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We Are Family: Valuing Associationalism in Disputes over Children's Surnames

Merle H. Weiner

"WE ARE FAMILY"*: VALUING ASSOCIATIONALISM IN DISPUTES OVER CHILDREN'S SURNAMES

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An increasing volume of litigation has arisen between divorced or separated parents concerning the surnames of their minor children. For example, a newly divorced mother will sometimes petition the court to change her child's surname from the surname of the absent father to the mother's birth surname or her remarried surname. Courts adjudicating such petitions usually apply one of three standards: a presumption favoring the status quo, a "best interest of the child" test, or a custodial parent presumption. In this Article, Professor Merle Weiner argues that all three of these standards are flawed—either in their express requirements or in their application by the courts—because they reflect men's conception of surnames and undervalue associationalist principles.

After setting forth her feminist methodology, Professor Weiner explores the differences between men's and women's experiences with their own surnames. Professor Weiner argues that because men typically retain their surnames from birth to death, many men come to believe that a constant surname is essential for a stable sense of identity. Women, by contrast, are more accustomed to surnominal alterity because they often change their names upon marriage. Women generally conceive of surnames as markers of association—i.e., a surname indicates "I am presently associated with family members in this household." Professor

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* SISTERS SLEDGE, *We Are Family, on* WE ARE FAMILY (Atlantic Records 1979).

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Weiner also discusses other differences between men's and women's views of surnames, including the belief of many men, but not women, that a non-custodial parent and his child need to share the same surname in order to preserve a strong filial bond. Professor Weiner argues that the male conception of surnames pervades all of the standards presently used by the courts to adjudicate name change disputes, and the courts ignore or undervalue the female conception of surnames. This gender bias is unfortunate, Professor Weiner contends, because the female associationalist perspective is more consistent with children's interests, and better comports with the values that courts should be promoting in the context of marital dissolution.

Professor Weiner suggests various alternatives for reform. She argues that equal protection litigation and the education of judges are not sufficient to ensure that associationalism receives the attention it deserves in name change disputes. Professor Weiner concludes by proposing a "family association rule." This rule would require courts to grant the custodial parent's name change petition provided that an associational justification exists. The rule carves out an exception if the non-custodial parent demonstrates, by clear and convincing evidence, that serious harm to the child would result from the name change. While recognizing the limitations of this solution, Professor Weiner contends that it offers the best promise of ensuring that associationalist principles guide the adjudication of name change disputes involving children.

I. INTRODUCTION

Alan Gubernat killed his three-year-old son and himself three days after the New Jersey Supreme Court decided that the boy would bear his mother's surname, Deremer, rather than the surname Gubernat.[1] No one had foreseen that this naming dispute would lead to such disastrous consequences. The court described Mr. Gubernat's relationship with his son as "loving and supportive."[2] Mr. Gubernat's own lawyer said, " 'The quality of the relationship he had with this child is so contrary to this, so antipodal.' "[3] Even Mr. Gubernat's psychologist had seen no forewarning of the tragedy.[4] Though Mr. Gubernat was by all accounts a "doting" father,[5] he would sooner murder his own son than endure the ignominy of permitting the boy to bear the maternal surname.

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1. *See* Gubernat v. Deremer, 657 A.2d 856, 857 (N.J. 1995) (adjudicating name dispute of non-marital child); *Doting Father Kills Son, Self After Losing Battle Over Name*, L.A. TIMES, May 16, 1995, at A20 [hereinafter *Doting Father Kills Son*].

2. *See Gubernat*, 657 A.2d at 870.

3. Paula Span, *Killing Ends Fight Over Child's Name: Officials Say Father Shot Son, Self After Court Ruled for Mother*, WASH. POST, May 16, 1995, at A1.

4. *See id.*

5. *See Doting Father Kills Son, supra* note 1, at A20.

Mr. Gubernat's fatal obsession with his son's surname provides a disturbing backdrop against which to analyze the law governing the changing of children's surnames. To be sure, most disputes over children's surnames never result in litigation, let alone murder or suicide. In cases that do not reach the legal system, the selection of a child's cognomen may be influenced by statute,[6] testamentary instrument,[7] third-party contract,[8] pre-existing agreement between the parents,[9] relatives' pleas,[10] family custom,[11] parental negotiation,[12] ma-

6. *See, e.g.*, Henne v. Wright, 904 F.2d 1208, 1209-10 (8th Cir. 1990) (upholding constitutionality of statute setting parameters for choice of child's surname); Robertson v. Pfister, 523 So. 2d 678, 679 (Fla. Dist. Ct. App. 1988) (upholding constitutionality of FLA. STAT. ANN. § 382.16 (West 1985) (repealed 1987), requiring mother to give child conceived during marriage father's surname); *see also infra* note 591 (citing statutes setting parameters for choice of child's surname).

7. *See* L. I. Reiser, Annotation, *Validity and Effect of Provision in Will or Trust Instrument, Conditioning Gift on Beneficiary's Assumption or Retention of Family Name*, 38 A.L.R.2d 1343, 1344 (1954).

8. *See* Lewis C. Warden, Annotation, *Validity and Enforceability of Contract in Consideration of Naming Child*, 21 A.L.R.2d 1061, 1063 (1952).

9. Couples sometimes try to avoid disputes over their children's surnames with premarital agreements, *see, e.g.*, Combs v. Sherry-Combs, 865 P.2d 50, 52 (Wyo. 1993) (presenting a pre-marital agreement under dispute that provided, "Any progeny resulting from the union of this couple shall bear the surname of the father...."), or separation agreements, *see, e.g.*, Gershowitz v. Gershowitz, 491 N.Y.S.2d 356, 356 (App. Div.) (presenting separation agreement that provided, " 'wife agrees not to change the surname of the child, formally or informally, without the husband's express written assent thereto' "), *appeal dismissed*, 489 N.E.2d 773 (N.Y. 1985).

10. *Cf.* RICHARD D. ALFORD, NAMING AND IDENTITY: A CROSS-CULTURAL STUDY OF PERSONAL NAMING PRACTICES 128-29 (1988) (noting that mothers receive pressure from friends or relatives in seven percent of initial naming decisions); Frank F. Furstenberg, Jr. & Kathy Gordon Talvitie, *Children's Names and Paternal Claims*, 1 J. FAM. ISSUES 31, 40 (1980) (commenting that adolescent mothers sometimes defer to a relative, usually the adolescent's mother, in the selection of a first name for a non-marital child); Robert R. Holt, Studies in the Psychology of Names 153 (1939) (unpublished B.A. thesis, Princeton University) (copies available from the Seeley G. Mudd Manuscript Library, Princeton University Archives, Princeton, NJ, 08544) (discussing example of woman who named daughter-in-law's first child).

11. As one scholar warned, albeit in another context, " 'Domestic law' should not be understood as trivial." Carol Weisbrod, *Family Governance: A Reading of Kafka's Letter to His Father*, 24 U. TOL. L. REV. 689, 706 n.92 (1993) (describing family eating rules experienced by Franz Kafka as a boy).

12. *Cf.* Internet survey (response of Karen Clark) (results on file with author) (explaining that child will use father's surname even though mother usually uses her birth name because "I have chosen not [to] pursue that battle in favor of other concessions"). As I was expecting a baby in August 1997, I joined an Internet list for people who were expecting a baby then. In mid-May, I sent the following questions to the 220 individuals who were on the list: "Is your last name the same as your partner's last name? If not, what will be the baby's last name? Why did you decide upon that last name? How did you arrive at the decision? Who was involved in the decision?" I received fifteen replies. *See id.*; *cf.* Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L.

ternal or paternal monopolization of the decision,[13] brute strength,[14] or even a coin toss.[15] Yet countless naming disputes still enter the legal system.[16] Although judicial involvement is not new,[17] since the 1960s an increasing number of these disputes have resulted in litigation.[18] This trend has been accelerated by the influence of the feminist movement,[19] women's increased participation in the labor

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REV. 615, 668 (1992) (noting, in a discussion of custody rules, that "family members['] ... interactions involve an intricate pattern of exchanges, decisions, assignments of tasks, and spheres of authority that [are] shaped by preferences, values, and external pressures").

13. *Cf.* ALFORD, *supra* note 10, at 167, 126, 128 (demonstrating that mothers monopolize approximately 25% of decisions regarding newborns' first names in the United States compared to 9% of fathers; however, fathers make a greater proportion of the first name decisions as economic class increases, with upper-middle class fathers making 23.5% of the decisions and upper-middle class mothers making only 11.8%). African-American and American-Indian mothers are much more likely to monopolize first name decisions than Caucasian mothers. *See id.* at 128 (reporting that African-American mothers made 61.1% of the naming decisions and that American Indian mothers made 75% of the decisions).

14. Domestic violence occurs in some relationships where a naming dispute also exists. *See, e.g.*, Hamby v. Jacobson, 769 P.2d 273, 274-75 (Utah Ct. App. 1989).

15. While I have not discovered a case where the parties used this method to settle a naming dispute, coin tossing is utilized as a method of resolving other disputes within the family, *see, e.g.*, Tognazzini v. Tognazzini, 271 P.2d 77, 79 (Cal. Dist. Ct. App. 1954) (reporting that brother and sister tossed coin to facilitate partition of estate among beneficiaries), and the technique probably has been used to resolve name disputes as well. One author has suggested that disagreement over a child's name at birth be resolved by coin flip. *See* Frederica K. Lombard, *The Law on Naming Children: Past, Present and Occasionally Future*, 32 NAMES 129, 131 (1984).

16. *See In re* Rossell by Yacono, 481 A.2d 602, 603 & n.1 (N.J. Super. Ct. Law Div. 1984) ("[M]any name change applications are filed in our court."); *id.* (reporting that Burlington County averaged 11 name change applications per Motion Day over a five-month period in 1984); Shannon J. Kennedy-Sjodin, Note, Keegan v. Gudahl*: The Child's Surname as a New Bargaining Chip in the Game of Divorce*, 41 S.D. L. REV. 166, 166 (1995-96) ("The consideration of a child's surname arises in hundreds of divorce cases each year."); Karen Springen, *Fight for a Name of His Own*, NEWSWEEK, Nov. 5, 1990, at 71, 72 ("No one knows how many couples take their name battles to court. Eight to 10 cases nationwide reach the appellate level each year, though hundreds are settled in lower courts ....") (citing Jeff Atkinson, Chair of the American Bar Association's Child Custody Committee).

17. *See, e.g.*, *In re* Epstein, 200 N.Y.S. 897 (County Ct. 1923); Arthur Scherr, *Change-Of-Name Petitions of the New York Courts: An Untapped Source in Historical Onomastics*, 34 NAMES 284, 289-91 (1986) (citing *Application of Abbie M. Richards, Mother and Guardian of Winthrop*, filed April 8, 1878, Court of Common Pleas, and other late Eighteenth and Nineteenth Century name cases).

18. A rough gauge of litigation in this area over time is the number of children's name change disputes that reach the appellate level. There was one such case in 1969, four in 1979, ten in 1989, and eighteen in 1995.

19. With the exception of the Lucy Stone League, *see infra* note 168, the organized women's movement had not agitated for a woman's right to keep her own surname upon marriage (or a woman's right to give her children that surname) until approximately 1970. *See* UNA STANNARD, MRS. MAN 4, 154-56, 268-72 (1977); *see also* ALFORD, *supra* note

force,[20] the rise in marital dissolutions,[21] and an increase in paternity and child support actions.[22] Divorce attorneys and judges predict that the number of legal disputes over children's surnames will continue to grow in the future.[23]

In the recent past, commentators have begun to argue that the legal standards governing name change disputes are biased in favor of the paternal surname. Only a little more than a decade ago, Priscilla Ruth MacDougall wrote that "[o]lder [marital] children's names ... remain almost completely subject to paternal control."[24] The author continued, "The right of women to determine their children's names is at a crossroads,"[25] and presents "a major feminist struggle for the next decade."[26] Another author, Cynthia Blevins Doll, has argued that cases from the latter half of the 1980s through 1991 show a "persistent bias toward the interest of the father."[27]

Courts have responded to such criticism. Today there are three primary rules that govern disputes over the changing of children's

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10, at 143 (arguing that the 1970s women's liberation movement was responsible for the trend of women keeping their own surnames or hyphenating their surnames with their husbands' surnames upon marriage).

20. In 1960, approximately 23 million women participated in the civilian labor force; by 1990, the number had grown to approximately 56.5 million. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1991, at 388 tbl. 638 (111th ed. 1991). Women in the labor force are more likely to continue using their birth names upon marriage. *See* Laura Pedersen-Pietersen, *Minding Your Business; To Have and to Hyphenate: The Marriage Name Game*, N.Y. TIMES, Mar. 16, 1997, at C11.

21. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1992, at 64 tbl. 80 (112th ed.) (showing the divorce rate per 1,000 population at 2.6 in 1950, 3.5 in 1970, 5.2 in 1980, and 4.7 in 1990).

22. *See* Ann Nichols-Casebolt & Irwin Garfinkel, *Trends in Paternity Adjudications and Child Support Awards*, 72 SOC. SCI. Q. 83, 95 (1991) ("[D]uring the 1979-86 period, the ratio of paternity adjudications to non-marital births increased by almost 50 percent and the average family of a never-married mother increased its probability of a child support award by almost 75 percent....").

23. *See* Springen, *supra* note 16, at 72 ("Divorce attorneys predict that disputes between biological parents will grow more common as women try to extend gender equality to their children's names."); *see also In re* Iverson, 786 P.2d 1, 3 (Mont. 1990) (Barz, J., dissenting) ("These type [sic] of cases [mother's petition to change non-marital child's surname to mother's surname] ... are likely to arise with more frequency as ... women ... question this society's customs and traditions regarding surnames.").

24. Priscilla Ruth MacDougall, *The Right of Women to Name Their Children*, 3 LAW & INEQ. J. 91, 131 (1985). MacDougall defines "older marital children" as children over three years of age. *See id.*; *see also* Beverly S. Seng, Note, *Like Father, Like Child: The Rights of Parents in Their Children's Surnames*, 70 VA. L. REV. 1303, 1305 (1984) (noting that there is "a nearly absolute presumption in favor of the paternal surname").

25. MacDougall, *supra* note 24, at 159.

26. *Id.* at 93.

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

surnames:[28] a presumption in favor of the status quo, a "best interest of the child" test, and a custodial parent presumption (the newest addition to the law).[29] The appellate courts have generally taken the position that pro-paternal bias does not necessarily inhere in these standards, and that courts can apply these standards in a gender-neutral manner when adjudicating name change disputes.[30] Accordingly, the courts have rejected equal protection challenges in such cases, except where the challenged statute or legal standard explicitly favors the paternal surname.[31]

I shall argue that gender bias continues to influence the law governing disputes over children's name changes. Despite the advent of the custodial parent presumption, and the proclamations by courts that still adhere to the other standards—primarily the best interest standard—that the law no longer privileges the male interest, none of the standards for resolving name change disputes have totally eliminated the law's patronymic bias.[32] While more women now prevail in cases involving marital children's surnames, there remain significant impediments to full gender equality. The courts have perhaps abandoned their automatic preference for the patronym, but they continue to view the significance of surnames and name change disputes from a traditionally male perspective. Evidence from the field of onomastics,[33] and from a variety of other fields, suggests that most women tend to conceptualize surnames and naming disputes differently from most men. I contend that the existing legal stan-

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28. Theoretically these three standards could be used to resolve name change disputes involving children's first names as well. Very few cases of this type are reported. *See, e.g.*, Webber v. Parker, 167 So. 2d 519, 522-23 (La. Ct. App. 1964) (debating whether the husband/father should be able to demand that both his first and last names be given to his child); Bugg v. Rojas, No. C8-94-2590, 1995 WL 365457, at *1 (Minn. Ct. App. June 20, 1995) (finding that trial court should have considered the first-name dispute); Cary v. Cary, No. 02A01-9401-CV-00003, 1995 WL 30603, at *7 (Tenn. Ct. App. Jan. 26, 1995) (resolving dispute over child's first name).

29. *See infra* text accompanying notes 284-87.

30. *See infra* notes 386-89, 535-37 and accompanying text.

31. *See infra* Section V.A.

32. The terms "patronymy" and "patronymics" are used in this Article to represent "the code by which last names are based on fathers' last names." SHARON LEBELL, NAMING OURSELVES, NAMING OUR CHILDREN: RESOLVING THE LAST NAME DILEMMA 9 (1988). Authors have sometimes used the terms to describe the practice whereby a father's first name is made part of another's surname. *See, e.g., id.* at 45; Holt, *supra* note 10, at 35.

33. Onomastics is an interdisciplinary venture to study the origin and form of words, and also includes the study of the system underlying the formation and use of words, including proper names. *See* WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 821 (1988).

dards (as well as the existing criticisms) are applied and interpreted in a way that tends to reflect men's views of surnames, rather than women's.[34] This result is unfortunate: In the context of family breakup, when the two paradigms are in conflict, the female perspective appears to be more consistent with children's interests and offers several other distinct advantages.[35]

The first step of my analysis involves a review of contemporary American naming practices grounded in Anglo-American custom. I shall argue that women and men, in general, have different experiences with their own names, and as a result they tend to attach different significance to their children's surnames.[36] Women, and not men, customarily forego using their birth names upon marriage.[37] It appears that the lability of women's own surnames leads many women to believe that surnames are fungible. For significant numbers of women, a surname functions as a marker of one's present propinquity with other family members in the same household. A surname is a way of saying, "I am currently associated with this fam-

34. *See infra* Section IV.

35. *See infra* text accompanying notes 344-45, 479-87, 614-25.

36. *See infra* Section III.

37. *See infra* notes 97, 169-70 and accompanying text. Various terminology has been used to designate a woman's surname at birth. It has been called the "birth name," the "maiden name," and the "father's name." *See* SUSAN C. ROSS, THE RIGHTS OF WOMEN: THE BASIC ACLU GUIDE TO A WOMAN'S RIGHTS 254 n.1 (1973). I choose to use the term "birth name." "Maiden name" perpetuates the image of women as virgins until marriage, a factual inaccuracy for many women. *See* Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 60 & nn. 256, 259, 262 (1994) (citing ALAN GUTTMACHER INSTITUTE, SEX AND AMERICA'S TEENAGERS (1994) for the statistic that 82% of all teenagers are sexually experienced, and Kristin Luker, *Dubious Conceptions: The Controversy Over Teen Pregnancy*, AM. PROSPECT, Spring 1991, at 73, 78, for the fact that "teenage girls are almost as likely as teenage boys to be sexually active before marriage"); UNITED STATES DEP'T OF HEALTH & HUMAN SERVS., EXECUTIVE SUMMARY: REPORT TO CONGRESS ON OUT-OF-WEDLOCK CHILDBEARING 1, 6 (1995) (citing statistic that unmarried teenagers gave birth to approximately 372,000 children in 1993). The term "maiden name" also has a normative tone, thereby contributing to women's sexual oppression by perpetuating double standards. *See* Oberman, *supra*, at 61-68 (arguing that the double standard causes girls to view sexuality with ambivalence and shame resulting in resistance to contraceptive use and the absence of any affirmative "discourse of desire"). The term "father's name" has appeal because it emphasizes that "most people in our society still give their children the surname of the father," ROSS, *supra*, 254 n.1. However, the term is factually inaccurate for those few women who bear their mothers' surnames, hyphenated or blended surnames, or other alternatives. For first names, I abandon the term "Christian name" and "given name" and use the more accurate "first name." "Christian name" seems inappropriate in our religiously diverse society and "given name" obscures the fact that a surname is also a given name.

ily member (or members)."[38] I term this concept "associationalism."[39] Also, for these women, a stable sense of identity is not dependent upon their fixed surnames. These women expect and generally welcome alterity, equating a change of surname with a change in marital status. Most men, in contrast, retain the same surname from birth until death. As a consequence, it appears that many men believe that their identities are inextricably intertwined with their birth names. This fact, along with the practice that married women and marital children typically take the man's surname, leads many men to reject, ignore, or diminish the importance of a child's surname as a marker of present association after marital dissolution. These men often believe that a child's surname should be immutable—a permanent expression of the child's individual identity and his patrilineal ancestry.

The analysis to be set forth is complicated by several facts. First, it is sometimes difficult to draw gender-based distinctions between men's and women's conceptions of surnames. It appears that the views of men and women fall along a continuum, with the views of most men (but not all) located on one side of the midpoint, and the views of most women (but not all) on the opposite side. Second, while it may appear logical that a causal connection exists between men's and women's varied experiences with surnames upon marriage and their varied perceptions about surnames, this connection has not been tested empirically.[40] Consequently, my assumptions, analysis, and conclusions represent a starting point for further social science research.

While several authors have written about the law of name change disputes, and particularly about naming as a women's rights issue, no scholar has taken the position I advocate in this Article, that men and women tend to see naming disputes in different terms

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38. To these women, a surname represents the woman's proximate physical association with those in her most immediate nuclear family (spouse and children). While non-nuclear family members can live in the household and play an important role in a woman's or child's life, the non-nuclear family members' surnames have not traditionally been shared by the woman and child.

39. Men also have an "associative" claim related to surnames. Many men believe that a shared surname is critical for a strong filial bond. I discuss in a later section the supposed connection between a shared surname and the father-child bond. *See infra* text accompanying notes 302-62, 392-414. For clarity, and because men's associative claim already has a label (the father-child bond argument), I only use the term "associationalism" in relation to the predominantly female view.

40. In fact, I find some support for my argument from suggestive—but not necessarily highly persuasive—sources. *See, e.g., infra* text accompanying notes 79-87 (fictional account of man's and girl's views of surnames).

and that the law (and criticisms of it) fail to address the predominantly female perspective.[41] By failing to acknowledge that most men's and women's views on surnames differ, some writers have inadvertently perpetuated and validated the male view while trying to further women's interests.[42] Authors have also failed to integrate

41. For example, Priscilla Ruth MacDougall claims that her article discusses "the assumptions, acknowledged and unacknowledged, behind courts' protection of fathers' primary naming right." MacDougall, *supra* note 24, at 133. While she identifies those assumptions (i.e., the father's liberty interest, the father-child bond, and the notion that men "own" their children by paying support for them), she does not explore women's beliefs, whether women's beliefs differ from men's beliefs and why, or whether the existing standards can accommodate women's beliefs. Consequently, MacDougall's cursory statements about women's beliefs seem, at times, inaccurate. For example, MacDougall argues that "[w]omen's growing demand to share the basic right to name children follows logically from women's successful assertion of their right to name themselves." *Id.* at 93. Yet, even prior to the establishment of a widely recognized right of women to keep using their birth names upon marriage, remarried women tried to give their children the stepfathers' names. Moreover, only one sixth of her sixty-six page article deals with the assumptions behind judicial decisions in favor of paternal naming rights. *See id.* at 136-46.

Beverly S. Seng, in *Like Father, Like Child: The Rights of Parents in Their Children's Surnames*, recognizes that "naming a child . . . invokes ideas particular to each parent." *See* Seng, *supra* note 24, at 1343. To the father, it expresses his parenthood, and to the mother, it declares that "she is part of the child's family heritage, that she is the equal of the child's father, that she is not the mere caretaker of a chattel that 'belongs' to someone else." *Id.* at 1343-44. However, no empirical data supports her interpretation of each gender's ideas, nor does she explain how these gendered differences may impact the implementation of existing law.

42. Numerous authors assume that most men's and women's views of their surnames are the same, and these authors use men's views as the norm. For example, Cynthia Blevins Doll states that courts have been wrong to assume that a woman's nominal identity is less than a man's because she has traditionally given up her name upon marriage. *See* Doll, *supra* note 27, at 260. Rather Doll assumes, without social science support, that a woman's name change has profound implications for her sense of self, and that "the trend of women retaining birth names, hyphenating, and even fusing names, underscores women's desire for control over their surnames." *Id.* at 231. Doll fails to differentiate the vast majority of women who still take their husbands' names upon marriage from the minority of women she references. *See id.* Sharon Lebell argues that "[t]he name and the person are one and the same," LEBELL, *supra* note 32, at 7, and that patronymy allows men's identity development to be "ever-deepening, expanding, and solidifying," *id.* at 17, whereas women have "identity ruptures," and that it is problematic that "[w]omen constantly shift the locus of their identity to transitory reference points: roles and relationships," *id.* at 24-25; *see also* Yvonne M. Cherena Pacheco, *Latino Surnames: Formal and Informal Forces in the United States Affecting the Retention and Use of the Maternal Surname*, 18 T. MARSHALL L. REV. 1, 2-3 (1992) (arguing that an individual's name is a "priceless possession" and that one's name is tied to one's identity).

Student authors have made a similar mistake. One student advocates a presumption for the status quo because it gives children "a stable identity referent." Ellen Jean Dannin, Note, *Proposal for a Model Name Act*, 10 U. MICH. J.L. REFORM 153, 167, 178-79 (1976) (proposing that both parents agree to a name change for a minor under 14 years old, unless exceptional circumstances indicate that the change is in the minor's best interest). Another student advocates a gender-neutral "best interest test," but he proposes

existing social science literature into their legal analysis—a critical component if one is to understand the limitations of existing judicial approaches to name change disputes. Many commentators have argued that parents should be treated equally in the adjudication of these disputes,[43] but these commentators have given little thought as to whether the existing or proposed standards can achieve equality,[44] or even whether this goal is desirable. Given the limitations of existing scholarship, there is a strong need for a thorough, interdisciplinary analysis of sex bias in the adjudication of name change disputes.

I conclude this Article by proposing a solution that tries to privilege the predominantly female perspective—that surnames should outwardly designate present propinquity. This proposal posits a "family association rule" for disputes over the changing of a child's surname. Under this rule, the surname selected by the parent who is the physical custodian should prevail, so long as an associational justification for the surname exists, unless the non-custodial parent can prove by clear and convincing evidence that serious harm to the child would result.[45] In determining whether clear and convincing evidence of harm exists, associationalism must be explicitly considered. I elaborate on the details of the proposal in the last part of the Article.[46] This proposed solution, while not integral to my argument, offers a potential alternative to the status quo's emphasis on surnominal stasis and patrilineal succession. My proposal provides a

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adding factors that are relevant from a male perspective. For example, he suggests that courts consider the effect of the name change on the mother-child relationship, as well as the length of time that a child has borne a particular surname. *See* Richard H. Thornton, Note, *The Controversy Over Children's Surnames: Familial Autonomy, Equal Protection and the Child's Best Interests*, 1979 UTAH L. REV. 303, 330. He also discussed the advantage of giving " 'children a stable identity referent.' " *Id.* at 327 (quoting Dannin, *supra*, at 167). Similarly, another law student calls for giving equal weight to the mother-child relationship when considering how a name change affects the child's best interest. *See* M. Hannah Leavitt, Note, *Surname Alternatives in Pennsylvania*, 82 DICK. L. REV. 101, 115 (1977).

43. *See, e.g.*, MacDougall, *supra* note 24, at 100.

44. Authors often suggest solutions to the perceived problem, but their solutions' efficacy is questionable as associationalism is never made a weighty consideration. *See, e.g.*, Doll, *supra* note 27, at 260-61 (recommending changes to the best interest of the child standard); Seng, *supra* note 24, at 1347-51 (advocating a rebuttable presumption in favor of a compound surname for children under 14 years of age); Kathryn R. Urbonya, Note, *No Judicial Dyslexia: The Custodial Parent Presumption Distinguishes The Paternal From the Parental Right to Name a Child*, 58 N.D. L. REV. 793, 794-96 (1982) (suggesting that courts adopt a custodial parent presumption); *see also* Thornton, *supra* note 42, at 328-30 (suggesting changes to the best interest standard).

45. *See infra* Section V.C.

46. *See infra* Section V.C.

starting point for a scholarly debate over the merits of reform in this area. By privileging the notion of associationalism in my proposal, I hope to encourage open discussion of the relative merit of the various values implicated in name change disputes.

I set forth this Article's methodology in Part II. Part III then explores the degree to which men and women tend to view surnames differently. Part IV chronicles the development of the existing legal standards that govern disputes over children's surnames, and demonstrates that these standards generally reflect a conception that is held by more men than women. Finally, Part V suggests an alternative approach to resolving disputes over children's surnames.

II. A FEMINIST PERSPECTIVE ON THE NAME GAME

I employ a feminist methodology,[47] and the Article accordingly starts with the "woman question:"[48] How, if at all, are women ad-

47. To counteract what Patricia Cain has called the "Gendered Misunderstanding of Feminist Scholarship," which contributes to its devaluation, I purposefully detail my assumptions. *See* Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 35-39 (1991). By explaining "the [feminist] project" in the context of name change disputes, I hope to make this Article meaningful to an audience larger than feminist scholars. In addition, overtly discussing methodology acknowledges that methodology, just like substantive analysis, is inextricably linked to the enterprise of combating patriarchy. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 887-88 (1990) [hereinafter Bartlett, *Feminist Legal Methods*]. Explaining one's methodology also helps expose—at the outset—some of the limitations of the substantive argument. My feminist methodology represents the "positionality" that Professor Bartlett has defined as combining "the postmodern critique of objectivity and neutrality in the law with the possibility of political commitments toward particular legal agendas." KATHARINE T. BARTLETT, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 921 (1993) [hereinafter BARTLETT, GENDER AND LAW]; *see also* Bartlett, *Feminist Legal Methods, supra*, at 880-85 (outlining her stance on positionality). As Professor Bartlett states, feminist methods do not displace conventional legal analysis. Rather,

> [t]he methods accept the necessity for rules, reason, legal abstraction, and efforts to eliminate bias and arbitrariness, but at the same time attempt to take greater account of how legal rules often invisibly represent the partial perspectives of those who are dominant in society and ignore the perspectives of others.

BARTLETT, GENDER AND LAW, *supra*, at 634.

48. *See* Bartlett, *Feminist Legal Methods*, *supra* note 47, at 837. Specifically Bartlett states:

> In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may be not only non-neutral in a general sense, but also 'male' in a specific sense. The purpose of the woman question is to expose those features and how they operate, and to suggest how they might be corrected.

Id. While I adopt the three other feminist methodological tools described by Katharine Bartlett in her comprehensive article, *Feminist Legal Methods* (feminist practical reason-

versely affected by the law governing disputes over children's surnames? While a thorough answer to this question must await later sections of the Article, it is possible at the outset to discern two broad categories of adverse effects on women: one practical and one symbolic.

The practical effects are easy to recognize. Children of divorced parents are predominantly in their mothers' custody,[49] but the overwhelming number of these children bear their fathers' surnames at the time of divorce.[50] Thus, it is not surprising that women institute most name change petitions—usually for the purpose of giving children the mother's birth name or the surname of a new stepfather.[51] In addition, women often must defend against actions by fathers who are trying to halt the use of a surname other than the child's original paternal surname. Whether the law helps or hinders women in these disputes is a matter of great salience to many women, and as one

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ing, consciousness-raising, and positionality), the woman question is discussed in detail because it frames this Article's thesis and because the technique illuminates very well the Article's underlying assumptions. Positionality has been discussed above. *See supra* note 47. Consciousness-raising will be discussed below. *See infra* text accompanying note 76. Feminist practical reasoning pervades this Article. Bartlett describes this last methodological tool as "combin[ing] some aspects of a classic Aristotelian model of practical deliberation with a feminist focus on identifying and taking into account the perspectives of the excluded." Bartlett, *Feminist Legal Methods*, *supra* note 47, at 850.

49. *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 112 (1992) (citing their California study which showed that "[m]others plainly remain[ed] the primary custodians of children following divorce: they receive sole physical custody of the children in two out of three cases, while fathers have sole physical custody less than 10 percent of the time"); *see also* Scott, *supra* note 12, at 635 ("Children of divorce in single-parent homes are overwhelmingly in the custody of their mothers . . . .") (citing Frank F. Furstenberg et al., *The Life Course of Children of Divorce: Marital Disruption and Parental Contact*, 48 AM. SOC. REV. 656, 667 (1983)); Nathalie Martin, Note, *Fathers and Families: Expanding the Familial Rights of Men*, 36 SYRACUSE L. REV. 1265, 1274 (1986) (estimating that "ninety percent of all children of divorce are still in the custody of their mothers").

50. *See* M.D. v. A.S.L., 646 A.2d 543, 544 (N.J. Super. Ct. Ch. Div. 1994) ("In modern society, it has been customary for a child to assume the surname of the father . . . ."); Rio v. Rio, 504 N.Y.S.2d 959, 960-61 (Sup. Ct. 1986) ("Most American children born in wedlock are given their father's surname," this is a "practically universal custom." (citation omitted)); Kay v. Bell, 121 N.E.2d 206, 208 (Ohio Ct. App. 1953) ("It has been the custom in our country since the time 'when the memory of man runneth not to the contrary' to give to a child the surname of its father." (citations omitted)). In fact, "[t]oday, few American mothers are aware that they are not legally required to give their children their father's surnames." *Rio*, 504 N.Y.S.2d at 963.

