

# William & Mary Journal of Race, Gender, and Social Justice

---

Volume 17 (2010-2011)  
Issue 1 *William & Mary Journal of Women and  
the Law*

Article 6

---

November 2010

## A Spouse by Any Other Name

Deborah J. Anthony

Follow this and additional works at: <https://scholarship.law.wm.edu/wmjowl>



Part of the [Family Law Commons](#)

---

### Repository Citation

Deborah J. Anthony, *A Spouse by Any Other Name*, 17 Wm. & Mary J. Women & L. 187 (2010),  
<https://scholarship.law.wm.edu/wmjowl/vol17/iss1/6>

Copyright c 2010 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmjowl>

## A SPOUSE BY ANY OTHER NAME

DEBORAH J. ANTHONY\*

### ABSTRACT

This article will investigate current state laws regarding the change of a husband's name to his wife's upon marriage. Given that tradition, and often law itself, discourage that practice, the lingering gendered norms that perpetuate the historical tradition will be explored. Components of this article will include a brief historical analysis of the origin of surnames and the law as it has developed on that issue, including an examination of the place of tradition in the law both empirically and normatively. A discussion of the psychological importance of names in the identities of men versus women will be addressed, as will possible justifications for the distinction between the rights of men and women in this regard. Finally, this article will discuss the application of gender discrimination laws and constitutional equal protection doctrine to current laws that provide differing rights and privileges based solely on one's status as a wife versus a husband.

### INTRODUCTION

- I. ORIGINATION AND DEVELOPMENT OF SURNAMES
- II. PSYCHOLOGICAL AND SOCIAL IMPORTANCE OF SURNAMES
- III. MODERN DEVELOPMENT OF LAW OF SURNAMES AT MARRIAGE
  - A. *Current State Laws*
- IV. ANALYSIS
  - A. *Women as Property and Social Expectations*
- V. LEGAL CONSIDERATIONS
  - A. *Custom/Tradition*
  - B. *Preservation of the Family*
  - C. *Administrative Convenience*
  - D. *Fraud Prevention*
  - E. *Minimal Injury*
  - F. *Right of Privacy*

### CONCLUSION

---

\* Assistant Professor of Legal Studies, University of Illinois Springfield.

## INTRODUCTION

*Suppose we had a tradition that when blacks married whites, the white name was always the name used by the family. It would be an outrage and racist. . . . [T]his is one of the last vestiges of sexism.*

—Morrison Bonpasse<sup>1</sup>

*There is something sacred about a name. It is our own business, not the government's.*

—*Henne v. Wright*<sup>2</sup>

When I was eight years old I discovered a piece of mail apparently addressed to my father; it bore his first and last name, but was preceded by the word “Mrs.” Obviously, the sender had made a mistake. Highly amused at the identification of my father as a married woman, and pleased as any eight-year-old can be at my cleverness in catching the mistake, I showed the mail to my mother, expecting her to laugh with me and shake her head at the sloppiness. Instead, she told me that there was no mistake. The mail was not for my father, but for *her*. Addressing a woman by her husband’s name was “just the way things were done.” There was no explanation whatsoever as to the logic or fairness behind the practice other than a vague notion of tradition, which failed to satisfy any conceptions I had of either logic or fairness. The issue was dropped; I was completely bewildered.

From that point on I have been fascinated and confounded by marital naming conventions that exist—and persist—over time. By the time I married in 2005, I had long since decided that I would keep my name. While my husband was supportive, the decision immediately raised eyebrows and created issues with others: for example, how would the minister announce us at the end of the wedding ceremony? Mr. and Mrs. Anthony wouldn’t work; neither would Mr. Gandara and Ms. Anthony—we were already that before we married. No one knew quite how to handle it. The minister thought she had the solution: “We should just announce you both with *his* name,” she decided, “since according to the law, you will automatically have it anyway.” Of course she was wrong about that, but I was stunned not only that someone in the business of marrying couples could be so misinformed, but that apparently the issue had never previously been raised for

---

1. Morrison Bonpasse, *quoted in* Chris Poon, *The Name Game—A Bride Has to Decide: Should She Change, Stay the Same, Hyphenate, or Invent?*, PROVIDENCE J. BULL., Oct. 17, 1999, at 8L.

2. *Henne v. Wright*, 904 F.2d 1208, 1217 (8th Cir. 1990) (Arnold, J., dissenting).

her. Thus, I experienced the first of many marital name problems—the practices surrounding which often still exemplify antiquated traditions, practices, and even laws—in a society whose gender norms are, in our own collective estimation, supposedly enlightened. My husband had not yet considered taking my name, but he decided to do so shortly thereafter. It was then that I discovered exactly *how* unequal our cultural marriage norms can still be—and how those norms often have legal backing.

It is quite clear that times are changing when it comes to marriage, family, and gender roles. Women are marrying later, and more often not at all, than they have in the past. When they do marry, couples often desire flexibility in choosing their last names. Their reasons may vary: a woman may have professional accomplishments under a birth name; she (or they) may decide on principle that they want a more gender-equal naming solution; she may have a desire not to lose her identity; she may have a strong connection with a birth name or have children with her current last name. Whatever the reasons for opting for an unconventional naming solution, the fact is that the law has trailed behind the times when it comes to allowing for the flexibility necessary to effectuate these choices. While a woman can simply adopt her husband's surname upon marriage, a man faces a much more challenging process if he wishes to take his wife's surname.<sup>3</sup>

The law—especially family law—serves the function of channeling people into certain socially preferred institutions and practices, while discouraging those that are viewed as less acceptable. As such, the law reinforces and encourages behavior considered desirable by society—or, perhaps, behavior once considered desirable but not subjected to recent critical examination. For example, there exists a plethora of benefits that accompany marriage which cannot be achieved any other way, a fact which serves to encourage people to enter the institution.<sup>4</sup> Extending those benefits to those outside of the institution is often derided as lessening the importance or “sanctity” of marriage.<sup>5</sup> In

---

3. See Steve Friess, *More Men Taking Wives' Last Names*, USA TODAY, Mar. 21, 2007, [http://www.usatoday.com/news/nation/2007-03-20-names-marriage\\_N.htm](http://www.usatoday.com/news/nation/2007-03-20-names-marriage_N.htm) (“Only seven states now allow a man who wishes to alter his name after his wedding to do so without going through the laborious, frequently expensive legal process set out by the courts for any name change. Women don't have to do so.”).

4. E.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/OGC-97-16, DEFENSE OF MARRIAGE ACT 3, (1997); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT 1 (2004); Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2694 (2004).

5. JAMES C. DOBSON, MARRIAGE UNDER FIRE: WHY WE MUST WIN THIS BATTLE 4 (2007).

many states, for example, the courts refuse to recognize cohabitation agreements among unmarried couples who choose to arrange their relationships in certain ways. Such a recognition, the courts contend, would make marriage less attractive<sup>6</sup>—as if that alone were reason enough to reject a policy out of hand.

The current law regarding names and name changes upon marriage belongs exclusively to the states.<sup>7</sup> While one might assume that gender discrimination has disappeared from our laws, if not from our social structure, as of 2010 the majority of states do not allow a man to change his name to that of his wife by virtue of marriage, while the woman can do so via a simple and straightforward process in every state except one.<sup>8</sup> Although there has been very little scholarship on this issue, what exists points to this fact as overt discrimination against men, and therefore unconstitutional. Yet there is much more to the issue than mere discrimination against men. Underlying the policy is discrimination against *women*, in the form of a legal sanction of the social norms that once legally subsumed women within their husbands' identities. Thus, the law discourages and penalizes men for making a "sacrifice" normally required, or expected, of women.

Although naming practices and policy may not appear to be as significant as many other critical equality issues including employment discrimination, intimate partner violence, or reproductive rights, they are a fundamental representation of the notion of choice—the choice to structure one's own identity, life, and family as one sees fit.<sup>9</sup> As such, the current state of the law reinforces unequal cultural norms and archaic gender roles, represents and implicitly supports inequality, and violates the constitutional principle of equal protection of the laws.

### I. ORIGATION AND DEVELOPMENT OF SURNAMES

Before investigating the current state of marital name change law, it is helpful to understand the history and development of both custom and law on surnames. American legal and social custom on names was handed down from the common law of England. In several thousand years of recorded history, surnames are a "relatively

---

6. *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1207 (Ill. 1979).

7. U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL—CONSULAR AFFAIRS, Vol. 7, 15-19 (2009); Name of Applicant to be Used in Passport, 22 C.F.R. § 51.25 (2010).

8. Louisiana law provides that "[m]arriage does not change the name of either spouse. However, a married person may use the surname of either or both spouses as a surname." LA. CIV. CODE ANN. art. 100 (2009).

9. Kif Augustine-Adams, *The Beginning of Wisdom Is to Call Things by Their Right Names*, 7 S. CAL. REV. L. & WOMEN'S STUD. 1, 3 (1997).

recent phenomenon,”<sup>10</sup> supplementing the use of first names, which has always been universal.<sup>11</sup> Any current-day notion that surnames are permanent is a gross misconception;<sup>12</sup> surnames themselves did not exist in England before the Norman Conquest in 1066.<sup>13</sup> The word “surname” originates from “sir” name,<sup>14</sup> or “sire” name,<sup>15</sup> and was initially used only by aristocracy, knights and gentry.<sup>16</sup> Their use gradually spread down the social ladder, until eventually even peasants used them regularly.<sup>17</sup>

After the Norman invasion, old Saxon customs, including those regarding names, were replaced with Norman ones.<sup>18</sup> Populations increased and larger cities grew while the list of possible first names was quite limited, resulting in confusion and the increasing need for some other means of identifying individuals.<sup>19</sup> Surnames therefore became more common in thirteenth and fourteenth-century England.<sup>20</sup> Adding to the necessity of more precise names, the state began to require a way to identify and regulate its citizens.<sup>21</sup> Kelly argues that early naming conventions also developed as a way to shape and structure citizens’ lives to correspond with the dominant culture,<sup>22</sup> a purpose which is still extant today. The use of surnames was quite flexible and inconsistent until the 1500s, however.<sup>23</sup> Names themselves were chosen by the bearer, sometimes according to local laws.<sup>24</sup> A 1465 law, for example, dictated that every Irishman living within specified districts should “take to him an English surname of one town, as *Sutton, Chester, Trynn, Skryne, Corke, Kinsall*; or colour, as *white, black, brown*; or arte or science, as smith or carpenter; or office as cooke, butler.”<sup>25</sup> Names changed quickly and easily through the fourteenth

---

10. WILLIAM DODGSON BOWMAN, *THE STORY OF SURNAMES* 13 (1932); L. G. PINE, *THE STORY OF SURNAMES* 11-12 (3d ed. 1970); Cynthia Blevins Doll, *Harmonizing Filial and Parental Rights in Names: Progress, Pitfalls, and Constitutional Problems*, 35 *HOW. L.J.* 227, 228 (1992).

11. Doll, *supra* note 10, at 228.

12. PINE, *supra* note 10, at 19.

13. *Id.* at 10.

14. BOWMAN, *supra* note 10, at 9.

15. DALE SPENDER, *MAN MADE LANGUAGE* 25 (1980).

16. BOWMAN, *supra* note 10, at 8, 9.

17. *Id.* at 8.

