THE RIGHT OF WOMEN TO USE THEIR MAIDEN NAMES

Names are more than a means of identifying an individual, for they tend to personify the social and personal image he or she embodies. Surnames, for instance, often indicate ethnic origins and have traditionally provided a common bond among family members. Christian or first names may indicate the individual's cultural background or geographic origins, or give rise to nicknames which are inspired by the personality or experiences of the individual. When an American woman marries she assumes the surname of her husband and thus symbolically relinquishes her ties to her own family and past life. Although this practice is not universal, and in certain cultures a married woman retains her maiden name, the majority of married women have not considered it objectionable to lose their maiden names; consequently, there has been little pressure on the courts or legislatures to change the present law and customs. As Professor Leo Kanowitz observes, married women may actually prefer their married identity because it allows them to merge symbolically into the personalities of their husbands. In a society which puts primary importance on the achievements of the husband as compared to those of his wife, she may find the merger a "highly desirable state of affairs."[1]

With regard to voluntary name change, married women have traditionally been treated differently from other members of society. This is primarily because the common law fiction that husband and wife are one still remains as an underlying premise. According to this fiction the use of a common surname — the husband's surname — makes perfect sense. As a result, the common law rule that anyone may adopt a new name simply by using it, as long as the change is not for any fraudulent purpose, never *seemed* to apply to married women.[2] A California appellate court provided a rationale for denying married women the common law method of name change when it proposed making the rule applicable only "under certain conditions and stations of life."[3] According to that standard, a married woman could be denied the common law method of name change simply because her station in life made it inappropriate. A man's wife was supposed to take his name and she was not supposed to want to retain her maiden name; consequently, she was denied the opportunity to do so under common law. Thus, the supposition was given judicial approval.

Within the last few years, however, there has been a growing number of married women who believe that they have a right to maintain their

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[1] L. KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 42 (1969) (hereinafter cited as KANOWITZ).

[2] *Id.* at 43.

[3] People v. Darcy, 59 Cal. App. 2d 342, 350, 139 P.2d 118, 124 (1943).

maiden names and who have been taking their cases to the courts and legislatures.[4] While these demands have met with varying degrees of success, the recent cases have at least tried to provide reasonable solutions to the maiden name problem, a problem which often has been treated by the male-dominated courts and legislatures as one of little consequence.

The problems faced by women who have tried to use their maiden names as legal names are not confined to one area of the law. They include difficulties in such diverse areas as the procurring of a driver's license,[5] the registration of a motor vehicle,[6] the mortgaging of property,[7] the obtaining of citizenship,[8] and registration as a voter.[9]

The question, then, is how to recognize and protect the rights of these women without infringing upon the rights of the majority of women who are content to follow the prevailing custom. This comment shall examine the maiden name problem from judicial, legislative, and constitutional viewpoints, while maintaining the essential social perspective necessary for a comprehensive understanding of the subject matter.

The Loss of the Maiden Name

The common law principle that the husband and wife are one is deeply ingrained in the American tradition and generally has been reinforced by denying a married woman the use of her maiden name. As early as 1881 a married woman's legal name was judicially declared to be her husband's name:

> For several centuries, by the common law among all English speaking people, a woman, upon her marriage, takes her husband's surname. That becomes her legal name, and she ceases to be known by her maiden name. By that name she must sue and be sued, make and take grants and execute all legal documents. Her maiden surname is absolutely lost, and she ceases to be known thereby.[10]

This theory was carried even further by an Alabama court which held that a married woman need only use "Mrs." and her husband's name in order to have a legal identity.[11] In essence, the court said that she did not even need her own *first* name in order to be identified. This court, however, is in the minority and the majority position remains that a

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[4] *See, e.g.*, note 43 *supra* and accompanying text.
[5] Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd mem.*, 405 U.S. 970 (1972).
[6] Bacon v. Boston Elevated Ry., 256 Mass. 30, 152 N.E. 35 (1926).
[7] Lane v. Duchac, 73 Wis. 646, 41 N.W. 962 (1889).
[8] *In re* Kayaloff, 9 F. Supp. 176 (S.D.N.Y. 1934).
[9] People *ex rel.* Ragov v. Lipsky, 327 Ill. App. 63, 63 N.E.2d 642 (1945).
[10] Chapman v. Phoenix Nat'l. Bank, 85 N.Y. 437, 450 (1881).
[11] Roberts v. Grayson, 233 Ala. 658, 173 So. 38 (1937).

married woman's legal name is her Christian name plus her husband's surname and that "Mrs.", like "Mr." or "Ms.", is merely a title.[12]

There were a few early courts that took exception to the general rule that a married woman's legal surname was that of her husband. For example, only eight years after *Chapman v. Phoenix National Bank,*[13] the Wisconsin Supreme Court decided that a married woman could use her maiden name in legal affairs. In *Lane v. Duchac*[14] the appellant had executed a mortgage in her maiden name and the respondents claimed that the mortgage was void since the use of appellant's maiden name created a fictitious mortgagee in the note. The court replied that this argument was spurious in that the appellant was hardly fictitious. Moreover, since there was nothing in the Wisconsin law prohibiting her from maintaining and legally using her maiden name, it was perfectly proper for her to do so.