51. *See* Kristine Cordier Karnezis, Annotation, *Rights and Remedies of Parents Inter Se with Respect to the Names of Their Children*, 92 A.L.R.3d 1091, 1095 (1979) (noting that the biological father "is ordinarily the objecting party" in a naming dispute); W. E. Shipley, Annotation, *Rights and Remedies of Parents Inter Se with Respect to the Names of Their Children*, 53 A.L.R.2d 914, 915 (1957) (stating that father is ordinarily objecting party).

state supreme court observed, constitutes an "important public issue."[52]

The law of name change disputes also has profound symbolic implications. Patronymy represents an overt vestige of coverture. Until it is eradicated, women will symbolically, and actually, remain unequal to men. As Sharon Lebell states:

> Patronymy is not the cause of patriarchy, but it does keep patriarchy alive and well. Like random male violence, it is one of the vital links in the patriarchal chain that holds women back from the full freedom to be their authentic selves. In many ways, patronymy is more insidious than some of the other grosser examples of patriarchy, which can be easily identified and decried. Since patronymy, if it is recognized at all, is typically seen as a trivial custom, something akin to our culture's preference for certain kinds of foods over others, no one does anything to change it.[53]

I do not propose a legal regime to eliminate patronymy at birth, as others have done.[54] Rather I address a more common legal problem and one of the most pernicious aspects of patronymy: the legal system's preference for the patronym in disputes between divorced

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52. *See* Lassiter-Geers v. Reichenbach, 492 A.2d 303, 305 (Md. 1985).

53. LEBELL, *supra* note 32, at 28.

54. There are a variety of non-sexist options, suggested both historically and recently, that a state could adopt to guide parents in choosing their children's initial surnames. For example, Charlotte Perkins Gilman's *Moving the Mountain* describes a utopian community where wives do not take husbands' names: Boys are given their fathers' names, and girls are given their mothers' names. *See* Charlotte Perkins Gilman, *Moving The Mountain: Chapter Three*, The Forerunner, Mar. 1911, at 79, 83; *see also* MARY LASSITER, OUR NAMES, OUR SELVES 98-99 (1983) (recommending the adoption of a system in which sons receive their fathers' surnames and daughters receive their mothers' surnames); Dannin, *supra* note 42, at 173 (proposing Model Name Act). In 1914, Fola La Follette proposed, among other options, that " 'the children could have . . . the combined names of their father and mother . . . .' " STANNARD, *supra* note 19, at 177; *see also* SUSAN J. KUPPER, SURNAMES FOR WOMEN: A DECISION-MAKING GUIDE 91 (1990) (advocating the hyphenation of "the parents' surnames in alphabetical order, if there is a dispute"). Sharon Lebell created the Bilineal Solution. Everyone keeps his or her "source name" for life, a last name one wishes to adopt. Girls take their mothers' surnames as their surnames, and their fathers' surnames as their middle names. Boys take their fathers' surnames as their surnames, and their mothers' surnames as their middle names. *See* LEBELL, *supra* note 32, at 64-66. One commentator has stated that Lebell's system means "that some family names are less likely to die out. Genealogists might also find it easier to trace families." Edwin D. Lawson, *Naming Ourselves, Naming Our Children: Resolving the Last Name Dilemma*, 37 NAMES 391, 392 (1989) (book review). Linda Bird Francke recommends adopting a matrilineal system of naming so that when a woman receives child custody upon divorce, as most women do, the child and mother would share the mother's birth name. *See* LINDA BIRD FRANCKE, GROWING UP DIVORCED 200 (1983). For a possible constitutional objection to such suggestions, see *infra* notes 627-31 and accompanying text.

parents over their child's surname. When the preference results in the child bearing the surname of his or her departed biological father, the law conveys a disturbing message that even in absentia the father outranks the custodial mother.

In asking the "woman question," I am cognizant of the hazard of overgeneralization that attends any such inquiry. Feminist scholars caution that one's categorization of "women" can easily exclude some women, and that "a partial description may mislead . . . [and] may actively disadvantage those whose experience was not considered."[55] The same can be said of the category of "men" when one tries to contrast the male and female perspectives. Realistically, overgeneralization is almost inevitable when formulating an answer to the woman question, especially in the naming context.[56] There are many levels of diversity among men or women: vertical diversity (that is, diversity among men or women based on characteristics such as nationality, religion, race, and class),[57] horizontal diversity (that is, diversity among men or women within the vertical groups),[58] and episodic diversity (that is, diversity experienced by a man or a woman at different times over the course of his or her life).[59] This manifold diversity hinders attempts to "essentialize" the experience of men or women,[60] and it renders impossible the formulation of rigid gender-

55. Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1029 (1991).

56. The problem of "exclusion" is often subsumed under "gender essentialism," *see, e.g.*, BARTLETT, GENDER AND LAW, *supra* note 47, at 871, but the former is not always a subset of the latter. Exclusion often attends overgeneralization, i.e., the tendency to see a homogeneity among women, despite their race, class, ethnicity, sexual orientation, etc. Gender essentialism is discussed in note 60, *infra*.

57. *See, e.g.*, ALFORD, *supra* note 10, at 2 (stating that practices for naming children "vary dramatically from society to society"); Edward H. Tebbenhoff, *Tacit Rules and Hidden Family Structures: Naming Practices and Godparentage in Schenectady, New York 1680-1800*, 18 J. SOC. HIST. 567, 583 (1985) (finding that first names reflect culturally derived patterns which "differ as widely as the range of cultures examined"). The Iroquois, for example, give a child only one name, selected by the mother or maternal grandmother from a set of names owned by the mother's clan. Between ages 14 and 16, an Iroquois child receives a new name which is selected by the women of the clan. These personal names, however, are not used; rather, kin terms are used with relatives, and terms indicating one's generational status are used with non-relatives. *See* ALFORD, *supra* note 10, at 3-4.

58. *See* Deborah A. Duggan et al., *Taking Thy Husband's Name: What Might it Mean?*, 41 NAMES 87, 98 (1993) ("Researchers have not fully explored the possibility . . . that women who make different choices regarding their marital last name may show different personality profiles.").

59. *See* Holt, *supra* note 10, at 49-80 (discussing various case studies that reflect the variety of feelings any one individual can have about the importance of names).

60. Gender essentialism assumes that there is something essential about women that explains the answer to the "woman question." *See* Cain, *supra* note 47, at 28. The fact

that women bear and nurture children may be an "essential" reason why most women and men view the importance of surnames differently. The gendered division for bearing and breast-feeding children arguably has psychological repercussions for women and men, including men's desire to distance themselves from their mothers (and, arguably, a consequent need to reject the matronymic and diminish the importance of associationalism, as defined in this Article). This observation finds its clearest formulation in NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978), where she discusses the effect of female mothering on the sexes and the development of the "individual" versus "relational" dichotomy:

> A boy, in order to feel himself adequately masculine, must distinguish and differentiate himself from others in a way that a girl need not—must categorize himself as someone apart. Moreover, he defines masculinity negatively as that which is not feminine and/or connected to women, rather than positively. This is another way boys come to deny and repress relation and connection in the process of growing up ....
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> ....
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> Girls' identification processes, then are more continuously embedded in and mediated by their ongoing relationship with their mother. They develop through and stress particularistic and affective relationships to others. A boy's identification processes are not likely to be so embedded in or mediated by a real affective relation to his father. At the same time, he tends to deny identification with and relationship to his mother and reject what he takes to be the feminine world; masculinity is defined as much negatively as positively. Masculine identification processes stress differentiation from others, the denial of affective relation, and categorical universalistic components of the masculine role. Feminine identification processes are relational, whereas masculine identification processes tend to deny relationship.

Id. at 174, 176; *see also* MARY BECKER ET AL., CASES AND MATERIALS ON FEMINIST JURISPRUDENCE, TAKING WOMEN SERIOUSLY 562 (1994) ("It is a fact that women nurture most children, and this fact has a profound impact upon those children as adults and, through them, upon gender relations in society."); ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION 11 (1986) ("There is much to suggest that the male mind has always been haunted by the force of the idea *of dependence on a woman for life itself*, the son's constant effort to assimilate, compensate for, or deny the fact that he is 'of woman born.' Women are also born of women. But we know little about the effect on culture of that fact, because women have not been makers and sayers of patriarchal culture."); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 2-3 (1988) ("[T]he claim that we are individuals 'first,' and the claim that what separates us is epistemologically and morally prior to what connects us—while 'trivially true' of men, [is] patently untrue of women.... Indeed, perhaps the central insight of feminist theory of the last decade has been that women are 'essentially connected,' not 'essentially separate,' from the rest of human life, both materially, through pregnancy, intercourse, and breast-feeding, and existentially, through the moral and practical life."). *But see* Tracy E. Higgins, *"By Reason of Their Sex": Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536, 1565-66 (1995) (criticizing use of "the mothering story").

The "non-essential" reasons why most women's and men's views of their children's surnames differ include the difference in social experience of giving up one's name upon marriage and gender role socialization. These reasons are not mutually exclusive explanations, and they are explored below. *See infra* notes 97, 121, 169-70, 244 and accompanying text.

I believe that women's and men's views of surnames are at least partially socially constructed because of the diversity that exists among and between men's and women's views. This belief raises the possibility that women's views are not "authentic." *See infra* notes

based classifications. Undeniably, some men hold all or a part of the views ascribed to women, and visa-versa,[61] even though the majority of men and women in this country have vastly different experiences with their own names. Consequently, when I describe the "male" and "female" views of surnames, these terms are best understood to be end points of a continuum. The terms reflect a hypothetical construct derived from the sources cited herein—sources that mainly reflect the influence of Anglo-American naming practices. At best, the sources suggest a loose dichotomy of viewpoints that merits further scrutiny by empirical research.

While space does not permit a comprehensive analysis accounting for all levels of diversity among men or women, the unique experience of one subgroup requires special attention. Latino naming practices differ dramatically from Anglo-American practices.[62] The dominant custom throughout Latin America and Spain is for a mother and father to combine their surnames into a hybrid cognomen that is given to their children.[63] Yet it is unclear whether the

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73, 77. Women's views may have grown out of patriarchy's insistence that women and children be surnominally associated to men. Even if women's voices are not "authentic," society should still include and value women's expressed views in order to validate women's voices generally, as women try to respond and cope with patriarchy's manifestations. This strategy of inclusion should occur in tandem with larger efforts to dismantle patriarchy.

61. As I was writing this Article, several colleagues asked what prompted my interest in the topic. I was pregnant at the time, and people correctly assumed that I had a personal interest in the subject. My husband and I were in the process of trying to determine what surname we would give our baby. Imagining ourselves to be "progressive," we considered our options. Our deliberations revealed the problem of episodic diversity that complicates categorizing "men's" or "women's" views. For example, my husband's views at times reflected the traditional male perspective and at other times were more liberal. At first, my husband reminded me that most other men get to have "their" children bear the paternal surname. It seemed to be his "right," and he presumed that it was the default position. He was the one who felt burdened to inform his parents and his grandmother that there may not be another "Lininger" (his surname) in the world. Yet my husband also displayed the desire to have the child's surname reflect both our identities, and he felt some discomfort with the patriarchal custom. On the other hand, while I felt very strongly that my son's surname should represent his association with both of his parents, I also felt that my "identity" was implicated as much as my husband's. The lesson of our experience is that individuals can, and often do, simultaneously embrace competing notions of "association" and "identity." Which notion wins out—as the legal system's preference—is the real inquiry. Incidentally, we ultimately decided to give our son the surname Weiner-Lininger.

62. As one commentator has stated, "the Latino name does not conform to any naming issues which have been addressed, disseminated and defended by the 'naming experts.' " Cherena Pacheco, *supra* note 42, at 31.

63. A child whose surname is "Garcia-Rodriguez" has probably derived the name "Garcia" from her father's side of the family, and the name "Rodriguez" from her mother's side. The two components of a Latino surname may either be hyphenated, free-

analysis set forth herein changes when applied to the Latino naming system. Among other things, the Latino system of naming children is still patrilineal. When Latino parents combine their surnames for their children, the children receive only one-half of each parent's name—usually the portion inherited from each parent's father.[64] The first name in the hyphenated sequence is from the father's side, and this name carries more social weight.[65] Thus it appears that the primacy of the patronym is common to both the Latino and the Anglo naming systems. Nonetheless, further study is needed to determine whether Latinos hold the same conception of surnames as others described in this Article,[66] and whether Latinos' disputes over their children's surnames take the same form. The paucity of empirical research on the implications of naming practices in general[67]—and

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standing, or separated by the word "y" (which means "and"). *See* Cherena Pacheco, *supra* note 42, at 9-11 & 11 n.43.

64. *See* LEBELL, *supra* note 32, at 48; Cherena Pacheco, *supra* note 42, at 10 n.42.

65. *See supra* note 63; *see also* LEBELL, *supra* note 33, at 48 (stating that first surname carries more social weight).

66. For example, "[i]t is not known to what extent these [naming] practices are continued by Latinos in the United States." Cherena Pacheco, *supra* note 42, at 3-4. It appears that most Latinos are forced into involuntary name changes in the United States, resulting in the abandonment of the maternal name. *See id.* Cherena Pacheco's own survey found that "the majority" of respondents do not use both surnames in the United States. *See id.* at 14 n.59. The author attributes this to the United States' tradition and custom, cultural supremacy, bureaucratic laziness (e.g., governmental forms only having space for shorter surnames), racism, and simple ignorance. *See id.* at 14-19. In addition, some Latina and Hispanic women may take their husbands' names upon marriage, although it is difficult to calculate precisely the number of women who do so and the exact form of the practice. The extant literature has shown that the marital naming practices of these women have taken several different approaches. One author explained that women who take their husbands' names after marriage often just append "de" and their husbands' names after their surnames. *See* Cherena Pacheco, *supra* note 42, at 11. Another author explained that upon marriage, Hispanic women drop the mother's name and take on the husband's name, hyphenating the two names or separating them by the word "de." *See* Melanie S. Landis, *Hispanic Blend*, LANCASTER NEW ERA, INTELLIGENCER J., May 4, 1993, at C2. Another author explained that for some legal purposes, and in aristocratic circles, women will be referred to as her first name " 'de *her husband's name.*' " *See* LEBELL, *supra* note 31, at 49. And yet a fourth pair of authors explained: "In some Latin American countries, husbands and wives keep both their father's and mother's last names as their last name," "or opt to use their birth name on a day-to-day basis." David R. Johnson & Laurie K. Scheuble, *Women's Marital Naming in Two Generations: A National Study*, 57 J. MARR. & FAM. 724, 725 (1995) (citing S. LOBO, A HOUSE OF MY OWN: SOCIAL ORGANIZATION IN THE SQUATTER SETTLEMENTS OF LIMA, PERU 87 (1982)). Some believe the practice of using the word "de," which means "of," signals male ownership of the female. *See* Karen A. Foss & Belle A. Edson, *What's in a Name? Accounts of Married Women's Name Choices*, 53 W.J. SPEECH COMM. 356, 366 (1989).

67. *See* Foss & Edson, *supra* note 66, at 357 ("The interest in the implications of married women's name changes is a much more recent and still largely untapped area for investigation."); *see also* ALFORD, *supra* note 10, at 6, 18 (commenting on the virtual non-

the dearth of research on inter-ethnic variations in particular[68]—provides little basis on which to examine the Latino naming system in the present Article.[69]

While the omnipresent diversity complicates any attempt to compare the genders' views of surnames, it should not stymie scholarship. Gender-based distinctions are a revealing analytical tool, and the use of these distinctions presupposes some ability to differentiate differences between the sexes.[70] Instead of abandoning such analysis altogether because of the complexity, it makes more sense to acknowledge the impossibility of crafting a solution that speaks to all men's and women's experiences[71] and to evaluate honestly the disadvantages of drawing the line where one does.[72] Although constrained

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existence of information on name changing in scientific literature on naming generally); Penelope Wasson Dralle & Kathelynne Mackiewicz, *Psychological Impact of Women's Name Change at Marriage: Literature Review and Implications for Further Study*, 9 AM. J. FAM. THERAPY 50, 51 (1981) ("[T]he psychological literature includes little published research on the impact on women of changing surnames at marriage."); Johnson & Scheuble, *supra* note 66, at 724, 732 (1995) (calling for more research because "[s]ocial explanations for patterns and trends in marital naming have received only sporadic attention from both social scientists and the mass media" and such information "would tell us more about the consequences of naming choice[s] for . . . relationships with . . . children"); Laurie Scheuble & David R. Johnson, *Marital Name Change: Plans and Attitudes of College Students*, 55 J. MARR. & FAM. 747, 747 (1993) ("Given the changes that are currently taking place in marriage and family role expectations, marital name change issues clearly warrant examination, yet this topic has been virtually unexplored by social scientists.").

68. *See* ALFORD, *supra* note 10, at 6, 18 (commenting on scant ethnographic material on naming); Duggan et al., *supra* note 58, at 98 (commenting that "more information is needed on the topic of marital names in which the ethnicity of the respondents is taken into consideration"); *see also infra* note 172 (discussing the reluctance of some African-American women to take their husbands' names).

69. This Article does, however, rely on one major study that included Hispanic respondents. *See infra* note 207 and accompanying text.

70. *See generally* Higgins, *supra* note 60, at 1537 (" 'Woman' is a troublesome term, in feminism and in law. The category is neither consistently nor coherently constituted in linguistic, historical or legal contexts. Yet the framework through which women have sought (and gained) improvements in their legal, economic, and social status depends upon the ascription of meaning to the term." (citations omitted)); *see also* Christine A. Littleton, *Does It Still Make Sense to Talk About "Women"?*, 1 UCLA WOMEN'S L.J. 15, 37-51 (1991) (arguing that it is useful to ask "the woman question" and showing, through a "move-away" case, that gender neutrality assumes both a commonality of interest and equality of situation not yet achieved between men and women).

71. *Cf.* Abrams, *supra* note 55, at 1030 ("It is difficult to formulate a remedy that is responsive to the entire range of women's perspectives.").

72. *See id*; *see also* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 586 (1990) ("My suggestion is only that we make our categories explicitly tentative, relational, and unstable, and that to do so is all the more important in a discipline like law, where abstraction and 'frozen' categories are the norm."); Higgins, *supra* note 60, at 1581 (arguing that accepting "objectivist accounts of gender . . . entails a recognition that to choose among such partial accounts is an exercise of power. Such a

by space limitations, I will attempt in Part V to propose a solution that benefits most women, and I will discuss the varying effects of the proposal on women and men with diverse perspectives and experiences. If future empirical research fails to validate the apparent dichotomy between men's and women's views on surnames, at least the feminist approach will have illuminated the variety of values that can influence the selection and maintenance of a child's surname, and will have facilitated consideration of which interests should be privileged.

Feminist scholars also caution about the problem of "authentic voice," which poses a very real challenge for this project.[73] Examining legal opinions to derive men's and women's feelings about names is an imperfect way to gather information. Within the legal system, women may forego their "authentic voices" and adopt a more formalistic discourse in accordance with the prevailing legal standards. If I am correct that the law governing name change disputes generally reflects male values concerning surnames, then women's legal arguments under the current system may mask their true feelings because these arguments may be couched in language designed to appeal to judges who are applying the male-oriented legal standards.[74] I shall attempt to discover the authentic voices of women by relying on non-legal sources such as personal testimonials, the popular press, fiction, literary criticism, and anthropological, socio-

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recognition does not imply that principled choices cannot be made but rather that they cannot be made *innocently*. Both the judge and the critic must investigate, acknowledge, and accept responsibility for the exclusionary implications of their choices rather than treating their assumptions as preexisting and fixed." (citations omitted)). *But see* Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?* 4 YALE J.L. & FEMINISM 13, 16 (1991) ("To speak of social treatment 'as a woman' is thus not to invoke any abstract essence or homogeneous generic or ideal type, not to posit anything, far less a universal anything, but to refer to this diverse and pervasive concrete material reality of social meanings and practices . . . ."). As Professor Mari Matsuda argues, to consider perspectives of women that have been excluded can only help achieve a more complete analysis of legal issues, regardless of whether the truth is partial. *See* Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1764-68 (1990); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

73. The problem of authentic voice is identified by the questions, "[W]hom do we believe? Who speaks the truth?" Is a woman's voice her own, or is it instead affected by her subordinated position in the gender hierarchy? *See* Cain, *supra* note 47, at 25.

74. *See* Scherr, *supra* note 17, at 285 (commenting that change-of-name petitions in New York between 1848 and 1924 "cast fresh light on American social norms and values . . . . Since attorneys usually represented the petitioners, the literary style of their requests was invariably legalistic, although the petitioners' feelings emerge from time to time").

logical, and psychological research.[75] Using the feminist methodology of "consciousness-raising,"[76] I employ these sources in an attempt to present women's true voices so that their experiences can affect the interpretation of the law and the formulation of proposals for legal reform.[77] Their personal narratives inspire, frame, and illustrate my argument,[78] although the voices reflected in this Article do not provide definitive proof of "men's" and "women's" views.

By listening to the words of women as they talk about their own surnames, one sees that the current legal regime for resolving children's naming disputes does not value, nor sometimes even address, what most women find significant about a surname. Rather, the law predominantly reflects the voices of men. I now turn to a detailed analysis of the extent to which men and women hold different views on the subject of surnames.

III. MEN'S AND WOMEN'S CONCEPTIONS OF SURNAMES

A. *An Illustrative Colloquy*

Ellen Foster, a novel by Kaye Gibbons,[79] offers an example of how men and women tend to view surnames differently. The eponymous protagonist is an eleven-year-old girl who has lived in a violent family: her father has molested her and killed her mother.[80] After Ellen's parents die, she moves to a series of temporary residences. Ellen is eventually placed in a foster home where she is

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75. In searching for clues about how people view surnames, I sometimes find a source, particularly fiction, relevant in a way that may not have been intended by its author. Most of my sources are anecdotal rather than empirical. They were not compiled systematically or in accordance with statistical methodology.

76. Bartlett, *Feminist Legal Methods*, *supra* note 47, at 866 (calling consciousness-raising the "meta-method" under which "the woman question and feminist practical reasoning" can occur); *see also* Cain, *supra* note 47, at 25 ("As a legal method, consciousness-raising has come to stand for any form of research or legal argument that begins with women's experience."); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 601-02 (1986) ("Feminist theory emphasizes the value of direct and personal experience as the place that theory should begin .... The notion of consciousness-raising as feminist method flows from this insight." (footnotes omitted)).

77. The search for an authentic voice may be ontologically and epistemologically problematic. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 115-16 (1989); Higgins, *supra* note 60, at 1594.

78. Patricia Cain calls this " 'connected scholarship.' " Cain, *supra* note 47, at 38. The advantages, and potential problems, of feminist narrative scholarship are set forth very completely by Kathryn Abrams, *supra* note 55 *passim*.

79. KAYE GIBBONS, ELLEN FOSTER (1987).

80. *See id.* at 10-11, 45.

relatively happy. Once she moves in with this foster family, she meets with the school psychologist to discuss a teacher's complaint that Ellen has been signing her papers with a new surname.[81] The following excerpt is narrated by Ellen:

> Ellen? he says to get my attention.
>
> I always think on my own when I sit with him.
>
> Yes?
>
> I understand from your teacher that you've taken to signing your papers differently.
>
> I wondered when somebody would catch it.
>
> Well Ellen he says like he might be a little confused his own self we could understand if you were misspelling your name but you've been signing Foster as your last name this entire term. Did you realize that?
>
> Of course I know my last name I tell him.
>
> OK then tell me your name.
>
> Ellen Foster.
>
> But that is not your last name. Would you like to talk about it?
>
> About what?
>
> About why you are using that name. You see Ellen sometimes children such as yourself who have experienced such a high degree of trauma tend to have identity problems. Do you follow me?
>
> OK go on.
>
> And these children express these identity problems in several ways. What I am thinking of in particular is the child who has experienced what he or she feels to be an unbearable amount of pain, and this child might not want to be

81. *See id.* at 101-02.

himself anymore. Are you with me so far?

I understand.

. . . .

It is not uncommon for such a child to pretend he is somebody else. He doesn't necessarily have to know that other person. Just so he does not feel the pain anymore is all that matters.

OK go on.

I don't know who this Foster is but it really doesn't matter. What does matter is that you open up and talk to me. Get that pain out of Ellen and she won't have to be somebody else.

Lord I say to him. I hate to tell him he's wrong because you can tell it took him a long time to make up his ideas. And the worst part is I can see he believes them.

Go ahead Ellen. Tell me what you're thinking. It's OK.

That may not be the name God or my mama gave me but that is my name now. Ellen Foster. My old family wore the other name out and I figured I would take the name of my new family. That one is fresh. Foster. I told him all that.

I'm starting to see your point. Go ahead he told me.

Before I even met Stella or Jo Jo or the rest of them I heard they were the Foster family. Then I moved in the house and met everybody and figured it was OK to make my name like theirs. Something told me I might have to change it legal or at a church but I was hoping I could slide by the law and folks would think I came by the name natural after a while.

He laughed like I had said a joke.[82]

At this point, the psychologist realizes that Ellen has assumed the name "Foster" because she believes it is the surname of her new

82. *Id.* at 101-03.

family, whom she knows only as "the Foster family." In fact, the family has a different surname, which is never revealed to the reader.

> After he explained it all to me I felt like a fool for a minute. Then I asked him if I could keep using that name anyway or if I needed to pick out another one.
>
> I just don't care for my old name I said to him. I sure could use another one. If I have to give up Foster then give me a while to think up a flashy one.
>
> When he stopped laughing he said we were back to where we started.
>
> But I thought we had everything figured out I said. Foster is not the right pick so I'll think up something else.
>
> No Ellen. The problem is not in the name. The problem is WHY you feel you need another identity.
>
> Not identity. Just a new name I wanted to write that big across the sky so he would understand and the picking into my head would stop.
>
> You are the one who is mixed up about me I told him.[83]

Ellen's voice contrasts sharply with the male psychologist's voice, and the contrast suggests how the sexes may view surnames differently. First, Ellen seems to believe that a surname is an indicium of association. Ellen refers to the foster family as her "new family," and Ellen's desire to express her connection with her new family leads her to adopt what she believes to be the family's surname, "Foster." Second, Ellen thinks that changing her name is natural and unexceptional. After she moves in with her new family, she expects that "folks would think I came by the name [Foster] natural[ly]."[84] Third, Ellen rejects the suggestion that changing her last name affects who she is—her own identity. She is hardly distraught by the abandonment of her birth name: "[Foster] may not be the name God or my mama gave me but that is my name now.... My old family wore the other name out and I figured I would take the name of my new family."[85] In short, Ellen appears to

83. *Id.* at 103-04.
84. *Id.* at 103.
85. *Id.*

believe that her surname is labile and fungible, and that her surname should be a marker of present association rather than of her father's lineage.

The school psychologist has a different view of surnames. He believes it is unnatural for Ellen to change her surname. He feels that in doing so she must be renouncing her true identity. The psychologist does not believe that Ellen could preserve her identity without retaining her birth surname. He fails to recognize that Ellen's newly adopted surname may represent an important statement about association. Ellen's attempt to affiliate herself with her new family by assuming their apparent surname strikes the psychologist as a "joke."[86] And as he always does, the psychologist "pull[s] and stretch[es]" what Ellen says until it falls within his paradigm.[87]

The foregoing passage from *Ellen Foster* can be read as illustrating some of the points that will be raised in the balance of this section: (1) Women tend to see surnames primarily as indicia of association, while men generally see surnames as implicating identity; (2) women tend to think that changing a surname is natural, whereas men tend to see it as aberrational; and, (3) each sex has difficulty acknowledging the other's viewpoint, but the male perspective usually is privileged (at least in the law relating to children's name changes).

B. Men's Conceptions of Surnames

For a number of reasons, men commonly attach great importance to the stability of a child's surname. Men often regard their own surnames as fixed symbols of their identities. Because most men never change their surnames over the course of their lives,[88] they come to associate a surname with a stable identity.[89] Many men also believe that a surname has value in the public sphere, where a man's surname (and his children's use of it) functions much like a trade name, accumulating goodwill and prestige over time.[90] In addition, some men believe the preservation and dissemination of their surnames gives them "immortality,"[91] and demarcates their dominion over others who bear their surnames.[92] Finally, many men believe that the sharing of a surname with their children is necessary to

86. *See id.* at 103.
87. *Id.* at 101.
88. *See infra* Section III.B.1.
89. *See infra* Section III.B.1.
90. *See infra* Section III.B.1.
91. *See infra* Section III.B.2.
92. *See infra* Section III.B.3.

maintain a strong filial bond, especially when their children are no longer in their custody.[93] For these reasons and others, men often have an instinctive aversion to name change petitions—an aversion that will be explored in greater detail in the following subsections.

1. Surnames and Identity

I argue here that many men believe their surnames are inextricably bound up with their identities. I define the term "identity" as it is defined in humanistic psychology: a person's self-structure. One's self-structure is comprised of "the self-concept (the person's beliefs about himself), the self-ideal (his view of how he ought to be), and his public selves (the way in which he wishes to be experienced by others)."[94] As Professor Sidney Jourard writes, "A person's self-structure functions as a regulator of his experience and action, so that from day to day, and year to year, he will sense continuity in his existence, and will recognize himself with a sense of familiarity.... Loss of a sense of identity is tantamount to dying...."[95] One's self-structure is influenced by social definitions of behavior appropriate to one's sex.[96]

To assess the link between surnames and identity, one must begin by noting the statistical rarity of name changes by adult men. Men in our society are far less likely than women to abandon use of their birth names at marriage or otherwise.[97] While some men do

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93. *See infra* Section III.B.4.

94. SIDNEY M. JOURARD, HEALTHY PERSONALITY: AN APPROACH FROM THE VIEWPOINT OF HUMANISTIC PSYCHOLOGY 170 (1974). Other definitions of identity exist. For example, Anselm L. Strauss argues that, while "[i]dentity as a concept is fully as elusive as is everyone's sense of his own personal identity," generally "identity is connected with the fateful appraisals made of oneself—by oneself and by others." ANSELM L. STRAUSS, MIRRORS AND MASKS: THE SEARCH FOR IDENTITY 9 (1969); *see also* Erik H. Erikson, *Identity and the Life Cycle*, 1 PSYCHOL. ISSUES 1, 23 (1959) ("The conscious feeling of having a *personal identity* is based on two simultaneous observations: the immediate perception of one's selfsameness and continuity in time; and the simultaneous perception of the fact that others recognize one's sameness and continuity."). For some insight into the term's complexity, see, e.g., CROSS-CULTURAL STUDIES IN MENTAL HEALTH: IDENTITY, MENTAL HEALTH AND VALUE SYSTEMS 3 (Kenneth Soddy ed., 1961) (commenting that the Scientific Committee of World Federations for Mental Health could not find "a unified convention of use" for the term "identity").

95. JOURARD, *supra* note 94, at 152.

96. *See id.* at 218.

97. *See* ALFORD, *supra* note 10, at 157-58 (noting that three million women assume their husbands' surnames at marriage each year, but there are only approximately one hundred thousand court-approved name changes annually in the United States); Holt, *supra* note 10, at 108 ("Marriage is, and has always been, the most productive source of substitution of one name for another."). *See also infra* notes 169-70 and accompanying

change their names—for example, immigrants seeking assimilation, religious converts, or people reasserting their ethnic identity[98] —the vast majority retain the same surname from birth to death. A journalist aptly described the male perspective:

> Married women have four or more choices. 1) Keep the last name they were given at birth. 2) Take the husband's last name. 3) Use three names, as in Hillary Rodham Clinton; or . . . join the wife's birth name and the husband's birth name with a hyphen . . . . 4) Use the unmarried name in most matters professional, and use the husband's name in at least some matters personal and domestic. Most men, if they were to wake up one morning and find themselves transformed into married women, would (rather huffily) choose Option No. 1.[99]

Because most men bear the same surname throughout their lives, they often believe that a single lifelong surname is vital to their sense of identity. One literary critic has written that "[t]o men in our culture, the name of the father is an irrevocable identity."[100] For example, Professor Jourard, a psychologist, has explained how his own

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text. Of course, some women do have a continuous surname for life: most notably, women who do not marry.

98. *See* ALFORD, *supra* note 10, at 158-60 (noting also "radical political conversions" and sex-changes as other motivations); *see also* STRAUSS, *supra* note 94, at 17 (mentioning religious conversion); Darrel W. Drury & John D. McCarthy, *The Social Psychology of Name Change: Reflections on a Serendipitous Discovery*, 43 SOC. PSYCHOL. Q. 310, 311 (1980) ("Upon entering a foreign culture where a language other than one's own is predominant, a person may experience pressure to alter his or her mode of self referral.") (quoting H. L. MENCKEN, THE AMERICAN LANGUAGE 347-48 (1931) and citing THE AMERICAN LANGUAGE: SUPPLEMENT II (1948)). In addition, actors are one group of men that sometimes do change their name, by assuming a "stage name." For example, Roy Harold Scherer Jr. became Rock Hudson, Leonard Slye became Roy Rogers, and Ferdinand La Methe became Jelly Roll Morton. *See generally* Don Asher, *Confessions of a Name-dropper*, HARPER'S MAG., Aug. 1994, at 71, 73 (discussing a number of actors' name changes).