18. Lisa Kelly, *Divining the Deep and Inscrutable: Toward a Gender-Neutral, Child-Centered Approach to Child Name Change Proceedings*, 99 *W. VA. L. REV.* 1, 10 (1996).

19. *Id.*; Omi Morgenstern Leissner, *The Problem That Has No Name*, 4 *CARDOZO WOMEN’S L.J.* 321, 366 (1998).

20. PINE, *supra* note 10, at 11; Kelly, *supra* note 18, at 10.

21. Kelly, *supra* note 18, at 6.

22. *Id.*

23. BOWMAN, *supra* note 10, at 8.

24. PINE, *supra* note 10, at 10; BOWMAN, *supra* note 10, at 8.

25. BOWMAN, *supra* note 10, at 8.

century, and reflected a person's trade, personal and physical characteristics, or residence more often than their paternity.<sup>26</sup> As a result of this flexibility in name choice, members of the same family would often have different surnames,<sup>27</sup> and those names would frequently change throughout one's life.<sup>28</sup> John Smith could have a daughter named Maude Weaver and a son named Henry Short, who may also be known as Henry Hill if he lived on a hill, or Henry Johnson as the son of John. Surnames gradually began to be hereditary in the fourteenth century due to state registration of citizens requiring more naming consistency.<sup>29</sup> As Kelly points out, many of the common English names of today reflect important functions of fourteenth century life.<sup>30</sup> Yet surnames were not universal or firmly established in all parts of England even by the early 1700s.<sup>31</sup> Indeed, the British royal family itself had no surname at all until 1917 when they adopted the name Windsor,<sup>32</sup> apparently as a means of distinguishing the family from the Germans during World War I.<sup>33</sup> Surnames, therefore, developed out of a combination of "custom, convenience, and law."<sup>34</sup>

The surnames of women in particular have not been well documented,<sup>35</sup> which essentially writes females out of history as their ancestry is so difficult to trace.<sup>36</sup> Evidence suggests, however, that girls were given names such as Alice Tomsdaughter, but these names were largely lost in time because English custom developed such that women tended to adopt the surnames of their husbands.<sup>37</sup> Yet it is also clear that there were exceptions to the norm; historically, if the wife inherited property, then her husband and children would take her last name in order to attach themselves to the estate.<sup>38</sup> Tuttle argues that the purpose of this was to ensure that the family and future generations might be "deluded" into believing in the consistency of the male line.<sup>39</sup> With time, however, the law imposed further restrictions

---

26. Doll, *supra* note 10, at 228.

27. *Id.* (citing *Smith v. U.S. Casualty Co.*, 90 N.E. 947, 948 (N.Y. 1910)).

28. PINE, *supra* note 10, at 15.

29. Kelly, *supra* note 18, at 11.

30. *Id.* at 11-12.

31. BOWMAN, *supra* note 10, at 10.

32. PINE, *supra* note 10, at 15.

33. *Id.* at 17.

34. Kelly, *supra* note 18, at 12.

35. *Id.* at 10.

36. SPENDER, *supra* note 15, at 24-25.

37. Kelly, *supra* note 18, at 11.

38. *Rio v. Rio*, 504 N.Y.S.2d 959, 961 (App. Div. 1986); *see also* PINE, *supra* note 10, at 23; Kelly, *supra* note 18, at 11.

39. PINE, *supra* note 10, at 24.

upon women's ownership of property, so that eventually only males were permitted ownership by law. This effectively ended the practice of men taking their wives' names at marriage.

Although westerners tend to think of our naming structure as set in stone and as representing the only reasonable approach, not only did these structures vary within our own culture over time, but worldwide many other practices have abounded.<sup>40</sup> There are still no surnames at all in many non-western societies.<sup>41</sup> "Matronymics," or the practice of naming after the maternal line, exists in modern Spain, medieval England, and amongst medieval Arabs and Jews.<sup>42</sup> Indeed, in medieval England children were often given the names of their mothers, or assumed them voluntarily, even when they were not illegitimate.<sup>43</sup> In some cultures, surnames are narrative and are neither patrilineal nor matrilineal.<sup>44</sup>

Clearly, then, there is a wide range of experience and custom with respect to surnames, not only worldwide, but in our own cultural history as well. Surnames today reflect both how the family is structured, and how we believe it should be structured.<sup>45</sup>

## II. PSYCHOLOGICAL AND SOCIAL IMPORTANCE OF SURNAMES

*The common experience of mankind . . . points up the universal importance to each individual of his own very personal label.*

—*O'Brien v. Tilson*<sup>46</sup>

*Surnames give an individual a personal identity and selfawareness.*

—*Roe v. Conn*<sup>47</sup>

Is our name really a trivial matter, one to which we should pay little heed? Experience and evidence indicate otherwise: our names are at the cornerstone of our lives; they make a statement both individually and collectively. They serve as the symbol of one's individuality, lineage, family beliefs, religion, and community, all of which

40. Kelly, *supra* note 18, at 7 (noting the wealth of possible naming systems worldwide).

41. *See id.* (discussing the lack of surnames in the matrilineal Himalayan Bhutanese society in Thailand) (citing *See Her Hands*, MOTHER-JONES, Sept.-Oct. 1995, at 40).

42. *Rio*, 504 N.Y.S.2d at 961.

43. BOWMAN, *supra* note 10, at 95.

44. *Id.* at 8.

45. Kelly, *supra* note 18, at 5-6.

46. *O'Brien v. Tilson*, 523 F. Supp. 494, 496 (E.D.N.C. 1981).

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

are fundamental to identity.<sup>48</sup> Names may also communicate certain values, including those of equality.<sup>49</sup> Indeed:

[F]or most of us, a name is much more than just a tag or a label. It is a symbol which stands for the unique combination of characters and attributes that define us as an individual. It is the closest thing that we have to a shorthand for self-concept.<sup>50</sup>

In the context of surname choice at marriage, this may also reveal the type of relationship a couple has or desires: independence, equality, and a rejection of traditional gender roles may all be reflected by a non-traditional last name choice.<sup>51</sup> The use and regulation of names is clearly anything but trivial.

Indeed, names often function as much more than a symbol of one's identity. They also constitute "linguistic correlates of social structure,"<sup>52</sup> and have been used throughout history as a means of oppression and control by stripping groups of their right to self-determination and self-identification.<sup>53</sup>

One's name also appears to have direct psychological effects on others. Names are, in fact, "charged with hidden meanings and unspoken overtones that profoundly help or hinder you in your relationships and your life."<sup>54</sup> One study found that married women who retain their surnames are more likely to be viewed as independent, assertive, well-educated, unattractive, feminist, and non-religious than those who adopt their husband's name.<sup>55</sup> Women called "Ms." were thought to be less honest than those called "Miss" or "Mrs." or with no title at all.<sup>56</sup> Indeed, Hillary Rodham Clinton exemplifies this image problem. She retained her birth name when she married in 1975, going by Hillary Rodham alone.<sup>57</sup> This fact caused significant

48. Michael Rosensaft, *The Right of Men to Change Their Names Upon Marriage*, 5 U. PA. J. CONST. L. 186, 190 (2002); Augustine-Adams, *supra* note 9, at 1-2.

49. Augustine-Adams, *supra* note 9, at 10.

50. Leissner, *supra* note 19, at 329 (quoting ELSDON C. SMITH, *THE STORY OF OUR NAMES* 277 (1950)).

51. Augustine-Adams, *supra* note 9, at 10.

52. *Id.* at 2 (citing John Bregenzler, *Naming Practices in South America*, 35 J. MINN. ACAD. SCI. 47 (1968)).

53. Leissner, *supra* note 19, at 330-31.

54. CHRISTOPHER P. ANDERSEN, *THE NAME GAME* 13 (1977).

55. Donna L. Atkinson, *Names and Titles: Maiden Name Retention and the Use of Ms.*, 10 WOMEN & LANGUAGE 37, 37 (1987); *see also* Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 780 (2007) (describing the attorney general's opinion that a woman who wants to retain her maiden name is "odd" and "confused").

56. Emens, *supra* note 55, at 780.

57. Michael Mahoney Frandina, *A Man's Right to Choose His Surname in Marriage: A Proposal*, 16 DUKE J. GENDER L. & POL'Y 155, 158 (2009).

criticism of her husband during his Arkansas gubernatorial race: his wife, it seemed, did not reflect important local values or present an acceptable role model for Arkansas girls.<sup>58</sup> He lost his re-election bid in 1980.<sup>59</sup> For the next race, Hillary dropped the name Rodham and went by Hillary Clinton (and even Mrs. Bill Clinton).<sup>60</sup> Her husband then won the gubernatorial election in 1982.<sup>61</sup> After Mr. Clinton eventually became president, Hillary brought back Rodham, going by Hillary Rodham Clinton.<sup>62</sup> During her own campaign for president in 2008, she dropped Rodham and was again Hillary Clinton.<sup>63</sup> Other common assumptions, which were often cited in court cases on the issue, included the idea that couples with different last names must be presumed unmarried, thereby stigmatizing children.<sup>64</sup> A 2002 study found that college students perceived men and women with hyphenated names differently than those without them.<sup>65</sup> Many viewed women who kept their birth names as harboring less commitment to the marriage,<sup>66</sup> though the reality was found to conflict with that assumption.<sup>67</sup> Even the Immigration and Naturalization Service (now the U.S. Citizenship and Immigration Service) considers it a red flag impugning the validity of a marriage when the woman retains her birth name.<sup>68</sup>

It is sometimes argued that the status quo with respect to marital names is appropriate because men are more connected to their names than are women. Certainly throughout most of modern history, society has accorded the surnames of men much more importance.<sup>69</sup> Names have tended to be more transitory for women, and as a result, men tend to hold more steadfastly to their names as a symbol of their identity. The common conception is that only men have “real” names, and their permanency is one of the rights of being male.<sup>70</sup> As we will see, that notion has made its way into the legal system, where the

---

58. Jennifer Christman, *The Name Game Despite Options, 90% of Women Choose to Take Husband's Name*, ARK. DEMOCRAT-GAZETTE, Mar. 8, 2000, at F1.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*; Frandina, *supra* note 57, at 158-59 (citing Larissa Dubecki, *So What's in a Name? Maybe a Presidency . . .*, THE AGE, May 12, 2007, at 3).

64. Augustine-Adams, *supra* note 9, at 19.

65. Gordon B. Forbes et al., *Perceptions of Married Women and Married Men with Hyphenated Surnames*, 46 SEX ROLES 167, 172 (2002).

66. David R. Johnson & Laurie Scheuble, *Marital Name Change: Plans and Attitudes of College Students*, 55 J. MARRIAGE & FAM. 747, 750 (1993).

