became the custom in England.").

120. *See* MacDougall, *supra* note 6, at 157.

121. Primogeniture is the "[a]ncient common law of descent in which the eldest son takes all property of his deceased father." BLACK'S LAW DICTIONARY 370 (3d ed. 1991). *See also* Seng, *supra* note 3, at 1324-25.

122. *See* Seng, *supra* note 3, at 1324; MacDougall, *supra* note 6, at 109.

Similarly, in the United States, the common law never required nonmarital children to bear their mothers' surnames. At common law, a bastard had no name based on parentage, but was a *filius nullius* — a child of no one — and could gain a name only by becoming known by it.[123] Customarily, however, mothers gave their illegitimate children their own surnames since they took care, custody and control of these children. Custom also dictated that marital children were initially named with their fathers' surnames and thereafter known by them. However, as with adults' names, minors' names were established by usage and could therefore be changed by the children at will.[124] It was not until the late 1970's that courts and state officials expressly recognized the right of parents, by their own will, to name their children, thus codifying custom.[125] Once several states enacted statutes eroding the common law right to name children, it became clear that custom had gained the force of law. In the 1990's, courts continue to perpetuate the force of custom through their decisions and interpretations of the law.

In recent years, judges have interpreted state naming statutes in different ways, depending on their particular subjective views. Courts vary by jurisdiction and characterize the common law of naming as either flexible or stable according to the result the judge wants to achieve. A minority of judges seeks to preserve the common law tradition that left the family and children free to choose their names through usage, rather than involving the state and courts in each naming decision. For example, in rejecting the majority view that a state may limit parents' choice of surname for their children to familial connections, one judge emphasized that there is a clear common law tradition of freedom to choose names, including children's liberty to select a name different from their parents. Therefore, he reasoned, there may be "no tradition of legislation denying any such right."[126] Similarly, a Kentucky judge noted that "Kentucky recognizes the common law right of any person to informally change their name by public declaration. Even a child may exercise such a common law right, but the child may not do so pursuant to statute because the statutory right is vested in the parent."[127] State interference had thus limited the rights existing under common law.

Some judges assert that codification by state legislatures is a reflection of common law. One dissenting judge in Iowa rejected the

123. *See* MacDougall, *supra* note 6, at 108.

124. *See id.*

125. *See, e.g.*, Secretary of Commonwealth v. City Clerk, 366 N.E.2d 717 (Mass. 1977); Doe v. Dunning, 549 P.2d 1 (Wash. 1976). Some states have recognized parental common law naming rights in codes, agency regulations and attorney general opinions. *See* MacDougall, *supra* note 6, at 114-15 n.62.

126. Henne v. Wright, 904 F.2d 1208, 1218-19 (8th Cir. 1990) (Arnold, J., dissenting in part and concurring in part).

127. Likins v. Logsdon, 793 S.W.2d 118, 124 (Ky. 1990) (Wintersheimer, J., dissenting) (quoting Burke v. Hammonds, 586 S.W.2d 307, 308 (Ky. Ct. App. 1979)).

majority's affirmation of a lower court's ruling that changed the name of a child from the father's to the mother's as part of a divorce decree.[128] In his view, the common law and statutory law have long recognized the need for a stable system in all areas, including provisions for name changing.[129] Allowing objections to traditional naming would lead to confusion, and such objections should therefore be overlooked.[130]

### 2. Constitutional Law

#### (a) Is Naming Your Child a Fundamental Right?

Litigation arose in the 1970's and 1980's between divorced or separated parents pertaining to the changing of a child's name from the father's to the mother's. Courts tended to find for the father in most cases, and characterized the paternal naming tradition as a "natural," "time-honored," "primary," fundamental, or "protectable" right.[131] Using these terms indicated that there was a constitutional privacy interest at stake in the right to name one's children.

The 1990's witnessed a retraction from the earlier declarations of parents' constitutional privacy right to name their children.[132] In *Henne v. Wright*, the United States Court of Appeals for the Eighth Circuit overturned the decision of the federal district court,[133] holding that the parents' right to give a child a surname unconnected to either parent was not a fundamental right under the Fourteenth Amendment.[134] In deciding whether the parents' right was fundamental, the court observed that the right would be an "extension of previously enunciated privacy interests in childbearing."[135] Consequently,

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128. *See In re* Gulsvig, 498 N.W.2d 725, 730 (Iowa 1993) (Snell, J., dissenting).

129. *See id.*

130. *See id.*

131. MacDougall, *supra* note 6, at 137. *See generally In re* Tubbs, 620 P.2d 384 (Okla. 1980); *In re* Robinson, 233 N.W.2d 138 (Minn. 1974); *In re* Lone, 338 A.2d 883 (N.J. Super. Ct. Law Div. 1975); *In re* Trower, 66 Cal. Rptr. 873 (Ct. App. 1968); Burke v. Hammonds, 586 S.W.2d 307 (Ky. Ct. App. 1979); *In re* Baldini, 183 N.Y.S.2d 416 (City Ct. Bronx County 1959). *But see* MacDougall, *supra* note 6, at 136 ("[C]onsistent with the basic tenet of common law that no one has such a property right in his or her personal name such that he or she can prevent another from using it, courts have expressly rejected the father's right in naming his marital children as a constitutional property right.").

132. *See* Concha v. Concha, 808 S.W.2d 230, 231 (Tex. 1991) (reprimanding the lower court for believing an attorney's unsupported assertion that a father has a constitutional right to have his child bear his surname).

133. *See* Henne v. Wright, 711 F. Supp. 511, 513-14 (D. Neb. 1989), *rev'd*, 904 F.2d 1208 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 692 (1991). *See also* Brian M. Katz, *Constitutional Law: Parental Right to Choose a Child's Surname Other than One Legally Connected to a Parent — Henne v. Wright*, 64 TEMP. L. REV. 1095 (1991) (arguing that the court was correct in not expanding the right to privacy under the Fourteenth Amendment).

134. *See* Henne v. Wright, 904 F.2d 1208, 1215 (8th Cir. 1990).

135. *Id.* at 1214.

the relevant inquiry was whether the right was "deeply rooted in this Nation's history and tradition."[136] The custom in America, the court noted, has always been that a marital child receives the father's name.[137] While some parents may wish to deviate from this norm, "we can find no American tradition to support the extension of the right of privacy to cover the right of a parent to give a child a surname with which that child has no legally recognized parental connection."[138] Since the court concluded that no such tradition existed, the right was not fundamental. A heightened level of scrutiny was not triggered, and the state needed only to demonstrate that the law rationally furthered legitimate state interests, which it was found to have done.[139]

In his dissenting opinion, Judge Arnold, like the district court, argued that the court was incorrect in framing the question so narrowly and asserted that the issue was broader.[140] Arnold asked whether a parent, in general, has a fundamental right to choose a child's surname. Arnold emphasized that there is a clear common law tradition of freedom to choose names, including children's liberty to select a name different from their parents.[141] Consequently, he reasoned, there may be no tradition of giving a child a name with which it has no legal relation, "[b]ut, by the same token, there is no solid tradition of legislation denying any such right."[142] Therefore, he reasoned, there may be a fundamental right at stake.[143] Arnold saw only a small step to move from a parent's fundamental right to self-name at will to the recognition of a parent's right to choose the surname of her or his child at will. A heightened level of scrutiny, therefore, needed to be applied. Because the state had no compelling interest warranting an infringement on this right, Arnold argued, the statute should be held unconstitutional.[144]

Because the statute in *Henne* was gender-neutral, it was an improvement over the mandatory paternal surname laws invalidated by earlier rulings. Ultimately, however, it has been realized that the apparently gender-neutral, familial-connection rule discriminates against women. As long as society dictates that wives and children

136. *Id.* (citing Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

137. *See id.*

138. *Id.* at 1215.

139. *See id. See generally* Patrick G. Nelson, *By Any Other Name: Henne v. Wright*, 24 CREIGHTON L. REV. 1135 (1991) (analyzing the rational relation test as applied by the Eighth Circuit, and arguing that the court correctly determined that the right of a parent to choose a surname does not warrant fundamental status).

140. *See Henne*, 904 F.2d at 1216 (Arnold, J., dissenting). Arnold also suggested possible First Amendment rights; however, since neither party raised the issue, he refrained from addressing it. *See id.*

141. *See id.* at 1217-18.

142. *Id.* (citing Michael H. v. Gerald D., 491 U.S. 110 (1989), *reh'g denied* 492 U.S. 937 (1989)) (holding no "societal tradition" of laws denying the right to choose one's own name).

143. *See id.*

144. *See id.*

must assume the name of their husband or father, it is *only* women, particularly divorced mothers, who require flexibility in naming (such as the plaintiff wanted in *Henne*) in order to recreate a family unit.[145] This is especially true because courts have characterized stepfathers' names as having no familial connection to the child, even when mothers assume their new husbands' names.[146] The husband will rarely have changed his name upon entering marriage, and the children from his previous marriage will probably bear his name. Thus, even after the dissolution of the marriage, he may happily unite with all his children and a newly acquired wife, in one house, with one name — his. The mother who chooses to remarry is precluded from ever again being united with all her children under a single family name, even as they live under one roof. Thus, a man may walk his way through life, marking his name on all the wives and children he acquires. But even after he has left, the women and children he has permanently marked will be constrained from ever asserting their individual identities. This dichotomy not only reflects parental inequality in naming children of marriage, it also undermines a woman's choice in naming herself and ignores any potential harm to the children involved.