99. Lance Morrow, *The Strange Burden of a Name*, TIME, Mar. 8, 1993, at 76; *see also* Carey Quan Gelernter, *Taking Names: Most Brides Now Are Using Their Husbands' Surnames*, SEATTLE TIMES, Mar. 10, 1986, at C1 ("[S]ome husbands who are uncomfortable about a wife keeping her own name will accept her hyphenating her name. Most won't hyphenate theirs, though.").

100. Marie Maclean, *The Performance of Illegitimacy: Signing the Matronym*, 25 NEW LITERARY HIST. 95, 99 (1994); *see also* Esco v. State, 179 So. 2d 766, 768 (Ala. 1965) ("The general rule is well settled that identity of name imports, prima facie, identity of person. It would seem to follow that a difference of name imports, prima facie, a difference of person. A change of name, then, it can be argued, always imports, at least prima facie, a difference in identity. To some extent, a change of name always conceals the nominee's identity." (citations omitted)); Avner Falk, *Identity and Name Changes*, 62 PSYCHOANALYTIC REV. 647, 655 (1976) ("Names have strong affective value and symbolize an important part of a person's identity.").

identity is tightly intertwined with his name:

> I am a Jourard, and of all the Jourards, I am that one named Sidney. People from my home town had little difficulty recognizing me as a Jourard when I was growing up; there was a physical resemblance among us and we all took pride in being hard-working, friendly, and independent. But I am that Jourard named Sidney, and I do not behave in ways identical with my brothers and sisters, nor do I experience the world in the ways they do. *My identity is my own.* My first name and my surname come to stand for some limits on the ways in which I will act—there are many things I will not do because I am a Jourard, named Sidney, and there are many things which I demand of myself, and which others expect of me, because I am that very person.[101]

Professor Jourard argued that it would be "out of character" for a man to change his surname; to do so would compromise his identity.[102]

Other men concur with Professor Jourard's sentiment. John Russell, a nursing manager of a nonprofit home-health agency, opined that " '[n]ames are very important and I would never give up mine; I couldn't understand why anybody would give up hers.' "[103] Another man, who held "conventional" views,[104] explained that his name was a real part of him (like an arm or finger), and believed that " '*everyone* feels their name is a part of them—it is a part of them.' "[105] The author Arthur Kurzweil has echoed this view:

> [I would never change my surname!] . . . "Surnames are equally important [as first names]. I could never understand how a person could change his last name. . . . [For me] changing one's name is like cutting off an arm. It is part of you. How can you bear to lose it?"[106]

The link between a constant name and a consistent identity emerges in some male litigants' arguments in disputes over their children's surnames. For example, one father testified "that he felt

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101. JOURARD, *supra* note 94, at 150 (emphasis added).

102. *See id.* at 155.

103. Gelernter, *supra* note 99, at C1.

104. *See* Holt, *supra* note 10, at 227 (interview with George Woodward Trcziyulny).

105. *Id.* at 231 (interview with George Woodward Trcziyulny).

106. LEBELL, *supra* note 32, at 24 (quoting ARTHUR KURZWEIL, FROM GENERATION TO GENERATION: HOW TO TRACE YOUR JEWISH GENEALOGY AND PERSONAL HISTORY 27 (1982) (first and third alteration in original) (second omission in original)); Jim Croce, *I Got a Name*, *on* I GOT A NAME (ABC Records 1973) ("Like pine trees lining the winding road I've got a name/ I got a name Like the singing bird and the croaking toad/ I've got a name And I carry it with me like my daddy did. . . .").

that it would be in the child's interest to retain his name as it would provide him 'a stable identity in an uncertain future.' "[107] Even when this argument is not made so explicitly, it is likely that such sentiments motivate other non-custodial fathers who oppose petitions to change their children's surnames.

Many men believe that a constant surname is important not only to one's personal sense of identity, but also to one's projection of that identity in the public sphere. In the fourteenth century, when surnames came into general use in England,[108] a surname actually communicated something about the person who bore the surname. At that time, due to the limited number of first names, it became customary for men to add surnames to their baptismal names.[109] Surnames usually reflected an aspect of a man's life circumstances: "Practically all of the European family names were ... derived in one or another of the following four ways: I. From the man's place of residence, either present or past; II. From the man's occupation;

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107. Hardy v. Hardy, 306 A.2d 244, 246 (Md. 1973).

108. Surname use probably began at the time of the Norman Conquest in 1066, influenced by the Domesday book. Initially, knights, nobility and gentry adopted surnames and not the peasantry. *See generally* Holt, *supra* note 10, at 36-37; Cherena Pacheco, *supra* note 42, at 5-9. Surnames became generally necessary and hereditary (by custom, not law) when Edward I established primogeniture, and when Richard II implemented the poll tax, which required assessors to record names. *See* C.M. MATTHEWS, ENGLISH SURNAMES 43-44 (1966); Seng, *supra* note 24, at 1307-08, 1324-27. Surname proliferation was also aided by the Parish Registers required by Henry VIII. *See In re* Shipley, 205 N.Y.S.2d 581, 586 (Sup. Ct. 1960) (citing CHARLES WAREING BARDSLEY, ENGLISH SURNAMES 3 (1875)); MATTHEWS, *supra* note 31, at 47; G.S. Arnold, *Personal Names*, 15 YALE L.J. 227, 227 (1906). It seems that "English surnames became fixed and hereditary in the period between the battles of Hastings and Agincourt." MATTHEWS, *supra* note 31, at 17. By 1300, 99% of all recorded men, rich as well as poor, had surnames, and many were hereditary. *See id.* at 48, 51. Various historians, legal scholars, and courts have already chronicled the history of surname adoption in England and its related history in the United States. Apart from those sources cited above, see *In re Marriage of Schiffman*, 620 P.2d 579, 581 (Cal. 1980) (en banc); *Gubernat v. Deremer*, 657 A.2d 856, 859-67 (N.J. 1995); *M.D. v. A.S.L.*, 646 A.2d 543, 544-45 (N.J. Super. Ct. Ch. Div. 1994); *In re Snook*, 2 Hilt. 566, 568-71 (N.Y.C.P. 1859); J. N. HOOK, FAMILY NAMES: HOW OUR SURNAMES CAME TO AMERICA 10-18 (1982); KUPPER, *supra* note 54, at 9-21; Doll, *supra* note 27, at 228-30; Shirley Raissi Bysiewicz & Gloria Jeanne Stillson MacDonnell, *Married Women's Surnames*, 5 CONN. L. Rev. 598, 599-602 (1973); Kennedy-Sjodin, *supra* note 16, at 173-75; MacDougall, *supra* note 24, at 108 n.37; Thornton, *supra* note 42, at 304-06.

109. *See* Arnold, *supra* note 108, at 227; Ralph Slovenko, *Overview: Names and the Law*, 32 NAMES 107, 107 (1984) ("The Normans adopted the Catholic system of a couple of hundred saints' names as constituting the entire acceptable repertoire of names. One could not complain that another used the same name. As a consequence, after the Catholic system took hold, there were not enough names in the village to distinguish everyone, and so, in the 14th century, surnames ... were adopted.").

III. From the father's name; IV. From a descriptive nickname."[110] A few surnames were even derived from mothers' first names.[111]

The importance of men's names to their public identities was reinforced in later centuries when the courts began protecting trade names, which sometimes derived from the surnames of businessmen. Courts initially regarded the right to use one's surname in business as "sacred,"[112] "absolute,"[113] and "natural and inalienable."[114] As one court stated in 1875:

> every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do any thing [sic] calculated to mislead.[115]

Absent a subjective intent to defraud, courts seldom limited a businessman's use of his surname as the name of his business.[116] It

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110. ELSDON C. SMITH, NEW DICTIONARY OF AMERICAN FAMILY NAMES xiv (1988); *see also* Smith v. United States Cas. Co., 90 N.E. 947, 948 (N.Y. 1910) (mentioning that names of estates, *inter alia*, also became surnames); MATTHEWS, *supra* note 32, at 32 ("In fact in Domesday Book we see the four types into which surnames can always be classified, those of locality, relationship, occupation and description . . . ."); Arnold, *supra* note 108, at 227 (noting that "even [a man's] real or fancied resemblance to an animal" could form the basis of a surname). African Americans, on the other hand, have surnames which may have been derived from different sources, depending upon whether their ancestors were slaves:

> Some slaves assumed and kept the names of their owners or past owners after the Civil War ended in 1865. Once emancipated, others adopted the names of notable citizens in their area or significant historical figures, such as Washington and Jefferson. Still others invented names to describe their status or occupation, such as "Freeman" or "Blacksmith." The result is that many biological families have a multiplicity of surnames which may or may not be based on legal relationships, such as marriage.

Shelly Reese, *Shrouded by Slavery*, 17 AM. DEMOGRAPHICS 51, 51 (1995); *see also* Arnold, *supra* note 108, at 232 (stating that after the civil war many "freedmen appropriated at wholesale the names of families in which they had formerly served" (citation omitted)).

111. *See* Leonard R.N. Ashley, *Nicknames and Surnames: Neglected Origins of Family Names, Especially Surnames Derived from Inn Signs*, 39 NAMES 167, 169 (1991) (explaining, among other examples, that the first name Barbara produced the surnames "*Babb, Babe, Babcock, Babson, Baby*, [and] maybe *Babbitt*").

112. Levitt Corp. v. Levitt, 593 F.2d 463, 467-68 (2d Cir. 1979) (explaining the demise of this view).

113. Meneely v. Meneely, 62 N.Y. 427, 431 (1875).

114. Hilton v. Hilton, 89 N.J. Eq. 182, 183-84 (1918).

115. *Meneely*, 62 N.Y. at 431-32.

116. *See* David Goldberg, *The Right To Use One's Own Name in Business*, 32 NAMES 156, 157 (1984); *see also, e.g.*, Brown Chem. Co. v. Meyer, 139 U.S. 540, 544-46 (1891)

was only at the turn of the century that courts started awarding limited injunctions if public confusion could result, despite the defendant's honest subjective intent.[117] The law's protection of surnames as trade names not only encouraged the equation of a man's surname with his public identity, but even implied that a man's surname had proprietary significance, and that encroachment upon the patronym infringed upon a man's property rights. Women, by contrast, were less influenced than men by judicial protection of trade names. Women were not involved in commerce to the same extent as men, and those women who were employed often adopted their husbands' surnames.[118]

(affirming lower court's ruling against plaintiff, maker of "Brown's Iron Bitters," in suit arising from defendant's labeling of product "Brown's Iron Tonic" because "the usual indicia of fraud are lacking"); Paul Westphal v. Westphal's World's Best Corp., 215 N.Y.S. 4, 6-7 (App. Div. 1926) (granting injunction because defendant was dishonestly trying to pass off tonic as invented by his grandfather when plaintiff owned the rights), *aff'd*, 154 N.E. 638 (N.Y. 1926) (per curiam).

117. *See, e.g.*, L.E. Waterman Co. v. Modern Pen Co., 235 U.S. 88, 93-95, 98 (1914) (upholding limited injunction). Public confusion continues to be relevant in determining whether an injunction will be granted. *See, e.g.*, Visser v. Macres, 29 Cal. Rptr. 367, 372 (Dist. Ct. App. 1963) (upholding injunction against flower shop operator although defendant did not intend to deceive); David B. Findlay, Inc. v. Findlay, 218 N.E.2d 531, 533 (N.Y. 1966) (upholding injunction which prevented Wally Findlay from opening "Wally Findlay Galleries" on the same block as his brother's art store which was called "Findlay's on 57th St."). However, injunctions based upon public confusion are usually narrowly tailored. *See, e.g.*, Herring-Hall-Marvin Safe Co. v. Hall's Safe Co., 208 U.S. 554, 559 (1908) ("An absolute prohibition against using the name would carry trade-marks too far. Therefore the rights of the two parties have been reconciled by allowing the use, provided that an explanation [that the companies are not associated] is attached."); Taylor Wine Co. v. Bully Hill Vineyards, Inc., 569 F.2d 731, 736 (2d Cir. 1978) (ruling that the defendant "may use his signature on a Bully Hill label or advertisement if he chooses, but only with appropriate disclaimer that he is not connected with, or a successor to, the Taylor Wine Company"); Purofied Down Prods. Corp. v. Puro Down Int'l, 530 F. Supp. 134, 136 (E.D.N.Y. 1982) (allowing defendant Arthur Puro to use his name in business, but enjoining the use in conjunction with the word "Down"); *Findlay*, 218 N.E.2d at 535 (enjoining Wally Findlay from using the family name only for his gallery on 57th Street). Yet a broad injunction may be issued if the defendant has sold the right to his name. *See, e.g.*, *Levitt*, 593 F.2d at 468. Over time, the law in this area has moved closer to general trademark law. *See* Goldberg, *supra* note 116, at 161.

118. *See* MATTHEWS, *supra* note 32, at 51-52 ("[F]rom the early fourteenth century . . . we see the majority of women of the working class called by their husband's surnames."); Slovenko, *supra* note 109, at 109 ("In the history of naming, as surnames were basically descriptive or occupational (like John the carpenter becoming John Carpenter), and as women did not pursue an occupation outside the home and inheritance typically passed through sons or other male heirs, women took upon marriage their husbands' surnames as their own."). *But see* GEORGE CASPAR HOMANS, ENGLISH VILLAGERS OF THE THIRTEENTH CENTURY 187 (1941) (explaining how husbands changed their surnames to their wives' surnames to "keep 'the name on the land' " if wife was an heiress); *but c.f.* Doe v. Hancock County Bd. of Health, 436 N.E.2d 791, 796 (Ind. 1982) (" 'Historically, it was not uncommon for children to take the mother's surname where she owned the most

Today a man's surname usually does not reflect his personal characteristics, nor is it as strongly protected as a trade name as it once was; his surname is probably not even unique to him.[119] Yet a man's surname continues to be intertwined with his public identity. Men generally hold the positions of power and prestige in our society.[120] Men still are socialized to have a public persona, to provide financial support to the family, to succeed in the world, and to make a name for themselves.[121] A young man, striving to meet his male-defined role, uses his name to link his life's accomplishments together, in order to gain further power and prestige. His name is a very important part of his actual or potential public identity. This stark reality was captured in a Harvard Business Review article about business names. The author cautioned against using one's surname to name a business: "Remember, most entrepreneurial ven-

property or had the largest estate.' " (quoting Doe v. Danning, 549 P.2d 1, 4 (Wash. 1976) (en banc)) (Hunter, J., dissenting to grant of petition to transfer and dismissal).

119. While the United States' current population is approximately 260,000,000, U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995, at 1 (115th ed.), there are only 1,286,556 different surnames in the United States (as determined from Social Security Administration records). *See* Edward Callary, *Review of The Book of Names*, 34 NAMES 318, 319-20 (1986). In fact, the 100 most common surnames account for approximately one sixth of the population, and the most common 3,160 surnames account for more than half of the population. There are only 500,000 one-of-a-kind names. When one considers the global population, a name's uniqueness seems even more illusive. For example, some 75 million people answer to the name of Chang. *Id.*

120. The Federal Glass Ceiling Commission, chaired by then Labor Secretary Robert Reich, reported in March 1995 that 95% of the senior-level managers in the largest 2000 American industrial and service companies are men. *See* FEDERAL GLASS CEILING COMMISSION, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL iii-iv (1993); *see also An Unbreakable Glass Ceiling?*, BUS. WK., Mar. 20, 1995, at 42 (discussing the report); *The Glass Ceiling*, ECONOMIST, Aug. 26, 1995, at 59 (same).

121. *See* Jacquelynne S. Eccles & Lois W. Hoffman, *Sex Roles, Socialization, and Occupational Behavior*, *in* 1 CHILD DEVELOPMENT RESEARCH & SOCIAL POLICY, 367, 378 (Harold W. Stevenson & Alberta E. Siegel eds., 1984) ("Child-rearing practices in a society reflect the adult roles that children are expected to occupy. Because little girls are expected to grow up to be mothers with primary child-rearing responsibilities . . . nurturing, caring qualities are encouraged . . . . Boys, on the other hand, are given early training in the qualities that are functional to occupational roles because these are assumed to be their major adult commitments. Thus, socialization patterns reflect and reinforce sex differences in adult roles." (citation omitted)); *see also* Jeanne H. Block, *Another Look at Sex Differentiation in the Socialization Behaviors of Mothers and Fathers*, *in* THE PSYCHOLOGY OF WOMEN: FUTURE DIRECTIONS IN RESEARCH 29, 74-75 (Julia A. Sherman & Florence L. Denmark eds., 1978) (noting, for example, that data indicates parents emphasize "achievement" and "competition" more for sons than daughters, and that parents' relations with their daughters are characterized by more "physical closeness" and trust); Scott, *supra* note 12, at 663 ("Although the message is surely softened in the modern context, female children continue to absorb from society that self-fulfillment is found first through marriage and motherhood, while for male children self-fulfillment is more often equated with success in the broader world beyond the family." (footnote omitted)).

tures fail and when the business contains your surname, your name fails too. And when your name fails, to the public you as a person have failed."[122]

The significance of men's surnames in the public sphere probably contributes to the difficulty many men have envisioning the relinquishment of a surname. When children forego the paternal surname, the father may also perceive a public statement of rejection and failure, as when a business that bears his name fails. According to one jurist, "No amount of judicial legerdemain can conceal the fact that, in changing the surname of these children, the mother and the Courts are thereby encouraging the children to dishonor the name of the man who gave them paternity, and who is supporting them."[123] It is not surprising that men who hold this view are strongly opposed to name change petitions.

2. Patronymy as "Immortality"

Another reason why some men seek to preserve and disseminate their surnames is their belief that this practice allows them to achieve a sort of "immortality." As one researcher noted, "Many a Junior has been so named in the hope that he will be his father all over again."[124] In one case study, a male subject explained that "[s]ince he has no children, the family is going to die out, for he is the last [Trcziyulny] anywhere in this country . . . and it is a source of regret to him."[125] Similarly, a non-custodial father opposed to adding the maternal surname with a hyphen to his children's paternal surname explained that the son was the "only male heir of the Dennis surname, as I am an only child and my father is an only child."[126] In another case, the father's sole explanation for why it was in his nonmarital child's best interest to have the father's surname, and not the mother's surname, was that the child was his only son and the father's surname "was an honorable name which he would 'truly like' to have 'carried on.' "[127] The mother made no comparable claim, al-

122. Joseph R. Mancuso, *How to Name—And Not Name—A Business*, HARV. BUS. REV., Nov.-Dec. 1978, at 20, 21. The author cited the example of Ford's unsuccessful Edsel model, the failure of which redounds to the infamy of Henry Ford's great-grandson, Edsel Ford. *See id.* at 22.

123. Clinton v. Morrow, 247 S.W.2d 1015, 1019 (Ark. 1952) (McFaddin, J., dissenting in part).

124. Holt, *supra* note 10, at 21.

125. *Id.* at 231.

126. Appellant's Brief at 36a, *In re* Saxton, 309 N.W.2d 298 (Minn. 1981) (No. 50811), *cited in* Urbonya, *supra* note 44, at 798 n.35.

127. *In re* Paternity of M.O.B., 627 N.E.2d 1317, 1319 (Ind. Ct. App. 1994); *see also In*

though arguably the boy would carry on her surname if she were victorious in court.[128] In fact, women rarely, if ever, make such a claim.

The notion of "name immortality" through the practice of patronymics values abstract, historical, rarefied, and incomplete family relationships. Patrilineal succession obliterates the genealogical history of the maternal line, with potentially harmful consequences for children.[129] Patronymy connects a person to less than one half of one percent of all direct ancestors:

> Suppose the last name you were given at birth happened to be around ten generations ago, that your great-great-great-great-great-great-great-great-great-grandfather had this name.... If you went back to the tenth generation preceding your birth, you would have 1,024 great-great-great-great-great-great-great-great-great-grandparents. Only one great-great, etc.-grandfather among that gang of 1,024 would bear the patronym that was passed on to you. If you were to add up all your direct ancestors (... parents, grandparents, great-grandparents, and so forth, as distinguished from collateral ancestors: cousins, aunts, and uncles) back to that tenth generation, you would come up with 2,046 people. Of those 2,046 people, only ten of them bore (and passed on) this patronym.... [M]ore than 200 times as many of your direct ancestors bore another name than the one you happened to get.... What's more ... remember that of those ten men who represent the line of your patronymical last name, each of them came from, not one line, but two. So, each of those men who bore their given patronym for life did so at the expense of obliterating the hundreds of other names found along their maternal lines.[130]

The "immortality" achieved through patronymy is illusory indeed:

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re Marriage of Presson, 451 N.E.2d 970, 971 (Ill. App. Ct. 1983) (noting that father argued that "his son is his only male child and the only male grandchild of his parents"), *rev'd*, 465 N.E.2d 85 (Ill. 1984); Aitkin County Family Serv. Agency v. Girard, 390 N.W.2d 906, 908 (Minn. Ct. App. 1986) (noting that father explained "that he was the only son in his family that named a son after his father, that his father had expressed a dying wish that the Girard name be carried forward, and that he wanted to fulfill his father's wish").

128. *See M.O.B.*, 627 N.E.2d at 1317.

129. *See* CASEY MILLER & KATE SWIFT, WORDS AND WOMEN 10 (1976) ("To most of us the identity of our mother's mother's mother's mother, and that of *her* mother, and on back, are lost forever. How is one affected by this fading out of female ancestors whose names have disappeared from memory and the genealogical records? Research on the subject is not readily available, if it exists at all, but it seems likely that daughters are affected somewhat differently from sons. If it is emotionally healthy, as psychologists believe, for a child to identify with the parent of the same sex, would it not also be healthy for a child to identify with ancestors of the same sex?").

130. LEBELL, *supra* note 32, at 19-20.

Not only are future generations deracinated from their female ancestry, but they also lose their connection to all but a few male ancestors. Yet, flawed as it may be, the "immortality" theory remains widely held. As long as some men perceive a connection between their place in history and the dissemination of their surnames, patronymy will have its staunch advocates.

3. Surnames as Markers of Dominion

From time immemorial, the ability to name has corresponded with power. As Friedrich Nietzsche stated:

> The lordly right of giving names extends so far that one should allow oneself to conceive the origin of language itself as an expression of power on the part of the rulers: they say "this *is* this and this," they seal every thing and event with a sound and, as it were, take possession of it.[131]

Historically, a man's power often extended over the objects and people that bore his surname or that he named, as exemplified by businesses named after their owners,[132] slaves named by their masters,[133] and women and children named after their husbands and fathers.[134] Today, as discussed below, some men still perceive the dissemination of their surnames to their wives and children as de-

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131. FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 26 (Walter Kaufmann & R. J. Hollingdale trans., Vintage Books 1967) (describing the origin of the concept of "good").

132. For example, Honda was named for Japanese engineer Soichiro Honda. *See* ADRIAN ROOM, DICTIONARY OF TRADE NAME ORIGINS 92 (1982). The Hoover vacuum cleaner was named for William Henry Hoover, who bought the rights to the cleaner from J. Murray Spangler. *See id.* at 92-93. Max Factor established his cosmetics firm in 1909. *See id.* at 118. Tupperware was named after U.S. molding engineer Earl Tupper. *See id.* at 176.

133. *See* Cheryll Ann Cody, *There Was No "Absalom" on the Ball Plantations: Slave-Naming Practices in the South Carolina Low Country, 1720-1865*, 92 AM. HIST. REV. 563, 572 & n.15, 590 tbl. (1987) (stating that slave owners selected the names of purchased slaves and first generation slave children in order to uniquely identify the slave, although the number of plantations, size of the slave population, and regular owner absenteeism made it unlikely that owners continued to select the names of slave children after the first generation).

134. *See In re* Marriage of Schiffman, 620 P.2d 579, 581 (Cal. 1980) (en banc) (linking to coverture the customs that a woman assumed her husband's surname upon marriage and the offspring assumed the father's surname); MacDougall, *supra* note 24, at 138 (attributing the tradition of patronymics to the practice of men naming everything they paid for); Leavitt, *supra* note 42, at 101 ("When the doctrine of coverture made it impossible . . . for the married woman to handle property, no reason existed for the family to bear any name but the paternal surname."); Margaret Buc Spencer, Comment, *A Woman's Right to Her Name*, 21 UCLA L. REV. 665, 666 (1973) (arguing that the common law's marital surname rule derives from the doctrine of coverture).

marcating the extent of their dominion, either symbolically or actually.[135]

Margaret Atwood's novel *The Handmaid's Tale* provides a chilling illustration of the Nietzschean notion that naming is an expression of dominion.[136] The novel is set in a future dystopian society in which only a small proportion of women are capable of reproduction. The "Handmaids" are fertile women who are kept as chattel by male masters. The novel's narrator, a Handmaid, has been given a new name, like all Handmaids. While one never learns any Handmaid's surname in the novel, the Handmaid narrator is called Offred, a name different from her first name at birth. As her master's name is Fred, her name represents his possession of her: she is Of-fred. If a Handmaid changes masters, her name changes as well.

> The significance of their namelessness—their interchangeability in the eyes of their masters—is made especially clear in one incident involving the Handmaid with whom Offred is paired for daily shopping excursions. This woman, Ofglen, who has been active in the underground, suddenly disappears (We learn that her underground activities have been discovered, and, fearing that under torture she may incriminate others, she kills herself). Offred goes to meet her at the prearranged street corner and is met by her replacement. When the frightened Offred asks, " '["h]as Ofglen been transferred so soon?,' " the replacement replies, " 'I am Ofglen.' "[137]

In some respects, the nightmarish world of *The Handmaid's Tale* parallels modern America.[138] In our society, women tend to assume their husbands' names upon marriage, and children are given the husbands' surnames as well. Just as every Handmaid who belonged to Glen was "Ofglen," every woman married to Mr. Smith is the new Mrs. Smith, and every child fathered by Mr. Smith is named Smith also. The symbolism attending the practice is pronouced.

The use of "rights" language by courts in reference to fathers' ability to prevent their non-custodial children from abandoning the

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135. *See infra* text accompanying note 151.

136. *See* MARGARET ATWOOD, THE HANDMAID'S TALE (1986); *see generally* Charlotte Templin, *Names and Naming Tell an Archetypal Story in Margaret Atwood's* The Handmaid's Tale, 41 NAMES 143, 146 (1993) ("Men occupy positions of authority; women serve and obey, and have names appropriate to their subordinate status.").

137. Templin, *supra* note 136, at 148-49 (quoting ATWOOD, *supra* note 136, at 283).

138. *See* Templin, *supra* note 136, at 145 ("[Atwood's novel] is a fable of our time, showing us the fundamental flaws in our society .... This fable can be read in part through the names of Atwood's characters.").

patronym reinforces the image that men alone have the power to name. In the past, courts had often characterized the man's interest in passing his surname on to his children as a "protectible interest"[139] or a "right."[140] While many courts had used this language in the context of affording the father procedural due process to challenge a purposed name change,[141] the language also had substantive weight.

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139. Laks v. Laks, 540 P.2d. 1277, 1279 (Ariz. Ct. App. 1975) (stating that although father's right to have children bear his surname has "never amounted to a common law legal right," courts "have generally recognized that the father has a protectible interest in having his child bear the parental surname in accordance with the usual custom"); Carroll v. Johnson, 565 S.W.2d 10, 13 (Ark. 1978) (" 'The courts have generally recognized that the father has a protectible interest in having his child bear the parental surname in accordance with the usual custom....' ") (quoting W.E. Shipley, Annotation, *Rights and Remedies of Parents with Respect to the Names of their Children*, 53 A.L.R.2d 914, 915 (1957)); *In re* Trower, 66 Cal. Rptr. 873, 874 (Ct. App. 1968) (father has a "protectible interest in having the child bear the paternal surname"), *overruled by In re* Marriage of Schiffman, 620 P.2d 579, 583 (Cal. 1980) (adopting best interests test); Burke v. Hammonds, 586 S.W.2d 307, 309 (Ky. Ct. App. 1979) (recognizing that "a natural father has a protectable right to have his child bear his name"); *Ex parte* Stull, 280 S.E.2d 209, 210 (S.C. 1981) ("[B]ecause the father has a protectible interest in having his child bear the parental surname ... he should be notified of any proceedings for a change in his minor child's surname...."); Brown v. Carroll, 683 S.W.2d 61, 63 (Tex. App. 1984, no writ) ("protectible interest").

140. *See, e.g.*, Worms v. Worms, 60 Cal. Rptr. 88, 91 (Ct. App. 1967) ("natural right"), *overruled by Schiffman*, 620 P.2d at 583 (adopting best interests test); West v. Wright, 283 A.2d 401, 402 (Md. 1971) (" '[T]he father has a natural right to have his son bear his name....' ") (quoting *In re* Yessner, 304 N.Y.S.2d 901, 903 (Cir. Ct. 1969)); Sobel v. Sobel, 134 A.2d 598, 600 (N.J. Super. Ct. Ch. Div. 1957) (holding that a father has "the right to expect his kin to bear his name"); Rio v. Rio, 504 N.Y.S.2d 959, 960-61 (Sup. Ct. 1986) (noting that courts base the father's right on natural law); *In re* Wachsberger, N.Y.L.J., June 28, 1982, at 16, 16 (Sup. Ct.) (noting the "inherent, natural fundamental [sic], primary or time-honored right of a father in his child's continued use of the paternal surname"); Young v. Board of Educ., 114 N.Y.S.2d 693, 694 (Sup. Ct. 1952) ("fundamental right"); De Vorkin v. Foster, 66 N.Y.S.2d 54, 55 (Sup. Ct. 1946) ("natural right"); Good v. Stevenson, 448 N.Y.S.2d 981, 983 (Fam. Ct. 1982) (stating that "a common law right of a father to have his child use his surname seems to have developed"); Yessner, 304 N.Y.S.2d at 903 (recognizing a father's "natural right to have his son bear his name"); *In re* Harris, 236 S.E.2d 426, 430 (W. Va. 1977) (comparing a father's right to have his child bear his surname to his rights under the state's adoption statute). Some courts raise the interest to the level of a "fundamental right" by equating loss of the paternal name with destruction of the parental bond. *See In re* J.S.S. & B.A.B., 895 P.2d 748, 749 (Okla. Ct. App. 1995). *But see* Concha v. Concha, 808 S.W.2d 230, 231 (Tex. Ct. App. 1991, no writ) (stating that father has no constitutionally protected interest in child bearing his surname; rather the standard is best interest of minor).

141. *See, e.g.*, *Carroll*, 565 S.W.2d at 17 (holding that non-custodial parent was entitled to notice of children's name change petition under procedural due process); *In re* Larson, 183 P.2d 688, 690-91 (Cal. Dist. Ct. App. 1947) (dismissing decree changing minor's name for failure to provide adequate notice and opportunity to be heard to child's father), *overruled by Schiffman*, 620 P.2d at 583 (adopting best interest test); Lazow v. Lazow, 147 So. 2d 12, 14 (Fla. Dist. Ct. App. 1962) (holding that six days' notice to father of name change hearing was insufficient); *In re* DeJesus, 254 N.Y.S.2d 23, 24-25 (Civ. Ct. 1964) (refusing to

A family law treatise summarized the law's "traditional view" of a petition by a divorcing or a divorced woman seeking to change her children's surname to either her resumed birth name or the children's stepfather's name: "[T]here was a sort of presumption or vaguely qualified right in the child's father that the child should continue to have the father's surname."[142] Although women may now have the equal legal right to pass their surnames on to their children,[143] numerous decisions within the last decade continue to characterize the *father's* interest as a "protectible interest" or a "right."[144] Such language persists because most children receive the patronym at birth and therefore it is their fathers' "protectible interest" that is implicated by name change petitions.[145] Consequently, the notion of dominion that attaches to the dissemination of a man's surname continues to receive the state's imprimatur by the courts' strong descriptive language.

It appears that the ramifications of patronymy are not merely symbolic. This practice disseminates a message (subconsciously or overtly) that reinforces patriarchy. "In Western society the patronym embodies the forces of tradition and authority; it enables the

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grant name change unless natural father is given due notice); *In re* Tubbs, 620 P.2d 384, 388 (Okla. 1980) (holding name change decree void for failure to give due notice to father); *Ex parte Stull*, 280 S.E.2d at 210 (stating that father should be notified of name change proceedings and allowed to participate); Scucchi v. Woodruff, 503 S.W.2d 356, 359-60 (Tex. Civ. App. 1973, no writ) (dismissing a default judgment changing child's name for failure to serve father with proper notice); Eschrich v. Williamson, 475 S.W.2d 380, 383 (Tex. Civ. App. 1972, writ ref'd n.r.e.) (holding that natural father was entitled to notice of hearing regarding changing of child's name); *In re Harris*, 236 S.E.2d at 430 (stating that child should be able to change surname if father has abandoned child, but "upon proper notice to the father").

142. HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 547-48 (1988); *see also supra* notes 144 & 145.

143. *See supra* section V.A.

144. *E.g.*, *In re* Paternity of Tibbitts, 668 N.E.2d 1266, 1268 (Ind. Ct. App. 1996) (father has a " 'protectible interest' " in his non-marital child bearing his surname) (quoting D.R.S. v. R.S.H., 412 N.E.2d 1257, 1265 (Ind. Ct. App. 1980)); Likins v. Logsdon, 793 S.W.2d 118, 122 (Ky. 1990) ("a right and a protectible interest"); Keegan v. Gudahl, 525 N.W.2d 695, 701 (S.D. 1994) (Henderson, Retired J., concurring in part, dissenting in part) ("protectible interest"); Replogle v. Replogle, No. 01-01-9312-cv-00516, 1994 WL 228227, at *2 (Tenn. Ct. App. May 27, 1994) ("protectible interest"); Halloran v. Kostka, 778 S.W.2d 454, 456 (Tenn. Ct. App. 1988) (" 'protectible interest' ") (quoting 57 AM. JUR. 2D *Name* § 15 (1988)); Beyah v. Shelton, 344 S.E.2d 909, 911 (Va. 1986) ("the importance of 'a father's interest' ") (quoting Flowers v. Cain, 237 S.E.2d 111, 113 (Va. 1977)).

145. The courts seem to use the term in a way that does necessarily reflect a preference for the patronym. *See, e.g.*, Cohan v. Cunningham, 480 N.Y.S.2d 656, 657 (1984) ("[A] father has a recognized interest in having his child bear his surname . . . [but] neither parent has a superior right to determine the surname of the child.").

dominant ideology and culture."[146] In addition, the continued practice of families bearing the male surname both strengthens and is strengthened by the actual power that many men wield within their families. This power is manifested through, among other things, domestic violence,[147] child discipline,[148] and women's and children's economic dependence.[149] The courts' preference for the patronym in

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146. Maclean, *supra* note 100, at 96.

147. Domestic violence victims are predominantly women. "Women were about 6 times more likely than men to experience violence committed by an intimate." BUREAU OF JUSTICE STATISTICS, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 1 (1995). Approximately one million women a year suffer violence at the hands of an intimate. *See id.* at 3. Nearly one third of all female murder victims are killed by their husbands or boyfriends. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 13 (1990).

148. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.6 (1986) ("The parent of a minor child is justified in using a reasonable amount of force upon the child for the purpose of safeguarding or promoting the child's welfare. Thus the parent may punish the child for wrongdoing and not be guilty of a battery or of a violation of a statute punishing cruelty to children if the punishment is inflicted for this beneficent purpose, and if the punishment thus inflicted is not excessive in view of all the circumstances...."); *see also, e.g.*, Moakley v. State, 547 So. 2d 1246, 1246-47 (Fla. Dist. Ct. App. 1989) (overruling father's conviction for aggravated child abuse because spanking an eight-year-old child with a belt and causing bruising on buttocks and hips did not rise to the level of malicious punishment).

149. *See* Joan C. Williams, *Married Women and Property*, 1 VA. J. SOC. POL'Y & L. 383, 383 (1994) ("Female-headed households are five times more likely to be poor and up to ten times more likely to stay poor than are households with a male present." (citation omitted)) [hereinafter Williams, *Married Women and Property*]. Even when a male is present, the common law doctrine of family privacy helps ensure that any benefits the woman has in the marriage bargain may not be enforceable until divorce. *See, e.g.*, McGuire v. McGuire, 59 N.W.2d 336, 342 (Neb. 1953) (holding that so long as a couple is still living together, "[t]he living standards of a family are a matter of concern to the household, and not for the courts to determine"). Additionally, "[i]n intact families, sociological studies have found that husbands' market power translates into power within the household. Other studies show that husbands' ability to exit the marriage while retaining the key family asset greatly enhances their bargaining power within the marriage." Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2281 (1994) (citing SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 158 (1989) and ELLEN ISRAEL ROSEN, BITTER CHOICES: BLUE-COLLAR WOMEN IN AND OUT OF WORK 100-01 (1987)).

Various authors have described women's subordinated family status in stark terms. *See, e.g.*, SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 218-19 (1982) ("Although men no longer legally own women, many act as if they do. In her marriage vows today, the woman still promises to love, honor and obey.... Men's status is upheld by a general division of labor outside as well as inside the home that makes women economically dependent on men.... Battering is one tool that enforces husbands' authority over wives or simply reminds women that this authority exists."); Birgit Schmidt am Busch, *Domestic Violence and Title III of the Violence Against Women Act of 1993: A Feminist Critique*, 6 HASTINGS WOMEN'S L.J. 1, 24 (1995) ("The structure of today's society explains the prevalence of

the interpretation and application of the law gives men additional power that women do not have.[150]

While no conclusive evidence supports a causal link between a family's use of a man's surname and the man's power within the family, enough men articulate such a connection to raise here that possibility. A study by researchers at Indiana University showed that thirty-six percent of undergraduate male respondents, but only seven percent of undergraduate female respondents, agreed with the proposition that a man becomes the head of the household when his wife takes his name.[151] In addition, sixty-four percent of undergraduate male respondents, but only twenty-nine percent of undergraduate female respondents, agreed with the proposition that society would expect that a couple followed traditional marital roles if the couple observed traditional surname custom.[152] The same study also demonstrated that both men and women, but more men than women, attribute new responsibilities to a man when his family takes his surname.[153]

Some circumstantial evidence also supports the causal link between a family's use of the patronym and the man's power within his family. The fact that many more men than women believe a woman

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males as abusers and females as victims. Battering is supported by the belief that the father is the head of the family. The disproportionate degree to which women are objectified in society is another factor. The increasing use of pornography and the use of women's bodies to sell products ... reinforce the abuser's perception of women as property or subhuman. The ability of men to control women's education and employment further facilitates the use of violence against women. Women are financially unable to provide for themselves and the children without the abuser."); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996) ("The status of married women has improved, but wives still have not attained equality with their husband—if we measure equality as the dignitary and material 'goods' associated with the wealth wives control, or the kinds of work they perform, or the degree of physical security they enjoy."); Williams, *Married Women and Property*, *supra*, at 407-08 ("Today, laws supposedly aimed at 'equality' give women the formal right to own property. But the legal definition of property excludes human capital, leaving women with disproportionately little property to own, and revealing modern property law as little more than an updated version of coverture.").

150. *See infra* Section IV.

151. *See* Margaret Jean Intons-Peterson & Jill Crawford, *The Meanings of Marital Surnames*, 12 SEX ROLES 1163, 1168 (1985). As the researchers concluded, "In general, our female respondents were more likely than the males to dissociate traditional marital-surname styles from marital roles." *Id.*

152. *See id.* at 1168.

153. Undergraduate and graduate students believe that the wife's assumption of her husband's surname imposed responsibility upon the husband akin to that existing under coverture. *See id.* at 1169 ("When asked if a man becomes legally responsible for a women [sic] when she assumed his last name, 36% of the female and 43% of the male undergraduates and 19% of the graduate women and 31% of the graduate men agreed.").

should always change her name to that of her husband,[154] and the fact that even men married to women with different last names often seek to perpetuate the patronym through their children,[155] may suggest that men perceive an enhancement of their power through the practice. In addition, statements by women who have kept their birth names upon marriage provide further material for conjecture. Some of these women described their choice as motivated by a desire "to avoid feeling like an appendage, like someone's property."[156] They also often reported that their husbands supported their decision because the husbands wanted an equal partner.[157]

On the other hand, the fact that most women agree to adopt their spouses' surnames and to give those surnames to their children may undermine the alleged relationship (causal or other) between patronymy and men's power. If a connection exists, and if women perceive it at the time they choose to follow the custom of patronymy, then difficult questions are raised about why women follow custom or whether they have the ability to resist. A possible explanation is provided in a later section of this Article.[158]

4. Patronymy and the Father-Child Bond

Men whose marriages end in dissolution often lose physical custody of their children.[159] When later faced with the prospect that their children's surnames may change, many men who contest the name changes argue, and many courts agree, that the loss of a shared surname will harm the father's relationship with his child.[160] The

154. *See* Scheuble & Johnson, *supra* note 67, at 750 (noting that 32% of males and 5% of females interviewed agreed with the statement that "a woman should always change her name to that of her husband").

155. In Susan J. Kupper's study, almost 50% of the men said that the children should receive the father's surname even if the parents use different surnames. *See* KUPPER, *supra* note 53, at 84. "Most used as their rationale either tradition (one man wrote, 'this is a patrilineal society') or simplicity for the sake of the child." *Id.* Another 25% of the men said that the children should be given a combined surname, while the final 25% of the men said that they did not know or had not decided. *See id.* Only one respondent wanted the children to bear the mother's surname. *See id.* Yet fewer men in Kupper's study will probably select a nontraditional surname for their children than the men's responses indicate. Many of the men advocating combined surnames for their children were not yet fathers, and in fact, 84.5% of those who already had children gave them the fathers' surname alone. *See id.* at 84. Many of the women explaining the traditional surname choice for their children stated that their husbands wanted to pass on the patronym. *See id.* at 85.

156. *Id.* at 24 (response of 10% of women who maintained their own surname).

157. *See* Foss & Edson, *supra* note 66, at 364. *But see infra* note 243.

158. *See infra* text accompanying notes 242-44.

159. *See supra* note 49.

160. *See infra* text accompanying notes 303 and 395-414.

father-child bond may already be strained by the physical separation of parent and child and the acrimony surrounding the dissolution, and a father may fear further deterioration of the relationship.

The connection between a surname and the strength of the parent-child relationship is discussed at length below in Section IV, when the Article explores how the law reflects men's conceptions of surnames. The connection between a shared surname and the quality of the parent-child relationship is the most common way courts justify a ruling that requires a child to continue using the surname of a non-custodial father.[161] In Section IV, I suggest that this benevolent rationale has serious limitations.[162]

In sum, I have maintained that the majority of men have a particular understanding of surnames. They believe, in whole or in part, that a surname is: (1) a fixed symbol of a man's identity, both on a personal level and in the public sphere; (2) a vessel for the man's "immortality"; (3) a marker of dominion indicating a man's authority over his wife and children; and (4) an essential component of a man's relationship with his children following marital dissolution. These perceptions have led many men to conclude that children's surnames should remain constant, even after the father who shares the child's surname has departed the household.

C. *Women's Conceptions of Surnames*

In general, most women's conceptions of the importance of surnames differ dramatically from the traditional male view analyzed above. Juliet's famous soliloquy in *Romeo and Juliet* provides a *mise-en-scène* for this section's discussion of the female perspective.

> O Romeo, Romeo, wherefore art thou Romeo?
> Deny thy father and refuse thy name;
> Or if thou wilt not, be but sworn my love
> And I'll no longer be a Capulet
> . . . .
> 'Tis but thy name that is my enemy,
> Thou art thyself, though not a Montague.
> What's Montague? It is nor hand nor foot
> Nor arm nor face, O be some other name
> Belonging to a man.

161. *See id.*

162. *See infra* text accompanying notes 305-62.

> What's in a name? that which we call a rose
> By any other word would smell as sweet.
> So Romeo would, were he not Romeo call'd,
> Retain that dear perfection which he owes
> Without that title. Romeo, doff thy name,
> And for thy name, which is no part of thee,
> Take all myself.[163]

Like Juliet, many women view a surname as fungible and distinct from one's core identity. The reason Juliet holds this view may vary from why other women hold this view: Juliet is enmeshed in a family feud that keeps her apart from Romeo, and that feud is identified in terms of the families' surnames. Most contemporary women's views on surnames, rather, are probably influenced by the fact that women generally forego their surnames upon marriage.[164] Most women do not expect surnominal constancy, so, as social science data confirms, their sense of a stable identity is not dependent on it.[165] In addition, Juliet's willingness to relinquish her own surname when she leaves her family's household to be with Romeo, while related to her unique circumstances, is consistent with many women's understanding of a surname as an associational label. Today most women view a surname's significance in its ability to label the woman, her husband, and her children as a "family."

1. Lability of Surnames

Under our society's system of patronymy, the imperative of patrilineal succession yields only to the tradition that a woman will relinquish her father's surname upon marriage and acquire her husband's surname. In a decision affirmed without comment by the United States Supreme Court, the District Court for the Middle District of Alabama explained the pervasiveness of this custom:

> Certainly the custom of the husband's surname denominating the wedded couple is one of long standing. While its origin is obscure, it suffices for our purposes to recognize that it is a tradition extending back into the heritage of most western civilizations. It is a custom common to all 50 states in this union.[166]

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163. WILLIAM SHAKESPEARE, THE TRAGEDY OF ROMEO AND JULIET 37-38 (Richard Hosley ed., Yale Univ. Press 1964).

164. *See infra* text accompanying footnotes 169-70.

165. *See infra* Section III.C.2.

166. Forbush v. Wallace, 341 F. Supp. 217, 221 (M.D. Ala. 1971) (upholding the unwrit-

Simply, "[a surname] is one of the things a little girl grows up knowing she will be expected to lose if she marries."[167]

The custom persists today. Most American women are not like Lucy Stone, the women's rights activist and abolitionist, who in 1855 refused to change her name upon marrying Henry Blackwell, saying: " 'My name is the symbol of my identity and must not be lost.' "[168] A 1994 study found that 90% of American women still take their husbands' surnames upon marriage or remarriage, and only two percent use their birth names exclusively.[169] A 1995 study found that it was

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ten regulation of the Alabama Department of Public Safety that a married woman use her husband's surname to seek and obtain a driver's license), *aff'd*, 405 U.S. 970 (1972); *accord* M.D. v. A.S.L., 646 A.2d 543, 544 (N.J. Super. Ct. Ch. Div. 1994) ("In modern society . . . it has been customary for a woman to adopt her husband's surname upon marriage."); *In re* Dengler, 246 N.W.2d 758, 760 (N.D. 1976) ("[W]hen daughters marry, by custom, each assumes the surname of her husband.").

167. MILLER & SWIFT, *supra* note 129, at 5.

168. *Id.* at 13; *see* Holt, *supra* note 10, at 109 (same). Stone initially went by "Lucy Stone Blackwell," adopting the same name structure as Elizabeth Cady Stanton. *See* Denise Stamp Yannone, *His Name or Yours?*, MODERN BRIDE, Feb. 1984, at 210, 210 (quoting Dr. Natalie Naylor, specialist in women's history at Hofstra University). She later reverted back to using just Stone. Stone's refusal to take her husband's name meant that she was refused permission to vote in a 1879 school committee election. Ultimately, her attempt to vote led the Massachusetts Board of Registrars to convert its decision in her case into a general ruling that " '[a] married woman must vote bearing her husband's surname.' " Una Stannard, *Manners Make Laws: Married Women's Names in the United States*, 32 NAMES 114, 115 (1984). The controversy was widely reported in the Boston and New York newspapers, and Lucy Stone's "attempt to defy custom," *id.* at 115, apparently caused a legal backlash, including the codification of the rule that women must take their husbands' surnames upon marriage, which was not the common law rule nor previously codified in treatises, *see id.* at 114-15 (noting, for example, that while the first five editions of Joel P. Bishop's *Commentaries on the Law of Marriage and Divorce* did not mention names, the 1881 edition added a section that stated "[t]he rule of law and custom is familiar, that marriage confers on the woman the husband's surname.").

Lucy Stone and Henry Blackwell had a daughter and named her Alice Stone Blackwell; Stone was her middle name. While Henry felt that Lucy had the right to give Alice the surname Stone, because Lucy had " 'suffered to bring the child into the world,' " Lucy felt that this was unfair to Henry and Alice, as Alice would have been marked as illegitimate. STANNARD, *supra* note 19, at 101; *see also* ALICE STONE BLACKWELL, LUCY STONE: PIONEER OF WOMAN'S RIGHTS 195 (1930) (same); ELINOR RICE HAYS, MORNING STAR: A BIOGRAPHY OF LUCY STONE, 1818-1893, 151 (1961) (same).

The Lucy Stone League opened in New York in 1921 and was organized to help women keep their names after marriage. *See* MILLER & SWIFT, *supra* note 129, at 14. It was activated when the keep-your-own name movement from 1910-1920 seemed to be dying. *See* STANNARD, *supra* note 19, at 187. The League's position on children's surnames was very conservative; it adopted the position that children should continue to be named after the father, as that was the children's "guarantee of legitimacy and of their legal rights of inheritance." *Id.* at 200. In fact, almost all Lucy Stoners, like Lucy Stone herself, gave their children the mother's surname as a middle name and the father's surname as the child's surname. *See id.*

169. *See* Joan Brightman, *Why Hillary Chooses Rodham Clinton*, AM. DEMO-

the norm in more than ninety-five out of one hundred marriages for a woman to take her husband's surname upon marriage.[170] The practice of a woman taking her husband's surname upon marriage, to the extent it is in decline, is eroding very slowly.[171] Some evidence exists, however, that it may be eroding faster for African-American women,[172] and that it may erode slightly faster in the future for Cau-

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GRAPHICS, Mar. 1994, at 9, 9 ("Nine out of ten American wives use their husband's last name."). In fact,

> [H]yphenated names are used by 5 percent of couples, while just 2 percent of married women use their maiden name exclusively. About 3 percent of women use other alternatives. This category includes... [women who use a] maiden name as a middle name.... [It also includes women who] switch names, using [a] maiden name professionally and [a] husband's name for social or legal purposes.

Id.; see also Carmen Livingston, *Many Take Vows But Not 'His' Name*, MILWAUKEE J., June 20, 1993, at G1 (While "[a] survey of 2,000 engaged men and women in 1991 by Bride's magazine found that 29% of the brides planned to keep their birth surnames," "an informal telephone survey [done by the reporter] suggests that most women here still follow the tradition of giving up their birth surnames and taking their husband's.").

170. *See* Johnson & Scheuble, *supra* note 66, at 731. Among those women who married after 1980 and did not follow tradition, half either kept their birth names or hyphenated. *See id.* at 727. For those who married before 1980, "other" was the most common unconventional choice, which the authors speculated may have been the woman's last name in a previous marriage. *See id.* The authors, however, also found that among both groups, approximately 25% retained their birth name as a middle name, as this practice was extremely common in the South and had a long history in Southern society. *See id.* at 731. For the variables that correlated with unconventional name choice, see *infra* notes 234-38 and accompanying text.

171. *See* Johnson & Scheuble, *supra* note 66, at 731 (stating that there appears to be only "some minor erosion of this practice" when one compares individuals who married before 1980 and those who married after 1980). For those women married before 1980, only 1.4% reported using an unconventional last name. For those women married after 1980, 4.7% selected an unconventional last name. *See id.* at 727. *See also* Gelernter, *supra* note 99, at C1 ("[A]fter a period in the 1970s when women in greater numbers were keeping their own surnames or creating hyphenated names upon marriage, the custom of taking the husband's name seems to be emerging stronger than ever.") (reporting that out of 150 wedding announcements sent to *The New York Times* in the last two years, seven women kept their names, five women used both names, all the other women took their husbands' names, and no man hyphenated his name or used his wife's name).

172. There is some indication that African-American women are more reluctant to take their husbands' names than the Johnson and Scheuble numbers, *see supra* note 170 and accompanying text, reflect. *See* Syed Malik Khatib, *Personal Names and Name Changes*, 25 J. BLACK STUD. 349, 350-52 (1995) (reporting that a study of African-American college students showed that approximately 50% of women and 10% of men anticipated changing their names; half of the women who anticipated changing their names would do so for marital reasons, and half said they would change their names "for reasons associated with monetary gain or cultural (African) identification"); *see also* Livingston, *supra* note 169, at G1 ("Black Milwaukeeans tend not to make an issue out of taking the husband's name, two local ministers said. The Rev. James Leary... says that about 20% of his 800-member congregation have chosen to hyphenate."). Yet one author claims that African-American men put more importance on their spouses taking their surnames than non-African-American men because the former want to ensure that the image of black man-

casian women than in the recent past.[173]

Because of the convention, many women change their surnames repeatedly throughout the course of their lives.[174] For example, Leona Helmsley has had five surnames during her life.[175] The annals of history are replete with similar examples.[176] Most Americans never raise an eyebrow when a woman changes her name upon remarriage, but if a man were to adopt the surname of his spouse each time he married, he would surely draw the attention (and perhaps the censure) of his peers.[177]

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hood is not blemished or the black family divided. *See id.* (citing Harriette Cole, fashion editor of *Essence* magazine and author of *Jumping the Broom: The African-American Wedding Planner*). More empirical research on African Americans and their marital naming practices is needed. *See* Johnson & Scheuble, *supra* note 66, at 725 ("Much less is known about the expected pattern among African Americans [regarding women's marital naming], so we cannot hypothesize the direction of the effect for this group."); Scheuble & Johnson, *supra* note 67, at 748 ("The marital naming practices and attitudes towards naming in the predominately white American culture or in racial or ethnic minorities have not been explored in the research literature and are thus unknown.").

173. In another study by David Johnson and Laurie Scheuble, 82% of female college students indicated that they intended to take their spouse's name upon marriage, and another 7% indicated that they would hyphenate their last name. *See* Scheuble & Johnson, *supra* note 67, at 750 tbl.1. Scheuble and Johnson's study sample was 98% white. *See id.* at 749.

174. Actresses historically have been one group of women, however, who do not change their surnames upon marriage. Elizabeth Taylor serves as a recent example.

175. Leona Helmsley was born with the surname Rosenthal, she has had three husbands (one of whom she married twice), and she adopted the surname Roberts in between marriages. *See* Andrea Rothman, *What if Leona Leaves The Palace for the Pokey?*, BUS. WK., July 24, 1989, at 79, 79-81.

176. For example, Mary Baker Eddy, the founder of Christian Science, had a nominal history of Mary Morse Baker Glover Patterson Eddy. She was Mary Morse Baker for twenty-two years (although she published some poems under various pseudonyms during that time), Mrs. Glover for ten years (after marrying George Glover, although he died six months later), Mrs. Patterson for fifteen years (after marrying Dr. Daniel Patterson), Mrs. Morse Glover and Mrs. Baker Glover for nine years (after her separation from Dr. Patterson), and Mrs. Eddy (when she married Asa Gilbert Eddy at age fifty-five). *See* STANNARD, *supra* note 22, at 76-78. Betsy Ross had three husbands and her gravestone reads: " 'Elizabeth Griscom Ross Ashbourn Claypoole.'" *Id.* at 73. This phenomenon was fairly common throughout the Nineteenth Century because when husbands died, their wives often remarried. *See id.*

177. Consider, for example, if F. Lee Bailey had changed his name each of the four times he married. In his early twenties, when he studied law and was admitted to the bar, he might have become F. Lee Gott. He would have become F. Lee Victoria after his second marriage in the 1960s. In 1972, upon his third marriage, he might have become F. Lee Hart, and that would have been the name under which he published numerous books on criminal law and defended Patty Hearst. In 1985, upon his fourth marriage, he might have become F. Lee Shiers, and under this name he would have defended O.J. Simpson. As he had two sons by his first marriage, and another son with his second wife, he might have retained some of his prior surnames for his children's benefit. For example, he might have taken the name F. Lee Gott Victoria Hart upon his third marriage. Or he might have had

The lability of most women's surnames allows women to see the advantages of change in a way men do not. A name change usually signals a marriage, a positive event in the woman's life. Even when the name change accompanies a divorce, the name change may signal a welcomed change of status or a woman may enjoy having multiple personae. One woman who had been married three times and divorced three times "uses all four available last names, changing them as if she were changing outfits, according to mood or season."[178] Even women who never marry benefit from society's acceptance of the fungibility of women's names: for example, five women in the fourth generation of the Rockefeller clan, known as "the cousins," dropped the Rockefeller name without the prompting of marriage.[179] As a general matter, women enjoy a flexibility to alter their surnames that men do not share.[180]

The law undoubtedly has contributed to most women's attitudes toward their own surnames. Although neither the common law of England nor the early common law of the United States required a woman to forego her surname upon marriage,[181] starting in the late 1800s, numerous United States courts and treatises stated that upon marriage a woman's surname changed as a matter of law.[182] As late

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attachment to each of his names, so that when he married a fourth time he might have been F. Lee B.G.V.H. Shiers, using the initials B.G.V.H. to represent the first letter of each of his previous surnames. *See* WHO'S WHO IN AMERICA 145 (47th ed. 1992-93); Ira Silverman & Fredric Dannen, *A Complicated Life*, 72 NEW YORKER, Mar. 11, 1996, at 44, 45-46; *cf.* STANNARD, *supra* note 19, at 78-79 (employing the same analysis for William O. Douglas, who married four times).

178. Morrow, *supra* note 99, at 76.

179. *See* Carol J. Loomis, *The Rockefellers End of a Dynasty?*, FORTUNE, Aug. 4, 1986, at 26, 26-28. Some of these women use their middle names as their surnames (e.g., Hope Aldrich and Margaret Dulany), and others adopted new surnames (e.g., Ann Clark Roberts). *See id.* at 28.

180. *See* LEBELL, *supra* note 32, at 24; *see also* 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, 8-9 (1996) (explaining her own name choice upon marriage and that her husband's "identity was wrapped positively in the folds of [his surname]" and that he did not "have the same sense of possibility about the transitory nature of names or identity in relation to others").

181. *See* 9 THE AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 813 (John Houston Merrill ed., 1st ed. 1889) ("[B]y custom, the wife is called by the husband's name. But whether marriage shall work any change of name at all, is, after all, a mere question of choice, and either may take the other's name, or they may join their names together."); *see also* Stannard, *supra* note 168, at 114 ("[I]t gradually became the custom for women to change their name to their husband's. They did so as a matter of choice. . . .").

182. *See* Stannard, *supra* note 168, at 114-17; *see also* Chapman v. Phoenix Nat'l Bank, 85 N.Y. 437, 449 (1881) ("For several centuries, by the common law among all English speaking people, a woman, upon her marriage, takes her husband's surname. That becomes her legal name, and she ceases to be known by her maiden name."); JAMES

as 1966, *Corpus Juris Secundum's* section on the "Name of Married Woman" started with the proposition: "At marriage the wife takes the husband's surname and [it] ... becomes her legal name. Her maiden surname is absolutely lost, and she ceases to be known thereby."[183] In March 1972, the United States Supreme Court affirmed *Forbush v. Wallace*,[184] in which the district court claimed that Alabama had "adopted the common law rule that upon marriage the wife by operation of law takes the husband's surname."[185] It was not until October 1972 that the legal pendulum started swinging in the opposite direction.[186] In the case of *Stuart v. Board of Supervisors of Elections*,[187] a court upheld a woman's right to use her birth name upon marriage and stated its understanding of the common law rule as derived from England.[188] In the years after *Stuart*, several other state courts also concluded that the common law did not require that a woman take her husband's surname upon marriage; these courts determined that the proper understanding of the English common law is that upon marriage a woman " 'acquires a new name by repute.... The change of name is in fact, rather than in law, a consequence of the marriage.' "[189] Today "all states ... recognize

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SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS § 40 (1882) ("Marriage at our law does not change the man's name, but it confers his surname upon the woman."); *Proper Designation of Married Women in Legal Proceedings*, 4 (new series) VA. L. REG. 721, 721 (1919) ("The law confers upon a wife the surname of her husband."). Stannard sees these initial legal misstatements as a backlash to both Lucy Stone's efforts to keep her own name and the Lucy Stone League's subsequent efforts. *See* Stannard, *supra* note 168, at 114-23.

183. 65 C.J.S. *Names* § 3 (1966).

184. 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd*, 405 U.S. 970 (1972).

185. *Id.* at 221 (upholding Alabama policy requiring married woman to use her husband's surname to seek and obtain a driver's license).

186. *See* Stannard, *supra* note 168, at 125; *see also* STANNARD, *supra* note 19, at 282 ("Between 1972 and 1976 over thirty states, either by Attorney General Opinions, decisions in higher courts or legislation, acknowledged that when a woman takes her husband's name, she does so under the old common law right to use the name of one's choice, that married women, therefore, cannot be compelled to use their husbands' names for any purpose.").

187. 295 A.2d 223 (Md. 1972).

188. *See id.* at 227. "Under the common law of Maryland, as derived from the common law of England, Mary Emily Stuart's surname ... has not been changed by operation of law ... solely by reason of her marriage...." *Id.* The court noted that "[t]he mere fact of the marriage does not, as a matter of law, operate to establish the custom and tradition of the majority as a rule of law binding upon all." *Id.*

189. Kruzel v. Podell, 226 N.W.2d 458, 461 (Wis. 1975) (quoting 19 HALSBURY'S LAWS OF ENGLAND § 1350, at 829 (Viscount Simond ed., 3d ed. 1957)); *see also* State v. Taylor, 415 So. 2d 1043, 1047 (Ala. 1982) ("Our research has convinced us that *Forbush v. Wallace* does not accurately state the common law on names...."); Simmons v. O'Brien, 272 N.W.2d 273, 274 (Neb. 1978) ("A married woman, being free to adopt or not to adopt her

that women have the right to not change their names when they marry."[190] While women are no longer legally required to take their husbands' surnames upon marriage, generations of women grew up believing that the law required women to do so as a condition of marriage.

The ritualized and almost universal abandonment of birth names by half of the married population, mandated until recently by the law, likely influences women's perceptions of a surname's mutability. The impermanency of most women's surnames in turn affects many women's openness to name changes generally. As feminist literary critic Marie Maclean has explained:

> Whether they became brides of Christ or merely brides, ninety percent of women have traditionally experienced at least two public names in their lifetime (not including the changes in personal appellation which accompany us all in private life). Women therefore had from the first a certain protean quality. If one change is possible then all other changes become thinkable.[191]

2. Surnames and Identity

The fungibility of women's surnames led one researcher to study women who kept using their birth names upon marriage and to ask, "What does a name represent?"[192] Her rhetorical inquiry could be characterized as positing the end points of a continuum: "[t]he core of one's identity, or a fluid and changing entity . . . ?"[193] Social science data and women's voices indicate that the answer for most women falls much closer to the "fluid and changing entity" end of the continuum.[194] While some women's views fall on the opposite end, these women are a distinct minority, and even these women tend to have views similar to the vast majority of women with respect to children's surnames.[195]

Women, like men, have "identities," and a woman's name change upon marriage affects her identity. A surname change upon

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husband's surname at common law, remains free to do so.").

190. MacDougall, *supra* note 24, at 96 n.9 ("By statute, judicial opinion, state attorney general opinion, formal and informal agency directives or memoranda, or legislation, all states now recognize that women have the right to not change their names when they marry." (citing authority from all fifty states)).

191. Maclean, *supra* note 100, at 99.

192. KUPPER, *supra* note 54, at 1.

193. *Id.*

194. *See infra* text accompanying notes 198, 205-19.

195. *See infra* text accompanying notes 220-26, 239-41.

marriage signals a change of status (i.e., marriage), the passage into adulthood,[196] and/or the capacity for socially-permissible reproduction.[197] Yet a woman's name change does not generally jar her core sense of identity, as it might for a man. Rather, most women expect alterity; a woman's socialization tells her that she will bear a succession of surnames during her life. As one woman stated:

> I think in my case the name I am called doesn't matter very much. I feel much more strongly that the person that I am should continue and that it doesn't matter what that person is called. I would not care for an ugly name with unpleasant connotations (for aesthetic reasons as much as anything) but otherwise I am content to be called anything because *I am I* anyway . . . .[198]

To the extent that a woman's identity depends upon a constant name, it probably attaches to her praenomen.[199] Women's first names allow women to achieve recognition without being mistaken for a more publicly-known father or husband. In her article *Feminist Legal Methods*, Katharine Bartlett laments that the *Harvard Law Review* editors will not let her cite authors by their first and last names, in order "to humanize and particularize the authors."[200] She states, "First names have been one dignified way in which women could distinguish themselves from their fathers and their husbands."[201] Additionally, because of the impermanence of women's surnames, women's first names, perhaps more than men's first names, take on a special importance.[202] A possible outgrowth of the importance of women's first name is that girls are more likely than

196. *See* Susan Ferraro, *Name-Dropper*, N.Y. TIMES, May 2, 1993, § 6 (Magazine), at 18; Maclean, *supra* note 100, at 100.

197. *See* Maclean, *supra* note 100, at 100.