67. Betsy Rubiner, *Married Women and Surnames: Tradition Still Plays a Large Role*, SEATTLE TIMES, Nov. 3, 1996.

68. Kelly, *supra* note 18, at 28.

69. Doll, *supra* note 10, at 229.

70. SPENDER, *supra* note 15, at 24.

courts have time and time again upheld a man's naming "rights" with respect to his wife and children. Whereas the identities of women change based on their relation to others, men's identities are solid and consistent.<sup>71</sup> Because of the fleeting nature of a woman's name, it is assumed that her investment in and connection to her birth name must be less significant.<sup>72</sup> Yet early research found that, contrary to researchers' expectations, both women and men identified strongly with their last names, and people tend to underestimate the number of women who do so.<sup>73</sup> Emens argues that the psychological connection of men to their names stands to reason, given that boys are taught from a young age that their names are permanent markers of their identity, while girls are only taught of their names' contingent impermanence.<sup>74</sup> A girl grows up:

knowing from a young age that her name would disappear and be replaced by another name, if and only if she were lucky enough to be loved enough to be given a new name. Her children would bear that name as yet unknown to her, that name that would mark her success in love.<sup>75</sup>

Thus, to the extent that men are in fact more psychologically tied to their surnames, it is a result of a social structure that tells them their names are more important. This alone cannot stand as a justification for continuing the very conditions which created it: namely, women and only women changing their names at marriage. Indeed, "current preferences are likely to be endogenous to the state's previous mandatory regime. It would be surprising if women's (and men's) preferences did not adapt to that mandatory regime."<sup>76</sup> Yet courts have based decisions on this presumed male psychological connection with their names, ignoring in the process women's interests in their own names,<sup>77</sup> and assuming that "women merely inhabit names which actually belong to their husbands."<sup>78</sup>

---

71. See Kelly, *supra* note 18, at 5 (stating the author's realization that men do "not have the same sense of possibility about the transitory nature of names or identity in relation to others"); Leissner, *supra* note 19, at 355 (describing the "discontinuous, temporary, [and] adaptive" nature of women's names) (alteration in original) (citation omitted).

72. Doll, *supra* note 10, at 231.

73. Leissner, *supra* note 19, at 363.

74. Emens, *supra* note 55, at 778.

75. *Id.*

76. *Id.* at 764.

77. Cf. Leissner, *supra* note 19, at 363 & n.223 (noting findings that respondents often "underestimate the number of women who identify with their birth names") (citation omitted).

78. Doll, *supra* note 10, at 235 (analyzing *Burke v. Hammonds*, 586 S.W.2d 307, 309 (Ky. Ct. App. 1979), in which a mother's attempt to change the child's surname to hers was actually an attempt to change the child's name to that of his stepfather).

Yet the issue involves more than simply a psychological connection to one's surname. There appears to also be a psychological desire on the part of a man not simply to keep his own name, but to actually have his wife give up her name in favor of his. Indeed, studies have found that men are less likely to view it as acceptable for a woman to keep her birth name at marriage (fifty-seven percent of men versus ninety-two percent of women).<sup>79</sup> Men tend to assume that such an act evinces a lack of love for the husband.<sup>80</sup> Stannard argues that "a wife by any other name than her husband's is offensive to men,"<sup>81</sup> while the wife who keeps her birth name after marriage is considered "one of *those* women."<sup>82</sup>

### III. MODERN DEVELOPMENT OF LAW OF SURNAMES AT MARRIAGE

*My name is the symbol of my identity which must not be lost.*

—Lucy Stone<sup>83</sup>

*[A]n application to change the name of a wife without the concurrence and consent of the husband is . . . wrong in principle.*

—*Converse v. Converse*<sup>84</sup>

The question of what the law actually requires when it comes to names at marriage has been anything but clear. There is, and in theory, has always existed, a common law right to change one's name, provided the purposes were not fraudulent.<sup>85</sup> Nevertheless, possessing a right formally and being able to exercise it practically are sometimes incongruous matters, especially when it comes to women.<sup>86</sup>

79. Johnson & Scheuble, *supra* note 66, at 750; *see also* Rubiner, *supra* note 67, at L6 (stating that although most women think it acceptable for a woman to retain her name at marriage, ninety percent of women still plan to take their husband's name).

80. Christman, *supra* note 58, at F1.

81. UNA STANNARD, MARRIED WOMEN V. HUSBAND'S NAMES, THE CASE FOR WIVES WHO KEEP THEIR OWN NAME 3 (1973).

82. Augustine-Adams, *supra* note 9, at 1 (emphasis added).

83. Lucy Stone, quoted in STANNARD, *supra* note 81, at 5 (a statement that became the motto of the Lucy Stone League formed by Ruth Hale in 1921).

84. *Converse v. Converse*, 30 S.C. Eq. 535, 539-40 (1856).

85. *Linton v. First Nat. Bank*, 10 F. 894, 897 (C.C.W.D. Pa. 1882); *In re McUlta*, 189 F. 250, 253 (M.D. Pa. 1911); Doll, *supra* note 10, at 228; Yury Kolesnikov, *Chapter 567: Saying "I Do" to Name Changes by Husbands and Domestic Partners*, 39 MCGEORGE L. REV. 429, 430 (2008).

86. *See, e.g., Minor v. Happersett*, 88 U.S. 162, 163 (1874) (holding that the Fourteenth Amendment does not grant women the right to vote); *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872) (holding that the Fourteenth Amendment's Equal Protection Clause does not grant

Lucy Stone was the first known American woman to keep her birth name after marriage, when she married Henry Blackwell in 1855.<sup>87</sup> A prominent abolitionist and suffragist, Stone and her husband jointly read a statement at their marriage announcing their intention to enter “an equal and permanent partnership.”<sup>88</sup> Stone was also the first woman denied the right to vote because of the use of her maiden name.<sup>89</sup> The Lucy Stone League was formed in her honor in 1921 to litigate the right of women to use their birth names after marriage,<sup>90</sup> and the League was rejuvenated in 1997 to work for equality in naming more generally.<sup>91</sup>

When women began more frequently to assert their right to retain their birth name after marriage, the legal response was quite negative. Although a woman’s ordinary use of her name could not be controlled, the law was employed as a punishment mechanism in the context of activities such as voting, driving, suing, and obtaining passports.<sup>92</sup> The justifications used were rather sparse, typically referencing “long-established custom.”<sup>93</sup> Courts would also occasionally speak of the social shame that would attend a relationship that gives the appearance of illicit cohabitation, claiming that children of the marriage would therefore suffer ostracism if such a thing were allowed.<sup>94</sup> A New York court declared that:

---

women the right to practice a profession). The Fourteenth Amendment’s equal protection guarantees were not applied to women by the U.S. Supreme Court until *Reed v. Reed*, 404 U.S. 71, 76 (1971).

87. Claudia Goldin & Maria Shim, *Making a Name: Women’s Surnames at Marriage and Beyond*, 18 J. ECON. PERSP. 143, 143 (2004); Omi Morgenstern Leissner, *The Name of the Maiden*, 12 WIS. WOMEN’S L.J. 253, 254-55 (1997).

88. Leissner, *supra* note 87, at 255 (quoting Julia C. Lamber, *A Married Women’s Surname: Is Custom Law?*, 1973 WASH. U. L.Q. 779, 794).

89. Leissner, *supra* note 19, at 353. Although this was before women gained the right to vote with the Nineteenth Amendment in 1920, Massachusetts had granted women the right to vote in school committee elections in 1879. *November 2, 1915: Voters Deny Massachusetts Women the Vote*, <http://massmoments.org/moment.cfm?mid=316>, (last visited Nov. 22, 2010).

90. Leissner, *supra* note 19, at 389.

91. Emens, *supra* note 55, at 768 n.7.

92. See, e.g., *Forbush v. Wallace*, 341 F. Supp 217, 222-23 (M.D. Ala. 1971) (discussing driving); *Rago v. Lipsky*, 63 N.E.2d 642, 645 (Ill. App. Ct. 1945) (discussing voting); *UNA STANNARD, MRS. MAN 256* (1973) (discussing passports).

93. *Rago*, 63 N.E.2d at 645.

94. *In re Erickson*, 547 S.W.2d 357, 359 (Tex. Civ. App. 1977) (citing lower court’s findings of fact and law); see also *In re Hauptly*, 312 N.E.2d 857, 860-61 (Ind. 1974) (Indiana lower court denied a woman’s name change, where the state argued it would embarrass future children and be an “insult to her husband.” The Indiana Supreme Court ultimately reversed the trial court’s ruling.); *In re Evetts*, 392 S.W.2d 781, 784 (Tex. Civ. App. 1965) (denying a woman the right to use a different surname from her husband’s because of the social shame arising from the appearance of cohabitation); *In re Lawrence*, 319 A.2d 793, 801 (Bergen County Ct. 1974), *rev’d*, 337 A.2d 49 (N.J. Super. Ct. App. Div. 1975) (disallowing a name change because of the detrimental effect on future children).

[f]or 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 . . . and execute all legal documents. Her maiden surname is absolutely lost, and she ceases to be known thereby.<sup>95</sup>

Service of process on a married woman in her birth name was held to be inherently invalid in Texas.<sup>96</sup> The Supreme Court of Alabama held in 1937 that the general custom was for a wife to be designated by the surname *and* first name of her husband, together with the prefix "Mrs.," and that this identification of married women was "more perfect and complete" than one which used their own first name.<sup>97</sup> An Illinois appeals court held that a woman could be denied the right to vote when she did not re-register in her husband's name after marriage.<sup>98</sup> The court noted the "long-established custom, policy and rule of the common law among English-speaking peoples whereby a woman's name is changed by marriage and her husband's surname becomes as a matter of law her surname."<sup>99</sup> In effect, that court decided that the state's "interest" in women adopting their husbands' names outweighed the constitutional right to vote.<sup>100</sup> A Hawaii statute required women to adopt the name of their husbands, and they were forbidden from thereafter changing their names.<sup>101</sup> The statute was not repealed until 1976.<sup>102</sup> A Massachusetts woman injured in a car accident had her lawsuit thrown out of court because her vehicle was registered in her birth name rather than her married name, and it was therefore illegally registered and deemed a "nuisance" on the road.<sup>103</sup> The U.S. Department of State concluded that a woman's legal name was that of her husband, routinely refusing to issue passports to married women in their birth names.<sup>104</sup> One woman was even suspended from her job with the county health department for refusing to adopt her husband's surname after marriage.<sup>105</sup> Another married

---

95. *Chapman v. Phoenix Nat'l. Bank*, 85 N.Y. 437, 449 (1881).

96. *Freeman v. Hawkins*, 14 S.W. 364, 365 (Tex. 1890).

97. *Roberts v. Grayson*, 173 So. 38, 39 (Ala. 1937).

98. *Rago*, 63 N.E.2d at 646.

99. *Id.* at 645.

100. Kelly, *supra* note 18, at 25-26 (citing the holding in *Rago*, 63 N.E.2d 642, 646 (1945)).

101. An Act to Regulate Names, 1860 Haw. Sess. Laws 32.

102. *Augustine-Adams*, *supra* note 9, at 4 n.8, 8 n.23 (citing HAW. REV. STAT. § 574-1 (1993)).

103. *Bacon v. Boston Elevated Ry. Co.*, 152 N.E. 35, 36 (Mass. 1926).

104. STANNARD, *supra* note 92, at 256.

105. *Allen v. Lovejoy*, 553 F.2d 522, 523 (6th Cir. 1977) (upholding plaintiff's gender discrimination claim).

woman applying for naturalization was denied the right to retain her birth name on her naturalization documents, the court contended that such refusal would result in minimal harm to her.<sup>106</sup> Interestingly, the “no harm, no foul” argument arises today in the debate as to whether a man should have the right to adopt his wife’s name at marriage,<sup>107</sup> as will be discussed in Part V.