The outcome of *Henne* reflects not only disparate treatment of women, but a setback to married couples as well. By sketching a narrow portrait of tradition and overlooking the common law permissiveness regarding names, the court in *Henne* (and the Nebraska legislature) demonstrated a continued preference for custom and skepticism towards new approaches. By obstinately maintaining traditional solutions as the sole resolution, courts discourage couples who are struggling with naming from discovering alternative, more equitable solutions such as fused or hyphenated names. Couples no longer have the leeway to struggle over naming and create their own unique solutions. Thus, in excluding novel choices in favor of more traditional ones, the courts not only infringe upon the parents' rights in what should be a private matter, but also inhibit the creativity and compromise so essential to resolution of family problems.[147]

### (b) Equal Protection

During the 1980's, some courts recognized the equal protection issues inherent in the right to name children. In the ground-breaking opinion, *In re Schiffman,* the California Supreme Court effectively abrogated the rule granting the father a primary right to have his child

145. According to Doll, even if some variation is attributable to the fact that nonmarital children never bore the patronymic, it is inappropriate to conclude that the interest of divorced men in the change of the child's surname exceeds the interest of divorced women, rather than exceeding the interests of fathers who never married. *See* Doll, *supra* note 102, at 247

146. *See infra* note 163.

147. *See* Doll, *supra* note 102, at 259-60.

bear his surname.[148] After outlining the history of sexist naming customs, the court cited legislative advances such as the Married Women's Property Act, no-fault divorce and sex-neutral custody statutes.[149] Accordingly, the court noted that that the historical "bases for the patrimonial control of surnames have virtually disappeared."[150]

A few courts recognized other women's rights issues inherent in decisions regarding children's names.[151] Some courts expressly referred to the universal importance of "one's own very personal label,"[152] and suggested that the paternal preference infringes on the mother's right to equal protection.[153] As to state statutes mandating the paternal surname for marital children and the maternal surname for non-marital (at birth) children, three United States district courts declared such legislation unconstitutional in the early 1980's.[154] The courts held that the requirements interfered with parental liberty and privacy to rear children, and amounted to discrimination on the basis of sex or birth status.[155]

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148. *See In re* Schiffman, 620 P.2d 579 (Cal. 1980).

149. *See id.* at 581.

150. *Id.* at 581-82.

151. *See, e.g.*, Hamby v. Jacobson, 769 P.2d 272 (Utah Ct. App. 1989).

152. Jech v. Burch, 466 F. Supp. 714, 719 (D. Haw. 1979) (approving the surname made by the parents combining syllables of both names, in an effort to express that their marriage was a unity of equals, and holding unconstitutional a Hawaii statute requiring children to bear their father's surnames).

153. *See* Laks v. Laks, 540 P.2d 1277, 1280 (Ariz. Ct. App. 1975) (noting, in dictum, "merit" in appellant's contention that the recognition of a father's interest in having his child bear his surname constitutes impermissible sex-based classification); *see also In re* Douglass, 252 Cal. Rptr. 839, 841 (Ct. App. 1988); O'Brien v. Tilson, 523 F. Supp. 494, 496 (E.D.N.C. 1981); Rio v. Rio, 504 N.Y.S.2d 959, 963 (Sup. Ct. 1986); K.K. v. G., 530 A.2d 361, 363 (N.J. Super. Ct. Ch. Div. 1987) (quoting *In re* Rossell, 481 A.2d 602, 605 (N.J. Super. Ct. Law Div. 1984)).

154. *See* Sydney v. Pingree, 564 F. Supp. 412, 413 (S.D. Fla. 1982) (finding that a statute denying parents the right to name their child a combination of both their surnames was unconstitutional); *Jech*, 466 F. Supp. at 719; *O'Brien*, 523 F. Supp. at 496 (involving three sets of parents seeking invalidation of a North Carolina statute that imposed the father's surname on the children of married parents, claiming that it violated their constitutional rights to privacy, due process, and equal protection).

155. *See Sydney*, 564 F. Supp. at 413; *Jech*, 466 F. Supp. at 721; *O'Brien*, 523 F. Supp. at 497. The courts looked to the *Meyer-Pierce-Roe* line of reasoning, acknowledging that the due process clause of the Fourteenth Amendment protects the rights of parents to choose their child's surname. *See generally* Meyer v. Nebraska, 262 U.S. 390 (1922) (right to instruct child in foreign language); Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925) (right to send children to private school); Roe v. Wade, 410 U.S. 113 (1973) (right to choose abortion). *See also* Miller v. Leavitt, No. CIV 82-369-E (W.D. Okla., Dec. 24, 1982) (unpublished entry of judgment) (following the precedents of *Jech* and *O'Brien* and concluding that constitutionally protected privacy interests were implicated by Oklahoma's regulation requiring married parents to give their children the father's surname; the dispute ended in an out-of-court settlement in which the state only agreed to amend its regulation). *But see* Doe v. Hancock County Bd. of Health, 436 N.E.2d 791 (Ind. 1982) (declining to inter-

Nevertheless, judicial recognition of the equal rights implications for women in naming their children was unusual and short lived. Even today, when women's issues are more widely recognized, they tend to come embodied in paternalistic judicial diatribes.[156] Courts continue to talk of the *father's* "protected" right or interest.[157] Women who seek to undermine this superior right are strongly castigated. In an Iowa case, a mother's desire to resume the name of her second husband after an unsuccessful third marriage was characterized by the dissent as an action motivated by spite.[158] The fact that the child would be living with his mother and his two sisters, who bore the name from the previous marriage, seemed to be of no consequence to the dissent. Justice Snell retorted that the case before him "is not [a case] about women's rights; it is about equal rights."[159] He reprimanded the mother for "unilaterally naming" the couple's son, and thereby depriving him of "a true parental name,"[160] *i.e.*, a (unilaterally given) paternal name. "To approve [the mother's] unilateral and deceitful act on the principle of promoting family unity is not an affirmation of the equality of women, which I support, but assault on the dignity of man. . . . At once, history is ignored, custom rejected and genealogy abjured."[161]

Snell's view reveals the horrific double bind in which the mother is girdled. First, she must comply with the patrilineal naming tradition and adopt her husband's surname. Later, courts will use this fact against her in order to deprive her of the right to choose her child's name.[162] Despite personally having held the name of her previous husband, and despite having two children who identify with that

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fere with legislative policy); Robertson v. Pfister, 523 So. 2d 678 (Fla. Dist. Ct. App. 1988) (declining to follow *Sydney*).

156. *See In re* Gulsvig, 498 N.W.2d 725, 733 (Iowa 1993) (Snell, J., dissenting ) (stating that the mother's "claim to name the child a name of her own choosing is based on no more weighty factors than personal pique at [the ex-husband] and her conception of appearances").

157. *See* Keegan v. Gudhal, 525 N.W.2d 695, 702 (S.D. 1994); Likins v. Logsdon, 793 S.W.2d 118, 121 (Ky. 1990) (articulating a strong version of the rule that a father possesses a right to have his children share his name unless "forfeited by his own conduct").

158. *See Gulsvig*, 498 N.W.2d at 733 (Snell, J., dissenting).

159. *Id.* at 731. It is not, he continues, "a Lucy Stone type case," although he admits that "an implication is there." *Id.*

160. *Id.* at 731-32.

161. *Id.* at 733. Similarly, in his dissent in *Quirk*, Snell once again claims to "recognize that a child's mother has a right equal to that of its father to choose its name." *In re* Quirk, 504 N.W.2d 879, 884 (Iowa 1993) (Snell, J., dissenting). But the act of a mother who unilaterally names her child (even in a situation where the marriage was basically over at the time of the birth) to the total exclusion of the child's father and his rights, "insults the dignity of man (the human race of men and women)." *Id.* No mention is made of the insulting custom which has reigned for years whereby both the mother and the child are "unilaterally" named by the father.

162. *See, e.g.*, Halloran v. Kostka, 778 S.W.2d 454 (Tenn. Ct. App. 1989).

name, the mother is viewed as seeking to impose the name of "another man" on the child.[163]

In *Keegan v. Gudhal*, Judge Henderson applied a similar double standard. On the one hand, he accused the mother of purposely omitting information as to the father's identity on the birth certificate in order to enable her to name the child unilaterally by her surname.[164] This was viewed as "a strange type of philosophy"[165] promulgated by "the feminist movement."[166] Henderson declared that the "[n]atural mother had no superior right to interrupt the inheritance of a surname. Such type of action 'is not commensurate with genealogy, history, justice and fairness in the United States.'"[167] And yet, he saw no injustice in the present custom whereby a father has a naturally superior right to name the child.[168]

One exception is in the dissenting opinion of Judge Arnold in *Henne*, who commented on the absurdity of denying women parental naming rights: "We know . . . that these woman had a fundamental right to prevent their children from being born in the first place. It is a bizarre rule of law indeed that says they cannot name the children once they are born."[169]

### 3. State Interests

The parallels between the parental naming cases of the 1990's and the women's naming cases of the 1970's are most clearly articulated when examining the justifications offered by states in support of

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163. *See Gulsvig*, 498 N.W.2d at 733 (Snell, J., dissenting). In other cases, courts persist in characterizing mothers' requests to change children's names according to their new family name as a contest between the father and the stepfather. *See* Likins v. Logsdon, 793 S.W.2d 118, 121 (Ky. 1990). This ignores the fact that the stepfather's name is also the mother's name and further entrenches the tendency to regard women as borrowing names rather than being identified by them.