198. Holt, *supra* note 10, at 138; *see also* Jenny McPhee, *A Mother's Name*, N.Y. TIMES, Feb. 2, 1996 (Magazine), at 68 ("Though names can mean a lot to women, girls learn very early that they will probably lose their names when they marry. If you know you will lose something, you do not get very attached to it. Thus, the connection for women between name and identity becomes insignificant and unimportant.").

199. *See* Holt, *supra* note 10, at 152 (describing one woman's feeling that her first name was "inviolable").

200. Bartlett, *Feminist Legal Methods*, *supra* note 47, at 829 n.*.

201. *Id.*

202. *See* MILLER & SWIFT, *supra* note 129, at 7 (discussing how women's "first names seem often to be considered the logical, appropriate, or even polite counterpart of men's surnames") (citing as an example the many news stories that referred to Secretary of State Henry Kissinger and Nancy Maginnis when they married as "Kissinger and Nancy"). *But see supra* text accompanying note 101.

boys to have unusual first names.[203] Many mothers "want[] their daughters to have a 'different,' even 'odd-sounding' name .... that would make others take notice ...."[204]

The most relevant social science research reveals that women who took their husbands' surnames upon marriage did not feel that the name changes compromised their individual identities, but rather, the name changes celebrated their new relationships.[205] A 1989 study of 180 married women by Karen Foss and Belle Edson sought to explore "the kinds of accounts women offer about their [marital-]name choices and to determine the larger theories behind these accounts,"[206] as "names, name choices, and explanations about names provide clues about the world views of women."[207] The authors sent an equal number of questionnaires to three groups of women: (1) women who upon marriage took their husbands' surnames; (2) women who kept their own surnames; and (3) women

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203. *See* ALFORD, *supra* note 10, at 134 (1988) (finding boys' names to be more traditional and recurrent than girls' names, and hypothesizing that it reflects "one feature of a general cultural value emphasizing attractiveness for females and accomplishment for males"); *see also* Frank N. Willis et al., *Given Names, Social Class, and Professional Achievement*, 51 PSYCHOL. REP. 543, 548 (1982) ("Parents seem less bound by tradition in selecting a name for a girl. Perhaps they feel that it is more important for a girl to be temporarily attractive (have a name that is currently fashionable or eye catching) than to be conforming in the long run.").

204. Furstenberg & Talvitie, *supra* note 10, at 55 n.2 (citation omitted). My own experience supports this observation. My first name is Merle, and my brothers' first names are David and Gary.

205. Unfortunately, the social science research examining the implications of women's surname choices is rather limited. *See supra* note 67. Deborah A. Duggan et al. identified only nine empirical studies on women's marital names. *See* Duggan et al., *supra* note 58, at 89. Six of those studies are examined and discussed in this Article. The studies reviewed are the following: ALFORD, *supra* note 10; Holt, *supra* note 10; KUPPER, *supra* note 54; Foss & Edson, *supra* note 66; Penelope Wasson Dralle, *Women Physicians' Name Choices at Marriage*, 42 J. AM. MED. WOMEN'S ASS'N 173 (1987); Intons-Peterson & Crawford, *supra* note 152. Omitted as irrelevant to this Article's thesis are two studies which address stereotypes associated with women who continue using their birth names after marriage. *See* Sheila M. Embleton & Ruth King, *Attitudes Towards Maiden Name Retention*, 66 ONOMASTICA CANADIANA 11 (1984); Donna L. Atkinson, *Names and Titles: Maiden Name Retention and the Use of Ms.*, 9 J. ATLANTIC PROVINCES LINGUISTIC ASS'N 56 (1987). Also omitted is one study addressing cross-cultural patterns of marital naming practices. *See* Rubie S. Watson, *The Named and The Nameless: Gender and Person in Chinese Society*, 13 AM. ETHNOLOGIST 619 (1986).

206. Foss & Edson, *supra* note 66, at 358.

207. *Id.* at 370. They studied women who were pursuing a college degree or those with a degree who were working outside the home. Their sample was two-thirds White and one-third Black, Asian, or Hispanic. *See id.* at 359. The educational background of their sample casts some doubt on the ability to generalize their results to women generally. *See infra* note 237 (noting only 19.2% of women in the United States have college degrees).

who adopted hyphenated or new surnames.[208] The responses of the women who assumed their husbands' surnames are particularly revealing for purposes of this Article. These women's marital name choices correspond to the choices made by the vast majority of married women in this country.[209]

The authors found that all of the women's explanations for their name choices fell into one of three categories: "(1) concerns about self; (2) concerns about relationships; and (3) concerns about cultural or societal expectations."[210] However, while "all of the responses incorporated to a degree one of these concerns ... each group prioritized these levels differently."[211] "In the accounts offered by the women who took their husbands' names upon marriage, relationships emerge as the primary focus."[212]

> These women consistently place their relationships with their husbands and children in a central position in their lives, and their identities stem from these relationships more than from professional careers or other independent activities. For many of the women in this sample, having their husbands' names identifies them as "a team, a single unit."[213]

Cultural expectations ranked second in importance for these women, that is, seeing marriage as a prescribed role in life, with the name change at marriage as part of custom and convention.[214] The women were least concerned about their own "selves" in explaining their name choices. "These women repeatedly state that 'names don't mean that much to me .... [They are] only a trivial social custom,' 'My name is not particularly important to my identity,' 'what's in a name,' 'I didn't feel strongly about keeping it,' and 'names are just

208. *See id.* at 359.

209. Additionally, a greater percentage of the woman who assumed their husbands' surnames had children, so these women may be more likely to face a dispute upon divorce over a child's surname. *See id.* at 361 (stating that 86% of the women who took their husband's surnames were mothers compared to 59% of those women with hyphenated names and 53% who used solely their birth names). In addition, women who assumed their husbands' surnames were apt to change their surnames upon divorce or remarriage, with approximately one third of the women saying that they would resume using their birth names upon divorce, and most claiming they would take their new husbands' names if they remarried. *See id.* at 362. For a discussion of the views of the women in Foss and Edson's second and third categories, see *infra* note 220 and accompanying text.

210. *See* Foss & Edson, *supra* note 66, at 360.

211. *Id.*

212. *Id.*

213. *Id.*

214. *See id.* at 361.

labels; labels are not extremely important.' "[215] Foss and Edson conclude, "These women's sense of self depends on others; it is an acquired identity obtained through the marriage relationship."[216] Other commentators have reached similar conclusions.[217] As a reporter observed, "Many women who say it's easier to go with tradition argue that names aren't that significant."[218] A respondent to my informal Internet survey serves as an example: "I've never had a particular attachment to my last name, so it never bothered me to think of changing it."[219]

Other research, as well as Foss and Edson's own study, indicates that some women do link their identities to their birth names. Foss and Edson found that identity factored prominently in the reasoning of women who kept using their birth names upon marriage.[220] Similarly, Susan Kupper's study of women who continued using their birth names upon marriage found that "many women have a visceral need not to take 'someone else's' name: They fear that if the label changes, the contents will change, too."[221] Dr. Marion Panzer, a psy-

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215. *Id.* at 362.

216. *Id.* at 367.

217. For example, early Twentieth Century Austrian philosopher Otto Weininger stated that the custom of a woman changing her surname upon marriage reveals that "[w]omen are not bound to their names with any strong bond." OTTO WEININGER, SEX AND CHARACTER 206 (1906). Rather, a woman can assume the name of her husband "without any sense of loss." *Id.* Yet Weininger's interpretation of this fact was pejorative: "The fundamental namelessness of the woman is simply a sign of her undifferentiated personality." *See id.* This book "had a brief but powerful influence on popular psychology," MILLER & SWIFT, *supra* note 129, at 5, but has been severely criticized for its sexist and anti-Semitic content. *See, e.g.*, JEWS AND GENDER: RESPONSES TO OTTO WEININGER 3 (Nancy A. Harrowitz & Barbara Hyams eds., 1995) (describing Weininger's work as "an apotheosis of misogyny"); Misha Kavka, *The "Alluring Abyss of Nothingness": Misogyny and (Male) Hysteria in Otto Weininger*, 66 NEW GERMAN CRITIQUE 123, 123-24 (1995) ("*Sex and Character* now stands as one of the most blatant examples of misogynist and anti-Semitic writing to come out of turn-of-the-century Austria and Germany.").

218. *See* Gelernter, *supra* note 99, at C1.

219. Internet survey, *supra* note 12 (response of Roberta Becker).

220. *See* Foss & Edson, *supra* note 66, at 363 ("For women who kept their birth names the most important context is the self.... They consistently state that they want to 'maintain' or 'not lose' their personal identities...."). For women who adopted a hyphenated or new surname, the two most important explanations that emerged were "relationship" and "self," and these were given equal weight. *See id.* at 365.

221. KUPPER, *supra* note 54, at 5; *see id.* at 131 ("I was startled at the intensity of their feelings. Many of the women who wrote to me felt that their names are at the core of their being."). In addition, Bugental and Zelen conducted a study asking groups of individuals, "Who are you?" *See* James F.T. Bugental & Seymour L. Zelen, *Investigations into the 'Self-Concept' I. The W-A-Y*, 18 J. PERSONALITY 483, 483 (1950). Although the authors did not differentiate between first names and surnames, the authors concluded that for all individuals studied—university students, male construction workers, and female church

chologist, concurs: " '[T]he primary motivation for many women who retain their birth name stems from a desire to define themselves and maintain a stable sense of identity.' "[222] The following two statements by women who are reluctant to forego use of their birth names upon marriage are illustrative. One twenty-six-year-old teacher stated, "[A] man doesn't have to change his name and give up his identity when he marries. Why should I?"[223] Another teacher stated, "If I should ever marry, I plan to keep my name because it is my name. It is part of my identity. I don't want to feel that by marrying I become a completely different person."[224]

A 1985 study by Margaret Jean Intons-Peterson and Jill Crawford captured the sentiments of the women that strongly identify with their birth names. This study examined, among other areas, the "extent to which a person identifies with her or his premarital surname" and the "willingness to consider surname change," in order to evaluate these "variables" of identity.[225] As to the "extent to which a person identifies with her or his premarital surname," the authors found:

> Tradition suggests that females identify less with their premarital surnames than men because they are expected to change to another surname if they marry. Our data contradict this view: Half of both female and male undergraduates indicated that they identified a great deal with their *premarital* surnames. Even higher percentages of the graduate groups held this opinion (60% of the women and 58% of the men). The percentages did not differ significantly by sex for either group, indicating that both older and younger women identified as much as men with their surnames.
>
> What would happen to their sense of identity if they changed their surnames? More than half of the undergraduate men (61%) and women (53%) believed that their identities would change. The older group concurred: 62%

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members—"the name seems to be a central aspect or representative of the Self-Concept." *Id.* at 493 (evaluating significance of name as an answer to the question "Who are you?"). Yet, importantly, the listing of one's family status showed "its maximal frequency in the data at hand in the mature females, suggesting its increasing emphasis and importance in their concept of themselves." *Id.* at 494.

222. Yannone, *supra* note 168, at 210 (quoting interview with psychologist Marion Panzer).

223. *Id.* at 210. But the teacher's husband wanted "some recognition," which led the teacher to use her husband's surname as her middle name. *See id.*

224. *Id.* at 210.

225. Intons-Peterson & Crawford, *supra* note 152, at 1164.

of the women and 73% of the men thought it would change at least some.[226]

There are several ways to reconcile Foss and Edson's conclusions about women who use their spouses' names exclusively upon marriage (the vast majority of married women) with Intons-Peterson and Crawford's findings, although further social science research might dispute the studies' compatibility. First, only Foss and Edson explicitly asked subjects about the importance of a surname as an associational label. If the women in Intons-Peterson and Crawford's study valued their premarital surnames because those surnames connected them to their birth families, then Intons-Peterson and Crawford's study would support the proposition that women generally see a surname as an associational label, and it is the associational aspect of the name that helps define their identities. In fact, one explanation for why the women in Intons-Peterson and Crawford's study believed their identities would change if their surnames were changed is that those women were contemplating the underlying change of their life circumstances (i.e., marriage and the reorganization of family relationships) and the consequent separation from their birth families. Indeed, Intons-Peterson and Crawford's respondents hinted that associationalism was a more significant concept for some women than for the men generally.[227]

Second, it is plausible that a woman's attitude about her name evolves as she bears her new marital name.[228] Intons-Peterson and Crawford's study inquired about respondents' hypothetical willingness to change their surnames, whereas Foss and Edson inquired about name choices actually made. Intons-Peterson and Crawford never, for example, asked their married respondents how their actual name choices affected their sense of identity. A woman may come to

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226. *Id.* at 1164-65. The Intons-Peterson and Crawford study also found that both men and women underestimated the amount that women, but not men, claim to identify with their surnames. *See id.* at 1165-66. This finding may mean that courts, when deciding which parental surname a child should bear, may erroneously minimize the woman's interest.

227. First, the respondents "overwhelmingly thought social expectations or customs were the reasons why wives typically adopt their husbands' surnames on marriage .... [but] [t]he desire of women to merge their identities with those of their husbands was chosen by 26% of the undergraduate women and by 11% of the undergraduate men." *Id.* at 1168. Second, "[s]ome graduates, especially women, claimed other reasons ... [including] joining the man's family." *Id.* Third, 69% of graduate women are unwilling to share a surname with a divorced spouse, whereas 45% of graduate men were unwilling to do so. *See id.* at 1166.

228. The authors found that more unmarried women than married women believed that "women identified some or a great deal with their surnames." *Id.* at 1166.

see her marital surname over time more as an important marker of her association with her family, and minimize her birth name's importance as a symbol of her individual identity. Consistent with this interpretation is the finding by Intons-Peterson and Crawford that many more unmarried women than married women identified with their surnames.[229]

Third, Intons-Peterson and Crawford did not ask their subjects whether they perceived the identity change as a positive or negative experience. While women may identify with their premarital surnames and feel that their identities change when their surnames change upon marriage, such change may not be antithetical to a woman's self-structure. Most women expect to change their surnames upon marriage. Even if they reluctantly anticipate it, society considers this change to be identity-affirming, rather than identity-challenging. Therefore, the female respondents may have welcomed their name changes. Consistent with this interpretation are Intons-Peterson and Crawford's findings that women were more likely than men to anticipate changing their surnames upon marriage,[230] that women were much more likely than men to prefer a surname change upon marriage,[231] that men and women thought it was easier for females than for males to change a surname upon marriage,[232] and that men were more likely than women to think their identities would change a great deal as a result of a name change.[233]

Another way to reconcile the findings is to focus generally on the characteristics of women that believe their birth names are integral to their self-identities. This raises the possibility that Intons-Peterson and Crawford's study overrepresents the views of women in a particular (and narrow) demographic group. Women who keep their birth names upon marriage and who speak in terms of individ-

229. *See id.* at 1165 ("Almost one-fourth of the married women reported little or no identification with their marital surnames, whereas almost no single (non-married) graduate women indicated low surname identification ....").

230. *See id.* at 1166 ("None of the younger males strongly agreed that they would change their surnames on marriage, whereas 61% of the younger women strongly agreed. Moreover, 92% of these males disagreed or strongly disagreed that they would change ....").

231. *See id.* at 1167 (stating that "92% of the undergraduate men, but 11% of the women, preferred to keep their own surname.... Similarly, more graduate men (88%) than graduate women (37%) preferred to retain their surname on marriage").

232. *See id.* ("Approximately two-thirds of both the younger and the older groups thought it was psychologically easier for females than for males to change names.").

233. *See id.* at 1165 ("[M]en (38%) were more likely than women to think their identities would change a great deal. With the older group, this difference between the sexes was statistically significant ....").

ual identity tend to be professionally accomplished prior to marriage.[234] Additionally, they tend to be better educated, better paid, and more accustomed to progressive gender roles; they also tend to have married later in life.[235] In fact, Intons-Peterson and Crawford conducted their research on highly educated undergraduate and graduate students—women who are less inclined than other women to adopt a new surname upon marriage,[236] and who are more inclined than other women to view their birth names as integral to their identities.

One who shares the views of women who see a birth surname as important to a sense of identity, or belongs to the same demographic stratum as these women, might be tempted to accord undue emphasis to their voices. Yet these women's conceptions of surnames are not representative of most women's views, nor are their lives similar. Most women are not obtaining or do not have a four-year college degree, unlike the women in Intons-Peterson and Crawford's study

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234. *See* KUPPER, *supra* note 54, at 28 ("About a quarter of those who answered the questionnaire stated that they had maintained their own names after marriage because they had established professional reputations under those names."); Foss & Edson, *supra* note 66, at 363 ("[T]he maintenance of separate professional identities is another major reason for women to keep their birth names. Many had established careers when they married."); *see also* Brightman, *supra* note 169, at 9 (commenting that the number of new brides who announced their weddings in *The New York Times* and who chose to keep their birth names or to use hyphenated names rose from 22% to 26% between 1988 and 1993, but that the newspaper "tends to publish announcements for brides and grooms with professional accomplishments"); Gelernter, *supra* note 99, at C1 (stating that in the 1970s the women who bucked tradition were "primarily professionals with established career track records under maiden names"). *But see* Dralle, *supra* note 205, at 174 (noting that women physicians in Louisiana who took their husbands' surnames upon marriage more often married after they had obtained an M.D.).

235. *See* Brightman, *supra* note 169, at 9 (finding that married women who use something other than their husbands' last names after marriage tended to be younger, better educated, and of higher income than other women). Johnson and Scheuble found that an unconventional marital name choice for women who married before 1980 tended to correspond to later-in-life marriages, higher educational achievement, greater career orientation, and more liberal gender role values than for other women. *See* Johnson & Scheuble, *supra* note 66, at 727. However, the strongest correlate found was for region. *See id.* An unconventional marital name choice for women who married after 1980 tended to correspond to region and rejection of gender role traditionalism. *See id.* These women also tended to be older, early daters, and to have a mother with an unconventional surname. *See id.* at 727-28. Johnson and Scheuble found that an unconventional surname was not related in either group to "number of times married, premarital cohabitation, family income, and religiosity measured by church attendance." *Id.* at 728; *see also* KUPPER, *supra* note 54, at 6-8 (finding married women who made nontraditional naming decisions in the sample pool to be very well educated, successful professionals, late marriers, and prosperous).

236. *See infra* note 235. The male respondents' educational background may also have affected their responses.

or Kupper's study.[237] Only four percent of Kupper's sample worked at home as housewives, homemakers and mothers.[238] While their message may sound familiar, these women constitute a small subset of women generally. To privilege the minority's message is to silence the vast majority of women and to ascribe to women generally a type of social and economic reality that most women lack. A myopic focus on the viewpoints of the minority of women does a great disservice to the majority of women.

Whether or not the minority's views are more "authentic"—because these women have managed to escape some or all the effects of patriarchy—the fact remains that even women who link their own surnames to their identities usually do not insist upon the dissemination of their surnames to their children. While some women retain their birth names upon marriage, they almost invariably give their children the paternal surname.[239] Dr. Harriet Lerner, a psychologist, stated, " 'Baby-naming is the bottom line .... That's when you find out whose name is really important. And it's almost always the man's.' "[240] Most of Intons-Peterson and Crawford's respondents thought that a child should be given the father's surname.[241]

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237. Ninety percent of the women responding to Kupper's study, for example, had at least a college degree; 32% also had a Master's degree, and 22% had either a professional degree or a Ph.D. *See* KUPPER, *supra* note 54, at 7. In contrast, only 19.2% of women in the country have college degrees. U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1994, at 157 chart no. 233 (114th ed. 1994).

238. *See* KUPPER, *supra* note 54, at 8. This contrasts, for example, with the sample studied in 1984-85 by Maccoby and Mnookin of 1,100 divorced families in California. *See* MACCOBY & MNOOKIN, *supra* note 49, at 60-61. "[Thirty] percent of the mothers were full-time homemakers before the breakdown of the marriage," and those employed outside the home tended to work "part time or for substantially fewer hours than the father." *Id.* In a substantial majority of the families, the mother had primary managerial responsibility for the child-rearing functions before divorce. *See id.* at 268.

239. *See* Slovenko, *supra* note 109, at 109 ("Statistics are not available, but it appears that many professional women in the United States are keeping their maiden names. When it comes to naming the children, however, feminist determination fades into indecision."); Gelernter, *supra* note 99, at C1 ("And even women who hyphenate their names or have kept their own are usually giving their children the husband's surname."); *see also* Intons-Peterson & Crawford, *supra* note 152, at 1169 (finding that 82% of undergraduate women and 78% of undergraduate men surveyed, and 52% of graduate women and 66% of graduate men surveyed, agreed or strongly agreed with the proposition that a child should be given the father's surname). Unfortunately, the studies cited in this note do not provide enough detail or lack a diverse enough sample to suggest a more pluralistic pattern, especially with regard to teenage mothers, non-marital children, children in different birth order and/or children of different gender.

240. Gelernter, *supra* note 99, at C1 (quoting Dr. Harriet Lerner).

241. *See* Intons-Peterson & Crawford, *supra* note 152, at 1169-70 ("[W]hen several options for a child's surname were offered in a multiple-choice question, 86% of the female and 82% of the male undergraduates preferred giving the father's surname to the

The pervasiveness of patronymics among women who make unconventional surname choices upon marriage has four possible explanations: (1) these women are not deeply offended by patronymics (women who keep their birth names upon marriage, after all, are usually using their fathers' surnames);[242] (2) these women lack power in their relationships to influence their children's surnames;[243] (3) these women are more accommodating than their spouses and therefore acquiesce to their husbands' preferences;[244] or (4) these women attach an importance to their own surnames that is independent of the surnames' dissemination to their children. While any of these reasons could be true for an individual woman, I believe the third and fourth explanations most frequently apply to the subset of women who make unconventional surname choices upon marriage. These women often express disdain for patronymy, and they appear to have power in their relationships as evidenced by their own unconventional marital surnames. Rather it seems likely that women who speak of their names as a critical component of their own identities speak a language different from men: the importance of a surname is not dependent upon the surname's dissemination to others, either to enable one's "immortality" or as a marker of one's dominion. Consequently, these women, like the majority of women, tend to yield to the patronym because it identifies the child, albeit incompletely, with the household family members. The patronym satisfies their belief that a surname signals associationalism—and accepting the patronym also allows them to accommodate their husbands' wishes.

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child.... For the graduates, 64% of the women and 68% of the women [sic] would use the father's surname for the child. More women (14%) than men (6%), however, chose a hyphenated name.").

242. Patronymics may also seem less objectionable than the perceived confusion that may result from an unconventional choice or the perceived harm that may befall the child from an unconventional surname.

243. *Cf.* Dralle, *supra* note 205, at 174 (finding that women who continued to use their birth names upon marriage rated their marriages as more traditional than women who changed their surnames).

244. *See* LEBELL, *supra* note 32, at 92 ("Women are so programmed into being relational, they are uncomfortable bearing a name different from their husband's and even more uncomfortable giving their children names other than that of the children's father's."). As one woman said, "Giving the baby Phil's surname was not really an issue to me. I am not overly emotional about my last name and having to keep it. It seemed more conventional and it made Phil happy which was good enough for me at the time." Internet Survey, *supra* note 12 (response of Suzette Galka).

3. Surnames as Markers of Association

For many women, a surname functions primarily as an indicium of association—that is, it signifies one's present association with other family members, especially those in the same household. Carson McCullers' play, *The Member of the Wedding*, can be interpreted to illustrate this concept. Frankie Addams, a twelve-year-old girl, speaks to Berenice Sadie Brown, the African-American cook, about Frankie's relationship with her brother and his fiancée:

> Frankie: Janice and Jarvis. It gives me this pain just to think about them.
>
> Berenice: It is a known truth that gray-eyed people are jealous.
>
> Frankie: I told you I wasn't jealous. I couldn't be jealous of one of them without being jealous of them both. I 'sociate the two of them together. Somehow they're just so different from us .... J.A.—Janice and Jarvis. Isn't that the strangest thing?
>
> Berenice: What?
>
> Frankie: J.A.—Both their names begin with "J.A."
>
> Berenice : And? What about it?
>
> Frankie: If only my name was Jane. Jane or Jasmine.
>
> Berenice: I don't follow your frame of mind.
>
> Frankie: Jarvis and Janice and Jasmine. See?
>
> Berenice: No. I don't see.
>
> Frankie: I wonder if it's against the law to change your name. Or add to it.
>
> Berenice: Naturally. It's against the law.
>
> Frankie: Well, I don't care. F. Jasmine Addams.[245]

Not only does Frankie see her name as fungible and a name change as a positive step, but as a commentator states, "The childlike quality of F. Jasmine's speech should not blind us to the fact that a naming of self is always a genuine placement or categorization."[246] In the play, Frankie desperately wants to be part of Jarvis' and Janice's group. Frankie states:

> Shush, just now I realized something. The trouble with me is that for a long time I have been just an "I" person. All other people can say "we." ... All people belong to a "we"

245. CARSON MCCULLERS, THE MEMBER OF THE WEDDING 25-27 (1951) (stage directions omitted).

246. STRAUSS, *supra* note 94, at 18.

> except me .... Not to belong to a "we" makes you too lonesome. Until this afternoon I didn't have a "we," but now after seeing Janice and Jarvis I suddenly realize something .... I know that the bride and my brother are the "we" of me. So I'm going with them, and joining with the wedding .... I love the two of them so much and we belong to be together. I love the two of them so much because they are the *we* of me.[247]

Through Frankie's assumption of a first name that links her to Jarvis and Janice, it appears that Frankie is attempting to become the "we" she desires. Although she will share the same surname as her brother and his wife, her desire for a common praenomen may indicate her recognition that her surname will likely change one day.

Berenice's response demonstrates the error in formulating an ironclad model of how men and women view surnames. Berenice thinks Frankie is silly, but Berenice holds the male view of names more than the female view. She has been married four times and apparently has never changed her name. She sees names as unchangeable markers of identity. In fact, Berenice explained that it was against the law to change one's name because "it would be a confusion. Suppose we all suddenly change to entirely different names. Nobody would ever know who anybody was talking about. The whole world would go crazy ... [b]ecause things accumulate around your name."[248] Unfortunately, McCullers does not give the reader enough information about Berenice to explain why her views fall on the side of the spectrum usually inhabited by men.

Social science research confirms a surname's importance as an associational label for most women. Foss and Edson's research, introduced above, indicated that women who forego their birth names upon marriage give their present associations with their husbands and children precedence over their individual sense-of-self: Their identities are primarily framed by their familial associations. These women "describe[d] themselves as making deliberate and conscious decisions about their names,"[249] and many thought that taking their husbands' names was a positive choice.[250]

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247. MCCULLERS, *supra* note 245, at 51-52.

248. *See id.* at 84.

249. Foss & Edson, *supra* note 66, at 367.

250. Duggan et al. claim that Robert R. Holt's *Studies in the Psychology of Names*, *supra* note 10, found that women did not believe that taking their husbands' surnames was a positive choice. The authors were "unable to reconcile these discrepancies" with Foss and Edson's findings. Duggan et al., *supra* note 58, at 93. Yet, a close reading of Holt leads to no such conclusion. For example, many of Holt's female married subjects found

Women's individual voices vividly express the importance of a surname as an associational label. For example, a journalist described why she took her husband's name upon marriage, although it was contrary to the normal practice of people in her profession, at her age, and with her ideology. She explained, "I'd done it, in part, for the usual sappy, deliciously irrational and not politically correct reason that makes Valentine's Day big business. I was in love. I wanted to shout our *association* from the rooftops and everywhere else—introductions, letterheads, legal documents, tax forms."[251] Another woman stated, " 'Having the same last name as your spouse identifies you as being a couple . . . .' "[252] This woman wants any children of the marriage to bear the same surname in order to reflect the family bond.[253] Another woman explained, " 'I'm all for changing to my husband's name . . . . A family's surname aids in continuity and identification with a family.' "[254] And yet another woman stated that " 'it seemed marvelous' " to change her name upon marriage " 'because that meant complete identity with him, and that is what she wanted.' "[255] When she had two children, she felt "even more a part of the name."[256] This woman later divorced and believed "she owes it to them [the children] to keep it."[257] She further stated, " 'A name becomes a symbol of family characteristics . . . a symbol of

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the name change easy. *See* Holt, *supra* note 10, at 123-56. As one subject stated, " 'I found the change in names a delightful and happy one.' " *Id.* at 124. To the extent a woman was displeased with the change, it often related to the feeling of separation from her birth family, *see id.* at 126, 128, 149, to her prior professional accomplishment, *see id.* at 128-29, 141, or to her displeasure with the marriage, *see id.* at 133-34, 148. As Holt recognized, there was a range of responses by women: "The chief factors that seem to be involved are the attitude towards the name, the degree of identification with it, the values associated with the name, the habit systems in which it is involved, and the degree to which the owner has been made aware of it." *Id.* at 157. Yet "the chief factor of importance [in determining ease connected with a name change] is the connection of personal values . . . and name." *Id.* at 126. Although Holt draws few gender distinctions, when he does, his bias is evident: "On himself, the effect of a man's changing his name may be severe emotional disturbances, a feeling of split personality, or other maladjustments. But women who object to change because of possible violation of important values are usually maladjusted anyway, and projecting their difficulties onto the norm." *Id.* at 312.

251. Ferraro, *supra* note 196, at 18 (emphasis added).

252. *See* Gelernter, *supra* note 99, at C1 (quoting Wendy Russell).

253. *See id.*

254. *Your Name—Keep it or Change?*, CLEVELAND PLAIN DEALER, Mar. 9, 1993, at 4C (quoting Carol from Solon, Ohio).

255. Holt, *supra* note 10, at 173 (interview with Katharine Gilman MacKenty Bryan).

256. *Id.* at 175.

257. *Id.* at 176; *see also* KUPPER, *supra* note 54, at 90 ("Some women who were divorced or widowed and then remarried kept their first husbands' surnames for the sake of their children. They felt that it would be comforting to the children to continue to share a name with their mothers.").

family you can identify with.' "[258] The importance of a surname as a marker of association also explains why many women relinquish their husbands' surnames upon divorce.[259]

Even women who keep their own names upon marriage strongly evince the importance of association, although often it is an association to the women's birth families. Kupper's study of women who kept their birth names upon marriage indicated that, "[f]or many women, the most important factor in choosing a surname is family identification. For them, the question is not, 'What name will reveal my identity as an individual?' but, 'what name will show my family membership?' "[260] As to the importance of family ties, she writes:

> The women in my study expressed this need for family identification repeatedly in their questionnaires. Many said that one of the most important reasons for using the names they did was to express ties with their families. This was often the rationale for retaining or regaining their birth surnames or for adopting other surnames that had family associations.[261]

Whether or not a woman assumes her husband's surname upon marriage, she tends to value the associationalist notion that children should bear the same surname as other family members in the same household. While no social science research specifically addresses this point, anecdotal evidence—in particular, women's arguments to

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258. Holt, *supra* note 10, at 181.

259. Forty-one women in Kupper's study specifically mentioned that they "changed their names [to their birth names] to avoid keeping their former husbands' names, which often evoked painful memories. Many also felt that since the marriages were over, they no longer wanted the names that symbolized these relationships." KUPPER, *supra* note 54, at 35. However, a woman's self-identity can be intertwined with a name taken primarily for associational reasons, although it no longer reflects that or any family association. For example, Laura D'Andrea Tyson still bears the surname of her first husband "Tyson," a marriage which ended in the mid-1970s, and which produced no children. *See* NEWSMAKERS 1994 CUMULATION 506 (Louise Mooney Collins ed., 1994); Susan Dentzer & Erik Tarloff, *A Woman of Influence*, WORKING WOMAN, Aug. 1993, at 30, 30.

260. KUPPER, *supra* note 54, at 38. As one women stated, she took her husband's surname when she married the first time, and kept it upon divorce. Yet when she remarried she took her stepfather's name and stated, "I chose my Pop's name because I strongly identify myself as his daughter, and receive a great deal of pleasure from this." *Id.* at 33. Another women explained,

> The most important factor is that I come from a family of five daughters. We are very close-knit and we encourage each other to pursue all interests, no matter how far-fetched. Except for my husband, I do not feel at all close to my husband's family so I feel it makes more sense to keep my own name.

Id. at 32.

261. *Id.* at 31. Sometimes this included a desire to stay connected to an ethnic heritage. *See id.* at 32.

courts explaining why their children should bear their surnames—lends support to this observation. For example, in *D.R.S. v. R.S.H.*[262] the mother stated, "I feel it is best that our names be consistent since he will be living with me."[263] In *In re Rossell*,[264] the mother sought to change her son's surname to her birth name, which she resumed after divorce. The court stated that "[s]ince her son is always with her, she believes he should share her name."[265] In *Hamby v. Jacobson*,[266] the mother sought to have all three of her children bear the name Hamby, a name she acquired from a former husband, and the name of one of her three children. She testified that "if all family members had the same last name, the family members would be closer and more secure."[267] In *In re A.D.*,[268] a lesbian, who was artificially inseminated by an anonymous donor, wanted her child to bear her lover's name, as the lover acted as a parent to the child. She explained that the reason for the change, among other things, was "the symbolism of family."[269] While some men may also accept the con-

262. 412 N.E.2d 1257 (Ind. Ct. App. 1980).