Even the United States Supreme Court weighed in on the issue in 1972 in the *Forbush v. Wallace* case.<sup>108</sup> An Alabama woman brought a class action lawsuit challenging the constitutionality of an unwritten Alabama regulation that required the driver’s license of a married woman to be issued in her husband’s last name.<sup>109</sup> A three-judge federal district court upheld the regulation, and the U.S. Supreme Court affirmed the decision without opinion.<sup>110</sup> *Forbush* was relied upon in a 1976 Sixth Circuit Court of Appeals case upholding a similar practice in Kentucky.<sup>111</sup> These cases catalyzed the modern movement for birth-name rights at marriage.<sup>112</sup> As late as 1996, the Ninth Circuit Court of Appeals in an immigration case refused to even refer to the female petitioner by her birth name by which she identified herself.<sup>113</sup> Instead, they insisted on using her husband’s last name, while at the same time denying the validity of her marriage in the immigration context, a move seen by the dissent as “cruelly ironic.”<sup>114</sup>

Thus, the custom of women adopting the surnames of their husbands, while originally not required, became so ubiquitous that it eventually developed legal force.<sup>115</sup> Indeed, “[c]ommon practice has always made common law.”<sup>116</sup> Kelly discusses the “dynamic synergy” between social custom and the common law and its relevance in the marital surname context.<sup>117</sup> Clearly the common law evolves slowly in response to changing conditions, but in the case of marital names, that process can be excruciatingly slow.

When the women’s rights movement was in full swing in the 1970s, women’s autonomy in name choice was one of many demands.<sup>118</sup> Some women began to see the retention of their birth

---

106. *In re Kayaloff*, 9 F. Supp. 176, 176 (S.D.N.Y. 1934).

107. Leissner, *supra* note 87, at 264.

108. *Forbush v. Wallace*, 405 U.S. 970 (1972).

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

110. *Forbush*, 405 U.S. at 970.

111. *Whitlow v. Hodges*, 539 F.2d 582, 583 (1976).

112. Leissner, *supra* note 87, at 258.

113. *Fisher v. INS*, 79 F.3d 955, 967 (9th Cir. 1996) (Noonan, J., dissenting).

114. *Id.*

115. Doll, *supra* note 10, at 233.

116. *In re Reben*, 342 A.2d 688, 699 (Me. 1975) (citing *Whelton v. Daly*, 37 A.2d 1 (N.H. 1944)).

117. Kelly, *supra* note 18, at 24.

118. Leissner, *supra* note 87, at 257.

names as a representation of their equal partnership in marriage.<sup>119</sup> They considered the adoption of husbands' names to be perpetuating male dominance and maintaining the existing unequal social structure.<sup>120</sup> It was believed that one of the reasons behind the social expectation was to encourage the woman to take on the identity, achievements, and status of her husband rather than attempting to forge and develop her own.<sup>121</sup>

The 1970s witnessed the gradual reversing of such restrictive common law principles.<sup>122</sup> With individual court decisions, Attorneys General opinions, and state statutes, the law became well-established by the early 1980s that a married woman had the right to use any name she chose after marriage.<sup>123</sup> The women's movement, having achieved what it was after, moved on to other issues.<sup>124</sup> It is remarkable, then, that 40 years later, "a maiden who slips on a wedding ring will still, most probably, simultaneously slip out of her name,"<sup>125</sup> while her husband will almost never slip into hers.

Feminist scholars of the 1970s women's movement predicted sweeping changes in gender norms with respect to names, including the eradication of all name prefixes (Mrs., Miss, Ms., and Mr.) and even the elimination of gender-specific first names.<sup>126</sup> Yet these radical speculations make no mention whatsoever of the possibility (or legality) of a man choosing to take his wife's name at marriage.<sup>127</sup> Apparently the abrogation of *all* gender in naming was more conceivable than the idea of a man taking on a traditionally female role.<sup>128</sup> With the difficult battles women fought to achieve the right to keep their names upon marriage, there was no consideration of allowing for the reverse; the battle was deemed won, and there has been little

---

119. *Id.*

120. *Id.*

121. *Id.* at 257-58.

122. See *Allen v. Lovejoy*, 553 F.2d 522, 525 (6th Cir. 1977) (discussing that a woman could be awarded back pay after being suspended from employment at a county health department for refusing to adopt her husband's surname after marriage); *Davis v. Roos*, 326 So. 2d 226, 229 (Fla. Dist. Ct. App. 1976) (holding that a woman cannot be refused a driver's license in her birth name); *Dunn v. Palermo*, 522 S.W.2d 679, 688 (Tenn. 1975) (holding that a wife was not required to take her husband's name for voter registration purposes).

123. See *Kelly*, *supra* note 18, at 28 (stating that a woman can use any name she would like); *Leissner*, *supra* note 87, at 266 (recognizing a woman's right to retain her maiden name).

124. *Leissner*, *supra* note 87, at 266.

125. *Id.*

126. See EDWARD J. BANDER, *CHANGE OF NAME AND LAW OF NAMES* 54 (1973) (discussing the elimination of gender-specific names and prefixes).

127. Nowhere in Bander's discussion of a unisex name future is there any mention of how *men's* names will change. *Id.*

128. *Id.*

investigation of the issue since then.<sup>129</sup> However, not only have women failed to win the social acceptance that would make that right a true one, they have also not yet won the legal right to easily enjoy an option that men have always had: to marry a spouse who adopts their name. The question is, “Will she change?” or “Will she keep?” while a prospective groom is never asked whether he will keep his name when he marries.<sup>130</sup> Of the studies on marital names that have been undertaken, the husbands’ names are scarcely even mentioned, let alone actually studied.<sup>131</sup> It is clearly still an issue for women only; men are not expected to participate in efforts towards equality in naming. As Emens explains, “[s]he may be choosing, but so long as his name is not up for discussion, she’s choosing from a very limited decision set.”<sup>132</sup> The change in the law is incomplete because social views have remained the same. A woman’s (and her husband’s, certainly) choices are highly influenced by societal and family pressure, as well as by what options are available to them legally.

#### A. Current State Laws

The Maine Supreme Court stated in 1975 of woman that, “[s]he is on the same footing as her prospective husband in that she may insist, as a premarital condition, that the family surname for her intended husband and herself be that of her choice.”<sup>133</sup> The court was highly out of touch with social reality and the state of the law in that sentiment, given that a woman did not have the social capital to insist on her husband adopting her name, nor did a man have the legal right to do so as a part of the marriage process.

Both men and women have the common law right to change their names as they choose—at marriage or any other time—so the claim that a man does not have the right to adopt his wife’s name at marriage requires some explanation. When a woman marries, her change of name is simple and straightforward. She may either fill in her new name on the marriage license application, or bring the marriage certificate to the Social Security Office or Motor Vehicle Department, obtain new documents, and her name change is complete.<sup>134</sup> In most

---

129. Augustine-Adams, *supra* note 9, at 9 (citing Leila Obier Schroeder, *A Rose By Any Other Name: Post-Marital Right to Use Maiden Name: 1934-1982*, 70 SOC. & SOC. RES. 290, 290 (1986)).

130. Emens, *supra* note 55, at 775.

131. *Id.*

132. *Id.* at 777.

133. *In re Reben*, 342 A.2d 688, 701 (Me. 1975).

134. *Name Change Options*, OFFICE OF THE CITY CLERK, THE CITY OF N.Y. MARRIAGE BUREAU, [http://cityclerk.nyc.gov/html/marriage/name\\_change.shtml#procedure](http://cityclerk.nyc.gov/html/marriage/name_change.shtml#procedure) (last visited

states this is not allowed for men; instead, a man who wishes to change his name must go through an entirely separate and lengthy court process for name change.<sup>135</sup> A petition must be filed in court and a filing fee paid (at least \$319 in Cook County, Illinois).<sup>136</sup> Normally the person must also publish notice of the name change in a local newspaper (with additional fees) continuously for a period of several weeks, making quite personal information public, sometimes including previous crimes and bankruptcies.<sup>137</sup> The individual must then appear before a judge and answer questions about the requested name change.<sup>138</sup> The process can be expensive, especially if a lawyer is required. What's more, this statutory name change process is not always guaranteed to be approved.<sup>139</sup> Judges typically have discretion as to whether to grant the change, the standard being what a court shall deem "right and proper," or for "substantial reason."<sup>140</sup> The petitioner may also need evidence of "good character."<sup>141</sup> Under these standards, a request may easily be denied for reasons that would not apply to a woman changing her name at marriage.

In the exercise of their discretion, judges are free to apply whatever social norms (including personal gender role conceptions) they find acceptable.<sup>142</sup> One Florida man attempting to take his wife's name was told by a judge that getting married was not a good enough reason for the change.<sup>143</sup> In a number of cases, the right to change one's name was denied.<sup>144</sup> Many cases have denied the right of a person to adopt the last name of their same-sex partner, purportedly for reasons of "public policy."<sup>145</sup> Though these cases were often overturned

---

Nov. 22, 2010); *Five Filing Facts for Recently Married or Divorced Taxpayers*, INTERNAL REVENUE SERV. <http://www.irs.gov/newsroom/article/0,,id=105969,00.html> (last visited Nov. 22, 2010); SOC. SEC. ADMIN., WHAT EVERY WOMAN SHOULD KNOW, 7, <http://www.socialsecurity.gov/pubs/10127.pdf> (last visited Nov. 22, 2010).

135. *E.g.*, Lou Gonzales, *Man Finds Resistance to Name Change*, FLA. TIMES-UNION, Feb. 10, 2000, at D2.

136. *A Guide to Procedures in Change of Name Proceedings* OFFICE OF THE CHIEF JUDGE, CIRCUIT COURT OF COOK COUNTY, [http://www.cookcountycourt.org/divisions/county/change\\_name.html](http://www.cookcountycourt.org/divisions/county/change_name.html) (last visited Nov. 22, 2010).

137. Rosensaft, *supra* note 48, at 208.

138. *E.g.*, *In re Ross*, 67 P.2d 94, 95 (Cal. 1937).

139. *Id.*

140. *See, e.g., id.* at 94-95 ("This provision permits the court in the exercise of its discretion to deny the application . . ."); Rosensaft, *supra* note 48, at 189; Kolesnikov, *supra* note 85, at 433.

141. Rosensaft, *supra* note 48, at 11 (referring to N.C. GEN. STAT. § 101-4 (1999)).

142. *Id.* at 208.

143. Gonzales, *supra* note 135, at D2.

144. *Cf.* Rosensaft, *supra* note 48, at 217-18 (noting that most marital name change statutes are discriminatory, and that the Court should recognize the right to change one's name upon marriage as a "fundamental" right).

145. Emens, *supra* note 55, at 790.

on appeal,<sup>146</sup> they demonstrate the effect that judicial discretion—and social norms—can have on the statutory “right” to change one’s name. Furthermore, it is unknown how many cases were denied in which the petitioner chose not to appeal. Clearly, any right that men have to change their names through the statutory mechanism is not equivalent to the martial name change mechanism.