164. *See* Keegan v. Gudhal, 525 N.W.2d 695 (S.D. 1994) (Henderson, J., concurring in part, dissenting in part).

165. *Id.* at 702.

166. *Id.* at 701. ("In this day of law by acceleration and whirl, augured by the feminist movement in the field of domestic relations, why not make an inaccurate certificate! Excluding information about the known father served some kind of social/status gratification, to her way of thinking.").

167. *Id.* (quoting Montandon v. Montandon, 242 Cal. App. 2d 886 (Ct. App. 1966)).

168. *See id.* at 701-02 ("Obviously, if she had [included the father's name on the birth certificate], the child's surname would have been the same as the natural father: the mother's husband! The natural father has a protectible interest to have the child bear his surname.").

169. Henne v. Wright, 904 F.2d 1208, 1217 (8th Cir. 1990) (Arnold, J., dissenting). *See also In re* Andrews, 454 N.W.2d 488, 491 (Neb. 1990) (invoking *In re Schiffman*, the court declares that "the custom of patrilineal succession" has been superseded by a trend toward parental and marital equality in reference to children and that neither parent has a superior right in the determination of the surname for the parents' child, and in particular, recognizes a mother's interest in her child bearing her premarital or maiden surname).

the patrilineal tradition. Several courts had declared these state interests to be invalid or not bearing any rational relation to the deprivation of a woman's naming rights. In spite of these victories, state lawmakers continue to assert the same ostensible interests and judicial opinions continue to uphold their validity in the child naming context. This is especially true of the present decade in which courts have demonstrated an express preference for a rational basis test, an easy obstacle for any law to meet, as opposed to a stricter level of scrutiny.[170]

### (a) Anglo-American Custom

Throughout the years, courts have alluded to custom and tradition in upholding the father's superior naming right,[171] a practice that persists well into the 1990's. In *Henne*, the court relied on "the nation's history and tradition"[172] in order to justify the limitations it imposed on the scope of parental naming choices. Some courts have gone further to enlist tradition and history in support of an explicit preference for the patronymic. One trial court, as part of a divorce action, amended the birth certificate of the parties' daughter by changing her surname from the mother's to the father's. In addressing the parties, the court noted that it

> would fly in the face of public policy to allow one parent to determine the name of the child. I guess I can't, you know, the public policy has always been [sic] that the child upon it [sic] marriage takes the patron name. *That's the way we are in Anglo-Saxon society and our Anglo-Saxon tradition.*[173]

On appeal, the Supreme Court of South Dakota criticized the trial court for deferring to the tradition of conferring the father's name on a legitimate child and for not applying the statutory best

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170. The *Henne* court did not differentiate itself from the district court cases that have looked at the issue of naming in particular. *See* cases cited *supra* note 154. A year later, in *Brill v. Hedges*, the court which adopted the *Henne* decision held that parents' interests in naming their children do not rise to the level of a fundamental right, and emphasized that the earlier courts, despite having identified naming a child as a fundamental privacy right, did not apply a strict scrutiny standard. *See* Brill v. Hedges, 783 F. Supp. 333, 338-39 (S.D. Ohio 1991). Based on this precedent, the court found the strict scrutiny analysis unsuitable, preferring a "reasonable relationship to a legitimate state interest." *Id.* at 338-39. *See also Henne*, 904 F.2d at 1216 (Arnold, J., dissenting) (conceding that if rational basis were the appropriate test, the state interests underlying the Nebraska naming statute would satisfy the test).

171. *See* Kay v. Bell, 121 N.E.2d 206, 208 (Ohio Ct. App. 1953) (stating that it "has been the custom in our country since 'the time when memory of man runneth not to the contrary' to give a child the surname of its father"). *But see* Bobo v. Jewell, 528 N.E.2d 180, 185 (Ohio 1988) ("[C]ustom is another way of arguing that it is permissible to discriminate because the discrimination has endured for many years.").

172. *Henne*, 904 F.2d at 1214.

173. *Keegan*, 525 N.W.2d at 696 (emphasis added) (quoting the trial court).

interests of the child standard.[174] This opinion was sharply divided. In a strong dissent, Judge Henderson upheld the patrinomial tradition, even invoking biblical passages to support his argument.[175]

In a recent Iowa case, a husband appealed a district court ruling denying his request to change the child's surname to his surname.[176] The appellate court rejected as outdated the husband's argument, which supported a presumption that a child should bear the surname of the father.[177] Again, however, the dissent reflected the archaic preference for patrilineal naming. "Courts have generally recognized that the father . . . has a protectible interest in having the child bear the paternal surname *in accordance with the usual custom.*"[178]

The same gender bias reveals itself in courts' discussions of the importance of naming generally and the magnitude of the injury in depriving a parent the opportunity to name his or her child. Some courts tend to undermine the significance of naming to women who try to name their children. This same marginalization occurred when women asserted their own naming rights in the 1970's.[179] In *Likins v. Logsdon,* the judge launched a venomous attack on the mother, in which he dismissed the importance of naming by referring to it as "a matter that should be of little or no consequence."[180] The opinion further characterized the mother's pursuit of the matter as stemming from hostility and indifference toward the best interests of the child "to the point that it could well cause the children emotional damage of a significant and permanent nature."[181]

However, the importance of naming is interpreted differently when a father stands to lose the right to perpetrate his name. In fact, where judges have emphasized the significance of naming, it is gener-

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174. *See id.* at 699. The case was remanded to the lower court with instructions that the dispute over the child's name be resolved in accordance with the best interest of the child. *See id.*

175. Here the father gives unto his child nourishment. I *Samuel* 1:22. And desires to bestow inheritance. *Luke* 12:13-14. A child should give honor to parents. *Exodus* 20:12. Permit it, under the law and this case, to be done. *Proverbs* 23:22 expresses: Hearken unto your father who begot you, and despise not your mother when she is old. Children are a heritage of the Lord. *Psalm* 127:3-5. As a trial judge, I was often told by counselors that problem children come from the very homes where parents have relinquished their responsibilities of nourishment, training, and overall responsibility. . . . Thereby, this child will not be vulnerable to strange types of philosophy which attack a firm foundation of right and wrong.

*Id.* at 702 (Henderson, J., concurring in part, dissenting in part).

176. *See In re* Gulsvig, 498 N.W.2d 725 (Iowa 1993).

177. *See id.* at 729 ("[T]his conclusion is similar to our repudiation of the inference that the best interests of young children are served by placing the children in their mother's custody." (citations omitted)).

178. *Id.* at 732 (Snell, J., dissenting) (emphasis added).

179. *See supra* notes 23-29 and accompanying text.

180. Likins v. Logsdon, 793 S.W.2d 118, 122 (Ky. 1990).

181. *Id.* at 122.

ally intended to buttress a father's right to name his child, usually a son.[182] In *Gulsvig*, the dissent emphasized the historical importance of naming, beginning with the use of family names or surnames at the time of the Emperor Fuxi in China in 2852 B.C. and in Ancient Rome, quoting an old Roman maxim: "Sine nomine homo non est" (Without a name a person is nothing).[183] The dissenting opinion in *Keegan*, articulated a similar feeling: "Nay, a child should know of his or her parentage — the name is a link to history."[184] Once again, it appears that the mother's parentage, history and progeny are of no consequence.

(b) Administrative Convenience & Efficiency

Almost invariably during the 1970's and 1980's, states argued that they may regulate the selection of children's surnames for administrative purposes. These administrative purposes were wide-ranging and included keeping vital statistics records, handling of official property records, regulating social security and military benefits, keeping insurance information, and avoiding an increase in costs.[185] It was also asserted that maintaining the patrilineal tradition would assist families in tracing their genealogy both for the detection of hereditary illnesses or simply for the prestige.[186] It is interesting to note that when it came to supporting a non-custodial father's right to have his children retain his surname, even if the custodial mother remarried and

182. For examples of cases addressing a father's right to name his son, *see Gulsvig*, 498 N.W.2d at 725; Keegan v. Gudhal, 525 N.W.2d 695 (S.D. 1994); Brill v. Hedges, 783 F. Supp. 333 (S.D. Ohio 1991); Delaney v. Appeal from Probate, No. CV 93 05212095, 1993 Conn. Super. LEXIS 2165 (Conn. Super. Ct. 1993); *In re* Gregory, 8 Conn. Prob. L.J. 205 (Conn. Prob. Ct. 1994). *But see* Henne v. Wright, 904 F.2d 1208 (8th Cir. 1990) (daughters with no father contesting); *In re* Andrews, 454 N.W.2d 488 (Neb. 1990) (daughter with father contesting).

183. *Gulsvig*, 498 N.W.2d at 730 (Snell, J., dissenting) (citing ELSDON C. SMITH, THE STORY OF OUR NAMES (1930)).

184. *Keegan*, 525 N.W.2d at 701 (Henderson, J., concurring in part, dissenting in part).

185. For example, prices would increase because the process of birth registration would be complicated. *See, e.g.*, Jech v. Burch, 466 F. Supp. 714, 720 (D. Haw. 1979); Doe v. Hancock County Bd. of Health, 436 N.E.2d 791, 794 (Ind. 1982) (Hunter, J., dissenting); Rice v. Department of Health and Rehabilitative Servs., 386 So. 2d 844, 850 (Fla. Dist. Ct. App. 1980) (Booth, J., dissenting) (conceding that a common law right to choose a surname at will, absent fraudulent intent, should not be given preference over a statutory scheme intended by the legislature to gather important public records); Sydney v. Pegree, 564 F. Supp. 412, 413 (S.D. Fla. 1982); O'Brien v. Tilson, 523 F. Supp. 494, 496-97 (E.D.N.C.1981).