263. *Id.* at 1267 (Shields, J., dissenting).

264. 481 A.2d 602 (N.J. Super. Ct. Law Div. 1984).

265. *Id.* at 602.

266. 769 P.2d 273 (Utah Ct. App. 1989).

267. *Id.* at 274.

268. 493 N.Y.S.2d 404 (Sup. Ct. 1985).

269. *Id.* at 405; *see also In re* Larson, 183 P.2d 688, 689 (Cal. Dist. Ct. App. 1947) (mother's petition stated the reasons for her daughter's name change were the mother's "divorce from appellant, the award to her of the custody of said minor, her remarriage to Weir P. Armstrong, and that said minor 'is now a member of the household of her mother, the said Marion Armstrong, and her stepfather, the said Weir P. Armstrong, and another child is about to be born to her mother and her stepfather; and it will be to the best interests of said child . . . that she have and bear the surname of her mother' "), *overruled by In re* Marriage of Schiffman, 620 P.2d 579 (Cal. 1980); *In re* Meyer, 471 N.E.2d 718, 719 (Ind. Ct. App. 1984) (mother argued name change would give child "a more secure feeling of family unity"); Hardy v. Hardy, 306 A.2d 244, 247 (Md. 1973) ("[S]he says it was because of the prominence of the Creighton name in that area and because she wanted her child, who was soon to start school, to have the same last name as the man she loved and was living with that she requested the child's name be changed . . . ."); *In re* Saxton, 309 N.W.2d 298, 300 (Minn. 1981) ("In [mother's] words, the proposed surname was desirable for the children because it would 'reflect the family unit, the Saxton family unit that we have established here in Minnesota after four years.' "); *In re* Sakaris, 610 N.Y.S.2d 1007, 1009-10 (Civ. Ct. 1993) (mother's petition stated, "[W]hile [mother] continues to use her maiden name, . . . Sakaris, she desires that the child be allowed to legally assume the name of . . . Steinman [her fiancée]. Since the Petitioner, and Mr. Steinman as well as the three children all live together as a family unit, it makes sense that all of the children use the same name."); Bobo v. Jewell, 528 N.E.2d 180, 182 (Ohio 1988) (non-marital child) (mother testified "I am, I just feel that he is going to be living with me, he is going to be going to school there, around all of his friends when he grows up they will just ask why his name is different then [sic] mine, and you know, if his father doesn't visit him regularly he

cept of associationalism, the name change cases do not reflect these men's views. Few fathers could emphasize the associational justification because the child usually lives with the mother.[270]

Various factors may help reinforce a woman's view that a child's surname is an important reflection of the child's physical association with family. The mother probably gave up her own surname upon marriage—an act that publicly affirmed her association with her spouse. Children customarily bear their parents' surname, openly signaling that the entire family is a unit. Additionally, society tells a woman that a family is "central to her identity,"[271] making mother-child surname congruence particularly important to many women who are custodial parents. For these women, the sharing of a common surname with their children reflects their family relationships and their social role as mothers.

Section III.C. has argued that the majority of women seem to view surnames very differently from the majority of men. Most women do not feel that their birth surnames are integral to their sense of identity, or that the dissemination of their surnames is crucial to achieve their "immortality" or to demarcate their dominion over others. Rather, most women believe that a surname can be fungible and that its primary purpose is to reflect one's association

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will say you know, who is my dad and why isn't he coming to see me, which you know, a lot of kids have, and I just feel that it would be better to keep it mine"); *In re* Crisafi, 662 N.E.2d 887, 890 (Ohio Ct. App. 1995) (noting mother's argument that "they have become a family unit since her second marriage and by changing the childrens' [sic] names to her married name, it will help unify the family"); Keegan v. Gudahl, 525 N.W.2d 695, 696 (S.D. 1994) (stating that mother resisted the father's request that the daughter's surname be changed from the mother's surname to his surname because "she wanted herself, Daughter, and another child by a different father to have the same last name"); *cf.* B.L.W. by Ellen K. v. Wollweber, 823 S.W.2d 119, 121 (Mo. Ct. App. 1992) (noting that mother testified that her daughter requested that her name be changed after she left foster care "because she and her mother were 'going to be a family' "); *In re* Andrews, 454 N.W.2d 488, 489 (Neb. 1990) (mother testified that "she wanted the name change for her daughters . . . because she wanted them to identify with her in reference to the name 'Brydl' and to appreciate their Czech ancestry and heritage"). Even a woman who keeps using her birth name upon marriage sometimes changes her surname if her baby is given the husband's surname. As one woman explained, "I could not have a different name than hers [the baby]." Ferrarro, *supra* note 196, at 18; *see also* Lombard, *supra* note 15, at 131 & n.18 (litigants seeking to change their children's names commonly argue that it is important for a child to bear the surname of the person with whom the child lives).

270. *See supra* note 49.

271. *See* Scott, *supra* note 12, at 658 ("Indirect evidence indicates that men and women both still regard a woman's maternal and domestic roles as central to her identity, requiring subordination of other pursuits."); *cf.* ALFORD, *supra* note 10, at 157 ("Clearly the facts that men at marriage retain their surnames, retain their title of respect ('Mr.'), and are less likely than women to wear wedding rings, suggest that the man's marital status is of less public and personal significance than the woman's.").

with family members in the same household.

IV. THE LAW REFLECTS MEN'S CONCEPTIONS OF SURNAMES AND UNDERVALUES ASSOCIATIONALIST PRINCIPLES

In general, the law views a surname as a component of an individual's separate identity. As one court emphasized, "a man's name is the mark or *indicia* by which he is distinguished from other men."[272] The law, in contrast to other disciplines,[273] frequently disregards names as markers of association; rather, the courts often emphasize that names serve to distinguish and differentiate between individuals.[274] In an illustrative case, Greg, a seven-year-old boy, ex-

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272. *In re* Snook, 2 Hilt. 566, 568 (N.Y. 1859).

273. For example, social historians tend to focus on how names connect family members. Two wonderful articles that discuss how first names help identify significant family relationships are Daniel Scott Smith, *Child-Naming Practices, Kinship Ties, and Change in Family Attitudes in Hingham, Massachusetts, 1641 to 1880*, 18 J. SOC. HIS. 541 (1985) and Tebbenhoff, *supra* note 57. The child-naming patterns in the Hingham study indicated the importance from the seventeenth to mid-nineteenth century of the nuclear family and the individuality of children. *See* Smith, *supra*, at 543. For example, Smith found that "Five of six fathers of sons and four of five mothers of daughters in families begun during the colonial period named a child for themselves." *Id.* at 546. In contrast, in the predominantly Dutch community of Schenectady, New York, naming patterns reveal the importance of lineally and laterally extended kin over the nuclear family. *See* Tebbenhoff, *supra* note 59, at 569. From 1680 until 1800, over 75% of first sons were named for a grandfather; it was slightly less for first daughters being named for a grandmother. *See id.* Hingham differed greatly: "Approximately eight of every ten first sons and daughters born in Schenectady between 1781 and 1800 shared the name of a grandparent as compared to less than two of every ten in Hingham." *Id.* In Schenectady, there was a clear preference for the paternal line for first-born children, although there was also a strong pattern of alternating the names between lineages. *See id.* at 572-73. The naming system was influenced by how property was transmitted through inheritance. "Dutch inheritance practices emphasized that property flowed equally through both the male and female lines and actively promoted the equality of all heirs." *Id.* at 573.

274. *See, e.g.*, *In re* Ritchie III, 206 Cal. Rptr. 239, 241 (Ct. App. 1984) (" 'The name of a person is the distinctive characterization in *words* by which he is known and distinguished from others.' ") (quoting Putnam v. Bessom, 197 N.E. 147, 148 (Mass. 1935)) (denying application to change name from Thomas Boyd Ritchie III to the Roman numeral "III"); Weathers v. Modern Masonry Materials, Inc., 129 S.E.2d 65, 68 (Ga. Ct. App. 1962) ("A name 'has been defined as the word or combination of words by which a person is distinguished from other individuals.' " (quoting 38 AM. JUR. *Name* § 2 (1941)) (excluding from evidence petition served on Mr. Nelson when defendant's name was Raymond P. Nelson); Romans v. State, 16 A.2d 642, 646 (Md. 1940) (stating that a name is a "designation or appellation which is used to distinguish one person from another"); *In re* Dengler, 246 N.W.2d 758, 760 (N.D. 1976) (" 'A name is . . . used to distinguish a person or thing or class from others . . . .' " (quoting 65 C.J.S. *Names* § 1 (1966)) (denying change of name from Michael Herbert Dengler to "1069"); Kay v. Bell, 121 N.E.2d 206, 208 (Ohio Ct. App. 1953) (stating that a name is " 'that by which an individual person or thing is designated and distinguished from others' ") (quoting Uihlein v. Gladieux, 78 N.E. 363, 365 (Ohio 1906)); Kay v. Kay, 112 N.E.2d 562, 564 (Ohio C.P. 1953) (noting a person's name is

plained to the trial court that he wished to be called both "Greg Presson" (the surname of his father) and "Greg Kelley" (the surname of his stepfather). He wanted to use his father's surname when he was with his father, and his stepfather's surname when he was with his stepfather and his mother.[275] Greg said, "I just love both names."[276] The Appellate Court of Illinois reversed an injunction granted by the trial court that would have permanently stopped the mother from instituting a name change proceeding or from giving the boy a name other than Greg Presson in any context.[277] The Appellate Court of Illinois described the boy as "intelligent" and said that Greg gave "a great deal of thought to his decision to utilize both the surnames."[278] Greg chose his binominalism "out of respect for the feelings of both [his father and stepfather]."[279] On further appeal, the Illinois Supreme Court reversed the Appellate Court and allowed the trial court to enjoin the mother from changing Greg's surname in any legal proceeding or official record.[280] The Illinois Supreme Court called Greg's solution "a childlike one, born of immaturity and eagerness not to offend anyone."[281] Just like Ellen Foster's psychologist,[282] the court stated, "Greg needs to know his identity. He is not two people—Gregory Presson and Gregory Kelley."[283] The Illinois Supreme Court's belief that a surname represents one's unalterable identity—and the court's failure to value a surname's importance as a marker of association—was starkly and uniquely visible in the case. However, the court's view is not atypical of how many courts think about surnames when applying and interpreting the law related to children's name change petitions. This conception is consistent with the views held by men generally, as noted in Section III.B. above, and it shows little regard for the predominantly

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" 'one or more words used to distinguish an individual' " (citation omitted)) (denying child's name change to match mother's and stepfather's surname); *see also* Joseph B. Bugliari, Note, *Domestic Relations: Change of Minor's Surname: Parental Rights in Minor's Surname*, CORNELL L. Q. 144, 144 (1958) ("A surname is merely an appellation by which society distinguishes one person with a given name from another with the same given name.").

275. *See In re* Marriage of Presson, 465 N.E.2d 85, 88 (Ill. 1984).

276. *In re* Marriage of Presson, 451 N.E.2d 970, 971 (Ill. App. Ct. 1983), *rev'd*, 465 N.E.2d 85 (Ill. 1984).

277. *See id.* at 972.

278. *Id.*

279. *Id.*

280. *See Presson*, 465 N.E.2d at 90.

281. *Id.* at 89.

282. *See supra* text accompanying notes 79-83.

283. *See Presson*, 465 N.E.2d at 89.

female perspective described in Section III.C. above.

Today the courts primarily use three standards for adjudicating name change disputes between parents of a marital child: (1) a presumption in favor of the status quo; (2) a "best interest of the child" test; and, (3) a custodial parent presumption.[284] These labels only roughly categorize the existing standards; in many respects, the standards overlap. For example, the "best interest of the child" test is incorporated to varying degrees in the other standards.[285] In addition, the "best interest of the child" standard is at times akin to the presumption in favor of the status quo due to the high burden of proof that the petitioner must bear.[286] Courts at times gloss over the minutiae that differentiate one state's standard from another's, espe-

284. A few states have not yet had an appellate court adjudicate a name change dispute among parents. Conceivably, these states' standards may differ from those that currently exist. *See* ALASKA STAT. § 09.55.010 (Michie 1996) ("A change of name of a person may not be made unless the court finds sufficient reasons for the change and also finds it consistent with the public interest."); IDAHO CODE § 7-804 (1990) ("[Court] may make an order changing the name or dismissing the application, as to the court may seem right and proper."); ME. REV. STAT. ANN. tit. 19, § 781 (West Supp. 1995) ("[T]he judge, after due notice, may change the name of the person...."); N.D. CENT. CODE § 32-28-02 (1996) (stating that name change will be granted if "there exists proper and reasonable cause for changing the name of the petitioner"); WIS. STAT. ANN. § 69.14(1)(F) (West 1990) (noting that custodial parent chooses surname at birth when parents are separated or divorced); Steinbach v. Gustafson, 502 N.W.2d 156 (Wis. Ct. App. 1993) (same); WYO. STAT. ANN. § 1-25-101 (Michie 1988) ("If the court is satisfied that the desired change is proper and not detrimental to the interests of any other person, it shall order the change to be made, and record the proceedings in the records of the court."). The three standards set out in the text often guide courts' resolution of non-marital children's naming disputes as well. *But see infra* note 438 and accompanying text (listing state statutes requiring a non-marital child to assume the mother's name absent an agreement between the parents or until legitimization occurs or paternity is established).

285. *See infra* text accompanying notes 537-38, 547-48; *see also infra* note 286.

286. *See, e.g., In re* Saxton, 309 N.W.2d 298, 301 (Minn. 1981) (stating best interest of the child standard governs but that a change of a minor's surname should be " 'exercised with great caution and only where the evidence is clear and compelling that the substantial welfare of the child necessitates such change' " (quoting Robinson v. Hansel, 223 N.W.2d 138, 140 (Minn. 1974)); Swank v. Petklovsek, 629 N.Y.S.2d 129, 130 (App. Div. 1995) (stating that "[a] court may change the name of an infant if it determines that 'the interests of the infant will be substantially promoted by the change' " (quoting N.Y. CIV. RIGHTS LAW § 63 (McKinney 1992))); Rio v. Rio, 504 N.Y.S.2d 959, 962 (Sup. Ct. 1986) (stating best interest of the child standard governs but that "[d]epriving a child of his or her father's surname is normally a far-reaching action, and applications for a change of an infant's surname are usually granted only where the natural father is guilty of misconduct, abandonment or lack of support"); Halloran v. Kostka, 778 S.W.2d 454, 456 (Tenn. Ct. App. 1988) (stating best interest of the child standard governs but that a name change will be permitted only " 'where ... the child's substantial interests require a change of name, as where the father's misconduct has been such as to justify a forfeiture of his right, or where his name is positively deleterious to the child' " (quoting 57 AM. JUR. 2D, *Name*, § 14)).

cially when the states adopt a similar rubric for their rules of decision.[287] Although subtle differences exist, the tripartite division allows one to conceptualize the differences among states without becoming bogged down in detail that is unimportant to the analysis. This section describes each of the three standards, illustrates their use in particular cases, and critiques them. It demonstrates that all three standards represent the mainly male view of the importance of surnames, either in the standards' assumptions, justifications, or applications.

A. Presumption in Favor of the Status Quo

The most conservative of the three standards is the presumption in favor of the status quo. Under this standard, the moving party has the burden of meeting a strict criterion before the child's surname will be changed, although the exact criterion varies considerably by state. Sometimes the party seeking the name change must prove that the current name poses a "significant detriment" to the child;[288] sometimes the party need prove "by clear, cogent, and convincing evidence that such change will significantly advance" the child's interests;[289] sometimes the party must establish that both parents consent to the change (unless there has been misconduct by one of the parents that would eliminate the need for that parent's consent);[290] and sometimes the party must prove a combination of these

287. *See, e.g., In re* Grimes, 609 A.2d 158, 161 n.5 (Pa. 1992) (wrongly classifying some jurisdictions as applying the "best interest of the child" test when some of the jurisdictions are more akin to the presumption in favor of the status quo).

288. *See* Likins v. Logsdon, 793 S.W.2d 118, 122 (Ky. 1990); *see also* West v. Wright, 283 A.2d 401, 403 (Md. 1971) ("The most prevalent basis for allowing a change of name is where there is proof of serious misconduct by the father which adversely affects the best interests of his children."); *In re* Spatz, 258 N.W.2d 814, 815 (Neb. 1977) (stating that name can be changed "only when the substantial welfare of the child requires [it]").

289. *In re* Harris, 236 S.E.2d 426, 429 (W. Va. 1977); *see also* 735 ILL. COMP. STAT. ANN. 5/21-101 (West 1992) (requiring "clear and convincing evidence that the change is necessary to serve the best interests of the child"); Norton v. Norton, 595 S.W.2d 709, 711 (Ark. Ct. App. 1980) (requiring substantial evidence that name change is beneficial to the child); *Saxton*, 309 N.W.2d at 301 (requiring clear and convincing evidence that the substantial welfare of the child necessitates a change); Beyah v. Shelton, 344 S.E.2d 909, 911 (Va. 1986) (requiring substantial reasons for changing name of non-marital child); Flowers v. Cain, 237 S.E.2d 111, 113 (Va. 1977) (requiring substantial reasons for name change in face of objection by natural father).

290. *See, e.g.*, IOWA CODE ANN. § 674.6 (West 1987); *Beyah*, 344 S.E.2d at 911 (refusing to allow name change for non-marital child over father's objection where father has not engaged in misconduct that would make it harmful for child to bear his name: "[I]n the face of such an objection [by the natural father] and the absence of substantial reasons, the change should not be ordered."); *cf.* Sobel v. Sobel, 134 A.2d 598, 600 (N.J.

requirements.[291] States that consider whether the party opposing the name change has engaged in improper conduct usually look for misconduct of a gross nature,[292] including abandonment and failure to support.[293] The presumption for the status quo currently exists in at

Super. Ct. Ch. Div. 1957) ("[T]here is no authority for [the mother] to change the surname of the child to that of the mother's subsequent husband, unless there are extenuating circumstances.").

291. *See, e.g.*, Laks v. Laks, 540 P.2d 1277, 1280 (Ariz. Ct. App. 1975) (permitting name change over father's objection only where the children's "substantial interests require a change of name, as where the father's misconduct has been such as to justify a forfeiture of his rights or where his name is possibly deleterious to the child"); Robinson v. Hansel, 223 N.W.2d 138, 140 (Minn. 1974) ("[J]udicial discretion in ordering a change of a minor's surname against the objection of one parent should be exercised with great caution and only where the evidence is clear and compelling that the substantial welfare of the child necessitates such change.").

292. *See* Hall v. Hall, 351 A.2d 917, 924 (Md. Ct. Spec. App. 1976) ("The most prevalent basis for allowing a change of name is where there is proof of serious misconduct by the father which adversely affects the best interests of the children .... There are no hard and fast definitions as to the type of misconduct required; however, the offense must be of such great magnitude that the continued use of the name by the children would result in significant harm or disgrace to them." (citing *West*, 283 A.2d at 403); *see, e.g.*, W. v. H., 246 A.2d 501, 501-02 (N.J. Super. Ch. Div. 1968) (allowing change where father pleaded guilty to sexual intercourse with eleven-year-old daughter and impregnated older daughter); *In re* Yessner, 304 N.Y.S.2d 901, 902-03 (Civ. Ct. 1969) (allowing change where father was convicted of manslaughter for choking child's maternal grandfather to death); *In re* Fein, 274 N.Y.S.2d 547, 554-55 (Civ. Ct. 1966) (allowing change where father was serving life sentence for second-degree murder, extensively associated with prostitutes, engaged in extramarital activities, exhibited addiction to gambling, and failed to support children after his arrest); *cf.* B.L.W. by Ellen K. v. Wollweber, 823 S.W.2d 119, 121-22 (Mo. Ct. App. 1992) (finding that substantial evidence existed that changing non-marital child's surname to mother's surname was in child's best interest as father was awaiting trial for first-degree murder of four-year-old and had been accused by daughter of sexual abuse); *In re* Christjohn, 428 A.2d 597, 599 (Pa. Super. Ct. 1981) (allowing change where father killed child's stepfather). *But see In re* Petras, 475 N.Y.S.2d 198, 203-04 (Civ. Ct. 1984) (holding that father's imprisonment on eleven felony counts of theft by receiving stolen property, along with him being "less than an admirable person ... as a father," were not compelling reasons to believe ten-year-old's " 'interests ... [would] be substantially promoted by [name] change' " (quoting N.Y. CIV. RIGHTS LAW § 63 (McKinney 1989))); *In re* Krcelic, 395 N.Y.S.2d 382, 383-85 (Civ. Ct. 1977) (finding father's disfiguring assault of child's mother insufficient to support name change in light of falsification of some facts by mother).

293. *See, e.g.*, IOWA CODE ANN. § 674.6 (West 1987); *Harris*, 236 S.E.2d at 430 ("Where a father abandons his children, provides no support and maintenance, does not visit the children, and does not in any other reasonable way, given his position in life and the opportunities for the exercise of his parental rights, exercise the authority or undertake the responsibilities of a parent, there is no reason why a mother ... should not be able to change the name of the child, upon proper notice to the father.") (noting that proof of abandonment for name change purposes cannot be less than required to divest father of parental rights under adoption statute); *see also In re* Robinson, 344 N.Y.S.2d 147, 150 (Civ. Ct. 1972) (granting name change where father had not supported or visited daughter in five years, and child lives with mother, stepfather, and two stepsisters); *In re* Proman, 63 N.Y.S.2d 83, 84 (City Ct. 1946) (holding that father lost right to object to change of child's name when he had seen son only once in eight years and contributed nothing to his sup-

least eight states,[294] and it appears that eight other states also use this standard to varying degrees in a less explicit manner.[295] This standard used to be the most common.[296] In some states, the presumption in favor of the status quo has been codified by statute;[297] in other states, this standard has developed through case law.[298]

The presumption in favor of the status quo poses various theoretical and practical problems for women. Most obviously, the standard presumes that a surname should be immutable—an assumption reflecting the traditional male view that surnames should remain constant (except for a woman upon her marriage). The presumption also favors the paternal surname, as that is the name given to most marital children.[299] The standard takes no account of present physical association as a criterion that should determine a child's surname. Accordingly, this standard fails to incorporate the typically female view of surnames.

Also problematic are the standard's justifications. The standard has variously been described as an outright preference for the male

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port). *But see Robinson*, 223 N.W.2d at 141 n.4 (stating that failure to consistently make support payments was "not of such character to evince a total indifference or neglect of his children over a period of years").

294. *See* GA. CODE ANN. § 19-12-1(c) (1990); IOWA CODE ANN. § 674.6 (West 1987); LA. REV. STAT. ANN. § 13-4751(c) (West 1991); N.C. GEN. STAT. § 101-2 (1995); Wearn v. Wray, 228 S.E.2d 385, 386 (Ga. Ct. App. 1976) (noting that written consent of parents is necessary absent abandonment of the child); Likins v. Logsdon, 793 S.W.2d 118, 122 (Ky. 1990); Young v. Young, 356 N.W.2d 823, 824 (Minn. Ct. App. 1984); Swank v. Petkovsek, 629 N.Y.S.2d 129 (App. Div. 1995); Sheppard v. Wright, 895 P.2d 748, 748 (Okla. Ct. App. 1995).

295. *See generally supra* notes 288-91.

296. *See* Shipley, *supra* note 51, at 916.

297. Iowa serves as an example of a state that imposes by statute a very specific and high threshold for changing a child's surname. Its statute states that both parents must consent to the name change petition, and if one does not consent, the name can be changed only if the non-consenting parent has abandoned the child, has failed without good cause to contribute to the child's support when ordered to do so or to financially aid in the child's birth, or does not object after notice. *See* IOWA CODE ANN. § 674.6 (West 1987); *see also* Gail v. Winemiller, 464 N.W.2d 697, 698 (Iowa Ct. App. 1990) (upholding change of child's surname to mother's surname pursuant to § 674.6 because father failed to pay child support without good cause). Iowa also allows a child's name to be changed in conjunction with a divorce, and in that context the best interest of the child standard governs. *See In re* Marriage of Gulsvig, 498 N.W.2d 725, 729 (Iowa 1993).

298. *See Likins*, 793 S.W.2d at 122 (requiring "substantial evidence of just cause and significant detriment" before allowing name change in Kentucky). No Kentucky statute mandated such a high threshold for changing a child's surname. *Cf.* Sheppard v. Wright, 895 P.2d 748 (Okla. Ct. App. 1995) (citing 12 OKLA. STAT. tit. 12, § 1631-37). Although no Oklahoma statute states that a mother cannot change a child's surname from that of the natural father over the father's objection, the Oklahoma Court of Appeals so held and attributed the position to a statutory prohibition. *See id.*

299. *See supra* note 50.

surname,[300] as a conservative emphasis on name stability,[301] or as a way to preserve the non-custodial parent's bond with the child. This last justification was clearly announced in the 1990 case of *Likins v. Logsdon*,[302] in which the Kentucky Supreme Court held: "We require a parent seeking to attenuate the relationship between her former spouse and his child to present objective and substantial evidence of just cause and significant detriment to the child before the child's name is changed where the petition for change of name is contested."[303] Because so many courts refer to the relationship between a shared surname and the strength of the non-custodial parent-child bond (in applying both the presumption for the status quo and the best interest of the child standard),[304] and because this last concern seems innocuous on its face, I take some time to discuss its gendered and inaccurate premise.

It is antithetical to most females' experience to believe that the father-child bond depends upon a shared surname. The typical female experience of foregoing use of the birth name upon marriage tells many women that a bond with one's father does not depend upon such an ephemeral label. The woman and her father love each other no less when the woman changes her surname upon marriage. As one women in Susan Kupper's study observed poignantly, "A

300. *See, e.g.*, Kay v. Bell, 121 N.E.2d 206, 208-09 (Ohio Ct. App. 1953) ("Where ... the child is born in lawful wedlock, the legal name is the first or Christian name, and the surname or last name of his or her natural father.").

301. *See, e.g.*, Aitkin County Family Serv. Agency v. Girard, 390 N.W.2d 906, 909 (Minn. Ct. App. 1986) ("It is in the best interests of such young children to provide them with stability and continuity.").

302. 793 S.W.2d 118 (Ky. 1990).

303. *Id.* at 118; *see also* Young v. Young, 356 N.W.2d 823, 824 (Minn. Ct. App. 1984) ("A name change risks alienating [the father] and jeopardizes the parent-child relationship."); Robinson v. Hansel, 223 N.W.2d 138, 140 (Minn. 1974) ("The link between a father and child in circumstances such as these [divorce] is uncertain at best, and a change of name could further weaken, if not sever, such a bond."); Rio v. Rio, 504 N.Y.S.2d 959, 964 (Sup. Ct. 1986) ("The need to preserve the father-child bond is a reason most often given for the paternal surname presumption." (citing *In re* Marriage of Presson, 465 N.E.2d 85, 89 (Ill. 1984)); *In re* Shipley, 205 N.Y.S.2d 581, 586 (Sup. Ct. 1960) (noting that a name change would "contribute to the further estrangement of the children from their natural father"); *Sheppard*, 895 P.2d at 748 (" 'It has been recognized that change of a child's paternal surname may foster an unnatural barrier between the father and the child and erode a relationship that should be nurtured. Some authorities believe that whenever the parents of a child are divorced and the custody is in the mother, the remaining bond between the father and child is at best tenuous and may be further weakened, if not utterly destroyed by a change of the minor's surname.' " (quoting *In re* Tubbs, 620 P.2d 384, 387 (Okla. 1980))).

304. *See supra* note 303; *infra* notes 395-414 and accompanying text.

name hardly affects a love relationship."[305]

The cases indicate that men repeatedly raise this bonding argument, and that women rarely raise a comparable claim. For example, in a 1996 case, the father "testified that he would feel a closer bond with child if the surnames were the same, however [the mother] testified that the change of surname would not affect her relationship with the child."[306] In an extensive survey of the case law, I have read no case where a mother sought to impose her surname on her child in order to maintain the mother-child bond, although this may reflect the fact that all of the mothers had physical custody of their children. In a few cases, the custodial mother argued that the existing mother-child bond, like the father-child bond, could be affected by the child's surname, but such arguments were usually offered in response to fathers' similar claims.[307] In addition, while male litigants often claim a name change will weaken the father-child bond, these men rarely argue that the name change petition was filed for this purpose. In one case, a woman admitted that she sought to change the child's name to weaken the father-child bond,[308] but this case stands out as an anomaly.

Even if some women believe that a name change may affect the father-child bond, the general proposition is questionable. One need only consider the numerous heart-warming stories involving parents and children with different surnames (e.g., step-parents and their step-children, foster parents and their foster children, and fathers and their non-marital children),[309] and the divorce rate between people with a shared surname,[310] to question the link between a shared surname and a family bond. In other contexts, a shared surname is not generally perceived either to hinder or further a domestic bond.[311] Even "children and fathers frequently testify that they

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305. KUPPER, *supra* note 54, at 68.

306. Jarrells v. Epperson, No. 2-96-12, 1996 WL 562052, at *1 (Ohio Ct. App. Oct. 1, 1996) (non-marital child).

307. *See infra* note 358 and accompanying text. In fact, often it is difficult to tell if the mother raised the argument, or if the court raised it *sua sponte.*

308. *See* Neal v. Neal, No. 20469, 1996 WL 507218, at *2-3 (Mo. Ct. App. Sept. 6, 1996), *rev'd* No. 79376, 1997 WL 133418, at *4 (Mo. Mar. 25, 1997) (en banc).

309. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989).

310. *See supra* note 21.

311. *See* Kathleen McKinney, *The Influence of Choice of Last Name and Career Status on Perceptions of a Woman and Her Spouse*, 19 FREE INQUIRY IN CREATIVE SOC. 3 (1991) (finding, in a study of predominantly white, middle-class college students, that the respondents believed the selection of a surname had no effect on a marital couple's chance for success as marital partners, potential parents, friends, or colleagues, or for success in careers and daily life, or for marital happiness and likelihood of having children).

would not love each other less if the child bore a different surname."[312]

Although courts have been concerned since at least the 1920s that a child's name change may erode the father-child bond,[313] no court has ever satisfactorily explained why the father-child bond might weaken if the child's surname were changed. One Pennsylvania court gave the following unpersuasive explanation:

> It is easy to understand why a father would object to the name change of a child who shares his surname. A name change in that case could arguably have some effect upon the parent-child relationship, at least to the extent that the child would no longer be held out to the world as the issue of his or her father.[314]

A New York Family Court said, without further explanation: "[I]t is easily apparent that this custom strengthens the relationship between father and child which is not as biologically obvious as the relationship between the mother and child."[315] It seems as if these courts believe that the father-child bond depends upon others' recognition of the father-child relationship, which in turn is only possible if the father and child share the same surname.

It is unconvincing to suggest that patronymy is justifiable because the father-child bond is not as "biologically obvious" as the mother-child bond. Women's private birthing experiences, the availability of bottle feeding and wet nurses, the short time period during which women tend to breast-feed, as well as gestational and genetic surrogacy, all make a woman's biological relationship to her children no more "obvious" to most of the world than the father's biological relationship. To the extent that a shared surname and third-party recognition of the father-child relationship historically helped reassure a father that the child was his own, today a paternity test can more conclusively establish the biological basis for the relationship.[316]

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312. Doll, *supra* note 27, at 234 (footnote omitted).

313. *See, e.g., In re* Epstein, 200 N.Y.S. 897, 898 (City Ct. 1923) (refusing to change minor's surname to stepfather's surname as it would "foster an unnatural barrier between the [natural] father and son").

314. *In re* Richie, 564 A.2d 239, 241 (Pa. Super. Ct. 1989) (non-marital child).

315. Good v. Stevenson, 448 N.Y.S.2d 981, 983 (Fam. Ct. 1982); *see also In re* Paternity of Tibbits, 668 N.E.2d 1266, 1268-69 (Ind. Ct. App. 1996) (noting that surname has impact on father-child relationship unlike mother-child relationship because father has to prove his paternity of a non-marital child).