Currently only nine state statutes explicitly allow a man to change his name through marriage with the same procedures as a woman.<sup>147</sup> Interestingly, it has been allowed in Maine since 1980 by Attorney General opinion rather than statute.<sup>148</sup> California was the most recent to join that group in 2007, as a result of a lawsuit filed by a man named Mike Buday, who desired to change his name to that of his wife but was prohibited from doing so outside of the court process.<sup>149</sup> Rather than fight the lawsuit, California amended its law with the Name Equality Act of 2007, which became effective in 2009.<sup>150</sup> The legislature noted the importance of names in Sec. 2 of the Act: “[T]he choice to adopt or not adopt a new name upon marriage or registration of domestic partnership is a profoundly personal reflection of one’s individuality, equality, family, community, and beliefs.”<sup>151</sup>

It should be noted that some states’ laws are not explicit, but may be interpreted to apply to both women and men, and that male name change at marriage may be allowed at the county level.<sup>152</sup> This results in what Emens identifies as “desk-clerk law,” where the law essentially consists of whatever the person at the desk says it is.<sup>153</sup> This results in interpretations that are incorrect and/or discouraging of unconventional choices, with results being highly inconsistent from one employee, and one county, to the next.<sup>154</sup> In response to an inquiry on a man’s name change, one clerk replied, “Society dictates that the woman change her name. Now, you can decide to keep your

---

146. *Id.*

147. California (CAL. CIV. PROC. CODE § 1279.6 (West 2009)); Georgia (GA. CODE ANN. § 19-3-33.1 (2010)); Hawaii (HAW. REV. STAT. § 574-1 (West 2010)); Iowa (IOWA CODE ANN. § 595.5 (West 2010)); Massachusetts (MASS. GEN. LAWS ANN. ch. 46, § 1D (West 2010)); New York (N.Y. DOM. REL. LAW § 15 (McKinney 2010)), North Dakota (N.D. CENT. CODE § 14-03-20.1 (West 2010)); Oregon (OR. REV. STAT. ANN. § 106.220 (West 2010)). Louisiana’s law provides that marriage does not change the legal name of either spouse, but spouses may use each other’s names, and validly sign documents with either name or a combination of the two. LA. CIV. CODE ANN. art. 100 (2009).

148. ME. REV. STAT. ANN. tit. 29-a, § 1401 (2009).

149. Martin Kasindorf, *L.A. Man Sues to Take Wife’s Last Name* USA TODAY, Jan. 11, 2007, [http://www.usatoday.com/news/nation/2007-01-11-man-sues-name-change\\_x.htm](http://www.usatoday.com/news/nation/2007-01-11-man-sues-name-change_x.htm).

150. CAL. CIV. PROC. CODE § 1279.6 (West 2010).

151. *Id.*

152. Emens, *supra* note 55, at 819.

153. *Id.* at 765.

154. *Id.*

maiden name or hyphenate your name or take his, whatever you want. But men don't normally change their names. I don't know what else to tell you."<sup>155</sup> Indeed, Mike Buday's lawsuit challenged "how state employees respond to a groom's name-changing request without a court order," while the marriage license form itself varied from county to county.<sup>156</sup> Therefore, it is not exclusively state statutory law that is in question; county and local practices may have as much effect (or more) on the name changing process as state law on the issue.

#### IV. ANALYSIS

*Any woman is respectable who is commonly mentioned as Mr. Such-a-one's wife, [but] Nothing can make a man respectable who is commonly mentioned as Mrs. Such-a-one's husband.*

—Thomas Wentworth Higginson<sup>157</sup>

*[W]e talk of you and Mrs. you.*

—Henry James<sup>158</sup>

It should be acknowledged at the outset that there is much debate within feminist theory about the legitimacy of marriage itself.<sup>159</sup>

155. Interview with Clerk in Jasper Cnty., Mo., (June 28, 2006) *quoted in id.* at 774.

156. Kolesnikov, *supra* note 85, at 432 n.28 (quoting Jim Sanders, *Groom Alleges Bias on Identity: Suit Says Man Was Blocked From Taking His Bride's Last Name*, SACRAMENTO BEE, Jan. 7, 2007, at A3).

157. Thomas Wentworth Higginson, *quoted in* STANNARD, *supra* note 92, at 71 (noting that Higginson's article was published in *Women's Journal* on September 27, 1873).

158. Letter from Henry James to William Dean Howells (Feb. 21, 1884), *in* HENRY JAMES: A LIFE IN LETTERS 152, 154 (Philip Horne ed., 1999).

159. For examples of feminist critique of marriage, *see* JESSIE BERNARD, *THE FUTURE OF MARRIAGE* 13-14 (1972) (arguing that unhappy marriages are the result of societal allocation of rewards and punishments on the basis of sex, because this practice creates different marital experiences for the husband and wife); SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* 250-56 (1970) (arguing that marriage promotes a "fundamentally oppressive biological condition," and will continue to be unsuccessful unless new alternatives are considered); MARILYN FRENCH, *THE WOMEN'S ROOM* 35-37 (1977) (describing marriage and the convent as women's only real options, despite suffrage); GERMAINE GREER, *THE FEMALE EUNUCH* 210-15, 234 (1971) (arguing that the "marrying-and-living-happily-ever-after myth" has never and will never be true); KATE MILLETT, *SEXUAL POLITICS* 208, 221-22 (1971) (describing how the feminist view of women and the Sexual Revolution undermined traditional notions of marriage); Sheila Jeffreys, *The Need to Abolish Marriage*, 14 *FEMINISM & PSYCHOL.* 327, 327 (2004) (arguing for the general abolition of marriage). For examples of feminist support of marriage, *see* ELIZABETH FOX-GENOVESE, *MARRIAGE: THE DREAM THAT REFUSES TO DIE* 44-45, 58-60 (2008) (arguing that marriage is intrinsically good, but that notions of individual choices and rights has undermined the institution— turning it from a special union to just a "lifestyle" choice); Mary Crawford, *Marriage: The Telling & the*

Some contend that it is an inherently patriarchal institution that is mired in sexist, heterosexist, religious, and exclusive rules and prescriptions that are inextricable from the institution itself.<sup>160</sup> It is argued in various camps that marriage should be abandoned altogether, modified, or replaced with civil union, or that it should at the very least be supplemented with other equally acceptable forms of relating.<sup>161</sup> Yet that debate, while relevant, is not the focus of this discussion. The fact is that the vast majority of Americans will be married within their lifetimes (over eighty percent by age forty),<sup>162</sup> and at this point at least, the institution is alive and well, despite the fact that it is no longer the mandatory practice it once was economically and socially. That being the case, the law regarding marriage should, at a minimum, support gender equality on its face. Yet even this most basic starting point has not been achieved.

The term “maiden name” itself likewise bears some brief discussion. It is still the primary method of denoting “birth name” or “name before marriage” for women, “maiden” meaning simply an unmarried woman.<sup>163</sup> After marriage, she is no longer a “maiden,” so her maiden name is lost.<sup>164</sup> Yet, despite the fact that the word “maiden” is no longer used in common parlance to refer to an unmarried woman, we have held on to the term when referring to names, which is further evidence that our naming traditions have largely escaped critical analysis. There is no male equivalent to the term “maiden name,” other than perhaps the French *ne* (meaning born),<sup>165</sup> which is unfamiliar to most Americans and rarely used in this country. Indeed, the ubiquitous “maiden name” line on various forms has caused considerable consternation in my own life, as I legally changed my surname years before I married. Is my birth name then my “maiden name,” even though it changed while I was still a “maiden?” The new name also applied to me both as a “maiden” and a married woman, so do

---

*Doing*, 14 FEMINISM & PSYCHOL. 313, 317 (2004) (arguing that the goals of feminism can be fostered in committed relationships, like marriage, but that the emphasis should be on the relational practices rather than the forms of the relationship); Vivienne Elizabeth, *To Marry, or Not to Marry*, 13 FEMINISM & PSYCHOL. 426, 429 (2003) (introducing the idea that marriage can have multiple meanings to different people and its mere existence is not the issue).

160. GREER, *supra* note 159, at 187-94.

161. *Id.*

162. PAULA GOODWIN ET AL., WHO MARRIES AND WHEN? AGE AT FIRST MARRIAGE IN THE UNITED STATES: 2002 5 (June 2009), <http://www.cdc.gov/nchs/data/databriefs/db19.pdf>.

163. *Maiden Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/maiden> (last visited Nov. 22, 2010).

164. *Id.*

165. *Born Translation*, GOOGLE TRANSLATE, <http://translate.google.com/#en/fr/born%0A> (last visited Nov. 22, 2010).

I have two maiden names? There was lengthy and complicated discussion about this issue amongst myself, my husband, and multiple hospital staff at the birth of my daughter, where confusion abounded regarding the birth certificate forms regarding both my name and my husband's. Clearly the term—and all the documents employing it—acknowledges only the standard naming structure, and thereby continues to reinforce that structure.

There is a marked gap in feminist scholarship on the issue of male name change at marriage. There has been some work that is critical of our current naming customs and traditions with respect to *women*.<sup>166</sup> Very little research exists which addresses the issue of a *man* choosing to adopt his wife's name, as there is virtually no acknowledgement even among feminists that the man even has a choice to make. What little can be found focuses on the unconstitutionality of the discrimination against men and the denial of their equal protection rights.<sup>167</sup> While this approach is clearly correct on the surface, there is much more to the issue. What at first appears to be discrimination against men is in reality discrimination against women: the status quo represents a legal sanctioning of the social norms that subsumed a woman within the husband's identity. Because taking their husbands' names at marriage was never really a "right" of women, but rather a requirement, the "right" actually inheres in the man. In essence, women are still denied what men have always enjoyed: the right to have a spouse adopt their name at marriage. This is why, in a society that has almost never legally favored the female over the male, and where men have always had the common law right to change their name whenever they chose, they are nevertheless not permitted to do so at marriage.

Outside of the marriage context, compulsory name changing has often been associated with cultural domination or assimilation.<sup>168</sup> Nazis in the 1930s required Jews to add Sarah or Israel to their names to mark them as "other."<sup>169</sup> Immigrants were regularly renamed at Ellis Island in order to assimilate them into American culture, sometimes involuntarily.<sup>170</sup> Slaves in America were often given no last

---

166. See, e.g., JUSTIN KAPLAN & ANNE BERNAYS, *THE LANGUAGE OF NAMES* 137-39 (1997) (taking a critical approach to the practice of women taking the husband's name, arguing that it leads to an inherently unequal marriage and the man's consumption of the woman's identity); Leissner, *supra* note 19, at 364 (arguing that the technical and bureaucratic obstacles that continue to accompany name change at marriage elicits a form of "civil death" for women).

167. See, e.g., Rosensaft, *supra* note 48, at 188-89; Frandina, *supra* note 57, at 156-57.

168. Kelly, *supra* note 18, at 12.

169. Emens, *supra* note 55, at 770.

170. Kelly, *supra* note 18, at 16-17.

names at all because, as property themselves, they could not have an independent surname.<sup>171</sup> When they did have last names, they were named and renamed as they exchanged owners.<sup>172</sup> This, in fact, was when women first recognized that their own name changes from father to husband seemed to signify a similar exchange of property.<sup>173</sup> In the later words of one feminist scholar, “[l]ike a slave she was brought to life by being given a name by her master . . . .”<sup>174</sup> Although this concept of surname as signifying ownership (of wife, children, and property) is no longer overt, it is still undoubtedly present in our social schema and naming framework.<sup>175</sup>

Courts litigating naming issues have talked of the “fundamental,” “primary,” “natural,” and “time-honored” right of a father to the naming of his family,<sup>176</sup> the presumption being that a practice so universal must somehow be based in laws of nature.<sup>177</sup> But aside from the fact that the presumption of universality is factually inaccurate, it is also logically fallacious; even a ubiquitous practice is not made just or right by virtue of its ubiquity. Recent cases have discussed these male rights in terms of the naming of men’s children, which has likewise fallen under the patriarchal dictates of the male line, and against which women continue to struggle.<sup>178</sup> For example, an Oregon trial court in 2006 granted an unmarried father’s demand to have his child’s last name legally changed from the mother’s to his, for no other reason than that he was the father.<sup>179</sup> Court cases well into the 1990s employed a tougher standard for mothers attempting to change their child’s name after divorce than those who were never married, suggesting that women still somehow give up naming rights upon marriage.<sup>180</sup> Leissner argues that despite some legal and social changes, the right of naming still resides in the male.<sup>181</sup> Under the current naming scheme, women’s heritage is minimized. While a man with no sons has his family line “die out,” no notice is taken of the

---

171. *Id.* at 12.