The civil law created another exception to the general rule, as is illustrated by the Louisiana case of *Succession of Kneip.*[15] In that case the testatrix's marriage license for her second marriage was in her maiden name rather than in her first husband's name. The court found that the use of her maiden name did not invalidate the license or the second marriage since under civil law a married woman keeps her maiden name as her legal name and uses her husband's surname only through custom. Louisiana has, however, subsequently abandoned the traditional civil law approach, and in 1963 a Louisiana court held that the legal name of a married woman candidate running against her husband was her Christian name plus her husband's surname.[16]

Bureaucratic Inflexibility

The legal obstacles of the married woman who seeks to use her maiden name exclusively (in contrast to the woman who uses two names, a married name and a professional name) can most clearly be seen when she tries to use her maiden name in connection with a government agency or procedure. For example, in *Bacon v. Boston Elevated Railway Co.,*[17] the plaintiff, a married woman, sued for personal injuries and damages to her car. The car was registered in her maiden name, which caused the court to find that the car was not legally registered:

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[12] *See, e.g.,* Brown v. Reinke, 159 Minn. 458, 199 N.W. 235 (1924); Feld v. Loftis, 240 Ill. 105, 88 N.E. 281 (1909).

[13] 85 N.Y. 437 (1881).

[14] 73 Wis. 646, 41 N.W. 962 (1889).

[15] 172 La. 411, 134 So. 376 (1931).

[16] Wilty v. Jefferson Parish Democratic Executive Comm., 245 La. 145, 157 So. 2d 718 (1963).

[17] 256 Mass. 30, 152 N.E. 35 (1926).

> It is manifest from the uncontradicted evidence that at the time of the accident the automobile was not legally registered and was a nuisance upon the highway, which precludes recovery by the owner.[18]

However, the fact that the plaintiff was generally known by her married name rather than her maiden name does not justify such a harsh decision. *Bacon* is a minority rule, however, and the majority rule is far more logical in holding that lack of proper automobile registration does not deprive the driver or passenger from the right to recover in a civil suit, since automobile registration is a revenue measure and not a safety provision.[19]

It is not unusual, however, for a state to require that a married woman use her married name on her driver's license. In *Forbush v. Wallace*[20] the United States Supreme Court recently affirmed this practice as being a proper exercise of the state's interest in regulating and identifying automobile licensees.

A second area in which a married woman using her maiden will incur difficulties is in naturalization proceedings. In *In re Kayaloff*,[21] a married woman who was a professional musician and widely known by her maiden name was refused naturalization under that name. Although there was no objection to her admission to the country other than her assertion of her maiden name, the court refused to grant her citizenship unless she used her married name. The court was not convinced that she would suffer the financial losses she claimed would occur if she had her married, non-professional name on her naturalization certificate. Rather, it was concerned about a discrepancy that would develop between her married name on her union card and her maiden name on the certificate. The court neglected to take into account the sensibilities of the woman involved. Instead it imposed upon her a two name standard that required her to use her married name for some purposes and her maiden name for others.

Voter registration is a third area in which a woman encounters difficulties when she attempts to use her maiden name. In *People* ex rel. *Ragov v. Lipsky*[22] a married woman attorney was denied the right to register and vote under her maiden name pusuant to a state statute which required re-registration by any voter who changed his or her name. The court found that there was no right to the use of a maiden name and that the limitation on name changes imposed by the legislature was reasonable in order to prevent deception. Although the holding appears to deny the use of maiden names on the grounds that a wife

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[18] *Id.* at 32, 152 N.E. at 36.
[19] *In re* Kayaloff, 9 F. Supp. 176 (S.D.N.Y. 1934).
[20] 405 U.S. 970 (1972). *See* note 41 *infra* and accompanying text.
[21] 9 F. Supp. 176 (S.D.N.Y. 1934).
[22] 327 Ill. App. 63, 63 N.E.2d 642, (1945).

takes her husband's surname as a matter of law, the case may also be interpreted in a more favorable manner. Kathleen A. Carlsson contends that the holding in *Lipsky* actually acknowledges the use of maiden names:

> From the case it is apparent that the court assumed that she did in fact have *two names* and would thereby cause confusion if she were not required to use her married name for voting purposes. Therefore, this case does not stand for the proposition that a woman must change her name at the time of marriage.[23]

In other words, Ms. Carlsson suggests that to prevent fraud, the court arbitrarily chose one of the petitioner's two names for her to use for voting purposes, but did not declare that her married name was her only legal name.

JUDICIAL INFLEXIBILITY

In legal proceedings the use of maiden names can cause a number of problems. For instance, when a recently married woman defendant was served a summons in her maiden name at her old residence rather than her new residence, it was held that the summons should have had her married name on it.[24] Consequently, there was no default when she did not appear in court. The court presumed that she changed her name upon marriage, a presumption which in that case favored the defendant.

Divorce proceedings provide instances in which name change difficulties abound. Most states, either by statute or by case law, allow a married woman who is granted a divorce to resume her maiden name. Professor Leo Kanowitz notes, however, that certain statutes (those of Minnesota and Montana, for example) can punish a divorced woman by denying her the right to resume her maiden name.[25]

In New York, *Rich v. Mayer*[26] has been cited for the principle that a divorced woman is entitled to resume her maiden name. The 1973 Legislative Session incorporated that principle into a new section of the New York Domestic Relations Law.[27] Still, the reasoning behind *Rich v. Mayer* was ahead of its time since it recognized that a divorced woman had a right to her maiden name. In 1889 the judge in that case proposed the following rationale for allowing the plaintiff divorced woman to regain her maiden name:

> The plaintiff had procured a divorce from a bad husband, and

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[23] Carlsson, *Surnames of Married Women and Legitimate Children*, 17 N.Y.L.F. 552, 558 (1971) (emphasis added).

[24] Claxton v. Simons, 177 N.E.2d 511 (Ohio 1961).

[25] KANOWITZ, *supra* note 1, at 44, 264 n. 68.