316. Similarly, it makes no sense that a surname can impact the father/non-marital child relationship simply because paternity must be proved for the relationship to have legal consequence. *See supra* note 315. A shared surname will not be sufficient by itself to

Despite the unclear rationale for believing that a shared surname is necessary for a viable parent-child bond, courts often accept very flimsy evidence to support a finding that the father-child bond will be affected if the child does not bear the patronym. For example, in the 1996 case of *Morris v. Morris*,[317] the father, Troi Morris, opposed a change of his non-marital child's surname from Morris to either Cope-Morris or Morris-Cope.[318] Cope was the mother's surname, and the mother brought the petition after the father stopped living with her and the child. The father's reason for opposing a change was as follows: "Wesley . . . can have a lot of pride in his last name. . . . [H]is last name will mean as much as my last name means to me. And I want him to have that. . . . He's going to be living with his mother. It's just what I've got to give to Wesley, and I want him to have it."[319] The father also stated that he had lived with his son for about six months and wanted to maintain their relationship.[320] The circuit court concluded that the proposed name change would unduly interfere with the father-child relationship, and therefore disallowed it. The appellate court upheld the circuit court's decision, admitting, rather generously, that the evidence offered by the father to support his position was not extensive.[321] Other courts have gone so far as to take "judicial notice" that the patronym "undoubtedly carries great significance in the father-child relationship."[322]

The social science research that best supports the argument that a name can affect the parent-child relationship, and what appears to be the only study of its kind, was conducted by Frank F. Furstenberg, Jr. and Kathy Gordon Talvitie.[323] The study involved 323 predominantly unmarried teenage mothers[324] and explored the following

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establish a legal relationship with the child, nor can the fact of diverse surnames stop the establishment of the legal relationship.

317. 926 S.W.2d 87 (Mo. Ct. App. 1996).

318. *See id.* at 88.

319. *Id.* at 89.

320. *See id.*

321. *See id.*

322. Good v. Stevenson, 448 N.Y.S.2d 981, 983 (Fam. Ct. 1982).

323. *See* Furstenberg & Talvitie, *supra* note 10. These authors noted that "[a]lmost no attention in studies of American kinship has been devoted to what would seem to be an obvious issue of anthropological and sociological interest: how naming patterns structure and reinforce familial bonds." *Id.* at 33.

324. Ninety-seven percent of the mothers were unmarried at conception and roughly seventy-five percent were unmarried at delivery. *See id.* at 36. It deserves mention that the methodology of this study was less than ideal. For example, the study had a non-representative sample. The sample was composed almost exclusively of African Americans in the lower socio-economic strata. *See id.* at 36 (stating that 91% of those who participated in the five-year follow-up were African American and describing the socio-

question: "[D]oes the assignment of patronyms involve a commitment on the part of fathers to participate in the upbringing of their children?"[325] The authors concluded that there was

> a clear and generally consistent association between naming patterns and paternal involvement in the families of never-married fathers. When children bore their father's name, they were much more likely to have regular contact with their fathers and to receive economic assistance from them .... [T]he expectation that naming patterns would be linked to subsequent paternal performance among unmarried fathers seems to be borne out.[326]

The correlation also applied to those fathers who married, but later divorced, the mothers.[327]

Despite this seemingly forceful conclusion, the Furstenberg and Talvitie study fails to support any connection between a shared surname and a better quality father-child relationship, at least from the child's perspective. The authors found that a child with the same name as his or her father "did not enjoy greater intimacy" with the non-custodial parent.[328] Indeed, children bearing their fathers' names "tended to have slightly less gratifying relations with [the] father."[329] Consequently, "[f]rom the child's point of view, being

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economic position of the sample). While research directed at this group is valuable, it is unclear to what extent one can extrapolate the results to the general population. Also, the study's design was an afterthought. Almost all of the relevant data was collected from the mother in the final interview of a five-year study initially designed to assess contraceptive services provided by a hospital. *See id.* at 36-37. The fathers were not contacted directly because "most males simply could not be located without an inordinate amount of time and expense." *Id.* This observation makes the mothers' characterization of the fathers' involvement in the children's lives inherently suspect. *See id.* at 43. In addition, no regression analysis was done to eliminate the effect of a surrogate father living in the home on the biological father-child relationship, an effect which appeared substantial both in terms of the father's physical contact and child support. *See id.* at 46-47 (stating that 62% of fathers continued to see their children when the mother remained unmarried, as compared to only 9% when a surrogate father lived in the home, and that 90% of fathers provided no financial support when the mother was married to another man, as compared to 59% when the mother was not married).

325. *See id.* at 35.

326. *Id.* at 47-49.

327. "The degree of paternal participation was roughly the same in the two subgroups." *Id.* at 45 (comparing children of fathers who had never married the mothers with children of fathers who had married the mothers but later left the home when the marriages ended). In addition, the "unmarried fathers provided almost as much (or as little) financial assistance as did the formerly married males." *Id.* Overall, "the sons of formerly married couples had more contact with their biological fathers and received greater support if they bore their names." *Id.* at 50.

328. *Id.* at 50.

329. *See id.* at 51, 56 n.8 (finding that 38% of those with the same name experienced

named after the father proved to be a mixed blessing. He received more attention than might otherwise have been the case but at a certain cost to the quality of his relationship with his father."[330] In addition, the increased financial support and physical contact were not accompanied by "dramatic or compelling" positive outcomes for the children.[331]

More recent research by Frank F. Furstenberg et al. casts further doubt on the benefits of any increased physical contact with the non-custodial father. Their 1987 study found that frequency of visitation by the father and closeness of the father-child relationship had no consistent effect on measures of child well-being.[332] A 1993 study, using the same database that Furstenberg and Talvitie relied upon but with a seventeen-year and a twenty-year follow-up, also found that the amount of contact a non-custodial father has with his child is a minor factor in obtaining positive outcomes.[333] Furstenberg has recently concluded that "[n]o one knows how to foster stronger and

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some difficulty with the father as compared to 14% of those who did not bear his name).

330. *Id.* at 51.

331. *See id.* at 52. There were some positive results in the areas of behavior problems, ratings on their personal qualities, and scores on the Pre-School Inventory (a measure of a child's cognitive skills) for the sons that shared their fathers' names. *See id.*

332. *See* Frank F. Furstenberg, Jr. et al., *Paternal Participation and Children's Well-Being After Marital Dissolution*, 52 AM. SOC. REV. 695, 697-98 (1987) (discussing results of study involving nationally representative sample of children, aged 11-16, of divorced parents). The authors suggest that various clinical studies that found contrary results involved "small and unrepresentative samples," casting "doubt on their conclusiveness." *Id.* at 696 (citations omitted). In fact, Furstenberg et al. found that it was children's closeness to their *mothers* that revealed a clear pattern of strong effects as to children's well-being. *See id.* at 698. The authors concluded, "[W]e see no strong evidence that children will benefit from the judicial or legislative interventions that have been designed to promote paternal participation, apart from providing economic support." *Id.* at 700; *see also* MACCOBY & MNOOKIN, *supra* note 49, at 164 ("[T]he evidence supporting beneficial effects of contact with non-resident fathers was thin and inconsistent.").

333. The authors stated:

> A close bond with the outside biological father has the least impact on youth outcomes. Although the children who had contact with and were strongly attached to their nonresidential biological fathers were more likely to have high measures of attainment and more likely to avoid imprisonment and depression, the advantage of the attachments is only marginally beneficial.

Frank F. Furstenberg, Jr. & Kathleen Mullan Harris, *When Fathers Matter/Why Fathers Matter: The Impact of Paternal Involvement on the Offspring of Adolescent Mothers, in* THE POLITICS OF PREGNANCY 189, at 207 (Annette Lawson and Deborah L. Rhode eds., 1993). In fact, children with strong attachments to nonresidential biological fathers were more likely to have their own children earlier than those who were not attached to their outside biological fathers or had no contact with them. *See id.* As few Caucasians remained in the study by 1987, the findings are generalizable only to African Americans living in urban areas. *See id.* at 192.

more lasting attachments between children and their fathers,"[334] and emphasized that "the seemingly obvious benefits for children of paternal participation in disrupted (or even intact) families cannot be assumed without stronger evidence than has been produced to date."[335] Although Furstenberg's more recent research does not dispute the importance for children of economic support from

334. *Id.* at 209.

335. *Id.* at 191. David Blankenhorn, in his book *Fatherless America*, argues that a child's well-being is enriched by a high level of paternal investment. *See* DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 25 (1995). Blankenhorn identifies violence among young men, child sexual abuse, child poverty and economic insecurity, and adolescent childbearing as all being linked to fatherlessness. *See id.* at 26-48. According to Blankenhorn's thesis, diminishing these negative outcomes requires a father's co-residency with the children and a parental alliance with the mother—or, in shorthand, "married fatherhood." *See id.* at 18. If co-residency and the parental alliance are absent, fatherhood becomes "essentially untenable, regardless of how he feels, how hard he tries, or whether he is a good guy." *Id.* at 19. While one may agree with Blankenhorn's thesis, married fatherhood is absent when the disputes discussed in this Article arise. Therefore, even if Blankenhorn's studies support his proposition, one cannot conclude that a child's use of the father's surname, when the father and the child live apart and hostility exists between the father and mother (e.g., over naming), will produce positive child outcomes. In fact, Blankenhorn admits that nothing short of eradicating fatherlessness will help. *See id.* at 48. He states:

> Visitation confers almost none of the predictable benefits of fatherhood because visitation is not fatherhood. Consequently, while children benefit dramatically from fathers, they often benefit little, if at all, from periodic visits with ex-fathers. Visitation is a shadow, a painful reminder, of fatherhood—observable and even measurable in clinical settings, but not nearly substantial enough to register as fatherhood, or even almost-fatherhood, on most large-scale surveys of quantifiable outcomes for children of divorce.

Id. at 299-300 n.58. Moreover, Blankenhorn admits that, over the last two decades, social scientists and many other influential people in public discourse have argued that fathers are not very important, although he disputes some of the researchers' findings. *See id.* at 69-83. Blankenhorn never criticizes Furstenberg's research, and, in fact, quotes him at various points in his book. Other sociologists have confirmed Furstenberg's conclusions. *See, e.g.*, Judith S. Wallerstein & Tony J. Tanke, *To Move Or Not To Move: Psychological And Legal Considerations In The Relocation Of Children Following Divorce*, 30 FAM. L.Q. 305, 312 (1996) ("There is no evidence in Dr. Wallerstein's work of many years, including the ten and fifteen year longitudinal study, or in that of any other research, that frequency of visiting or amount of time spent with the non-custodial parent over the child's entire growing-up years is significantly related to good outcome in the child or adolescent."). Even if one believes that visits by non-custodial fathers lead to positive outcomes, at best, one would have to admit that the research on this point is "inconsistent." *See* Jane W. Ellis, *Caught in the Middle: Protecting the Children of High-Conflict Divorce*, 22 N.Y.U. REV. L & SOC. CHANGE 253, 259-61 (1996) (book review). Inconsistent research should not be a sufficient justification for requiring a child to bear the non-custodial parent's name in order to promote the bond between the child and the non-custodial parent. In fact, even Blankenhorn admits that "the idea of children taking their father's name ... becomes impractical and increasingly hard to justify" in a society where fatherhood is decomposing. Blackenhorn, *supra*, at 310 n.31. He says, "Indeed, for growing numbers of families in our society, the practice may no longer be worth the trouble." *Id.*

nonresident fathers, the earlier connection Furstenberg and Talvitie drew between the payment of child support and a shared name must now be reevaluated in light of the federally-endorsed child support collection system. Furstenberg and Talvitie's conclusions stemmed from research conducted in 1975-80, before such programs expanded.[336]

Even assuming that a child benefits more from financial support and physical contact than from the quality of his or her relationship with the father (a debatable proposition), and that physical contact leads to positive child outcomes (another debatable proposition), and that financial support and any resultant physical contact are not obtainable through the existing child support system (a further debatable proposition), Furstenberg and Talvitie themselves cautioned against drawing any causal connection between the name borne by the child and the vitality of the father-child relationship.[337] They noted that the bestowal of the father's name may only be "an acknowledgment of the father's willingness at the time of birth to play an active part in the child's upbringing. As such, the name itself may have no direct bearing on the future relationship of parent and

336. The child support enforcement system may also provide another avenue to improve parental involvement in the child's life independent of the name the child bears. In 1975, part D was added to Title IV of the Social Security Act. This created the Office of Child Support Enforcement and set general requirements that states must meet in order to receive federal money. Before this, child support was generally a province of the states. The Child Support Enforcement Amendments of 1984 required states to adopt certain tools for enforcing child support obligations, including automatic wage withholding when payments were in arrears by one month and advisory child support guidelines. The Family Support Act of 1988 further strengthened the child support enforcement system. Among other things, it required immediate mandatory withholding and required that the guidelines be treated as a "rebuttable presumption," requiring courts to justify any deviation from the guidelines. It provided periodic review and updating of both the guidelines and the individual awards. *See generally* ANDREA H. BELLER & JOHN W. GRAHAM, SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT 4-5, 163-69 (1993) (discussing the Acts). In 1992, Congress passed the Child Support Recovery Act, which made it a federal criminal offense to fail to pay child support obligations to a child in another state. 18 U.S.C. § 228 (1994). And title III of the Personal Responsibility and Work Opportunity Act of 1996, Pub. L. 104-193, 110 Stat. 2105, contains requirements that the states set up child support distribution units and new hire registries to aid in locating parents with support obligations. The legal reform was accompanied by a 577% increase in government spending at the federal and state level on the child support programs between 1976 and 1986. *See* BELLER & GRAHAM, *supra*, at 5. While there is some question whether custodial parents generally have received more child support because of the legal reform and increased spending, small subgroups of black mothers and never-married mothers have benefited, and the authors noted that the real value of awards would have declined further had the law not been adopted. *See id.* at 6.

337. *See* Furstenberg & Talvitie, *supra* note 10, at 52.

child."[338] Other studies, from which one might extrapolate, help dispel the perception that a link exists between a child's surname and the strength of the father-child relationship.[339]

Still other studies indicate that bearing the same name as one's father may work to a child's detriment. Evidence indicates that the practice of father-naming (for example, naming a child "Junior") correlates with psychiatric problems for the child,[340] as well as with child abuse.[341] Moreover, the imposition of a biological father's surname on a reluctant child can foster resentment that further harms the father-child relationship.[342] Furstenberg's 1993 study found that a poor relationship with a biological father was worse than no relationship at all: "[A poor relationship] may interfere with the child developing a bond with another father figure, disturb his or her rela-

338. *Id.* at 49. The children's positive outcomes were potentially attributable to greater "parental involvement," rather than name congruence, *see id.* at 52, and the amount of parental involvement may turn on the quality of the relationship between the parents. *See supra* note 324.

339. Several researchers have found no impact (or a positive impact) on the marriage relationship when spouses have different surnames. For example, Susan Kupper's study found that, "[t]he great majority of the husbands and wives in the survey thought that the women's name choices [that differed from their husbands' surnames] had either a positive impact on their marriages or none at all." KUPPER, *supra* note 54, at 68. Penelope Wasson Dralle's study found that "[t]here were no differences in . . . commitment to marriage as measured by whether a marriage ended or how it ended" between women who took their husbands' surnames, those women who kept using their own surnames, and those women who adopted an alternative. Dralle, *supra* note 205, at 174. These results, however, may depend upon the fact that the spouses voluntarily chose different surnames. Alternatively, these results may be attributable to the women's efforts.

340. *See* Robert Plank, *The Use of "Jr." in Relation to Psychiatric Treatment*, 19 NAMES 132, 134 (1971) (discussing research supporting the Hamlet hypothesis that sons named Junior after the father tend to have more neurosis as reflected by the fact that Juniors are over represented among the neuropsychiatric patients and applicants for psychiatric outpatient treatment); *see also infra* text accompanying notes 346-47 (extent of father-naming).

341. *See* Catherine Cameron, *The Trouble With Junior: Father-Naming, Child Abuse, and Delinquency*, 71 SSR 200, 201-02 (1987) (finding strong support for the following hypotheses among Hispanics and Anglos, but not African Americans, when controlling for birth order and class: (1) that a higher percentage of father-named adolescents are found in the institution for delinquent male adolescents, and (2) that in the institution for delinquent male adolescents, a higher percentage of parental abuse is recorded in the files of father-named adolescents than in the files of boys not father-named). As the author explained, "A potentially abusive father, whose identity is fused with his name-sake's, has a natural target for hostility. So has the mother, who can displace resentments toward her lover, her husband, or former spouse onto the boy who bears his name." *Id.* at 200.

342. *See, e.g.*, Nellis v. Pressman, 282 A.2d 539, 540-41 (D.C. 1971) (involving sixteen year old who testified that court order requiring that he assume his father's surname caused his relationship with his father to deteriorate); Rappleye v. Rappleye, 454 N.W.2d 231, 232 n.2 (Mich. Ct. App. 1990) (upholding trial court's order allowing ten year old to continue informally to use her stepfather's surname).

tionship with the mother, or directly undercut the child's ability to function as an adult."[343] In fact, Furstenberg's 1993 research showed that a child's relationship with his or her mother and/or stepfather is probably more important in terms of positive outcomes for the child than the child's relationship with the non-residential biological father.[344] Consequently, to the extent that courts believe surname congruence is salutary for the adult-child bond, the courts should just as readily, if not more readily, give a child the surname of his or her mother and/or stepfather.[345]

The Furstenberg and Talvitie study also raises an interesting question about courts' orientation when they evaluate father-child bond arguments. Furstenberg and Talvitie focused on the effect of giving a child the father's *first* or *middle* name; the authors did not explicitly ask about the use of surnames.[346] Thus, whatever value accrues to the father-child relationship through a shared name may be

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343. *See* Furstenberg & Harris, *supra* note 333, at 208.

344. *See id.* at 193-94; *see also supra* note 332; Thomas S. Parish & Terry F. Copeland, *The Relationship Between Self-Concepts and Evaluations of Parents and Stepfathers*, 101 J. PSYCHOL. 135, 137 (1979) ("[I]ndividuals from father absent families more strongly identified with their mothers and their stepfathers, but not their fathers."). One third of the children studied lived with a stepfather or surrogate father even if they had lived with their biological fathers at some point, and 60% of the children who had never lived with their biological fathers lived with a stepfather or surrogate father. *See* Furstenberg & Harris, *supra* note 330, at 193. While over one third of the children living with a stepfather were highly attached to him, only 13% of children reported strong bonds with nonresidential biological fathers (with no difference between fathers who had been married to the mothers and those who had not or between those fathers who were in the home for six years or more and those who were never in the home). *See id.* at 196-97. The youths who had close ties with their stepfathers were "[p]erforming extremely well in early adulthood." *See id.* at 204. A similar result existed for those 13% who reported strong bonds with nonresidential biological fathers. *See id.* at 204-05. However, the children who showed the best results had strong bonds and lived with their biological fathers or stepfathers. These youths "were twice as likely to have entered college or to have found stable employment after high school, 75% less likely to have been a teenage parent, 80% less likely to have been in jail, and half as likely to have experienced multiple depression symptoms." *Id.* at 207.

345. As Joseph Goldstein et al. recognized:

> Unlike adults, children have no psychological conception of relationship by blood-tie until quite late in their development.... What registers in their minds are the day-to-day interchanges with the adults who take care of them and who, on the strength of these, become the parent figures to whom they are attached.

JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 12-13 (1979).

346. *See* Furstenberg & Talvitie, *supra* note 10, at 37. While the majority of children in the study were not named after any family member, children who were so named overwhelmingly had their fathers' names. Over half of the boys inherited their fathers' first or middle names (or both), although girls received a variety of the paternal forename only 8% of the time. *See id.* at 38, 41 (stating that 41% of the sons with unmarried parents and 66% of the sons with married parents were named after their fathers).

achieved through the sharing of the praenomen. Other studies demonstrate that large numbers of children receive the paternal first name (or a paternal relative's first name) as a first or middle name.[347] It is odd that courts *almost never* look at the child's first or middle name when analyzing whether the paternal-child bond will be damaged by a name change.[348] The omission seems odd because at common law the first name was an integral part of one's name,[349] and

347. *See* Alice S. Rossi, *Naming Children in Middle-Class Families*, 30 AM. SOC. REV. 499, 511 tbl.8 (1965) (stating that 62% of the children studied were named after a particular relative, almost invariably consanguineal kin; 42% of the sons were named after their fathers, rarely after maternal kin; 48% of girls were named for grandparents, with the maternal and paternal grandparents being approximately equally selected); *see also* ALFORD, *supra* note 10, at 131-34 (discussing a study in southeastern Oklahoma which revealed that 57% of children receive a first name or middle name from relatives; boys received a name from a relative 67% of the time, compared to 46% of the time for girls; 34% of boys were named for a patrilineal relative, and only 12% of girls are named for a matrilineal relative); Thomas V. Busse et al., *Identical First Names for Parent and Child*, 107 J. SOC. PSYCHOL. 293, 293 (1979) (noting that 22% of boys had same first names as fathers and 3% of girls had the same first names as mothers in study of 1727 students in grades two through six of a socio-economically heterogeneous suburban school district); Jill L. Johnson et al., *Sociobiology and the Naming of Adopted and Natural Children*, 12 ETHOLOGY & SOCIOBIOLOGY 365, 366 (1991), and research cited therein ("While there was undoubtedly a decrease in namesaking . . . during the nineteenth century, the practice has always been common and remains so today."); *id.* 368-73 (discussing naming practices for natural and adopted children and summarizing other research).

For discussions of research examining the historical practice of namesaking, see generally ALFORD, *supra* note 10, at 132-33 ("Presumably, the greater the prestige of a family, the more it will be concerned with prestige perpetuation."); Cody, *supra* note 133, at 569-595 (finding that the father's name was transmitted to the next generation in nine out of ten slave-owner families, and naming by slaves followed a similar patriarchal pattern, but not to the same extent, after Bible teaching took hold); Johnson et al., *supra*, at 373 ("The more that parenthood was assured, the less likely the child was to be namesaked.") (finding that adopted children are more likely than biological children to be namesaked); Rex Taylor, *John Doe, Jr.: A Study of His Distribution in Space, Time, and the Social Structure*, 53 SOC. FORCES 11, 17 (1974) ("Throughout the period [1913 to 1968] there is a strong and positive association between a father's occupational prestige and the propensity to name his son after himself.").

348. *See, e.g.*, Brown v. Carroll, 683 S.W.2d 61, 62-63 (Tex. Ct. App. 1984, no writ) (ignoring fact that one of the children was a Jr. in discussing preservation of father-child relationship); Flowers v. Cain, 237 S.E.2d 111, 113 (Va. 1977) (ignoring fact that one of the children was a Jr. in discussing the need to improve the "strained father-child relationship"); *see also In re* Marriage of Presson, 465 N.E. 2d 85, 86 (Ill. 1984) (father and son shared middle name); Michel D.L. v. Martha P. & Charles P., 203 N.Y. L.J. at 28 (May 11, 1990) (son's middle name was father's first name). *But see* Clinton v. Morrow, 247 S.W.2d 1015, 1017 (Ark. 1952) (concluding that changing child's surname to stepfather's surname was appropriate because boy experienced confusion and disadvantage from having identical first and middle initials, and similar names, as father, grandfather, and half-brother); *cf.* M.D. v. A.S.L., 646 A.2d 543, 546 (N.J. Super. Ct. Ch. Div. 1994) (changing non-marital child's middle name to the father's surname can achieve "bond").

349. *In re* Dengler, 246 N.W.2d 758, 760 (N.D. 1976) ("By the common law, since very

the cognomen's purported importance to maintaining the father-child bond after a divorce is not logically connected to its original purpose.[350] Moreover, in a number of name change cases, the child and the father bear the same first or middle name.[351] In addition, as women recognize from their own experiences, a first name can have more personal significance than a surname.[352]

Despite the lack of social science support for the father-child bond argument, a father might testify (and a psychologist might confirm)[353] that the father will treat his child less warmly if his child does not bear the father's surname.[354] Courts should not countenance this

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early times, a legal name has consisted of one Christian or given name, and of one surname, patronymic, or family name, the given name being used first and the surname last." (citation omitted)); *see also In re* Ritchie III, 159 Cal. App. 3d 1070, 1073-74 (Ct. App. 1984) ("At common law a person's name consisted of a given name and of a surname or family name."); C.P. Weathers v. Modern Masonry Materials, Inc., 129 S.E.2d 65, 68 (Ga. Ct. App. 1962) (noting historical implications of person's first name); *In re* Douglas, 304 N.Y.S.2d 558, 560 (App. Div. 1969) (pointing out that people were identified by their first names long before surnames even developed). At some points in history, a first name was the more important of one's two names. A man could only have one baptismal name although he could have numerous surnames. *See In re* Snook, 2 Hilt. 566, 568 (N.Y. 1859) (citing Coke LiH.3, a(m)). In fact, "throughout the early reports the Christian name is uniformly referred to as the most certain mark of the identity of the individual in all deeds or instruments." *Id.* at 568-69.

350. *See supra* note 108.

351. *See supra* note 348.

352. *See supra* text accompanying notes 199-204.

353. Contrary to what other authors have observed, *see, e.g.*, Doll, *supra* note 27, at 234 ("[T]his impairment of the father-child relationship had been an assumption by the courts, and fathers had not introduced circumstantial or scientific evidence of harm." (footnote omitted)), fathers sometimes do employ psychologists to help establish the connection between the surname and the parent-child bond. *See, e.g.*, Degerberg v. McCormick, 187 A.2d 436, 439 (Del. Ch. 1963) (citing psychiatric testimony that "change of surname of a child of divorced parents may contribute to estrangement of the child from his father"); Nellis v. Pressman, 282 A.2d 539, 541 (D.C. 1971) (citing father's psychologist's testimony that the children's use of the paternal surname was important to the familial relationship); Azzara v. Waller, 495 So. 2d 277, 278 (Fla. Dist. Ct. App. 1986) (citing psychologist's testimony that changing child's name would cause estrangement of child from her natural father). Yet psychologists can also be found who refute the father-child bond argument. *See In re* Marriage of Douglass, 205 Cal. App. 3d 1046, 1056 (Ct. App. 1988) (describing expert's testimony that "the particular surname used by a child was not a primary factor in maintaining parent-child relationships. He stated the most significant factor in maintaining a parent-child relationship is the attitudes and conduct of the parents"); *Nellis*, 282 A.2d at 540-41 (citing another psychologist's testimony that forcing the child to maintain the surname would hurt his relationship with his father); *Azzara*, 495 So. 2d at 278 (citing another psychologist's testimony that all children should have the same surname as the people with whom they live to signal normalcy). Social science research helps put this testimony into perspective.

354. *See* Garrison v. Knauss, 637 N.E.2d 160, 161 (Ind. Ct. App. 1994) (noting that father testified that it was in his non-marital daughters' best interest to change their surname to his surname upon the establishment of paternity "for—just for—that paternal

argument. The father speaks the language of patriarchy when he says, "I cannot love anyone I cannot label." Men who use such tactics are essentially threatening to withhold their love until they get what they seek: the perpetuation of the patronym. Since "in few appellate name dispute cases have the fathers who have wanted their children to retain their surnames sought custody,"[355] the fathers seek the benefits of a custodial relationship (a close bond with their children and a shared surname) without undertaking the responsibilities of a custodial parent.

Few appellate courts have rejected the argument that the patronym is vital to the father-child bond. The New Jersey Supreme Court is the only court that has made a normative pronouncement against entertaining the argument.[356] It recently stated: "The preservation of the paternal bond is not and should not be dependent on the retention of the paternal surname; nor is the paternal surname an indispensable element of the relationship between father and child."[357]

More commonly, courts that have wanted to reject the argument mistakenly have thought that the proper response was to extend the reasoning to women: "If the name is important to the strengthening of the father-son relationship, it is just as logical to say it is important to strengthening the mother-son relationship."[358] Yet few women would argue that their relationships with their children would suffer if the children did not bear the maternal surname. It is perhaps for this reason, or perhaps because the mother is typically the custodial parent, that " 'courts largely have ignored the impact a name may

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feeling that they are my children").

355. Urbonya, *supra* note 44, at 814 (citations omitted).

356. *See* Gubernat v. Deremer, 657 A.2d 856 (N.J. 1995). Other courts have rejected the argument without questioning its premise. *See, e.g.*, Pizziconi v. Yarbrough, 868 P.2d 1005, 1008 (Ariz. Ct. App. 1993) (rejecting father's argument that the child's discontinued use of his name would weaken father-child relationship by noting that father and child had bonded); Jones v. Roe, 604 N.E.2d 45, 48 (Mass. App. Ct. 1992) (reasoning that nonmarital child's name change was not necessary in light of the fact that parents had joint legal custody of child and custody would promote bond between father and child).

357. *Gubernat*, 657 A.2d at 867.

358. *Garrison*, 637 N.E.2d at 161 (quoting D.R.S. v. R.S.H., 412 N.E.2d 1257, 1268 (Ind. Ct. App. 1980) (Shields, J., dissenting)); *see also* Hamby v. Jacobson, 769 P.2d 273, 279 (Utah Ct. App. 1989); Leavitt, *supra* note 42, at 115 (arguing the state equal rights amendment requires equal consideration be given to the mother-child relationship). Even when courts consider "the impact of a name on the mother-child relationship," some courts have limited its potential applicability to "cases where the father is the custodial parent or where the custodial mother goes by her birth-given surname." *In re* Marriage of Schiffman, 620 P.2d 579, 584 (Cal. 1980) (en banc) (citing Thornton, *supra* note 42, at 330).

have on the mother-child relationship.' "[359] Even when the argument is occasionally made by mothers, courts sometimes exhibit an asymmetry in their acceptance of the argument. One court recently proclaimed that "the mother-child relationship is less affected by the surname used by the child [than the father-child relationship]" and "something such as a name will not affect significantly the mother-child condition."[360] The court's rationale for the distinction was that a mother need not establish maternity through the courts because "we know the origins of the mother-child relationship, inherently."[361] The court's basis for differentiating between mother and father in this way suffers from the same logical defects as the previously discussed justifications for linking a surname to the strength of the father-child bond.[362] The best tactic is to debunk altogether the myth that a name can affect the father-child bond, rather than to extend the argument, with its mixed results, to women.

In sum, the presumption in favor of the status quo is, virtually by definition, a standard that entrenches the current practice of patronymics.

B. Best Interest of the Child Standard

The "best interest of the child" standard is an alternative to the presumption in favor of the status quo. As the best interest of the child standard has become ubiquitous in family law, it is no surprise that courts use the standard to resolve disputes over children's surnames.[363] In fact, the best interest of the child standard is the most

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359. *In re* Andrews, 454 N.W.2d 488, 491 (Neb. 1990) (quoting *Schiffman*, 620 P.2d at 584). *See also infra* text accompanying note 409.

360. *In re* Paternity of Tibbitts, 668 N.E.2d 1266, 1268-69 (Ind. Ct. App. 1996) (discussing factors to be considered in adjudicating proposed name change for non-marital child).

361. *Id.*

362. *See supra* text accompanying notes 314-16.

363. Use of this standard began in the 1800s to resolve initial custody disputes between parents. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 237-42 (1985); Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1072 (1979). Use of the standard has proliferated so that it is difficult to find a family law case involving children where the phrase is not used. The standard is now used to resolve disputes in numerous areas, including adoption, neglect proceedings, and modification of custody orders. *See, e.g.*, IOWA CODE ANN. § 600.13(1)(e) (West 1995) ("At the conclusion of the adoption hearing, the court shall .... Dismiss the adoption petition ... if dismissal ... is in the best interest of the person whose adoption is petitioned."); *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1157, 1314 (1980) ("If a finding of neglect is made, the court is usually bound to dispose of the matter in accordance with the broad standard of the 'best interest' of the

common method by which courts resolve these disputes;[364] by current estimates, thirty-one states use this standard to determine whether or not to change a marital child's surname.[365]

The standard authorizes the court to determine the result that is best for a child. The parent who seeks to change the child's surname

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child."); Unif. Marriage and Divorce Act § 409(b), 9A U.L.A. 628 (1987) (stating that a court shall not modify a prior custody decree unless, inter alia, the modification "is necessary to serve the best interest of the child").

364. *See generally* Cardinal v. Perch, 611 A.2d 515, 516 (Del. Fam. Ct. 1991) ("[T]he great weight of judicial authority today supports the proposition that a child's last name should be determined on a 'best interest' standard."); *In re* Grimes, 609 A.2d 158, 161 (Pa. 1992) ("The best interests of the child is the standard used by an overwhelming majority of our sister states when reviewing petitions for change of name on behalf of minor children.").