172. *Id.* at 14.

173. Leissner, *supra* note 19, at 356.

174. Jeffreys, *supra* note 159, at 328.

175. *See, e.g.*, Leissner, *supra* note 19, at 358 (arguing that a woman who gives up her name has also given up no small part of her autonomy).

176. *Rio v. Rio*, 504 N.Y.S.2d 959, 961 (App. Div. 1986); *In re Trower*, 66 Cal. Rptr. 873, 874 (Ct. App. 1968) *overruled by In re Schiffman*, 620 P.2d 579, 583 (Cal. 1980).

177. *Rio*, 504 N.Y.S.2d at 961.

178. Doll, *supra* note 10, at 227.

179. *Doherty v. Wizner*, 150 P.3d 456, 457 (Or. Ct. App. 2006). The court overturned the trial court decision, and granted the father’s request for name change of the child. *Id.* at 466.

180. Doll, *supra* note 10, at 246.

181. Leissner, *supra* note 87, at 254.

fact that the mother's line dies out at the time of the marriage itself.<sup>182</sup> There is no recognition that the mother is a part of the child's legacy—how often do women name their daughters after themselves as men do?<sup>183</sup> In fact, the current legal right of women to choose their name after marriage is nothing more than an illusion, according to Leissner, because of the remaining “strong legal preclusion from naming our children.”<sup>184</sup> The denial of women's right to name themselves and their children are both elements of the same type of discrimination.<sup>185</sup> Eliminating one means little without eliminating the other, as most women do not want to be cut off from their families and children, who will almost always be given the surname of the father.<sup>186</sup> Allowing men to easily take the wife's name would partially solve this problem.

The same male “rights” logic was at one time applied to women changing their names at marriage, though the principle is no longer acknowledged outright, as it is now implicitly recognized that the “natural right” argument may not be legally justifiable in that context. Considering that well into the 1970s courts were still holding that a woman must adopt her husband's surname, the underlying principle was strongly entrenched, and courts were eager to enforce it.<sup>187</sup> Presenting the issue as a requirement upon women rather than a right of men makes it no less a male right in the eyes of the law.<sup>188</sup>

There has been little research into the actual last name choices of both men and women.<sup>189</sup> Studies are difficult to conduct because data sets do not contain information on birth names and married surnames of women, much less of men.<sup>190</sup> Some expectations and traditions are apparently so entrenched that we fail to even think to ask questions about them. Most studies that have been conducted, however, find that seventy-five to ninety-five percent of all women still

---

182. *Id.* at 268.

183. Leissner, *supra* note 19, at 340 (“The fact that women cannot use indications, such as II, III, Jr. or Sr., emphasizes the reality that ‘females are not regarded as part of a dynasty.’”) (quoting Ralph Slovenko, *Unisex and Cross-Sex Names*, J. PSYCHIATRY & L. 249, 293 (Spring-Summer 1986)).

184. Leissner, *supra* note 87, at 254.

185. *Id.*

186. *Id.*

187. There is even some evidence that courts considered this not just a right of individual men, but of men collectively. In one case a trial court refused to allow a woman's name change even when the husband had consented, as if allowing it in one case would taint the right of men in general. *In re Erickson*, 547 S.W.2d 357, 358-60 (Tex. Civ. App. 1977) (overruling trial court's rejection of name change request).

188. See Leissner, *supra* note 19, at 333-34 (discussing gendered naming power).

189. Johnson & Scheuble, *supra* note 66, at 724.

190. Goldin & Shim, *supra* note 87, at 143.

assume their husband's name upon marriage.<sup>191</sup> The older and more educated a woman is, the more likely she is to keep her own name, but oftentimes highly educated professional women adopt their husband's name but incorporate their birth name as a middle name after marriage—as did Ruth Bader Ginsburg and Sandra Day O'Connor.<sup>192</sup> One 1994 study determined that ninety percent of women took their husband's name, and of the rest, only two percent used their birth name exclusively with no change or name combination.<sup>193</sup> There are no studies about the numbers of men taking the names of their wives at marriage—perhaps because the numbers are so small as to not merit mention, or perhaps because it does not occur to researchers to investigate such a phenomenon. The number, however, appears to be increasing.<sup>194</sup> Again we see the idea that *she* has a choice, but he does not.

#### A. Women as Property and Social Expectations

Why is it then, decades after women ultimately won their legal battle against conventional naming requirements, and at a time when the legal identity of women is not formally absorbed by the husband's upon marriage, that the conventional choice is still preferred by the vast majority of couples? History cannot be ignored or escaped when investigating this question. The custom/requirement that a married woman adopt her husband's surname, quite simply, is rooted in patriarchy. Historically, the wife was in fact the legal property of the husband, so she took his name as a legal necessity.<sup>195</sup> This is an element of the system of coverture, whereby a woman's identity is subsumed into that of her husband.<sup>196</sup> Jurist William Blackstone explained the notion of coverture as it was understood in the eighteenth century:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated

---

191. *Id.* at 144; Johnson & Scheuble, *supra* note 66, at 724; Christman, *supra* note 58, at F1; *Hillary Drops her Maiden Name*, BRISBANE TIMES, (Apr. 30, 2007, 9:37 AM), <http://www.brisbanetimes.com.au/news/world/hillary-drops-her-maiden-name/2007/04/30/1177788007743.html>; Rubiner, *supra* note 67, at L6.

192. Goldin & Shim, *supra* note 87, at 143.

193. Sue Shellenbarger, *Odds and Ends*, WALL ST. J., June 29, 1994, at B1.

194. Jessica McBride, *More Grooms are Saying 'I Do' to Taking Bride's Last Name—In the Name of Love*, MILWAUKEE J. SENTINEL, Nov. 28, 1999, at L1 (noting that the clerk estimated the man took the woman's name in one out of one-hundred couples in Milwaukee County).

195. Christman, *supra* note 58, at F1.

196. 1 William Blackstone, *Commentaries* \*442.

into that of the husband: under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law—[F]rench a *feme-covert*, . . . and her condition during her marriage is called her *coverture*.<sup>197</sup>

The wife was legally prohibited from, among other things, owning property, entering into a contract, bringing or defending a lawsuit, or keeping her own wages,<sup>198</sup> as property can logically and legally do none of these things. The practice of the wife assuming the husband's surname reinforced this legal and social absorption.<sup>199</sup> "Custom said . . . that man owned what he paid for, and could put his name on everything for which he provided money . . . [H]is land, his house, his wife and children, his slaves when he had them, and on everything that was his."<sup>200</sup> If the custom reinforced the underlying inequality, does it not do the same today?<sup>201</sup> Although such formal inequality has almost entirely disappeared from the law,<sup>202</sup> it is still present in our collective conscience; it would be virtually unthinkable in law and policy for a man to want to be "owned" in that way by his wife. Our language and naming continues to instantiate women as objects, which is why it is so difficult to conceive of something so objectively simple as a man taking his wife's name: women do not, and never have, owned men.<sup>203</sup> This is presumably why the law still does not allow for a man to take his wife's name in most states.

Social pressure and expectations seem to play an important role in the naming decision for couples, and they are bolstered and supported by the law. There appear to be strongly negative reactions to nontraditional surname choices.<sup>204</sup> Though it is presumed that we have abandoned most traditional gender roles and norms, the simple

197. *Id.* (citations omitted).

198. *See, e.g.*, *Mellot v. Sullivan Ford Sales*, 236 A.2d 68, 70 (Me. 1967) ("In the eyes of the common law upon marriage a husband and wife became one person and that person was the husband. A married woman of any age was held incapable of entering into binding contractual relations and of acquiring or disposing of property. Upon marriage her husband took over all her personal property and the use of her real estate for his life and became responsible for her support, her debts and her torts").

199. "Merger" was the term often used in the law, but it is misleading in that it implies a combination of both identities into one whole, rather than the elimination of one in favor of the other. If there is a "unity" of identity, it is situated in the husband.

200. Priscilla Ruth MacDougall, *The Right of Women to Name Their Children*, 3 *LAW & INEQ.* 91, 138 (1985) (quoting Ruth Hale, *But What About the Postman?*, 54 *THE BOOKMAN* 560, 561 (1922)).

201. *See, e.g.*, SPENDER, *supra* note 15, at 25 (arguing that name change at marriage reinforces the notion of women as property).

202. The law of marital names is a notable exception.

203. *See* SPENDER, *supra* note 15, at 26-27 (arguing that because women don't "own" men, there has been no need to make men's marital status visible like women's are).

204. Augustine-Adams, *supra* note 9, at 9.

fact is that much of American society has not. Sharply divergent and gender-specific naming practices and expectations are both evidence and results of that fact. It is rare for a man to actually take his wife's name at marriage. In fact, Emens calls the discouragement of naming alternatives "the most robust feature of our current marital naming conventions."<sup>205</sup> Government agencies and forms are further evidence and support for the status quo, when they ask the woman and only the woman for her "maiden" name.