186. *See, e.g.*, Montandon v. Montandon, 52 Cal. Rptr. 43 (Ct. App. 1966); Clinton v. Morrow, 247 S.W.2d 1015 (Ark. 1952); *In re* Robinson, 344 N.Y.S.2d 147, 149 (Civ. Ct. 1972); Joseph B. Bugliari, Note, *Domestic Relations: Change of Minor's Surname: Parental Rights in Minor's Surname*, 44 CORNELL L.Q. 144 (1959); 12 MACROPEDIA, *Names* 818 (1981); Seng, *supra* note 3, at 1328-29.

the children resided with the new family unit, no mention was made of confusion or administrative difficulties.[187]

Well into the 1990's, the decade of advanced computer technology and cyberspace communication, claims concerning administrative efficiency continued to be invoked by states and affirmed by courts. The efficiency argument was asserted by the state in *Henne* and rejected by the lower court who felt the capacity of the system was sufficient to accommodate the plaintiff's wishes without entirely changing the record system.[188] The court also emphasized that the "Constitution recognizes higher values than speed and efficiency."[189] However, the Eighth Circuit reversed and found for the state, holding that "the legislature could reasonably conclude that it was easier and cheaper to verify and index the birth record of a person who has a surname in common with at least one legally verifiable parent."[190] A low level of scrutiny was applied to the state's efficiency argument.

Following *Henne,* the court in *Brill v. Hedges* applied a reasonable relationship test.[191] The state argued that requiring an unwed mother to give her child her surname was necessary to maintain an efficient and effective record keeping system, as well as to verify and document the genetic relationship between mother and child.[192] The state also alleged that their "system assisted in maintaining the tractability of the ancestral chain," aiding possible future detection of genetic diseases and defects.[193] The court concluded that the relationship between the statute and the state's alleged interests was facially unreasonable, especially with regard to the disparate treatment between married and unmarried mothers.[194]

> Given that the system allows the majority of births to be indexed under any name designated by the mother — including a name to which the child has absolutely no legally established parental connection — it is difficult to see how [the section] furthers any of the interests identified by the state. Additionally, given that the mother's, and usually the father's, name appears on each birth certificate, it is difficult to understand why genetic or ancestral tracing is made more difficult in the situation where a mother and child have different surnames.[195]

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187. *See* Rio v. Rio, 504 N.Y.S.2d 959, 962 (Sup. Ct. 1986) ("Notoriously absent from any discussion of convenience is the inconvenience to the mothers. . . .").

188. *See* Henne v. Wright, 711 F. Supp. 511, 515 (D. Neb. 1989). Further, the state did not produce any evidence to show how much expense would be incurred by the increase of records that would be required. *See id.*

189. *Id.* at 514 (quoting Stanley v. Illinois, 405 U.S. 645, 656 (1972)).

190. Henne v. Wright, 904 F.2d 1208, 1215 (8th Cir. 1990).

191. *See* Brill v. Hedges, 783 F. Supp. 333, 337-39 (S.D. Ohio 1991).

192. *See id.* at 339.

193. *Id.*

194. *See id.*

195. *Id.* at 340.

In spite of this bold assertion, without further evidence, the court found it "impossible . . . to decide whether the statute is reasonably related to the preservation of family life," and it declined to grant the requested relief.[196]

### (c) Fraud

One of the most spurious justifications for the requirement that children of unmarried parents bear their mothers' surnames was the ostensible need to protect innocent men from false paternity suits.[197] Implicit in this rationale is the assumption that a mother may fraudulently seek to induce a man to support her child by indicating, through naming, that he is the child's father. This reasoning is reminiscent of the myth that women, motivated by revenge, blackmail, jealousy, guilt or embarrassment, falsely claim rape after consenting to sexual relations.[198] This assumption is unfounded, as it does not rest on any empirical evidence.[199]

In *Henne*, the state claimed to have an interest in protecting innocent men from false paternity claims.[200] In refuting the legitimacy of this interest, the district court noted that names alone do not create a legal relationship between people.[201] The court also recognized that a man could have his reputation damaged by an unwed mother creating the appearance that he is the father by her choice of name.[202] The district court, however, rejected this argument by making two observations: (1) A tort claim and common law damages were always available to men who had actually been wrongly accused; and (2) the statute was overbroad if its intent was to protect wrongly accused men.[203] The court stated, "[i]t 'protects' all men — who are wrongly accused, men who are not accused at all — except men who want no protection, as is true with both natural fathers in this case. It protects women not at all."[204] The Eighth Circuit disagreed and accepted the state's claim that "the name of a non-parent could be improperly appropriated to achieve a deliberately misleading purpose, such as the creation of a false implication of paternity."[205]

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196. *Id.*

197. *See* Doe v. Hancock County Bd. of Health, 436 N.E.2d 791, 794 (Ind. 1982) (Hunter, J., dissenting).

198. *See* Morrison Torrey, *When Will We Be Believed? Rape Myths And The Idea Of A Fair Trial In Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1025 (1991).

199. *See id.*

200. *See* Henne v. Wright, 711 F. Supp. 511, 514 (D. Neb. 1989), *rev'd*, 904 F.2d 1208 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 692 (1991).

201. *See id.* at 516.

202. *See id.*

203. *See id.*

204. *Id.*

205. Henne v. Wright, 904 F.2d 1208, 1215 (8th Cir. 1990). In *Gulsvig*, Snell discusses only one of the various reasons that the *Henne* court relied on, namely, that "the name of a non-parent could be improperly appropriated to achieve a deliberately

In spite of this implied paternity noted by the Eighth Circuit, other courts have stated that a name does not establish paternity.[206] It should be noted that the risk of false inferences will continue only as long as the patrilineal naming custom persists.

(d) The Preservation of Family Life and the Child's Welfare

*i. The Best Interests of the Child*

As in most legal dispositions involving minors, the doctrine that came to be applied by courts, and later by legislatures, with regard to name-changing was that of the child's best interests.[207] Although facially neutral, in reality the standard has been used largely as "subterfuge to nevertheless perpetrate the paternal preference."[208] The principal way in which the best interests standard was used to prejudice women's legal efforts to gain control of their children's surnames was through apparently non-preferential standards of proof and similar procedural devices. Because most American children born into an intact marriage are given their fathers' surnames, the standard creates a nearly absolute presumption in favor of the paternal surname.[209] The presumption exists despite purportedly neutral standards, such as placing the burden of proof on the proponent of the name-change. As one commentator stated,

> The courts' attempts to appear neutral amount to sheer judicial hypocrisy. . . . In no known case has a custodial mother sought to change her marital child's surname from her birth name to the father's name or to another name. Nor is there any reported case of a non-custodial father attempting to change his marital child's surname from the paternal to the maternal or another surname. . . .

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misleading purpose, such as the creation of a false implication of paternity." *In re* Gulsvig, 498 N.W.2d 725, 732 (Iowa 1993) (Snell. J., dissenting).

206. *See, e.g.,* Doe v. Dunning, 549 P.2d 187 (Wash. 1976); MacDougall, *supra* note 6, at 154. Historically speaking, although names have expressed kinship, they have not necessarily expressed paternity. *See* Pacheco, *supra* note 29, at 5-9 nn.9-36.

207. *See In re* Andrews, 454 N.W.2d 488, 488 (Neb. 1990).

208. Hamby v. Jacobson, 769 P.2d 273, 278 (Utah Ct. App. 1989). Doll compares this with the courts' treatment of child custody cases in which gender neutral standards were adopted in favor of the "tender years" presumption. By contrast, throughout the seventies and early eighties, courts worked to strengthen the paternal surname presumption. *See* Doll, *supra* note 102, at 262 n.40. *See also* Seng, *supra* note 3, at 1315. The Supreme Court has criticized the best interests of the child standard as being vague. Belotti v. Baird, 443 U.S. 622, 655-56 (1979) (Stevens, J., concurring).

209. *See In re* Schiffman, 620 P.2d 579, 581 (Cal. 1980) (discussing past discrimination). However, even in *Schiffman,* the court qualified the right by according weight to the length of time the child had held the paternal surname. *See id.* This criteria only strengthens the father's prerogative. Seng characterizes the presumption as a "vested" right which the father gains after initially naming the child. *See* Seng, *supra* note 3, at 1334.

> Neutral language cannot conceal the appallingly disparate burden of proof imposed upon women in these name cases.[210]

Generally, a mother could satisfy her burden of proof only by showing the father's abandonment or misconduct. Such abandonment or misconduct had to be especially extreme, and even then a name change would rarely be granted.[211]

The vast majority of jurisdictions today continue to apply the best interests of the child standard.[212] While certain courts demonstrate true objectivity in applying this standard, many of the judicial opinions reflect outdated, historical notions. This bolsters the United States Supreme Court's criticism of the best interests standard as so vague that judges have almost complete discretion to make decisions that reflect their own subjective values.[213] The confusion of one probate court in applying this standard is clear. In examining the mother's request for a name change, the court declared that it would consider the best interests of the child but stated that "[i]n view of the special rights and interests that parents have with respect to their children, the court should also consider *the interests of the parents.*"[214] The Pennsylvania Supreme Court gave an even less coherent definition, stating that "a genuine determination of the best interest of the child [must take into account] good sense, common decency and fairness to all concerned and the public."[215]

A number of cases continue to prejudice mothers seeking name changes through the imposition of heavy burdens of proof.[216] In *Likins,* for example, the court imposed an additional stringent eviden-

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210. MacDougall, *supra* note 6, at 144. In addition, the procedural barriers served to virtually destroy any opportunity for an unbiased accounting of the child's best interests. Courts rarely would take the children's own views and feelings into consideration. *See* Seng, *supra* note 3, at 1340.