[26] 7 N.Y.S. 69 (N.Y. City Ct. 1889), *aff'd mem.* 8 N.Y.S. 952 (C.P.N.Y. City and County 1889).

[27] N.Y. SESSIONS LAWS, ch. 642 (1973) (will be DOMESTIC RELATIONS LAW § 240-a).

> judiciously dropped his bad name, and resumed that given by her parents. ... It was certainly not a change made for sinister or ulterior motives, but one that is praiseworthy and commendable.[28]

A rather unique variation on the resumption of a maiden name by a divorced woman occurs in *In re Westerman's Will*.[29] In that case a divorced woman testatrix had resumed her maiden name, thus provoking a challenge to the will. The court circumvented this problem by finding that it was not an important question in a will, since the main concern was to ascertain the identity of the individual who had written the instrument. Apparently, the use of both the maiden and married names did not hinder identification of the divorced woman concerned. Had the court found differently it might have created an unwieldy rule whereby the unmanifested intent of a woman becomes the paramount criterion for legality of a name.

Recent Cases: A New Consciousness?

Most of the cases which are discussed above were decided twenty or more years ago, long before the current women's liberation movement began to publicize the need for legal protection of the rights of women. The more recent cases do not rely heavily on the older opinions, but instead appear more tolerant and concerned for the women involved. Although this new concern may not have a great impact on the courts' ultimate decisions, it is an indication that they are at least listening to the arguments being made by married women.

Since 1961 there have been several cases which indicate that the courts have become more sensitive. Ohio has been a leader in this area by being the only state which has discarded the common law presumption that a married woman assumes her husband's surname.[30] This step was taken in *State* ex rel. *Krupa v. Green*[31] in which the Ohio appellate court held that a married woman is eligible to be on a ballot under her maiden name. There were a number of factors which the court took into consideration when it made its decision: an ante-nuptial agreement which provided that she retain her maiden name, notification to the Board of Elections of the use of her maiden name, a notation on her voter registration card indicating that she was married, the use of her maiden name in her professional capacity as an attorney, and the use of her maiden name for the purpose of voting in three elections. The court recognized that Ohio follows the custom whereby a married woman assumes her husband's surname; however, it said that there was

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[28] 7 N.Y.S. at 70.
[29] 401 Ill. 489, 82 N.E.2d 474 (1948).
[30] Hughes, *And Then There Were Two*, 23 Hastings L.J. 233, 235 (1971).
[31] 114 Ohio App. 497, 177 N.E.2d 616 (1961).

no statute compelling that the custom be followed. Since the petitioner had never used any other name, she was entitled to continue to use her maiden name.

Krupa contrasts with *People* ex rel. *Ragov v. Lipsky*.[32] In *Lipsky* there was mention of the two names of the married petitioner, while in *Krupa* the court considered the petitioner to have only one name, her maiden name.[33] The difference in assumptions is an indication that the two courts had very different views about the women in question and the validity of their requests. While in *Lipsky* the petitioner had not followed the elaborate precautions to maintain her maiden name that appear in *Krupa* (there was no ante-nuptial agreement or notation on her voter registration card), the petitioner did provide impressive evidence as to her reliance on her maiden name. For example, she held a certificate of admission to the Illinois Bar in her maiden name and was admitted to practice under that name in the federal courts in Chicago, as well as in the United States Supreme Court. Moreover, she had always used her maiden name with the approval of her husband and was known by it in her legal practice. The court, however, was preoccupied with the fear that abandonment of the common law rule would result in voter fraud. There was no recognition that the petitioner was being disenfranchised simply because she wished to use her maiden name instead of complying with the inflexible interpretation of the voter registration law. In *Lipsky*, the court's fear of change is evident:

> If petitioner were permitted to ignore her change of name by marriage and continue to remain registered and to vote under her maiden name, it would follow that any voter, man or woman, whose name is changed by judicial proceeding, could likewise ignore that change and continue to remain registered and to vote under the former name, and the same would be true as to any voluntary change of name without judicial proceeding. Such a situation would promote fraud and confusion and make the provisions of the statute a nullity.[34]

In fact, however, there would be far fewer opportunities for voter fraud if each person used the same name throughout her voting years. Changing a maiden name to a married name only creates confusion and paper work despite what the *Lipsky* court believed. In *Krupa* the entire problem of the re-registration statute is avoided:

> Since it is our view that Blanche Krupansky did not change her name upon marriage, these sections of the Election Laws have no application.[35]

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[32] 327 Ill. App. 63, 63 N.E.2d 642 (*See* note 17 *supra* and accompanying text).

[33] *See* Carlsson, note 23 *supra* (discussing these cases).

[34] 327 Ill. App. at 66, 63 N.E.2d at 646.

[35] 114 Ohio App. at 502, 177 N.E.2d at 620.

The court instead looked to the acts of the petitioner to determine her "intent and purpose to be identified and known by the name of Blanche Krupansky and by no other name."[36] In the majority opinion the court recognized that the evidence which the petitioner had presented illustrated that "the name of Blanche Krupansky [has] broad civic, political and social significance in this territory."[37] In a concurring opinion a "trend toward emancipation of married women from the common law rules of bondage"[38] is acknowledged, and the observation made "that many unnecessary restrictive customs have fallen by the wayside."[39]

The split of opinion evident in *Krupa* and *Lipsky* was most recently reiterated by the Maryland Court of Appeals in *Stuart v. Board of Supervisors of Elections*[40] in which the court followed *Krupa* and allowed a married woman to vote in her maiden name without re-registering. The court stated that the lower Maryland court had incorrectly followed the principles enunciated in *Lipsky,* and declared that Maryland law follows a different common law principle which allows any person, including a married woman, to adopt any name he or she chooses.