Aside from the psychological connection to names discussed above, and the legal roadblocks that will be discussed below, there also exists intense social pressure to follow prescribed norms.<sup>206</sup> Women contemplating marriage hear comments such as, "I hope you love your husband enough when you marry to take his name."<sup>207</sup> It would be unthinkable for a person to say the same thing to the man, though presumably he loves his wife as well. As a result, a woman's choice to retain her name at marriage may, even today, be considered "a political act," rather than simply a choice based on personal or family preferences.<sup>208</sup>

What is expected for women, then, is considered emasculating for men. Men who consider adopting their wives' names may have concerns about how family and colleagues will react, and with good reason; they have been called "gay," "wimp," "the feminine spouse,"<sup>209</sup> and not "real men,"<sup>210</sup> with references to drinking "sissy juice" and "turn[ing] in your man card."<sup>211</sup> One interviewee whose husband took her name stated, "[w]e got tons of opposition from his mother. She didn't talk to us for a while. She got over it, but she threatened to not come to the wedding. My parents were more supportive of it, but they were like, 'Can you do that?' 'Is that legal?'"<sup>212</sup> Outsiders believed the wife was simply being controlling, forcing the husband into a decision to which he was fundamentally opposed,<sup>213</sup> because there is a common belief that no "real man" would voluntarily give up his name. California's Name Equality Act of 2007 recognizes the strength of such reactions and the damage they can cause by protecting both parties in a marriage from "discrimination based on their name choices" by those with whom they do business.<sup>214</sup>

---

205. Emens, *supra* note 55, at 764.

206. Christman, *supra* note 58, at F1.

207. Augustine-Adams, *supra* note 9, at 1 (quoting a friend of the author).

208. Leissner, *supra* note 87, at 266-67 (citing Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 387 (1991)).

209. Emens, *supra* note 55, at 781 (citation omitted).

210. Christman, *supra* note 58, at F1.

211. Friess, *supra* note 3.

212. McBride, *supra* note 194, at L1.

213. *Id.*

214. Kolesnikov, *supra* note 85, at 436 (citation omitted).

These social pressures and expectations naturally support the laws that distinguish between the genders in naming. The law, of course, often draws its principles from custom and practice, and justifies itself by reference thereto. Yet conversely, the law also works to support or discourage certain social practices, and changing the law is often the first step in altering societal perceptions and practice. Indeed, “[t]he process by which law confers legitimacy on a structure of domination and dependency is *primarily* a system of symbols. For a court to add the judiciary’s own special *imprimatur* of legitimacy on the symbolism of women’s dependency is particularly destructive.”<sup>215</sup> It is not altogether surprising, then, that so few men change their names at marriage, when they are not permitted to do so in most states. The fact that policy and practice makes resisting social trends more difficult speaks to our continuing patriarchal tendencies. Our collective social attitudes about gender are accurately reflected in the fact that most women still do not carry permanent names of their own, but men do.<sup>216</sup>

While it is clear from the discussion above that names are central to one’s self-concept and identity, they are also important in a larger sense for what messages they send. Names taken at marriage arguably define the relationship in some respects.<sup>217</sup> If forcing a woman to take her husband’s name potentially defines the marriage as unequal,<sup>218</sup> then preventing a man from taking his wife’s name does the same thing. Naming choices send messages to children about women’s status as inferior; children recognize at a young age that their own family identity resides with their father, typically even after a divorce.<sup>219</sup> The message to children and to society in general is that the male identity and perspective is the one that counts.<sup>220</sup> There is even evidence that parents with biological children tend to have a preference for boys, which may be related to the fact that only boys carry on the family name.<sup>221</sup> It is clear, then, that even if men and women are both viewed as having a “choice” in their marital naming, as they clearly do to some extent, the current framework formally and informally preferences inegalitarian naming conventions.<sup>222</sup>

---

215. Leissner, *supra* note 19, at 331 (citing Kenneth Karst, *A Discrimination So Trivial: A Note on Law and the Symbolism of Women’s Dependency*, 35 OHIO ST. L.J. 546, 552 (1974) (alteration in original)).

216. See Leissner, *supra* note 87, at 254 (noting the lack of permanency might indicate society’s belief that women’s roles are that of daughter, wife, or mother).

217. Rosensaft, *supra* note 48, at 213.

218. *Id.*

219. Leissner, *supra* note 87, at 268.

220. Leissner, *supra* note 19, at 355.

221. Emens, *supra* note 55, at 784.

222. *Id.* at 764.

## V. LEGAL CONSIDERATIONS

*[A] state's decision to choose a rule that systematically harmed women . . . [is] the product of habit or . . . invidious and indefensible stereotype, and such decisions are inimical to the norm of impartial governments.*

—*Rio v. Rio*<sup>223</sup>

The United States has a long history of sex discrimination. The Supreme Court has derided “stereotyped distinctions between the sexes” and has held that state classifications based on sex are inherently suspect.<sup>224</sup> At the same time, the law’s prescriptions and prohibitions articulate certain conceptions of family, identity, and values through the naming choices it makes available. Those choices are currently limited based on gender. In the words of Justice Oliver Wendell Holmes, the law’s rules derive from prevailing moral sentiment “‘avowed or unconscious, even [by] the prejudices which judges share with their fellow men.’”<sup>225</sup> This is clearly the case with the laws of marital names, which are based on moral sentiment, habit, prejudice, and stereotype, and conflict with Supreme Court holdings on equal protection of the laws.

The underlying basis of this particular legal disparity is not discrimination against men. The fact is, however, that a disparate treatment claim may be more likely to be upheld—and perhaps easier to comprehend—when it is presented as discrimination against men, so for practical purposes, that may be the best approach. This section addresses the legal arguments that may be used to overcome the gender disparity in the law.

While it is customary that a wife take her husband’s name, she is permitted to keep her own. Thus, she is given a choice that in most states the husband is not—he may only keep his name.<sup>226</sup> The question, then, is whether this gender disparity is constitutionally permissible. The law in question here constitutes gender discrimination on its face. This does not in itself invalidate the practice; any such provision is subject to intermediate level scrutiny, meaning that in order to be upheld, the discrimination must be substantially related

---

223. *Rio v. Rio*, 504 N.Y.S.2d 959, 963 (App. Div. 1986).

224. *Frontiero v. Richardson*, 411 U.S. 677, 685, 688 (1973).

225. Justice Oliver Wendell Holmes, quoted in STANNARD, *supra* note 81, at 8 (alteration in original).

226. See *Kolesnikov*, *supra* note 85, at 441 (discussing some of the reasons why a man may wish to adopt his wife’s name).

to an important government interest.<sup>227</sup> The U.S. Supreme Court has held that this standard applies whether it is women or men who are disadvantaged under the law.<sup>228</sup> Furthermore, courts have held that naming choices implicate constitutional rights,<sup>229</sup> particularly when the law distinguishes between the naming rights of women and men.<sup>230</sup>

It is therefore necessary to consider whether there is any government interest important enough to justify discriminatory marital naming laws. The commonly cited interests include custom or tradition, preserving the family unit, administrative convenience, fraud prevention, and minimal injury (or *de minimis* injury),<sup>231</sup> although this last is not actually a government interest at all, but rather an argument that the harm involved is so minimal as to not be worthy of legal review.<sup>232</sup> Yet none of these interests is likely to pass even the lowest standard of constitutional review: the rational basis test. Certainly none is an important government interest substantially related to the marital naming policy such that it could pass intermediate scrutiny.<sup>233</sup>

#### A. Custom/Tradition

There is no dispute as to whether current state law on marital names represents the standard custom; as discussed, it goes back centuries. Yet that fact is meaningless in a constitutional analysis. Custom is not in itself a justifiable reason for the maintenance of any law, much less one that discriminates based on gender. Not only would such a result be patently undemocratic, but the notion of “custom” is also subject to interpretation and thus is easily manipulated.<sup>234</sup> Indeed, “[t]o subject different groups to disparate treatment because

---

227. *Craig v. Boren*, 429 U.S. 190, 210 (1976) (holding an Oklahoma statute allowing females to purchase beer at a younger age than males unconstitutional, as violating the Equal Protection Clause of the Fourteenth Amendment).

228. *See Michael M. v. Super. Ct.*, 450 U.S. 464, 466 (1981) (applying intermediate scrutiny to a statute making men alone criminally liable for statutory rape); *Califano v. Goldfarb*, 430 U.S. 199, 210-11 (1977) (applying intermediate scrutiny to analyze a statute with different standards of survivor benefits paid to women as those paid to men).

229. *See, e.g., Jech v. Burch*, 466 F. Supp. 714, 719 (D. Haw. 1979) (noting the constitutional rights involved in naming children).

230. *See O'Brien v. Tilson*, 523 F. Supp. 494, 496 (E.D.N.C. 1981) (discussing the equal protection issue raised by a statute that allows a child to receive his/her father's but not his/her mother's name).

231. *Kolesnikov, supra* note 85, at 437 (citing *Rosensaft, supra* note 48, at 200).

232. *Rosensaft, supra* note 48, at 205.

233. *See also Kolesnikov, supra* note 85, at 437-40 (discussing government interest in marital naming).

234. *Leissner, supra* note 87, at 263.

society historically has done so undermines the very purpose of equal protection.”<sup>235</sup> Nor should the length of the custom make any difference in its justification.<sup>236</sup> Equal protection jurisprudence is largely a history of the courts overruling custom in favor of constitutional rights.<sup>237</sup> The court in *Rio v. Rio* rejected custom as a justification for a required paternal surname for children, holding that such a presumption denies women’s equal protection rights.<sup>238</sup> It is entirely unclear why tradition should ever be a guiding force in law simply for its own sake. In fact, if tradition were held to be a legitimate state interest when it comes to marital name practices, then the total subjugation of women should also be endorsed, as that was the custom for the majority of United States history. In this sense, tradition often amounts to bias and inequality, and neither is enough to legitimate a discriminatory state law.

### *B. Preservation of the Family*

Opponents of California’s Name Equality Act argued that the state should not make it easier for men to take their wives’ last names because doing so would weaken the traditional male role.<sup>239</sup> They argued that “[g]overnment needs to encourage men to be stronger fathers who provide for and protect their families, . . . not to be sissy men who abdicate their masculine leadership role because they’re confused.”<sup>240</sup> Whereas it should be obvious at the outset that a man’s surname has no bearing on how much he does or does not provide for his family, the notion of “abdicating” one’s “masculine leadership role” is important to the claim of family preservation.<sup>241</sup> This view represents the idea that a family without a powerful “masculine leader” is no family at all, and that a man without his birth name is by definition a failure in that regard.<sup>242</sup> While such notions may underlie

---

235. *Id.*

236. *Id.* (citing Shirley Raissi Bysiewicz & Gloria Jeanne Stillson MacDonnell, *Marital Women’s Surnames*, 5 CONN. L. REV. 598, 598, 620 (1973)).

237. This took place with a number of once-traditional practices, including: segregation (*Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954)); anti-miscegenation laws (*Loving v. Virginia*, 388 U.S. 1, 6, 11 (1967)); reproductive rights (*Griswold v. Connecticut*, 381 U.S. 479, 480, 485 (1965)); and gender discrimination (*Craig v. Boren*, 429 U.S. 190, 209-10 (1976)).

238. *Rio v. Rio*, 504 N.Y.S.2d 959, 963-64 (App. Div. 1986).

239. Kolesnikov, *supra* note 85, at 441 (citing Frank D. Russo, *Why Did 26 of 32 California Assembly Republicans Vote Against the Name Equality Act?*, CAL. PROGRESS REP. (May 9, 2007), [http://californiaprogressreport.com/2007/05/why\\_did\\_26\\_of\\_3.html](http://californiaprogressreport.com/2007/05/why_did_26_of_3.html)).

240. *Id.* at 441 n.126 (alteration in original) (quoting Randy Thomasson, President of the Campaign for Children and Families).

241. *Id.* at 441 & n.126.

242. *Id.* at 441, nn.121, 126.

some of the opposition to equality in naming, it is fair to assume that no state today would make such an argument in a court of law.

Yet because children born in a marriage historically took their father's name, while "illegitimate" children took the mother's,<sup>243</sup> courts have held that allowing women to use their birth name after marriage would contribute to the breakdown of the family unit,<sup>244</sup> partly due to the stigma of illegitimacy. Feminists at the time believed this issue to be largely irrelevant, because once the traditional naming practices became less common, the stigma would disappear.<sup>245</sup> Granting for the sake of argument that family preservation is an important state interest, there is no reasonable connection between that interest and the law in question here. There is no reason to assume that preventing men from adopting their wives' names with ease would have any negative effect on the preservation of the family. The stigma discussed above is much less pronounced today, but if the husband adopted the wife's name, there would likely be very little of such stigma on a day-to-day familial basis, as there would be no presumed illegitimacy of children. Even so, the Supreme Court has indicated that stigma is not enough to justify a discriminatory law in itself.<sup>246</sup>

What's more, the argument is even less viable when one considers that a man *can* adopt his wife's name by going through the court process. The issue is that he is prevented from doing so by the same simple process that his wife is able to use. The state's purported interest in preserving the family unit is even less cogent, then, because only the straightforward version of the process is prohibited; the alternative court process, with the same end result, is still allowed. Family preservation is apparently not a very serious state interest after all.