211. *See* Kristine Cordier Karnezis, Annotation, *Rights and Remedies of Parents Inter Se with Respect to the Names of Their Children,* 92 A.L.R.3d 1091 (1980).

212. *See In re* Grimes, 609 A.2d 158, 161 n.5 (Pa. 1992) (citing a comprehensive list of the jurisdictions that apply the best interests of the child standard).

213. *See* Belotti, 443 U.S. at 655-56 (Stevens, J., concurring) (criticizing the standard because judges have proposed different and frequently conflicting subjective factors for deciding whether a particular name is in a child's best interests).

214. *In re* Gregory, 8 Conn. Prob. L.J. 205, 210 (Conn. Prob. Ct. 1994) (emphasis added).

215. *Grimes,* 609 A.2d at 162 (quoting Petition of Falucci, 50 A.2d 200, 202 (1947)).

216. *See In re* Gulsvig, 498 N.W.2d 725, 733 (Iowa 1993) (Snell, J., dissenting). Snell discusses a number of cases upholding a policy of judicial restraint in cases involving name changes for minors, stressing that only clear and compelling evidence of misconduct would justify granting the requested change. He proceeds to impose even higher demands with regard to the initial naming of a child:

> The legal standard that should be applied in this case of determining the child's name at birth should be more stringent than what is applied by the majority of courts in applications to change a name. In name change cases involving minors, the non-custodial father's name is entitled to be given significant consideration and a change is not warranted unless there is clear

tiary requirement on the mother, asserting that she must demonstrate concretely, through circumstantial evidence and expert testimony, how the name change *will benefit* the child.[217] In another case, the court categorically stated that when applying the best interests of the child test, it was not the policy of the court to grant the application to change the name without a compelling reason.[218] In a 1994 post-divorce proceeding by a custodial mother seeking to change her children's surnames from their father's surname to her maiden name, the court expressly rejected the mother's contention that "the best interests analysis, which necessarily maintains the status quo absent findings that the name change is in child's best interests, is inherently gender biased."[219]

### *ii. Deference to the Custodial Parent*

In earlier decades, in divorced families, the usual principles of family law gave the custodial parent or guardian the right to direct the child's upbringing and to protect her or his welfare.[220] When it came to questions of naming, however, few decisions gave weight to the fact that the mother was the custodial parent and a paternal presumption was generally preferred.[221] One particularly invidious form of dis-

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and convincing evidence that it is in the child's best interests to change its name.

*Id. See also* Keegan v. Gudhal, 525 N.W.2d 695, 701 (S.D. 1994) (Henderson, J., concurring in part, dissenting in part) (stating that a "father of an infant child has a right to have a child bear his name" (citations omitted)); Overton v. Overton, 674 P.2d 1089 (Mont. 1983); Cohan v. Cunningham, 104 A.D.2d 716 (N.Y. App. Div. 1984).

217. *See* Likins v. Logsdon, 793 S.W.2d 118, 122 (Ky. 1990). *But see id.* at 124 (Wintersheimer, J., dissenting) ("Although a number of other states have chosen to enact statutory standards encompassing the 'clear and convincing' standard, Kentucky has not. It is clear the general assembly has left the application of [the statute] to the sound discretion of the district court."); *In re* Andrews, 454 N.W.2d 488, 490 (Neb. 1990) (allowing a psychologist to testify that a hyphenated name would facilitate attachment to both parents); Delaney v. Appeal from Probate, No. CV 93 05212095, 1993 Conn. Super. LEXIS 2165, at *1 (Conn. Super. Ct. 1993) (allowing similar testimony in favor of the mother even though the court ruled against it); *Grimes*, 609 A.2d at 162.

218. *See In re* Maliszewski, 615 N.Y.S.2d 977 (Sup. Ct. 1994) (denying the mother's request to change her child's surname, absent proof the father had completely abandoned the child or totally failed to support her).

219. *In re* Wilson, 648 A.2d 648, 650 (Vt. 1994).

220. "Family-law principles prescribe that if both parents are not raising their child together, a court, presuming the custodial parents will act in the child's best interests, generally should vest decision-making power in the parent with whom the child lives." Foggan, *supra* note 105, at 597 (citing HOMER HARRISON CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 573-76 (1968)). "Beginning in the 1970's, courts reached the [conclusion] that the parent in daily contact with the child is better able to make decisions about his welfare." Seng, *supra* note 3, at 1311.

221. *See, e.g., In re* Schiffman, 620 P.2d 579, 584 (Cal. 1980) (Mosk, J., concurring) (suggesting the courts employ a presumption that the custodial parent is acting in the child's best interests). However, the few courts that have explicitly discussed the idea of a custodial presumption have rejected the idea. *See, e.g.*, Cohee v. Cohee,

crimination against the custodial mother surfaced when she remarried and assumed her new husband's name. When attempting to change her children's names to reflect her new name, courts tended to characterize the mother's request as an attempt to change the child's biological paternal surname to the stepfather's name. According to this view, a woman merely inhabits a name that belongs to her husband.[222] This assumption led to further disparity as it allowed the rare custodial father to create a new family unit under one name, but a custodial mother who remarried was not given this same opportunity.

Today, there are many more custodial fathers and parents that have joint physical custody than in the past. Nonetheless, there are still more custodial mothers than fathers.[223] In keeping with the well-established policy of deference to the father-child relationship, the courts continue to reject the principle of deference to the custodial parent. In Florida, for example, a statute provides that when a mother is not married at the time of the birth or if the mother is married at the time of birth but only one parent has custody, then the custodial parent chooses the name.[224] However, a 1992 court ruling emphasized that this applies only in the absence of paternity litigation, even if custody is awarded to the mother as part of the paternity action.[225] In *Gulsvig*, a father appealed from the district court's order of dissolution of marriage, which included a denial of his request to change the child's surname to his own.[226] The mother had unilaterally given the child her post-divorce, pre-marriage name before the final court order had been given and while her legal name was still that of her ex-husband.[227] The trial court ruled in favor of the mother as the custodial parent. The appellate court expressly rejected granting an absolute right to name the child to the mother because the mother did not have sole custody of the child at birth.[228] Nonetheless, the court appeared to take the mother's custody into account when examining the child's best interests, looking to such factors as the child's presence in the mother's home and the surname of the child's sister.[229]

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317 N.W.2d 381, 384 (Neb. 1982); *In re* Tubbs, 620 P.2d 384 (Okla. 1980); Seng, *supra* note 3, at 1310-16; Foggan, *supra* note 105, at 596-98. Arguments in favor of the custodial parent's judgment have been most successful in disputes regarding the initial name given at birth. *See* MacDougall, *supra* note 6, at 146 n.217.

222. *See* Doll, *supra* note 102, at 235.

223. *See* FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 610-11 (Mary Becker et al. eds., 1994) (reviewing the development of custody preferences). *But see* GENDER AND LAW 371 (Katharine T. Bartlett ed., 1993) ("Women still seek, and thus obtain, custody of children following most divorces.").

224. *See* FLA. STAT. ANN. § 382.013(5)(a)-(b) (West 1993).

225. *See* Brown v. Dykes, 601 So. 2d 568, 569 (Fla. Dist. Ct. App. 1992).

226. *See In re* Gulsvig, 498 N.W.2d 725 (Iowa 1993).

227. *See id.*

228. *See id.*

229. *See id.* at 729. The court rejected a hyphenated surname as a solution because it would "pour salt in the wounds of one or both of the parties and eventually

This was only a slim victory, however, since four justices dissented from the opinion. The dissenting opinion in *Gulsvig* demonstrates courts' general reluctance to defer to a custodial parent's decision as evidenced by expressions of extreme horror whenever a custodial mother unilaterally names her child.[230] According to at least one judge, deference should be shown to the non-custodial father in determining the child's name:

> In name change cases involving minors, the noncustodial father's name is entitled to be given significant consideration and a change is not warranted unless there is clear and convincing evidence that it is in the child's best interests to change its name. . . . I do not believe that a divorced father, who is without fault, should have to face the distinct possibility of losing not only the custody of his children but of having his name forever excised from their being. . . . The non-custodial father's role is reduced to that of an anonymous sperm donor, finance provider and unwelcome visitor.[231]

Finally, even in those cases where courts agreed to a child retaining or receiving the mother's surname, the decision was often conditioned upon the mother's promise not to change her name in the future.[232]

### *iii. The Paternal Bond*

In the groundbreaking case *In re Schiffman*, the court articulated the need to examine the mother-child relationship:

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would affect [the son]." *Id.* The court accepted the mother's assurance that she would retain her name if she remarried. *See id.*

230. *See id.* at 730-33 (Snell, J., dissenting).