Several aspects of the *Krupa-Lipsky* split appear in another maiden name case, *Forbush v. Wallace.*[41] In the *Forbush* opinion the court displays a certain degree of sensitivity to the class of women who seek to use their maiden names on their driver's licenses, but this sensitivity is overshadowed by a strict interpretation of an unwritten state regulation and the fourteenth amendment. The court held that because of an unwritten regulation promulgated by the State Department of Public Safety a married woman was not entitled to use her maiden name on her driver's license. It found that the requirement had a rational basis and was within the legitimate interests of the state in maintaining a record of its licensees.[42] The court also relied on the acceptance by the State of Alabama of the common law rule that a married woman's legal name is the surname of her husband.

While the *Forbush* decision is in many respects a step backwards in the evolution of the right to use maiden names, the attitude of the court as well as certain dicta illustrate the gradual trend toward the recognition of a woman's own name. For example, although the opinion is based on the assumption that the burden on the married women who are denied the use of their maiden names on their drivers' licenses is not "particularly onerous,"[43] it acknowledges "that it raises important and current

[36] *Id.* at 502, 177 N.E.2d at 619.
[37] *Id.* at 498, 177 N.E.2d at 617.
[38] *Id.* at 506, 177 N.E.2d at 622.
[39] *Id.*
[40] 266 Md. 440, 295 A.2d 223 (1972).
[41] 341 F. Supp. 217 (M.D. Ala. 1971).
[42] For a more thorough discussion of the constitutional questions involved *See* note 84 *infra* and accompanying text.
[43] 341 F. Supp. at 220.

questions concerning the constitutional rights of women."[44] The court is also sensitive to the difficulties involved in determining how many married women actually wish to maintain their maiden names. This becomes important because *Forbush* was a class action and there was no satisfactory way to identify all the members of the petitioning class other than through a "comprehensive public opinion poll"[45] which would be quite impractical. Most important, however, is the dictum in which the court states that when a married woman must resort to a court proceeding to regain her maiden name it must be simple and inexpensive:

> In balancing these interests, this Court notes that the State of Alabama has afforded a simple, inexpensive means by which any person, and this includes married women, can on application to a probate court change his or her name. Title 13, Section 278, Code of Alabama (Recomp. 1958). Thus, on balance, plaintiff's injury if any, through the operation of the law is *de minimis.*[46]

The cited Alabama statute provides for name change through a relatively uncomplicated procedure:

> The change of the name of any person residing in their county, upon filing his declaration in writing, signed by him, stating the name by which he is known, and the name to which he wishes it to be changed.[47]

In a recent Wisconsin case, *In re MacDougall,*[48] the petitioner in her brief compared the Alabama statute to the Wisconsin name change statute, arguing that the Wisconsin procedure was more expensive and more complicated, and that it therefore denied a number of women the opportunity of availing themselves of the statutory method of name change. Although the court in *Forbush* did not establish criteria by which a state name change statute could be evaluated as sufficiently simple and inexpensive, Ms. MacDougall made a convincing argument which partly relied on her experiences as an Assistant Attorney General. In her brief Ms. MacDougall states that in her official capacity she was often contacted by married women who wished to use their maiden names but could not afford the $125 minimum State Bar fee for the name change procedure. She also knew of a married woman who had successfully exercised her common law right to adopt a new name by usage in the state of Wisconsin:

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[44] *Id.*
[45] *Id.* at 221.
[46] *Id.* at 222.
[47] CODE OF ALABAMA, tit. 13, §278 (1958).
[48] No. 135463 Wis. Cir. Ct. (1972).

> She informed the Department of Motor Vehicles of her change and has received a new license in her maiden name. She has also received a new social security card in her own name. Nevertheless, this particular woman, who plans to move to another state, wishes the security of a court order as otherwise her name may fluctuate from state to state without legal proceedings, but she is unable to afford the legal fees involved.[49]

Thus, she argued, here is a woman who has maintained her maiden name in one state but faces the ironic possibility of losing it if she moves to another state. The Wisconsin court was apparently persuaded by some of Ms. MacDougall's arguments and allowed her to change her name back to her maiden name.

If the arguments that Ms. MacDougall presented to the court in her brief are accepted by other state courts, *Forbush* may actually strengthen the case for married women who live in states that do not provide a simple name change procedure for a nominal fee. Exactly what standard a court would use to evaluate a state name change statute remains to be seen, but the scrutiny of these statutes by the courts may well pressure the state legislatures into re-evaluating their present laws.

The Role of State Legislatures

The increasing number of married women who have been petitioning the courts to change their married names back to their maiden names have had varying degrees of success depending on the nature of the name change statute in their state. Generally, however, the states agree that the function of a name is to identify a person[50] and the purpose of a name change procedure is to record the new name.[51] Following that reasoning, one would think that the courts would want to encourage statutory name change procedures so that the public record would reflect common law name changes. Nevertheless, the name change statutes in some states make it extremely difficult, if not impossible, for a married woman to take advantage of the judicial proceeding by including provisions such as requiring the consent of the husband, or simply by excluding married women from the class of individuals who are entitled to change their name.[52]

Kentucky actually denies married women the opportunity to change their names, by allowing name changes only by unmarried women who have reached majority.[53] Hawaii achieves the same result by requiring

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[49] Brief for Petitioner at 7, *In re* MacDougall, No. 135463 Wis. Cir. Ct. (1972).

[50] *See, e.g., In re* Zanger, 266 N.Y. 165, 194 N.E. 72 (1935).