Furthermore, if it is true that a male name change implies a non-traditional marital relationship, then that is likewise not a sufficient reason to uphold the discrimination. The state has no interest in encouraging any particular *type* of marriage at all. One could marry out of love, greed, practicality, loneliness, lust, familial pressure, religious beliefs—the list goes on. Couples applying for a marriage

---

243. Leissner, *supra* note 87, at 264.

244. *Id.* at 264-65 (citing Julia C. Lamber, *A Married Woman's Surname: Is Custom Law?*, 1973 WASH U. L.Q. 779, 805 n.106).

245. *Id.* at 265 (citing Roslyn Goodman Daum, *The Right of Married Women to Assert Their Own Surnames*, 8 J. L. REFORM 64, 99 (1974)).

246. See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (rejecting the argument that stigma and prejudice directed toward a child based on an interracial marriage of the child's mother is a sufficient reason to prefer one parent over the other in a custody determination). The Court stated that "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.*

license are not asked about any of these issues any more than they are, or should be, asked about gender roles within the relationship. If a couple decides that the woman will work outside the home and be the “breadwinner” while the man raises the children, cleans the house, and cooks, what does the state have to say about that? Nothing, of course—nor should it. Yet it retains the right to dictate gender roles when it comes to the names spouses adopt upon marriage. If the state cannot prohibit husbands from being stay-at-home fathers, surely they cannot prohibit them from changing their name at marriage with the ease and simplicity that the woman enjoys. The state’s interest is in regulating marriage’s entry and exit alone. It has no interest in such personal matters as gender roles within the relationship.

### C. *Administrative Convenience*

States have argued in the past that disparities in naming rights are necessary because the alternative would be over-burdensome administratively.<sup>247</sup> This argument fails as well. In *O’Brien v. Tilson*, the Court held that a state law prohibiting a child of married parents from being given any name other than the father’s was not justified based on undue administrative burden.<sup>248</sup> Invalidating the law as unconstitutional, the Court stated that allowing the right would not detract from the registrar’s ability to perform its necessary duties.<sup>249</sup> In *Jech v. Burch*, Hawaii law required a child’s surname to be only that of its father, mother, or a hyphenation of the two.<sup>250</sup> The parents wanted to name the child with a non-hyphenated combination of their two surnames; the state refused to allow this, claiming that it would have to alter its record-keeping system and would thereby constitute too much administrative inconvenience.<sup>251</sup> The court rejected the state’s argument, stating that “[f]or reasons which have still not been explained satisfactorily to me, the department is completely defeated by the problem of indexing a child’s surname . . . .”<sup>252</sup> The court ultimately concluded that denying this right amounted to a denial of the constitutional rights of both the child and the parents.<sup>253</sup>

---

247. See *O’Brien v. Tilson*, 523 F. Supp. 494, 496 (E.D.N.C. 1981) (noting the state’s argument that the naming system facilitated efficient and correct recording of births).

248. *Id.*

249. *Id.*

250. *Jech v. Burch*, 466 F. Supp. 714, 716 (D. Haw. 1979).

251. *Id.* at 718.

252. *Id.*

253. *Id.* at 721; see also *O’Brien*, 523 F. Supp. at 496 (1981) (stating that a statute requiring a child born in wedlock to bear his father’s name violated a constitutional right to privacy).

These holdings, although dealing with the right to name children, would certainly apply to a state practice that allows a woman to change her name at marriage but prohibits a man from doing so. What the state already does for women would surely be only a minor and quite temporary inconvenience to do for men, and would mean nothing more than perhaps adding an extra line on a form and an additional field in a computer system.

#### *D. Fraud Prevention*

The prevention of fraud has long been one of the only reasons citizens were prevented from changing their names under the common law.<sup>254</sup> The rule exists for the protection of creditors who rely on the ability to correctly identify individuals to collect debts.<sup>255</sup> Case law confirms that this is indeed a legitimate government interest.<sup>256</sup> Given that fact, the question remains whether the discriminatory name change practice is substantially related to supporting that interest. The answer is quite clear: there is no reason to believe that treating one spouse differently than the other will have any effect on identity fraud. If there is no appreciable fraud concern for women who change their name at marriage, then there should not be any fraud concern for men who do the same. States have implicitly conceded by their current practices that name change at marriage does not implicate fraud. For this argument to be viable, the state should not allow *either* men or women to change their names at marriage. In an interesting twist, the fraud prevention argument was previously used as a justification for *requiring* women to change their names at marriage,<sup>257</sup> so it seems highly disingenuous to use the same argument to *prevent* men from doing so.

#### *E. Minimal Injury*

Sometimes states have argued, and courts have agreed, that the harm resulting from state action is “*de minimis*,” or so trivial as to not warrant court intervention or constitutional protection.<sup>258</sup>

---

254. Kolesnikov, *supra* note 85, at 430.

255. See Leissner, *supra* note 87, at 263 (discussing the potential for fraud inherent in the marital name changing process) (citing Rosensaft, *supra* note 48, at 211).

256. See Henne v. Wright, 904 F.2d, 1208, 1215 (8th Cir. 1990) (noting that a child’s surname could fraudulently designate paternity).

257. Leissner, *supra* note 87, at 263-64 (citing Rago v. Lipsky, 63 N.E.2d 642, 646 (Ill. App. Ct. 1945)).

258. *Id.* (discussing the characterization of the injury as *de minimis* by the court in *Forbush v. Wallace*).

Considering the importance of names to society and individuals alike, this claim is clearly specious. The argument has been used in the context of marital name change because even when they are prohibited from adopting their spouse's name immediately at marriage, men are permitted to change their name through the court system by statute. As discussed, that process is nowhere near equivalent; it imposes significant extra expense, time, and burdens on men choosing a marital name change that do not apply to women. The fact that there is a separate process sends a message to individuals and society at large about the value of that choice.<sup>259</sup> Even if there were some separate method men could employ that did not greatly increase their burden in the process, that would nevertheless fail to justify the state's refusal to allow men to utilize the same procedure that is allowed for women. The court in *Jech v. Burch* stated, "[w]hat is the state interest in refusing to allow parents to give their child at birth a name which they may immediately confer by way of change of name? I fail to see any such interest."<sup>260</sup>

It may also be argued that the common law in nearly every state affords anyone the right to change their name simply by calling oneself by that name,<sup>261</sup> a right which numerous cases have upheld.<sup>262</sup> As such, it is argued, any injury resulting from discriminatory state laws of marital surnames is minimal because a person can change his name under the common law in any case by simply calling himself by the new name.<sup>263</sup> Yet this common law right of name change cannot legitimately be considered a true right any longer, given that legal documentation is required to effectuate the name change on bank accounts, passports, driver's licenses, social security cards, professional licenses, etc. The common law right imposes no obligation on others to accept the name change.<sup>264</sup> A statutory name change is required to fully achieve a change of name,<sup>265</sup> and failing to allow it for men in the way it is allowed for women poses more than a *de minimis* injury.

#### *F. Right of Privacy*

Given that "one's own name is one of the most personal belongings of any individual,"<sup>266</sup> discriminatory and restrictive name change

---

259. Rosensaft, *supra* note 48, at 210.

260. *Jech v. Burch*, 466 F. Supp. 714, 720 (D. Haw. 1979).

261. Rosensaft, *supra* note 48, at 206.

262. *See, e.g., Smith v. U.S. Cas. Co.*, 90 N.E. 947, 950 (N.Y. 1910) (discussing the common law rule that a man may change his name at will).

263. Rosensaft, *supra* note 48, at 205.

264. Kolesnikov, *supra* note 85, at 431.

265. Rosensaft, *supra* note 48, at 212.

266. Leissner, *supra* note 87, at 262.

laws implicate privacy rights, though this is not part of a Fourteenth Amendment equal protection analysis. The right to adopt a spouse's name upon marriage is in fact central to the right of privacy.<sup>267</sup> Supporters of California's Name Equality Act argued that the "people, not the government, should decide basic issues like whose name to take."<sup>268</sup> Indeed, the U.S. Supreme Court has held that marriage and family issues are private matters entitled to constitutional protection,<sup>269</sup> stating:

These matters, involving the most intimate and personal choices . . . central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>270</sup>

Whereas the issue in that case was procreative choice, the adoption of a family name is likewise fundamental and personal, and is central to the family relationship; there is no room for state compulsion here. In *O'Brien v. Tilson*, the federal district court explicitly upheld the privacy argument in the context of naming when it invalidated a state law providing men more rights to the naming of children than women.<sup>271</sup> The court referenced the individual right to be free from state interference in the making of private decisions, as well as the right of individual expression.<sup>272</sup>

## CONCLUSION

Whereas some state laws explicitly allow men to change their names at marriage with the same ease as women, most do not. The law's imposition of outdated traditions not only fails to recognize the changing needs and desires of individuals and families today, but it

---

267. Kolesnikov, *supra* note 85, at 442-43 (citing Press Release, Equality Cal., Bill Gives Domestic Partners, Married Spouses Equal Opportunity to Take Surname of Choice, (Feb 13, 2007), available at [http://www.aclunc.org/news/press\\_releases/bill\\_gives\\_domestic\\_partners\\_married\\_spouses\\_equal\\_opportunity\\_to\\_take\\_surname\\_of\\_choice.shtml](http://www.aclunc.org/news/press_releases/bill_gives_domestic_partners_married_spouses_equal_opportunity_to_take_surname_of_choice.shtml)).

268. *Id.* (quoting Letter from James Vaughn, Dir., Log Cabin Republicans, to Assembly Member Fiona Ma, Cal. State Assembly (Mar. 19, 2007)).

269. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.") (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977)).

270. *Id.*

271. *O'Brien v. Tilson*, 523 F. Supp. 494, 496 (E.D.N.C. 1981).

272. *Id.*

clearly conflicts with constitutional rights and perpetuates traditional marital gender roles and archaic notions of women as property. Whether it is considered discrimination against men, who do not have the same ability to change their names as women, or discrimination against women, who are denied the right to have their spouse take their name and by social custom are still expected to give up their own, it is clearly gender-based discrimination that evidences no foundation in logic, fairness, common sense, or important governmental needs.

It is time to critically examine this long-standing custom, and the law that is based upon it, which have to date been largely taken for granted. Our naming practices reinforce and reconstitute a legal doctrine that no longer formally exists. In denying naming choices based on gender, the law perpetuates, and implicitly supports, the inferiority of women and the unimportance of their names and their identities. The law has a responsibility to acknowledge the acceptability of egalitarian naming options. In doing so, it conveys a strong social message that equality in naming is socially acceptable and appropriate. Perhaps then this vestige of gender discrimination will begin to disappear. Nearly forty years ago Una Stannard stated, "whether common sense will prevail is not certain because emotion not reason rules our legislators when they think about married women's names."<sup>273</sup> The correctness of this sentiment and all that it implies will be increasingly tested in the coming years.

---

273. STANNARD, *supra* note 81, at 17.