231. *Id.* at 733. For a case with a similar fact pattern in which the district court granted the father the name change, see *In re* Quirk, 504 N.W.2d 879 (Iowa 1993). On review, the Iowa Supreme Court remanded the case with instructions to hold a hearing to determine the best interests of the child, the standard mandated by the Iowa statute. *See id.* The dissent condemned the mother for unilaterally naming the child, and as to determining the child's best interests, stated, "the relationship of the noncustodial parent should be given 'significant consideration.'" *Id.* at 884 (Snell, J., dissenting). The concurrence declined to apply the statutory best interests standard, emphasizing that "this is simply not a name changing case [but rather] a challenge to the legitimacy of the name placed on the child's birth certificate in the first instance." *Id.* at 882 (Carter, J., concurring). The concurrence would have chosen to apply the *Gulsvig* principle, namely that "the mother does not have an absolute right to name the child because of custody due to birth. . . . Consequently, [the mother] should gain no advantage from her unilateral act in naming [the child]." *Id.* (quoting *Gulsvig*, 498 N.W.2d at 729). The *Quirk* concurrence further stated that "[a]lthough language in the *Gulsvig* opinion suggests otherwise, I believe that it is inaccurate to view that case as authority on the issue of changing the names of children whose name's were properly determined in the first place." *Id.* at 882-83.

232. *See, e.g.*, Pizziconi v. Yarbrough, 868 P.2d 1005, 1008 (Ariz. 1993); *Gulsvig*, 498 N.W.2d 725, 729 (Iowa 1993). *But cf.* McManamy v. Templeton, 18 Cal. Rptr. 2d 216 (Ct. App. 1993) (stating that there was no authority giving the mother's surname less importance because it was the surname of her former husband rather than her birth-given name).

> In recognizing a father's right to have his child bear his surname, courts largely have ignored the impact a name may have on the mother-child relationship. Perhaps that is because mothers, usually given custodial preference in the past, generally had more contact and could maintain a psychological relationship without the need for the tie a surname provides. However, "the maternal surname" might play a significant role in supporting the mother-child relationship, for example, in the cases where the father is the custodial parent or where the custodial mother goes by her birth-given surname.[233]

Despite this bold statement, the argument most commonly proposed in favor of the paternal surname presumption in the 1980's, both in the courts and later in legislatures, was that without the paternal name, the father-child bond would be weakened if not severed completely.[234] Some courts suggested that merely adding the mother's name to the child's surname would cause the father to lose all interest in the child.[235] Evidentiary requirements imposed on the mother were extremely stringent as courts and legislatures increased the burden by requiring the party requesting the name change to adduce clear and convincing evidence.[236] In contrast, the courts generally assumed without any additional evidentiary requirements an impairment of the father-child relationship would occur.[237] The maternal bond,[238] and even the child's own wishes,[239] were rarely mentioned.

Some recent court decisions have expressly followed *Schiffman* in rejecting the earlier presumption that the preservation of the father's name enhances the paternal bond. In *Andrews,* the Supreme Court of Nebraska overturned a district court ruling that denied the request of a divorced mother, who had been authorized to reassume her premarital surname, to change the name of her minor daughters to a hyphenated version reflecting both maternal and paternal surnames.[240]

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233. *In re* Schiffman, 620 P.2d 579, 581-82 (Cal. 1980). For a more recent articulation of the rule, see Hamby v. Jacobson, 769 P.2d 273, 279 (Utah Ct. App. 1989) (dismissing the father's claim that the children's use of his surname would strengthen the paternal bond, the court regarded the use of the father's name as a possible source of "[harm to] the mother-child relationship" and allowed the children to change formally to the mother's birth-name, which they had been using informally for years).

234. *See* Doll, *supra* note 102, at 234; Seng, *supra* note 3, at 1340; Foggan, *supra* note 105, at 88.

235. *See* Carroll v. Johnson, 565 S.W.2d 10, 15 (Ark. 1978).

236. *See In re* Saxton, 309 N.W.2d 298 (Minn. 1981), *cert. denied,* 455 U.S. 1034 (1982); Laks v. Laks, 540 P.2d 1277 (Ariz. Ct. App. 1975).

237. *See, e.g.,* Azzara v. Waller, 495 So. 2d 277, 278 (Fla. Dist. Ct. App. 1986).

238. *See Schiffman,* 620 P.2d at 584.

239. While in the 1950's and 1960's, some courts did grant name changes because of the child's embarrassment, by the 1970's and 1980's, when divorce had become more common, the courts became correspondingly less solicitous. *See* Seng, *supra* note 3, at 1316-17.

240. *See In re* Andrews, 454 N.W.2d 488 (Neb. 1990).

In granting the request, the supreme court invoked *Schiffman*, emphasizing that neither parent has a superior right to determine the surname of the child, and recognizing the mother's interest in her child bearing her premarital or maiden surname.[241]

Notwithstanding this progress, many recent decisions continue the tradition of focusing on the father-child relationship almost exclusively in their application of the best interests test.[242] For instance, the Kentucky Supreme Court held:

> No one can seriously argue that changing a child's name from that of his natural father to that of his stepfather could not weaken the emotional bond between the child and the father, or that such a change would necessarily be in the child's best interest. Further, it is recognized that a natural father has a protectible right to have his child bear his name.[243]

Generally, a father will be found to have forfeited his right to have his children bear his name only in cases of extreme misconduct.[244] In a 1994 case, a trial court emphasized that a father may forfeit his right to have his child bear his name by acts of misconduct or abandonment, "as in the case where a minor child's natural father had murdered the child's stepfather."[245] In this case, although finding that the relationship between the father and child may have been positive, the court found adequate justification for its deviance from the patrilineal rule.[246] The court based its decision in part on the existence of a court order prohibiting the father from having contact with the mother or child, and the fact that the child's attorney, appointed by the court, recommended that the application be granted in the best interests of the child.[247] However, the aggravating factor was the

241. *See id.* at 491.

242. *See In re* Gulsvig, 498 N.W.2d 725, 732 (Iowa 1993) (Snell, J., dissenting) (relying on precedent to underscore the importance of the name in maintaining the father-child relationship, emphasizing the courts' reluctance to sever and endanger an already strained relationship); *In re* Gregory, 8 Conn. Prob. L.J. 205, 210-11 (Conn. Prob. Ct. 1994) (emphasizing that traditionally courts try to maintain, encourage and strengthen the parental ties between a father and a child already separated by divorce, and that the change of name could further weaken that natural bond); Keegan v. Gudhal, 525 N.W.2d 695, 701 (S.D. 1994) (Henderson, J., concurring in part, dissenting in part) ("If a natural mother is the custodial parent and retains her maiden name or takes the surname of another, she risks eroding the natural bond between father and child if she imposes her surname upon the child. Certainly, weakening or severance of that relationship does not serve the child's best interest."); Delaney v. Appeal from Probate, No. CV 93 05212095, 1993 Conn. Super. LEXIS 2165, at *5 (holding that the bond between father and son would be preserved and enhanced by maintaining the father's surname).

243. Likins v. Logsdon, 793 S.W.2d 118, 121 (Ky. 1990) (quoting Burke v. Hammonds, 586 S.W.2d 307, 309 (Ky. Ct. App. 1979)).

244. *See id.*

245. *Gregory*, 8 Conn. Prob. L.J. at 211 (quoting 57 AM. JUR. 2D *Name* § 50 (1988)).

246. *See id.*

247. *See id.*

fact that the father had caused his son to witness his brutal attack on the mother with a baseball bat. "Although this brutal act of violence was not directed against the child, in a psychological sense it was. One can imagine no more harmful psychological trauma than forcing a child to watch his mother being beaten nearly to death."[248] It is unclear whether the outcome would have been the same had the attack occurred out of the child's sight.[249]

Some courts have been prepared to pardon misconduct of fathers in the hope that they might repent their erring ways in the future. In one case, the court overlooked the fact that a father had deserted his family due to alcoholism.[250] The Connecticut Superior Court addressed whether the surname of a minor should be legally changed to the custodial mother's maiden name after the child's parents divorced.[251] Based on a schoolteacher's testimony and the express wishes of the child, the lower court determined that it would be in the best interests of the child to drop the father's name entirely.[252] The court, however, also considered the future implications that this would have for the father and son.[253] According to the court, since leaving his family, the father had made significant steps towards his recovery, attributing his success to the realization that he must set a positive example for his son. He maintained a frequent visitation schedule and provided support. The court determined that a genuine bond of love and affection existed between the father and son, which would be preserved and enhanced by leaving the father's surname with the son.[254]

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248. *Id.*

249. Note also that the parents were not, in fact, ever married. *See id.*

250. *See* Delaney v. Appeal from Probate, No. CV 93 05212095, 1993 Conn. Super. LEXIS 2165 (Conn. Super. Ct. 1993). *See also* Richard J. Luissier, *Delaney v. Appeal from Probate: When is a Dual Surname in the Best Interest of the Child?*, 9 CONN. PROB. L.J. 161 (1994) (arguing that the dual surname solution in this case was correct in order to maintain the father-child relationship, but that each case must be examined on its merits).

251. *See Delaney*, 1993 Conn. Super. LEXIS 2165, at *1-2.

252. *See id.* at *3-4.

253. *See id.* at *5. Another example of looking to the future may be seen in *Keegan*, in which the dissent says:

> As a trial judge, I was often told by counselors that problem children come from the very homes where parents have relinquished their responsibilities of nourishment, training, and over-all responsibility. It is obvious this father desires to fulfill a good role. Permit him to do so; permit him to share a heritage with his child. Thereby, this child will not be vulnerable to the strange types of philosophy which attack a firm foundation of right and wrong.

Keegan v. Gudhal, 525 N.W.2d 695, 702 (S.D. 1994) (Henderson, J., concurring in part, dissenting in part).