[51] *See, e.g., In re* Useldinger, 35 Cal. App. 2d 723, 96 P.2d 958 (1939).

[52] KANOWITZ, *supra* note 1, at 43, 44 gives a good summary of state legislation on name changes.

[53] KENTUCKY REV. STAT. ANN. ch. 401, § 401.010 (1972).

that the husband's surname be used as the family name.[54] This clearly denies his wife a choice of names.

Certain other states follow the common law principle which allows a name change only when the interest of another party is not jeopardized.[55] The interested party is usually the husband, who is allowed to object to, and ultimately prevent, the resumption by his wife of her maiden name. For example, Colorado allows a husband to intervene in the name change proceeding of his wife[56] under a theory similar to that which allows a father to require his children to retain his surname as long as it is not detrimental to their welfare.[57] Consequently, the statute relegates married women to the same position as children.

In Michigan it is actually easier in some cases for a minor to change his name than it is for his mother. The statute[58] requires the court to change the name of a wife when her husband changes his surname, but allows the court discretion as to whether or not the minor children should be included. Furthermore, if the child is over 16 he must provide written consent to the name change.

NEW YORK LAW

It is quite common for statutory name changes to be discretionary with the courts. New York State, for example, gives the court great discretion in deciding whether to approve a name change petition. The procedure provided in the New York statute is relatively simple,[59] but the discretion allowed the court adds an element of complexity and uncertainty as to how a petition will be received. Section 63 of the New York Civil Rights Law is quite broad and provides that a name change order be given:

> If the court to which the petition is presented is satisfied thereby, or by the affidavit and certificate presented therewith, that the petition is true and that there is no reasonable objection to the change of name proposed ....[60]

While early New York case law established the principle that a name change petition should be granted[61] unless there is a protest or "some

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[54] HAWAII REV. STAT. tit. 31, ch. 574, § 574-1 (1968).

[55] KANOWITZ, *supra* note 1, at 44.

[56] COL. REV. STAT. ANN. ch. 20, art. 1, §20-1-1 (1963).

[57] Galanter v. Galanter, 133 N.Y.S.2d 266 (Sup. Ct. Kings County 1954). In that case a father was successful in obtaining an injunction preventing his former wife from enrolling their children in school under her present husband's name since it was not shown that the name change was in the best interest of the children. Convenience in using the new name did not overcome the right of the father to have his children use his surname.

[58] MICH. STAT. ANN. tit. 27, § 27.3178 (561) (1962).

[59] N.Y. CIVIL RIGHTS LAW art. 6, §§ 60-64 (McKinney 1948).

[60] *Id.* at §63. The statute also provides that any person may file a petition. *Id.* at §60.

[61] *See, e.g., In re* Slobody, 173 N.Y.S. 514 (Sup. Ct. Kings County 1918).

startling result"[62] which will be effected, the more recent cases have demonstrated that the courts are not reluctant to exercise their discretion and deny a name change.[63] *In re Green*[64] provides an example of abuse of discretion. The petitioner wished to change his name from Earl Green to Merwon Abdul Salaam because he had converted to the Islamic religion. The court denied that there was any infringement upon his freedom of religion because the name change bore no reasonable relationship to the practice of his religion. Moreover, the court noted that the petitioner could still avail himself of the common law method of name change since the statutory procedure was merely an alternative procedure, not an exclusive one. The opinion demonstrates the court's intolerance for an individual who seeks a name change for reasons beyond its realm of experience or understanding:

> He seeks not only to disavow the faith and tenets of his church and his forbears but also his patronymic. ... Green is a name that possesses an American echo in politics, government, finances, in peace and in war. The Revolutionary War produced the Green Mountain boys, who so valiantly fought and bled for their, and now our, glorious country. ... The blood spilled by the great American patriots should not be despoiled by strange and foreign adaptations.[65]

One can imagine how this court might use its discretion if a married woman presented a petition requesting a change to her maiden name.

A woman in New York State who wished to use the common law method would, however, probably encounter fewer problems than women in other states. For example, there is no prohibition against using a maiden name on a driver's license or motor vehicle registration, although the Motor Vehicle Department does require that the same name be used for both. Moreover, the married woman is permitted to change her name to either her married name or her maiden name at any time simply by procuring the appropriate form.

In New York a married woman may also use her maiden name for voting purposes. Section 412(3) of the New York Election Law states that a married woman "shall be permitted to vote under her maiden name if she prefers, unless challenged on other grounds."[66] If after having done so, however, she decides to use her married name, she need merely sign the name under which she is registered on the poll record and then sign her married name above that.[67]

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[62] *In re* Kastenbaum, 44 N.Y.S.2d 2 (Sup. Ct. Kings County 1943).
[63] *In re* Douglas, 60 Misc.2d 1057, 304 N.Y.S.2d 558 (Sup. Ct. N.Y. County 1969).
[64] *In re* Green, 54 Misc.2d 606, 283 N.Y.S.2d 242 (Civ. Ct. N.Y. City 1967).
[65] *Id.* at 606, 607, 608, 283 N.Y.S.2d at 244, 245.
[66] N.Y. ELECTION LAW tit. VIII, §412 (3) (McKinney 1964).
[67] *Id.*

The problem, then, is not with the Election Law, which is clear and fair, but with the administration of the law. There have been cases within the writer's own knowledge in which recently married women have been told at the polls that they either must re-register before they can vote or must use their married names to sign the voter card. Unless a woman has knowledge of the law, she may be coerced into either using her married name or forfeiting her right to vote. This abuse often arises from the ignorance of voting officials who are quick to be authorative toward a naive voter. This could be remedied by educating both women and poll officials to the appropriate provisions of the Election Law.

Although there seems to be no reported New York case law concerning married women's name changes, the courts do have the discretion to refuse these petitions. Perhaps the only way to counter abuse of this discretion would be to determine whether the New York name change procedure is sufficiently inexpensive and simple to satisfy the requirements of *Forbush*.[68] The New York procedure does appear to be more involved than that of the Alabama statute[69] in *Forbush* and includes requirements for providing for the filing of the order and appropriate papers, publication of the order, filing of an affidavit of publication, and the entry of a certification of compliance.[70]

The New York Legislature has taken the initiative to remove one category of women from discretionary name change. During the 1973 Legislative Session a law was passed adding to the New York Domestic Relations Law Section 240-a, which requires a judge to change a divorced woman's name back to her maiden name if she so desires:

> In any action or proceeding brought under the provisions of this chapter wherein all or part of the relief granted is divorce or annulment of a marriage any interlocutory or final judgment or decree shall contain, as a part thereof, a provision that the woman may resume the use of her maiden name.[71]

A legislative memorandum prepared by the New York Civil Liberties Union states that it had been the customary practice in New York for state supreme courts to grant name change requests of divorced women without children:

> In contrast, women with children are routinely denied these same requests and are summarily informed they must pursue independent actions to obtain such relief in Civil Court, under the change of name proceedings of Civil Rights Laws 60 *et seq.*[72]

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[68] 341 F. Supp. 217.

[69] CODE OF ALABAMA, tit. 13, §278 (1958).

[70] N.Y. CIVIL RIGHTS LAW, art. 6, 63 (McKinney 1948).

[71] N.Y. SESSION LAWS, c. 642 (1973).

[72] Unpublished Legislative Memorandum #21 on Assembly Bill 815 prepared by New York Civil Liberties Union, March 2, 1973.

Perhaps this new law will lead the way to other New York legislative reforms.

Possible Legislative Reforms

Since action through the courts has been only moderately successful, it is reasonable to consider some the legislative alternatives proposed. During the 1973 Legislative Session a bill was introduced in the New York State Assembly which would amend the Domestic Relations Law to allow a husband and wife to declare on their marriage license the name each chooses to use after marriage. The bill offered the married couple three options: to retain their own names, to choose the name of one spouse, or to choose a combination of both names.[73] This bill provided a simple procedure which could be instituted upon marriage, but it provided no remedy for the woman who was already married and wished to regain her maiden name. The bill died in committee.

Other states have proposed a variety of options for married women, and occasionally for married men and single persons as well. The Wisconsin Assembly passed a bill which the Governor subsequently vetoed in which a woman upon securing a marriage license, could elect to retain either her maiden name or another permissible name.[74] In the State of Washington, legislation was proposed which allowed a married woman the use of a combination of her name and that of her husband as well as the option for both of them to choose *any* name they wished to be known by.[75] In 1971 a California bill was introduced which added another alternative to the basic Wisconsin plan: the opportunity for a woman to use her mother's maiden name at marriage. The California bill also allowed all persons upon reaching the age of 21 to elect to bear the maiden name of their mother.[76] Massachusetts proposed a bill which would have allowed a married woman to use her maiden name simply by filing an intent to do so. This would have allowed married women who had been using their married names to regain their maiden names, and would have permitted women to elect to retain their maiden names upon marriage.[77] None of these bills was enacted into law.

Does a Married Woman Have a Right to Her Own Name?

All these proposals seem to satisfy the *Forbush* requirement that a name change procedure be simple and inexpensive. However, another possibility remains: a new presumption that a woman retains her

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[73] N.Y. Assembly Bill 1511 (1973 Session).

[74] Wis. Assembly Bill No. 781 (1969) (cited in Hughes, *supra* note 30, at 239).

[75] Wash. Senate Bill No. 503, §1 (42d Reg. Sess. 1971) (cited in Hughes, *supra* note 30, at 239).

[76] Cal. Assembly Bill No. 729 (1971 Reg. Sess.) (cited in Hughes, *supra* note 30, at 240).

[77] Mass. House Bill No. 4613 (1971) (cited in Hughes, *supra* note 30, at 240).

maiden name unless she declares otherwise. Thus, a new right would be created, the right of a married woman to keep her own name.

In the past few years an increasing number of married women have insisted that they have a right to their maiden names. Their reasons for wanting such a right are varied, but the attitude of the woman toward herself and her marriage is often central. For example, in a recent New Jersey case, a married woman applied for a name change simply because she wanted her own name. Her petition was granted because the New Jersey statute requires that name changes be granted unless there is a reasonable objection.[78] 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 and her husband wanted, one which encouraged each of them to be individuals.[79]

Feminists occasionally have looked to the United States Constitution in search of the right to a maiden name. It has been argued that the constitutional protections of due process, equal protection, and the first amendment protect women from involuntary name changes.[80] Moreover, one could argue that involuntary name changes are a breach of the right to privacy, since a name is a very personal possession.

Equal Protection

Any equal protection argument applicable to maiden names must be seen in light of both the recent Supreme Court decision *Frontiero v. Richardson*[81] and the possibility of the ratification of the equal rights amendment. Although a plurality of the *Frontiero* court determined that sex did constitute a suspect classification, making the discrimination in the case subject to strict scrutiny, the present make-up of the Supreme Court is such that the impact of the decision is uncertain. Hence, the ultimate hope of feminists who wish to establish a right to a maiden name may well be the ratification of the equal rights amendment. This amendment would constitutionally proscribe any law or regulation arbitrarily based on sex, and would thus force the states to eliminate sex discrimination in their name change procedures and "would not permit a legal requirement, or even a legal presumption, that a woman takes her husband's name at the time of marriage."[82] At the present time the ratification of the Equal Rights Amendment appears doubtful. Therefore, the case of *Frontiero v. Richardson* assumes great importance.