254. *See Delaney*, 1993 Conn. Super. LEXIS 2165, at *4. The court granted Ms. Brown's request to amend the petition to allow the child's name to be changed to Robert Delaney Brown. *See id.*

In *Likins,* the majority ignored the fact that the two children had witnessed their paternal grandmother attack their mother, an incident that had greatly influenced their attitude towards their father. The incident caused the children to stop using their father's surname. The Kentucky Supreme Court remarked that "the record of any conduct on the part of the father that would justify depriving him of having his children bear his surname is either insignificant or nonexistent."[255] The mother's and the children's wishes were ignored.[256]

As a final example, in a 1994 case, the court decided that while changing the children's name to the mother's maiden name might have helped them identify with her family unit, the children already had a strong bond with their mother and her maternal family, so that there was no need to strengthen the bonds further.[257] In contrast, the court found that the father's relationship with the children was one already strained by the pressures of his work schedule and family politics since the divorce, and that the change could detrimentally affect the children's relationship with the father and draw them further away from him.[258] The court found for the non-custodial father.

In one exceptional case rejecting a divorced father's request to change the child's surname to his surname, the Supreme Court of Iowa recognized the father's support of the child in formulating its opinion, but decided nonetheless to prefer the custodial mother's surname.[259] The dissent viewed the generous visitation rights provided by the mother as sufficient to mitigate the father's fears of damage to his relationship with the child.[260]

### *iv. Quid Pro Quo Relationship*

Stemming from a historic tradition, courts did not explicitly recognize the notion that fathers can purchase possession rights in their children, but continued to connect father's naming prerogatives with his duty to support his children.[261] In numerous cases, courts agreed to grant the father a veto to a proposed name change in light of his financial contribution to child support.[262] As stated explicitly by one trial court: "Well, I imagine my award so far as the amount [of child support] is going to be substantially less if the father doesn't have the right to have that child have his name. . . . [T]his women's lib thing

255. Likins v. Logsdon, 793 S.W.2d 118, 120 (Ky. 1990).

256. *See id.*

257. *See In re* Wilson, 648 A.2d 648, 651 (Vt. 1994).

258. *See id.*

259. *See In re* Gulsvig, 498 N.W.2d 725 (Iowa 1993).

260. *See id.* at 729 (Snell, J., dissenting).

261. *See In re* Harris, 236 S.E.2d 426, 429 (W. Va. 1977) (referring to the relationship explicitly as one of *quid pro quo*).

262. *See, e.g.*, West v. Wright, 283 A.2d 401 (Md. 1971); Hall v. Hall, 351 A.2d 917 (Md. Ct. Spec. App. 1976); *In re* Spatz, 258 N.W.2d 814 (Neb. 1977); Seng, *supra* note 3, at 1330; MacDougall, *supra* note 6, at 138-39.

makes me furious and I will put it on the record."[263] Conversely, in cases where children had taken their mothers' names informally, courts saw fit to terminate fathers' financial obligations.[264] Thus, whereas men's primary naming right provided little incentive to pay child support regularly, it did serve to deny women any real voice in naming their children. An Indiana Court in 1982 epitomized the thinking:

> I always point out that the man who is going to support the children should have the children in his name unless there is some valid strong reason, like he is a murderer or a criminal of some kind that would keep him from the children from using his name and carry it, you see.[265]

In the present decade, many individual judges continue to view the father's right to name the child and his duty to support the child as a *quid pro quo* relationship.[266] The dissenting judge in *Keegan* articulated this view in no uncertain terms: "She wants child support and medical expenses from daddy and has been receiving it, but she does not want the child to have daddy's name!"[267]

In addition to its discriminatory symbolic elements, this policy ignores the mother's parallel duty of support, whether or not she is the custodial parent. Even if a father does have a right to determine the child's surname, the father's support payments cannot give him a right superior to that of the mother, who must also support the child. This is especially important given the reality that many women do not receive the full amount of financial support due.[268]

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263. Seng, *supra* note 3, at 1330 n.133 (quoting D.R.S. v. R.S.H., 412 N.E.2d 1257, 1269 (Ind. Ct. App. 1980)).

264. *See* Cohen v. Schnepf, 94 A.2d 783 (Pa. 1983); Good v. Stevenson, 448 N.Y.S.2d 981 (Fam. Ct. 1982).

265. *In re* G.L.A., 430 N.E.2d 433, 434 (Ind. Ct. App. 1982). "In direct reaction to the fear that fathers might lose control over naming marital children, the Indiana legislature passed a statute in 1979 to give a rebuttable presumption in statutory name changes proceedings to an objecting parent if the parent pays support." MacDougall, *supra* note 6, at 143.

266. *See In re* Gulsvig, 498 N.W.2d 725, 730 (Iowa 1993) (Snell, J., dissenting) (remarking that if parent objects to a name change, his or her objection will be overlooked only if it is found, *inter alia,* that the nonconsenting parent has violated a court order to support the child financially). No such finding was made in that case. There, the condition was in fact incorporated expressly by the legislature. *See id. See also In re* Andrews, 454 N.W.2d 488, 493 (Neb. 1990) (examining the best interests of the child, the court found no evidence to suggest that the father failed to support his children or maintain visitation rights).

267. Keegan v. Gudhal, 525 N.W.2d 695, 700 (S.D. 1994) (Henderson, J., concurring in part, dissenting in part).

268. *See* GENDER AND LAW, *supra* note 223, at 335 (discussing the difficulties in obtaining realistic child support awards and in enforcing child support orders); FEMINIST JURISPRUDENCE, *supra* note 223, at 643 (citing data compiled by the Census Bureau showing that only about one-half of all women awarded child support payments receive the full amount awarded).

In one case, the court stated explicitly that even though the father conceded to being in arrears in support payments, he had paid his daughter's parochial school tuition and had either visited or sent presents on her birthday and holidays, and it could therefore not be said that he had abandoned his daughter or totally failed to support her.[269] Thus, the duty of support required by some courts does not appear to be too burdensome. At least one dissenting judge recognized this. In the case *In re Iverson*, the Montana Supreme Court upheld the denial of a mother's petition to change the name of her nonmarital child who had received the father's name at birth.[270] The dissent noted that the three factors the court had cited for the denial, "the father's magnanimous acknowledgment of paternity, his ability to follow a court order of paying $100 a month to help support the child," and vague plans to seek visitation, do not even touch the child's best interest.[271] Instead these factors merely reinforce archaic notions of proper surnames and contribute to "a subtle form of discrimination against women."[272]

### *v. The Mark of Illegitimacy*

Over the years, states have continued to claim that the interest of promoting marriage and family life requires that children of married parents bear their fathers' surnames and children of unmarried parents bear their mothers' surnames. The implication of this argument is that parents will marry in order to avoid stigmatizing their offspring as illegitimate.[273] By the end of the 1980's, major advances had been achieved for *married* parents (suing jointly) who challenged mandatory state requirements that a marital child be given its father's surname at birth.[274] Courts tended to give weight to the mother's position in cases where the father was petitioning for the name change of a non-marital child (at birth) who originally bore his mother's sur-

269. *See In re* Maliszewski, 615 NY.S.2d 977, 978 (Sup. Ct. 1994).

270. *See In re* Iverson, 786 P.2d 1 (Mont. 1990).

271. *Id.* at 3 (Barz, J., dissenting).

272. *Id.* at 4 (Barz, J., dissenting).

273. *See* Doe v. Hancock County Bd. of Health, 436 N.E.2d 791, 796 (Hunter, J. dissenting). The dissenting judge did not question the promotion of family life as an important state interest, however, he doubted that the statute in question would effectuate this interest. He relied on the fact that many families have members with different surnames, and that the law allows for the name of the parents and children to be changed after the birth certificate is recorded. The statute provided that the records of illegitimate children are filed separately and may be released by court order. Therefore, Justice Hunter noted, "[t]here is no relationship between the name of the child and the confidentiality." *Id.* at 795-96.

274. *See* MacDougall, *supra* note 6, at 117.

name.[275] Thus, courts persisted in treating married parents differently from unmarried parents.[276]

What is most striking in the 1990's is the courts' continued insistence that the traditionally married, nuclear, heterogeneous family is the only legitimate kind of family, and the name of the father is its sole legitimate title.[277] If no legal husband has accompanied the birth, the baby must be stained with the badge of ignobility — the mother's name. However, in an age of ever increasing divorce rates, single-parent families and non-traditional families, this argument seems inappropriate. In spite of numerous alternative family arrangements in the United States, the illegitimacy argument continues to be used to deny a woman her rights, even if the result will stigmatize the child. This predicament is succinctly expressed in the words of one dissenting judge, who vehemently opposed the mother's choice of her ex-husband's surname:

> [C]hildren who are born during wedlock are presumed to be the legitimate issue of marriage. Who is this lady who would turn around state law — state decisions — legitimacy — honor — a rightful birth — family relationships — family history? She wants the child's name to be her current name and that of another child by a different father. Thereby, she would have the family unit (ostensibly) have a more socially acceptable status and all names would be conveniently the same.[278]

This dissent did not take into account that at the time of the birth, divorce proceedings were already underway. Nor did he look to the fact that the mother had a child from the previous marriage who carried that name and the mother wanted all of her children to possess the same surname. It was his firm opinion that "the best interest of the little girl was to have a legitimate birth."[279]

An Ohio district court asserted a similar principle, although not without reservation, in *Brill v. Hedges*. The plaintiff, a divorced woman, had retained her married name because her attorney had informed her that formally returning to her maiden name would be a difficult and expensive process.[280] She gave birth to a son who received her maiden name. The child was not the son of the mother's former hus-

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275. *See, e.g.*, MacDougall, *supra* note 6, at 115 n.63; Bobo v. Jewell, 528 N.E.2d 180, 185 (Ohio 1988); Doll, *supra* note 102, at 245-46 nn.125-26, 128.