The plurality opinion in *Frontiero* was written by Justice Brennan,

[78] *In re* Hodes (Essex County Ct., N.J., Apr. 8, 1971).

[79] *In re* Nathanson, Civ. No. 731634 (Wash. Super. Ct. King County, Dec. 9, 1970).

[80] *See,* Carlsson, *supra* note 23, at 562; Hughs, *supra* note 30, at 240.

[81] 93 S. Ct. 64 (1973).

[82] Brown, Emerson, Falk, Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights For Women,* 80 Yale L.J. 871, 940.

joined by Justices Douglas, White and Marshall, and is clear in its rejection of two federal statutes[83] which discriminated against women in the armed services. These statutes required servicewomen to provide over one-half of the support for their husbands before the husbands could qualify for "dependent" benefits, while automatically giving the same benefits to the wives of servicemen. In reaching their decision, the plurality held that classifications based on sex were inherently suspect and required strict judicial scrutiny, citing *Reed v. Reed*[84] as authority. Justice Stewart concurred in the judgment but cited *Reed* for the proposition that the statute created invidious discrimination. He did not reach the question of whether sex is or is not a suspect classification, and from his one sentence concurrence it is impossible to determine exactly his view on classification by sex. This uncertainty is increased because the court in *Reed* explicitly refused to determine whether sex was a suspect classification: therefore, it may be that on that one issue Justice Stewart disagreed with the plurality.

Justice Rehnquist was the only dissenter. He relied on the opinion of the district court judge who had found a rational basis for the discrimination in the administrative convenience it created.[85] Another concurrence was written by Justice Powell, joined by Chief Justice Burger and Justice Blackmun. It firmly denied the necessity of classifying sex as a suspect category, again, citing *Reed*. Justice Powell wanted to allow the political machinery of the ratification process to accept or reject the equal rights amendment instead of having the judicial branch of government make the decision on this sensitive social issue.

Thus, *Frontiero* is not as conclusive as it might first appear. A tally of the views of the Justices on whether sex is a suspect classification reveals four who think that it is, one who is not certain, and four who think that it is not. These figures become more dramatic when it is realized that some of the older members of the Court are in the first category while the younger ones are in the latter, and that a change in the composition of the Court could tip the scale. Consequently, women who are involved in sex discrimination cases would be well advised to examine the arguments found in the cases prior to *Frontiero*,[86] since traditional equal protection remains vital.

One possible argument that could be used in a maiden name case to complement an argument of invidious sex discrimination would be that married women are also unconstitutionally discriminated against because of their marital status. Such an argument would emphasize that

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[83] 37 U.S.C. §§ 401, 403; 10 U.S.C. §§ 1072, 1076 (1970).

[84] 404 U.S. 71 (1971).

[85] Frontiero v. Laird, 341 F. Supp. 201 (M.D. Ala. 1972).

[86] *See e.g.*, Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971); Reed v. Reed, 404 U.S. 71 (1971).

the difficulties of common law name change which a married woman may experience are not imposed upon unmarried women. The inappropriateness of discrimination on the basis of marital status is discussed in *Eisenstadt v. Baird*[87] in which the Supreme Court condemned discrimination against single persons regarding contraceptive distribution:

> Whatever the rights of the individual to access to contraceptives must be, the rights must be the same for the married and the unmarried alike.[88]

An argument that is frequently presented to defend a discriminatory statute is that of administrative convenience. Although administrative convenience probably will not be sufficient to satisfy the new equal protection test, it may convince a court if the traditional test of rationality is used. There are, however, several strong cases, including *Frontiero* and *Reed,* which counter the administrative convenience argument. In maiden name cases, however, the *Forbush* court found it convincing and the case will have to be distinguished.

The fact of the matter is that the administrative problems often cited as reasons for refusing married women the use of their maiden names are sometimes exaggerated. While it is true that government bureaucracies need accurate records by which to identify those under their auspices, the name of a person is often only a secondary factor in the maintenance of their records. In the federal bureaucracy, a social security number is the conclusive means of identification. For example, the Internal Revenue Service uses it as an account number which is identical to the number submitted by the employer in his report.[89] This number remains constant throughout an individual's life despite any change of name. The Social Security Administration accepts name changes routinely at each district office, the only requirement being that the name used in employment be the same as the new name.[90] There is, however, no requirement that a woman upon marriage submit a name change application. Consistency in the use of a name seems to be the main concern of the Social Security Administration, not the actual name itself or the marital status of the social security card holder. The use of computers tends to make every person a number and clearly reduces any administrative reliance on names.

The equal protection arguments appropriate to maiden name cases have their foundations in the traditional tests used in cases like *Forbush*

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[87] 405 U.S. 438 (1972).

[88] *Id.* at 453.

[89] INT. REV. CODE of 1954, § 6109.

[90] 20 C.F.R. § 404.1241(b) (1972).

and *Reed*. The reasoning in those cases was the precursor of the strict equal protection test proposed by the plurality in *Frontiero*. Despite the emphasis of these recent cases on equal protection, there are also fourteenth amendment due process arguments which could be argued effectively to strengthen a maiden name case. *Forbush* is particularly relevant in that respect because it indicates that a married woman who wishes to retain her maiden name is not denied her rights if the state name change statute is simple enough. Thus, although *Forbush* does not directly deal with due process it may provide ammunition for those women who wish to use that argument.

Due Process

Although it may be argued that in *Forbush* the availability of a simple and inexpensive name change procedure reduced the burden on the plaintiff and provided due process, there are many women in other states who do not have access to such a simple procedure and who may even be denied the right to change their names by state statute. These women have essentially lost their maiden names and may be without satisfactory recourse if they wish to regain them. Under these circumstances, the argument may be made that these women have been denied due process.

A second due process argument would look not to the time when a woman is arbitrarily denied the use of her maiden name by an administrative agency, but rather to the time of her marriage when her maiden name is taken from her. According to this argument the automatic imposition of the husband's name denies a woman a choice and provides no process at all, save the remedial one of a legal name change procedure.

Freedom of Expression

Freedom of expression provides a third constitutional basis for the right of a woman to her maiden name. If one accepts the idea that a name can symbolize one's identity, it then becomes protected by the first amendment guarantee of freedom of expression. Expression can take an almost infinite variety of constitutionally protected forms: the wearing of black armbands,[91] the wearing of a jacket which says "Fuck the Draft,"[92] and even silence at a sit-in.[93] While each of these forms of expression is distinct, all were intended to communicate an idea or situation which the defendants considered important. Who is to say that

[91] Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).
[92] Cohen v. California, 403 U.S. 15 (1971).
[93] Brown v. Louisiana, 383 U.S. 131 (1966).

a married woman who retains her maiden name because it symbolizes her views on marriage and feminism is not communicating her life principles to those around her? It would seem that if a young man who believes that the war in Vietnam is wrong can write "Fuck the Draft" on the back of his jacket, then a married woman should be able to sign her maiden name on her driver's license, passport, voter registration, or anything else she wishes to sign, simply because she believes she is a separate and independent individual who is entitled to her own, not her husband's, name.

Right To Privacy

The United States Supreme Court has recognized a penumbral right to privacy under the first, fourth, ninth, and fourteenth amendments. This right could be extended to provide yet a fourth constitutional basis for a woman's right to her maiden name. The Court has defined the right of privacy to include a variety of personal rights including marital privacy,[94] contraception,[95] sterilization[96] and, most recently, abortion.[97] *Griswold v. Connecticut*[98] clearly includes marital sexual relationships within the right of personal privacy. Should not other aspects of the marriage relationship be protected under the aegis of personal privacy? Today it would seem that a couple is entitled to create its own concept of marriage, and indeed should be encouraged to do so. In *Eisenstadt v. Baird* the Court took note of the fact that a married couple is made up of individuals:

> The marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up.[99]

If the Court was sincere in this statement it would seem that it would be committed to encouraging the two members of a married couple to develop as individuals: allowing married women to use their maiden names and assert their own identities would be a logical outgrowth of such a commitment. While the Court has not yet taken that step, the reaffirmation of the right to privacy in the recent abortion opinion of *Roe v. Wade*[100] demonstrates that this right is being expanded to protect women, albeit somewhat cautiously, and may eventually encompass a right to one's own name.

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[94] Griswold v. Connecticut, 381 U.S. 479 (1965).
[95] Eisenstadt v. Baird, 405 U.S. 438 (1972).
[96] Skinner v. Oklahoma, 316 U.S. 535 (1942).
[97] Roe v. Wade, 93 S.Ct. 705 (1973); Doe v. Bolton, 93 S.Ct. 739 (1973).
[98] 381 U.S. at 486.
[99] 405 U.S. at 453.
[100] 93 S.Ct. 705.

In addition to the constitutional right to privacy, some states have instituted a statutory right to privacy which covers a limited number of situations. New York, for example, establishes a right of privacy which prohibits the unauthorized use of a person's name in advertising or trade.[101] This statute demonstrates the great importance the state puts on maintaining the integrity of a person's name, even though, one must note, the same importance is not placed on the taking away of a maiden name. However, New York does recognize that an individual's name is a very private thing closely associated with the privacy of home and family, traditionally the sources of one's name. To have one's own name is one of the most personal belongings any individual can have, and the right to maintain the integrity of that name should be within a constitutional, or at the very least within a statutory, right to privacy.

CONCLUSION

In the belief that they are required by law to use their husband's surname, most married women relinquish their maiden name, seeing no alternative but to accept that of their husband. Hearing little objection, the courts and legislatures have come to believe that *all* women prefer to take their husband's surname. Choice between her own and her husband's name is not likely to become available to the married woman until society changes its view of women and encourages them to assert their individuality:

> Since a woman is viewed as an accessory to a man in our culture, a woman as herself enjoys less dignity and status. She can attain social status through marriage. By relinquishing her identity and becoming part of the identity of her husband, she supposedly (though never really) shares in his position. The change of name reflects a lack of personal self-identity. This is not the case for men generally and this is one of the reasons why they tend to keep their own names after marriage. There are also many social pressures upon a woman encouraging her to change her name — pressures from people who do not value a woman equally. Thus the flight from "Miss" is often realistic for a woman with few personality resources.[102]

When a woman is viewed in this manner, it is reasonable to assume that she gains something very desirable when she marries. This reasoning, however, also leads to an inability to understand why a woman would wish her own name and own life. Until there is the acknowledgment that the right to retain a maiden name symbolizes many principles inherent in the movement for women's rights, maiden names will continue to be thought of as an insignificant problem within the larger framework of sex discrimination.

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[101] N.Y. CIVIL RIGHTS LAW art. 5, § 50 (McKinney 1948).

[102] Carlsson, *Supra* note 23, at 562, 563.