276. *See* Doll, *supra* note 102, at 246 n.128 (noting that out of 15 reported appellate cases involving nonmarital children between 1985 and 1992, women succeeded in 10 of them). This affirms the earlier trend noted by MacDougall. *See* MacDougall, *supra* note 6, at 120-21 nn.81-86.

277. *See generally* Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need For Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984).

278. Keegan v. Gudhal, 525 N.W.2d 695, 701 (Iowa 1993) (Henderson, J., concurring in part, dissenting in part).

279. *Id.*

280. *See* Brill v. Hedges, 783 F. Supp. 333, 334-35 (S.D. Ohio 1991).

band. Later, she was informed by the health authorities that as an unmarried mother, the Ohio law required her to record her child's birth under her current, legal surname. The mother brought an action, later certified as a class action, challenging the constitutionality of the statute as a violation of equal protection insofar as it restricted unmarried parents, but not married parents, from choosing the surname under which they register their children.[281] The court held that the Ohio statute requiring a child born to an unmarried mother to be registered in its mother's surname did not involve suspect classification for purposes of due process and equal protection analysis.

> The level of strict scrutiny has been reserved for situations in which a statute burdens an illegitimate child. . . . The plaintiffs never cite to any authority holding that a newborn child has an interest in having its mother give it a name. . . . Thus the only right involved in this case is the right of the parent to name a child, and the legitimate/illegitimate distinction is inapposite.[282]

The state justified the requirement that an unmarried mother and her child maintain the same surname as a means of preserving family life such that "both mother and child are identifiably bound as a family by society."[283] While the court found the relationship between the statute and the state's alleged interests to be "facially unreasonable, especially given the difference in treatment between married and unmarried mothers and the state's complete failure to even attempt to justify this disparity," it considered it "impossible" to grant the requested relief because of lack of evidence.[284]

The desire to promote the privacy and autonomy of the traditional nuclear family would appear to explain the continuing discrepancy in treatment of married and unmarried parents. This policy may have dictated the outcome of the *Henne* case, in which the court deviated from earlier decisions that had recognized parental naming rights as fundamental privacy rights. The courts appeared comfortable with deferring to the privacy rights of married couples in naming their children. In *Henne,* however, the plaintiffs' requests were far from traditional. The first plaintiff, Debra Henne, although married at the time of the birth, sought to name her child, not by her husband's name, but by the name of the acknowledged father of the child.[285] Her co-plaintiff, Linda Spidell, wished to give her daughter the name McKenzie, the surname which she had given to her two other children, both born out of wedlock to different fathers, simply because

281. *See id.* at 336.

282. *Id.* at 336 n.1.

283. *Id.* at 339.

284. *Id. But see* Barabas v. Rogers, 868 S.W.2d 283 (Tenn. Ct. App. 1993) (finding that the juvenile court erred in changing the surname of a *nonmarital* child from that of the father to the mother where the father failed to show that the change would be in child's best interest).

285. *See* Henne v. Wright, 904 F.2d 1208, 1210 (8th Cir. 1990).

"she liked the name."[286] The requests of these two women are inimical to the traditional nuclear patriarchal family model, and it is not surprising that the courts found ways to refuse them. Moreover, even in seemingly enlightened decisions, where the courts found that the purported stigma of illegitimacy did not warrant an order changing the child's name, the outcomes of these cases often accord with traditional rules.[287]

### *vi. Asking the Child*

There have been cases where courts have given weight to the preferences of the child. In a case where a child had informally been using his mother's name, the court said, "[a] forced change might well foster such resentment in the child as to lead to a further breakdown in the already fragile parental relationship between [the father] and the child."[288] A dissenting opinion pointed out that "[l]egally requiring children to use a name other than that of their preference only engenders continued confusion and ill will."[289]

Legal commentators have increasingly criticized courts for purportedly examining the interests of the child while largely ignoring the child's actual wishes and feelings. While in the 1950's and 1960's some courts granted name changes because of a child's embarrassment, by the 1970's and 1980's, when divorce had become more common, the courts became correspondingly less solicitous.[290] This trend persists into the 1990's: "[g]iving the child the mother's maiden name to avoid embarrassment, inconvenience, or confusion is of little or no consideration."[291] In delineating criteria for the best interest standard, the Pennsylvania Supreme Court stated that those general considerations should include, "where the child is of sufficient age, whether the child intellectually and rationally understands the signifi-

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286. *Id.*

287. *See, e.g.*, M.D. v. A.S.L., 646 A.2d 543 (N.J. Super. Ct. Ch. Div. 1994) (denying the father's request to change his illegitimate child's surname to his own because the child would be residing with the mother's other children, all of whom would bear the mother's surname); Lufft v. Lufft, 424 S.E.2d 266 (W. Va. 1992) (holding that the child should retain her mother's maiden name as her surname because the father failed to request the surname change at birth or soon after birth, even though he recognized the child as his own); Pizziconi v. Yarbrough, 868 P.2d 1005 (Ariz. 1993) (denying the father's request to change his illegitimate child's surname to his own because the child had been using the mother's surname for his entire life and the child's half-brother also used that name).

288. Rappleye v. Rappleye, 454 N.W.2d 231, 232 n.2 (Mich. Ct. App. 1990).

289. Likins v. Logsdon, 793 S.W.2d 118, 123 (Ky. 1990) (Wintersheimer, J., dissenting).

290. *See* Seng, *supra* note 3, at 1316-17 nn.48-54. Some exceptions did exist. *See* Aitkin County Family Servs. Agency v. Girard, 390 N.W.2d 906, 909 (Minn. Ct. App. 1986); Bobo v. Jewell, 528 N.E.2d 180, 184-85 (Ohio 1988).

291. Keegan v. Gudhal, 525 N.W.2d 695, 702 (Iowa 1993) (Henderson, J., concurring in part, dissenting in part).

cance of changing his or her name."[292] In overruling a lower court decision in which the child's view had not been heard, the judge intimated that "an interview with the child may have been helpful"[293] and characterized the dual-surname ruling as an "[arbitrary attempt] to pacify all the parties involved by this device."[294] Nonetheless, it saw fit to overturn the lower court ruling without testimony from the child, stating,

> The trial court, during the hearing, spent much time emphasizing the detrimental effects of divorce upon children. While that may be a statement of general truth, there was no evidence that the divorce involved herein was so injurious to [the child] that changing his name would compensate for any pain he might have suffered.[295]

In *Delaney*, the court addressed the question whether the surname of a minor should be legally changed to the custodial mother's maiden name after the child's parents divorced.[296] The child insisted that he preferred to be referred to by his mother's surname.[297] Nonetheless, the appellate court decided that the bond between father and son would be preserved and enhanced by leaving the father's surname in the child's name regardless of the child's preference.[298] In another case, the adamant desires of the two children, ages twelve and fourteen, were brushed aside with the prediction that this "temporary phenomenon" would disappear when the children acquired "the desired feeling toward" their father.[299]

## CONCLUSION

My own naming dilemma has led me to conclude that until we have achieved an equal right in naming our children, the right to name ourselves will be meaningless. The notion of an inherent mutuality between the two sets of rights is borne out by my comparative analysis of the judicial opinions in the two areas of law. Well into the 1990's, we see the issues of the 1970's being discussed in almost identical terms. The women's rights activists of that earlier struggle assumed that by attaining for women the right to name themselves, the patrilineal tradition of naming children would eventually dissipate. Reality has shown that the opposite might be true. In order to test this hypothesis, it is necessary that the women's movement embark upon a concerted campaign and develop an effective strategy regarding the right of women to name their children. However, even if my hypothe-

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292. *In re* Grimes, 609 A.2d 158, 161 (Pa. 1992).
293. *Id.* at 162.
294. *Id.*
295. *Id.*
296. *See* Delaney v. Appeal from Probate, No. CV 93 05212095, 1993 Conn. Super. LEXIS 2165 (Conn. Super. Ct. 1993).
297. *See id.* at *4.
298. *See id.*
299. Likins v. Logsdon, 793 S.W.2d 118, 120 (Ky. 1990).

sis is incorrect, we can only gain, for the problem of children's names is in and of itself an important feminist issue. As long it is patriarchy that dictates how women name themselves, the fight cannot be terminated.

> The emergence of women as equals of men in our society may be our most significant revolution. The acceptance of that emergence is grudgingly slow; it is an acceptance which the courts must not impede. Names, as this case clearly illustrates, are intimately involved with the status of women. Rules of law for changing names cannot be premised upon unacceptable theories of inequality. The right of a mother to have the child bear her name must be recognized as equal to that of the father. . . . In Romeo and Juliet, Shakespeare wrote, "What's in a name? That which we call a rose By any other name would smell as sweet. (II,ii,43.) However, Romeo's and Juliet's fateful outcome attest to the problems that arise as a result of a system based on customs and traditions attached to surnames.[300]

300. *In re* Iverson, 786 P.2d 1, 4 (Mont. 1990) (Barz, J., dissenting) (citing *In re* Rossell, 481 A.2d 602, 605 (N.J. Super. Ct. Law Div. 1984)).