365. The states which have adopted the best interest standard by statute or case law are the following: Arizona: ARIZ. REV. STAT. ANN. § 12-601(B) (West Supp. 1996); Arkansas: Stamps v. Rawlins, 761 S.W.2d 933, 936 (Ark. 1988); California: *In re* Marriage of McManamy, 18 Cal. Rptr. 2d 216, 217 (Ct. App. 1993); Colorado: Hamman v. County Court in and for Jefferson County, 753 P.2d 743, 749 (Colo. 1988) (en banc); Connecticut: Delaney v. Appeal From Probate, No. Cv9305212095, 1993 WL 328611, at *4 (Conn. Super. Ct. Aug. 17, 1993); District of Columbia: Nellis v. Pressman, 282 A.2d 539, 542 (D.C. 1971); Delaware: Degerberg v. McCormick, 187 A.2d 436, 439 (Del. Ch. 1963); Florida: Robertson v. Pfister, 523 So. 2d 678, 679 (Fla. Dist. Ct. App. 1988); Hawaii: HAW. REV. STAT. § 574-5 (1982 & Supp. 1992); Illinois: ILL. COMP. STAT. ANN. 5/21-101 (West 1992 & Supp. 1996); *In re* Craig, 518 N.E.2d 728, 729-30 (Ill. App. Ct. 1987); Indiana: IND. CODE ANN. § 34-4-6-4(d) (Michie 1986); *In re* Meyer, 471 N.E.2d 718, 720 (Ind. Ct. App. 1987); Kansas: *In re* Morehead, 706 P.2d 480, 483 (Kan. Ct. App. 1985); Maryland: Lawrence v. Lawrence, 538 A.2d 779, 781 (Md. Ct. Spec. App. 1988); Massachusetts: Mark v. Kahn, 131 N.E.2d 758, 762 (Mass. 1956); Michigan: Garling v. Spiering, 512 N.W.2d 12, 12 (Mich. Ct. App. 1993); Mississippi: Marshall v. Marshall, 93 So. 2d 822, 825-27 (Miss. 1957); Missouri: B.L.W. by Ellen K. v. WollWeber, 823 S.W.2d 119, 122 (Mo. Ct. App. 1992); Montana: *In re* Marriage of Firman, 610 P.2d 178, 181 (Mont. 1980); Nebraska: *In re* Andrews, 454 N.W.2d 488, 488-89 (Neb. 1990); New Mexico: *In re* Januskiewicz, 731 P.2d 1350, 1351 (N.M. Ct. App. 1986); Oregon: OR. REV. STAT. § 33.430(3) (1995); Pennsylvania: *In re* Grimes, 609 A.2d 158, 159 (Pa. 1992); South Carolina: S.C. CODE ANN. § 15-49-10(B) (Law. Co-op. 1993 & Supp. 1996); *Ex parte* Stull, 280 S.E.2d 209, 210 (S.C. 1981); South Dakota: Keegan v. Gudahl, 525 N.W.2d 695, 698 (S.D. 1994); Tennessee: Replogle v. Replogle, No. 01A-01-9312-cv-0516, 1994 WL 228227, at *2 (Tenn. Ct. App. May 27, 1994); Texas: TEX. FAM. CODE ANN. § 45.004(a) (West 1996); Utah: Hamby v. Jacobson, 769 P.2d 273, 277 (Utah Ct. App. 1989); Vermont: *In re* Wilson, 648 A.2d 648, 650 (Vt. 1994); Virginia: VA. CODE ANN. § 8.01-217 (Michie 1992); Flowers v. Cain, 237 S.E.2d 111, 112 (Va. 1977); Washington: Hurta v. Hurta, 605 P.2d 1278, 1279 (Wash. Ct. App. 1979); West Virginia: *In re* Harris, 236 S.E.2d 426, 428 (W. Va. 1977); *cf.* Alabama: ALA. CODE § 26-11-3(a)-(b) (1992) (requiring best interest standard be used after legitimization of children); New Hampshire: Moskowitz v. Moskowitz, 385 A.2d 120, 123 (N.H. 1978) (reasoning that authority exists to deny restoration of birth name to divorced woman with minor child "if the interests of a child would be adversely affected thereby"); Nevada: Magiera v. Luera, 802 P.2d 6, 7 (Nev. 1990) ("[T]he only factor relevant to the determination of what surname a child should bear is the best interest of the child.") (non-marital child); Rhode Island: Gersuny v. Armstrong, 581 A.2d 718, 719 (R.I. 1990) (applying best interest of child standard in case involving non-marital child).

must prove that the proposed change is in the child's best interest.[366] A court balances a number of considerations to reach its conclusion. One treatise writer summarized these factors as follows:

> a) the preservation of the father-child relationship; b) the strength of the mother-child relationship; c) the identification of the child as part of a family unit; d) the wishes of the child; e) the child's age and maturity; f) the nature of the family situation; g) misconduct of or neglect toward the child by the parent opposing the change; h) the name by which the child has customarily been called; i) the opposing party's conduct toward the spouse and the child during the marriage.[367]

Other factors that have been considered by courts include the length of time the child has used a name,[368] the child's comfort with using a surname that differs from the custodial parent's surname,[369] the child's alienation from neighborhood children who bear their fathers' surnames,[370] any negative association or social stigma that has attached to either the current or proposed name,[371] the child's safety if the child lacks a "locally identifiable" name,[372] and the petitioner's motive for seeking the name change.[373] Courts do not necessarily examine all of these factors,[374] and none of the factors constitutes a mandatory consideration.[375] The factors are not prioritized in importance, nor do most appellate courts or statutes set forth an exclusive

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366. *See Lawrence*, 538 A.2d at 781 ("[C]ourts from other jurisdictions agree that the proponent of the change bears the burden of demonstrating that the name change promotes the best interest of the child."); Doll, *supra* note 27, at 250 ("Women who wish to change their children's surnames have always shouldered the burden of proof. This is true even if the father is the plaintiff, trying to prevent the change."); Seng, *supra* note 24, at 1307 ("The usual rule governing minors' name changes places the burden of proof upon the mother who seeks to change the child's surname or to add her own name to the child's.").

367. CLARK, *supra* note 142, at 548.

368. *See, e.g., In re* Marriage of Schiffman, 620 P.2d 579, 583 (Cal. 1980) (en banc); *McManamy*, 18 Cal. Rptr. 2d at 217; Bobo v. Jewell, 528 N.E.2d 180, 185 (Ohio 1988).

369. *See, e.g.*, Gubernat v. Deremer, 657 A.2d 856, 867 (N.J. 1995); *Bobo*, 528 N.E.2d at 185; *Wilson*, 648 A.2d at 651.

370. *See, e.g.*, Cobb by Webb v. Cobb, 844 S.W.2d 7, 9 (Mo. Ct. App. 1992) (nonmarital child).

371. *See, e.g., Wilson*, 648 A.2d at 651.

372. *See* M.D. v. A.S.L., 646 A.2d 543, 546 (N.J. Super. Ct. Ch. Div. 1994).

373. *See, e.g., Wilson*, 648 A.2d at 651.

374. *See, e.g.*, Cohee v. Cohee, 317 N.W.2d 381, 384 (Neb. 1982) (emphasizing only five factors in determining the best interest of the child).

375. *See, e.g., Wilson*, 648 A.2d at 651 ("The court has broad discretion in determining what is in the best interests of the children . . . and thus which factors the court considers is a matter of discretion."(citation omitted)).

list of factors for trial courts to consider;[376] sometimes no factors at all are enumerated.[377] In the final analysis, the best interest of the child is determined by the virtually unfettered discretion of the trial court.

The indeterminacy of the standard has drawn criticism, and not solely in the naming context.[378] One court found difficulty in applying the standard to a name change dispute because "of the speculative quality of the inquiry into the effect that the chosen surname would have on the future welfare and happiness of the child."[379] Commentators have suggested that "[b]oth trial courts and the spouses are left at sea in these cases."[380] To appreciate the subjective nature of the test, one need only review a case that has been reversed on appeal to see just how two courts can reach diametrically opposite conclusions on each factor examined in the best interest inquiry.[381]

Just like most other issues involved in divorce litigation, disputes over children's name changes are often settled through negotiation with the parties bargaining "in the shadow of the law."[382] The apparent indeterminacy of the best interest standard provides

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376. *See* Bobo v. Jewell, 528 N.E.2d 180, 185 (Ohio 1988); *Wilson*, 648 A.2d at 651.

377. *See In re* Iverson, 786 P.2d 1, 3 (Mont. 1990) (Barz, J., dissenting) ("[G]uidelines are needed for the district courts, otherwise, the traditional preference for the father's name will continue and a subtle form of discrimination against women will prevail."). *But see In re* Grimes, 609 A.2d 158, 161 (Pa. 1992) ("Specific guidelines are difficult to establish, for the circumstances in each case will be unique, as each child has individual physical, intellectual, moral, social and spiritual needs.").

378. *See, e.g.*, Martha L. Fineman, *The Politics of Custody and the Transformation of American Custody Decision Making*, 22 U.C. DAVIS L. REV. 801, 845-46 (1989) (arguing that the differing conclusions reached by professional groups, special interest groups, and legal actors using the test "indicates that there are profound problems with the very articulation of the test"); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226, 229 (1975) (noting that determination of what is best for a child is "usually indeterminate and speculative"); Scott, *supra* note 12, at 622 ("The wide-open inquiry that the standard invites often devolves into a destructive contest in which each parent competes to expose the flaws of the other. The eventual determination can be speculative and value-laden .... [I]nconsistency and imprecision result even among courts that value the past parental caretaking role."). *But see* Carl E. Schneider, *Discretion, Rules and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2245-50, 2260-64 (1991) (canvassing the advantages of discretion).

379. Gubernat v. Deremer, 657 A.2d 856, 868 (N.J. 1995).

380. CLARK, *supra* note 142, at 548; *see also* Kennedy-Sjodin, *supra* note 16, at 184 (stating that the best interests test is vague and unpredictable).

381. *See, e.g.*, Hamby v. Jacobson, 769 P.2d 273, 275 (Utah Ct. App. 1989).

382. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979); Scott, *supra* note 12, at 643 ("Most divorce settlements and custody arrangements are decided through a process of negotiation between the spouses.").

little guidance for such bargaining, and as a result it can cause a party to trade economic benefits to obtain the desired name for the child. A vivid example of one party's willingness to trade economic benefits to secure a particular surname for a child was seen in *D.R.S. v. R.S.H.*[383] There the trial judge indicated that he would be inclined to reduce the father's support payments if the child's surname were not changed to the father's surname. The mother responded that she would forego all support if the child kept the mother's surname.[384]

The criticism that the best interest test is gender biased is not new. Scholars have commented that the standard is a " 'subterfuge to ... perpetuate the paternal [surname] preference.' "[385] Jurists have acknowledged the criticism, but have continued to use the standard. They deny that gender bias necessarily influences the best interest inquiry, and they pledge to apply the standard in a neutral manner.[386] For example, the Supreme Court of Vermont, while reaf-

383. 412 N.E.2d 1257 (Ind. Ct. App. 1980).

384. *See id.* at 1259 (non-marital child); *see also* Kennedy-Sjodin, *supra* note 16, at 166 (using the best interest test to decide a child's surname during divorce proceedings "adds a new aspect to the power struggle within divorce proceedings"). *But cf.* MACCOBY & MNOOKIN, *supra* note 49, at 273 (not finding custody being used as a bargaining chip in divorce negotiations).

385. *See* Doll, *supra* note 27, at 233 (quoting *Hamby*, 769 P.2d at 278); *see also* MacDougall, *supra* note 24, at 131 (arguing that courts implicitly adopted a presumption for the father's name when applying the best interest standard in disputes over renaming marital children originally given fathers' names); Thornton, *supra* note 42, at 304 (stating that recent decisions cast doubt on whether courts really consider the children's best interests or merely defer to the father's wishes).

386. *See* Pizziconi v. Yarbrough, 868 P.2d 1005, 1008 (Ariz. Ct. App. 1993) (non-marital child) ("[C]ourts should not give greater weight to the father's interest in having the child bear the paternal surname...."); *In re* Marriage of Schiffman, 620 P.2d 579, 583 (Cal. 1980) (en banc) (employing the best interest standard but indicating that the father's name would no longer be given preference); Jones v. Roe, 604 N.E.2d 45, 47 (Mass. App. Ct. 1992) (non-marital child) ("[A] court should not attribute greater weight to the father's interest in having the child bear the paternal surname than to the mother's interest in having the child bear her name.... The current trend of the cases is that the right of the father to have the child bear his name is no greater than that of the mother to have the child bear her name."); Overton v. Overton, 674 P.2d 1089, 1091 (Mont. 1983) (applying best interest test and adopting district court finding that husband had no "preference or natural right to have his daughter bear his surname"); *In re* Andrews, 454 N.W.2d 488, 491 (Neb. 1990) ("[T]oday's trend is toward parental and marital equality in reference to children...."); Cohee v. Cohee, 317 N.W.2d 381, 382 (Neb. 1982) ("Today, patrimonial control of surnames has virtually disappeared."); Gubernat v. Deremer, 657 A.2d 856, 867 (N.J. 1995) ("[I]n resolving disputes over surnames we apply the best-interest-of-the-child standard free of gender-based notions of parental rights."); K.K. v. G., 530 A.2d 361, 363 (N.J. Super. Ct. Ch. Div. 1987) (non-marital child) ("The right of a mother to have her child bear her name must be recognized as equal to that of the father." (footnote omitted)); Spence-Chapin Serv. to Families & Children v. Tedeno, 421 N.Y.S.2d 297, 299 (Sup. Ct. 1979) ("[N]either parent has a right superior to the other to determine the surname of

firming the propriety of using the standard, stated in *In re Wilson*,[387] "We agree that the best interests standard should not be used to give greater weight to the paternal surname."[388] In fact, some courts specifically adopted the best interest standard in order to combat the assumption that a father had a primary right to have his child bear his surname.[389]

Yet despite judges' proclamations that the best interest of the child standard is no longer a subterfuge for a paternal surname preference, the interpretation and application of the best interest test still favors the male surname. One commentator observed that the earlier criticism of the best interest standard has caused "the tenor, if not always the holdings, of recent decisions ... [to] become more equitable."[390] Simply, the factors that go into a best interest determination often reflect men's understanding of a surname's importance. Even in cases where women ultimately prevail, women are fighting on turf that favors their opponents. This section now analyzes how the standard reflects men's conceptions of surnames and undervalues associationalist principles.[391]

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the [non-marital] child."); *In re* Sakaris, 610 N.Y.S.2d 1007, 1013 (Civ. Ct. 1993) ("Neither parent has a superior right to determine the surname of a child and the question is always whether the best interests of the child will be served by the proposed change."); Bobo v. Jewell, 528 N.E.2d 180, 184-85 (Ohio 1988) ("We ... refrain from defining the best-interest-of-the-child test as purporting to give primary or greater weight to the father's interest in having the child bear the paternal surname.... In these times of parental equality, arguing that the child of unmarried parents should bear the paternal surname based on custom is another way of arguing that it is permissible to discriminate because the discrimination has endured for many years."); Keegan v. Gudahl, 525 N.W.2d 695, 700 (S.D. 1994) ("[T]he custom of giving a child the father's surname should not serve to give the father an advantage. Only the child's best interest should be considered by the court on remand."); Hamby v. Jacobson, 769 P.2d 273, 278 (Utah Ct. App. 1989) ("[L]ip-service to the best interests of the child should not be used as a subterfuge to nevertheless perpetuate the paternal preference.").

387. 648 A.2d 648 (Vt. 1994).

388. *Id.* at 650.

389. *See, e.g.*, *Schiffman*, 620 P.2d at 583; *Hamby*, 769 P.2d at 276-77.

390. *See* Doll, *supra* note 27, at 237.

391. While there may be parts of the best interest inquiry that seem on the surface to favor the women's perspective, I believe the undiscussed factors tend, at best, to be gender neutral. For example, "the identification of the child as part of the family unit," *see supra* text accompanying note 367, could be used to either party's advantage, depending upon who the court sees as the relevant family unit. Similarly, "the opposing party's conduct toward the spouse and the child during the marriage," *id.*, could be used to either party's advantage, as the factor would make relevant evidence of the opposing party's good and bad conduct.

1. Child's Interest in Preserving Relationship with Father

Critics who have complained of gender bias in the best interest standard have focused almost exclusively on this factor, noting that the *father's* interest in his relationship with his child is often considered determinative by the courts.[392] The critics argued that it was improper to consider the father's interest (including the father's right to have the child bear his surname) when the exercise was supposed to be child-focused. While that problem sometimes persists today,[393] most litigants and courts recognize that the critics were correct. Consequently, male litigants now make a different, but related, claim: they state that the quality of the parent-child relationship will be affected if the child bears another last name, and that relationship affects the child's best interest. Courts understand the distinction between the former and latter arguments, and accept the new version. For example, in *In re Lone* the court stated:

> To the extent that the paternal 'right' represents a recognition of a father's interest in perpetuating his own name or in protecting his ego or in preserving his perceived male prerogatives, it may have little or no relevance to the best interests of the child or the propriety of a name change. But to the extent the 'right' recognizes the father's interest in maintaining his relationship with his child for their mutual benefit, it becomes highly relevant.[394]

In the context of the best interest inquiry, between 1990 and 1996 numerous appellate courts have mentioned and given credence to the argument that a name change affects the father-child bond.[395]

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392. *See Schiffman*, 620 P.2d at 585 (Mosk, J., concurring); Doll, *supra* note 27, at 241; Seng, *supra* note 24, at 1339-41; Thornton, *supra* note 42, at 323; Urbonya, *supra* note 44, at 796-97.

393. *See* Gubernat v. Deremer, 657 A.2d 856, 867 (N.J. 1995) (explaining that some courts "rely on traditional presumptions that obscure a clear evaluation of what constitutes the child's best interests. Those courts have continued to favor the retention and use of the paternal surname by treating the child's best interest as synonymous with the father's best interests"); *see also* D.R.S. v. R.S.H., 412 N.E.2d 1257, 1263 (Ind. Ct. App. 1980) ("In determining whether a change of name will promote the child's best interests, courts look to various factors. First, significant consideration is given to the father's interest in having his child bear the paternal surname in accordance with tradition.").

394. *In re* Lone, 338 A.2d 883, 887 (N.J. Super. Ct. Law Div. 1975); *accord In re* Marriage of Douglass, 252 Cal. Rptr. 839, 843-44 (Ct. App. 1988); *In re* Marriage of Omelson, 445 N.E.2d 951, 955-56 (Ill. App. Ct. 1983) (citing *Lone*, 338 A.2d at 887).

395. *See, e.g., In re* Marriage of McManamy, 18 Cal. Rptr. 2d 216, 218 (Ct. App. 1993); Delaney v. Appeal from Probate, No. Cv9305212095, 1993 WL 328611, at *2 (Conn. Super. Ct. Aug. 17, 1993); *In re* Mattson, 608 N.E.2d 1284, 1287 (Ill. App. Ct. 1993) (nonmarital child); *In re* Paternity of Tibbitts, 668 N.E.2d 1266, 1268 (Ind. Ct. App. 1996) (nonmarital child); Neal v. Neal, No. 20469, 1996 WL 507218, at *3 (Mo. Ct. App. Sept. 6,

Some commentators have suggested that this consideration is the factor that courts weigh most heavily when evaluating a child's best interest.[396] While it is not a new phenomenon for the courts to consider the father's ongoing relationship with his children in a best interest inquiry,[397] two recent cases provide excellent examples of how this factor is often determinative: *In re Wilson*,[398] a 1994 decision from the Supreme Court of Vermont, and *In re Crisafi*,[399] a 1995 decision from the Court of Appeals of Ohio.

In re Wilson involved two marital children who received their father's surname, Wilson, at birth. At that time, their mother had the name Pomerleau-Wilson.[400] The couple later divorced and the mother resumed use of her birth name, Pomerleau. The mother obtained both legal and physical custody of the children.[401] During the next five years, the mother remarried, yet she kept using her birth name exclusively. When the children were ten and five years old, the mother sought to change the children's surnames to Pomerleau, a name they had already begun using at school.[402] While the probate

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1996) ("[T]rial court could have reasonably concluded that the name change might aid in the preservation and development of the father/son relationship."), *rev'd* No. 79376, 1997 WL 133418, at *4 (Mo. Mar. 25, 1997) (en banc); Morris v. Morris, 926 S.W.2d 87, 90 (Mo. Ct. App. 1996) ("The Circuit Court could have appropriately concluded that the proposed name change would unduly interfere with [the father's] relationship with his son.") (non-marital child); *In re* Crisafi, 662 N.E.2d 887, 889 (Ohio Ct. App. 1995); *In re* Wilson, 648 A.2d 648, 651 (Vt. 1994); *In re* Grimes, 609 A.2d 158, 161-62 (Pa. 1992); Keegan v. Gudahl, 525 N.W.2d 695, 701 (S.D. 1994) (stating that mother "risks eroding the natural bond between father and child if she imposes her surname upon the child" and that "a father of an infant child has a natural right to have a child bear his name") (Henderson, Retired J., concurring in part and dissenting in part); *cf. supra* text accompanying notes 302-03.

396. *See* Doll, *supra* note 27, at 241; Seng, *supra* note 24, at 1339; Thornton, *supra* note 42, at 334-35.

397. *See, e.g.*, Laks v. Laks, 540 P.2d 1277, 1279 (Ariz. App. Ct. 1975); Degerberg v. McCormick, 187 A.2d 436, 439 (Del. Ch. 1963); Lazow v. Lazow, 147 So. 2d 12, 14 (Fla. Dist. Ct. App. 1962); *In re* Marriage of Presson, 465 N.E.2d 85, 89 (Ill. 1984); *In re* Marriage of Omelson, 445 N.E.2d 951, 956 (Ill. Ct. App. 1983); D.H.S. v. R.S.H., 412 N.E.2d 1257, 1263 (Ind. Ct. App. 1980) (non-marital child); West v. Wright, 283 A.2d 401, 404 (Md. 1971); Mark v. Kahn, 131 N.E.2d 758, 762 (Mass. 1956); Marshall v. Marshall, 93 So. 2d 822, 825 (Miss. 1957); Firman v. Firman, 610 P.2d 178, 181 (Mont. 1980); *In re* Spatz, 258 N.W.2d 814, 816 (Neb. 1977); *Lone*, 338 A.2d at 887; Kay v. Kay, 112 N.E.2d 562, 567 (Ohio Ct. Comm. Pleas 1953); Plass v. Leithold, 381 S.W.2d 580, 582 (Tex. Civ. App. 1964, writ granted); Brown v. Carroll, 683 S.W.2d 61, 63 (Tex. Ct. App. 1984, no writ); Flowers v. Cain, 237 S.E.2d 111, 113 (Va. 1977); Daves v. Nastos, 711 P.2d 314, 318 (Wash. 1985) (en banc).

398. 648 A.2d 648 (Vt. 1994).

399. 662 N.E.2d 887 (Ohio Ct. App. 1995) (per curiam).

400. *See Wilson*, 648 A.2d at 649.

401. *See id.*

402. *See id.*

court granted the mother's petition, the superior court reversed, and the mother appealed to the Supreme Court of Vermont.[403] The supreme court affirmed the superior court's decision.[404]

The supreme court confirmed that the "best interest of the child" standard governed the adjudication of a name change petition submitted on behalf of a minor child, even though the mother had legal custody.[405] Although the statute did not specify what factors had to be considered in the best interest analysis, the supreme court identified the factors that other courts had considered.[406] The supreme court affirmed because it found that the trial court considered many of these factors, giving weight to some, and discounting others. What was most interesting, however, was the supreme court's response to the mother's claim that the trial court improperly weighed the impact of the name change on the children's bonds with each of the parents. The supreme court stated:

> We also cannot agree that the trial court improperly weighed the factors considered. The court concluded, and mother does not disagree, that the children have a strong bond with mother and her maternal family, so that while changing the children's surname to Pomerleau might help them identify with her family unit, "there is no need to strengthen the bonds" further. In contrast, the court found that father's relationship with the children is "one already strained by the pressures of a work schedule, and the pressures of family politics since the divorce," and a change will likely detrimentally affect the children's relationship with their father and draw them further away from him.[407]

When the mother suggested that the best interest analysis, as applied by the trial court, made it "almost impossible to win a name change

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403. *See id.*

404. *See id.* at 652.

405. *See id.* at 650. Name change decisions have been differentiated from other decisions over which a legal custodian has authority. *See infra* note 521 and accompanying text.

406. These factors included:

> the child's preference, taking into account the child's age and maturity; the length of time the child has used the surname; the effect of a surname change on the preservation and development of the child's relationship with each parent; whether the child might feel embarrassment or discomfort bearing a surname different from the rest of the family; whether any negative association or social stigma has attached to either the current or proposed name; the motives of the moving parent; and any other factor relevant to the child's best interest.

Wilson, 648 A.2d at 651.

407. *Id.*

petition when the children bear the name of the noncustodial parent,"[408] the supreme court agreed:

> It is true that the custodial parent and the children, having regular contact and the primary home, have a greater opportunity to maintain their psychological relationship without having to rely on the symbol of a name, and this fact may weigh heavily in support of retaining the noncustodial parent's surname. But the determination is case specific, and here the trial court found that the best way for the children to maintain close contact with both parents was to retain the noncustodial parent's surname.[409]

In re Crisafi involved a mother who sought to change the surname of her minor children to her remarried name, and her exhusband opposed it. The Ohio appellate court affirmed the trial court's denial of her application, applying the best interest of the child test.[410] What became most relevant in the *Crisafi* case was not the various best interest factors enumerated in earlier cases, but rather the referee's finding "that the natural father has demonstrated a continuing interest in his children and the name change might lead to 'possible alienation and estrangement between the children and their natural father.' "[411] This factor was determinative, despite the fact that the former husband had "not been diligent in taking advantage of his visitation rights" and was "substantially behind" in his child support payments.[412] Nor was the mother's argument, which was based on association, persuasive:

> Debra Hobt argues that they have become a family unit since her second marriage and by changing the children's names to her married name, it will help unify the family. This position, although well founded, fails in light of the possible alienation and estrangement between the children and their natural father.[413]

The court concluded:

> In absence of such evidence [that it clearly is in the child's best interest to change the name], as here, it would not contribute to the child's best interest to permit interference with the usual custom of succession to the father's name or

408. *Id.*
409. *Id.* at 651-52.
410. *See In re* Crisafi, 662 N.E.2d 887, 888-90 (Ohio Ct. App. 1995) (per curiam).
411. *Id.* at 888.
412. *Id.*
413. *Id.* at 890.

> to foster any unnatural barrier between the father and child.[414]

These two cases illustrate the weight that courts place on preserving the father-child relationship, and help to explain why noncustodial fathers emphasize this factor in litigation over children's surnames. The sexism inherent in this factor, as described above in Section IV.A., calls into question the supposed neutrality of the best interest test.

2. Child's Interest in Retaining Long-Used Surname

Courts attempting to determine the best interest of the child often attach great significance to the length of time the child has used a surname.[415] Courts assume that children's identities are bound up with their surnames, and that name stability is necessary for a stable sense of identity.[416] Some courts have suggested that it is harmful to change a child's surname repeatedly, absent some showing that strong benefit will result from the changes.[417]

These assumptions contrast sharply with the typical female view of surnames. As noted in previous sections, most women do not believe that one's stable sense of identity is dependent upon one's surname. Women tend to change their surnames upon marriage, often after using their birth names for decades. Although no empirical research speaks to whether most women feel their children's surnames are just as alterable, women who seek to change their children's surnames probably believe so. Courts (as well as re-

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414. *Id.* at 889.

415. *See In re* Marriage of Schiffman, 620 P.2d 579, 583 (Cal. 1980) (en banc) ("[T]he length of time that the child has used a surname is to be considered. If, as here, the time is negligible because the child is very young, other facts may be controlling."); *see also In re* Saxton, 309 N.W.2d 298, 302 (Minn. 1981) (stating that while no preference is accorded to the maternal or paternal surname, "[d]ue deference is given, however, to the fact the child has borne a given surname for an extended period of time"); Aitkin County Family Serv. Agency v. Girard, 390 N.W.2d 906, 909 (Minn. Ct. App. 1986) (non-marital child) (calling length of time child bore name one of two factors that "are particularly important").

416. Courts consider the link between identity and a surname to be strong even if a child has not borne the surname for a long time. *See, e.g., In re* Marriage of Omelson, 445 N.E.2d 951, 957 (Ill. App. Ct. 1983) (noting that child was five years old when name change was sought); *In re* Lone, 338 A.2d 883, 887-88 (N.J. Super. Ct. Law Div. 1975) (same). *See generally* Dannin, *supra* note 42, at 174 ("[W]here the name desired has been used since infancy there would be a reasonable ground for granting a change of name" because of the "child's sense of identity."); Thornton, *supra* note 42, at 327 ("[C]ourts give significant weight to the fact that a child has been continuously known by a nonpaternal surname for a long period of time and consider whether the child might perceive a change back to the paternal surname as an attempt to destroy his identity.").

417. *See, e.g., In re* Marriage of McManamy, 18 Cal. Rptr. 2d 216, 218 (Ct. App. 1993).

searchers) should explore this possibility.

There is some empirical research that has examined whether children believe that a constant surname is integral to a stable sense of identity. A study by Carol Guardo and Janis Beebe Bohan of children age six to nine sought to ascertain whether those subjects believe a child could "assume an identity different from his own and yet not give up his own personal identity."[418] One of the questions asked was whether the child would maintain the same identity if his or her name were taken away.[419] While the study found that younger children resort to nominal realism,[420] "[b]y the age of 8, however, the recognition that names are arbitrary designations and not guarantees of identity was clear-cut. As one precocious [subject] put it: 'Because my name isn't what I am. It's just my name!' "[421] Another girl, when asked if she would remain the same if her name were taken away, stated, "I'd still be the same person. [Examiner: what stays the same?] My per-son-al-i-ty?"[422] There were even some children under eight years old who recognized that a name is "not the essential anchor of identity, but rather personaeity, the feeling of being a singular and personal identity, is."[423]

Guardo and Bohan's study indicates that there is only a short time frame in which a child believes that his or her name is essential to his or her identity. Before a certain age, the child is too young to be concerned with such considerations.[424] After a certain point, the

418. Carol J. Guardo & Janis Beebe Bohan, *Development of a Sense of Self-Identity in Children*, 42 CHILD DEV. 1909, 1912 (1972).

419. *See id.* at 1913.

420. "Nominal realism," as used by Jean Piaget in *The Child's Conception of the World* 81, 83 (1929) (Joan Tomlinson & Andrew Tomlinson trans., Littlefield, Adams & Co. 1971) and adopted by Guardo & Bohan, *supra* note 418, is comprised of both ontological nominal realism and logical nominal realism. The former means that "[t]he child considers names as being 'in' the object and 'generated' by the object (rather than produced by the subject)," and the latter means "[t]he child considers names as being endowed with intrinsic values (instead of giving them conventional meaning)." ANTONIO M. BATTRO, PIAGET: DICTIONARY OF TERMS 141 (Elizabeth Rütschi-Hermann & Sarah F. Campbell eds., 1973).

421. Guardo & Bohan, *supra* note 418, at 1918; *see also* PIAGET, *supra* note 418, at 81, 83 (finding that after an average age of ten, children agreed that names could be changed, which reflected a decline of ontological realism: that names are tied up to the things they represent).

422. Guardo & Bohan, *supra* note 418, at 1920.

423. *Id.* at 1919.

424. *See* Jones v. Roe, 604 N.E.2d 45, 48 (Mass. App. Ct. 1992) (holding that two-and-a-half-year-old, non-marital girl was "too young to have achieved any significant identification with her last name"); *In re* Andrews, 454 N.W.2d 488, 490 (Neb. 1990) (citing psychologist's testimony that two-year-old child is too young to identify with a specific

child understands the disjunction between one's surname and one's identity. Guardo and Bohan's results suggest that girls may recognize at an earlier age than boys that a name is not an essential identity anchor.[425] This difference may presage the divergence of the genders' views in later life, as noted in Sections III.B.1 and III.C.2 above, though it may be erroneous to equate a child's belief in nominal realism with an adult's sense of self-structure. Guardo and Bohan's study supports a case-by-case examination of children's dependence upon their surnames for their sense of identity, with the caveat that the inquiry is relevant only for children within a narrow age range.

Even for children within the relevant age range, the length of time a child has borne a surname is an inaccurate proxy for the identity issue. Rather a court must engage in a careful examination of a child's particular beliefs and circumstances. First,. a child may not actually experience any discontinuity when his or her surname is changed to *coincide* with the custodial parent's surname. A child may find that changing his or her surname to match his or her physical custodian's surname provides more stability than retaining the surname of a departed parent. Guardo and Bohan did not explore the interaction of identity and association. Second, a child may experience no discontinuity when his or her surname is changed because the child's "core" sense of identity may be more closely intertwined with the child's first name than with the cognomen.[426] Psychologists often refer to a child's first name when speaking about the importance of a child's name to his or her sense of self.[427]

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surname); *In re* Rossell, 481 A.2d 602, 606 (N.J. Super. Ct. Law Div. 1984) (concluding that two-year-old child "is too young to have achieved any significant identification with his last name"); Hamby v. Jacobson, 769 P.2d 273, 279 (Utah Ct. App. 1989) (stating that two-year-old child was "too young to be accustomed to the surname Hamby").

425. *See* Guardo & Bohan, *supra* note 418, at 1919.

426. Various social scientists believe that the first name symbolizes one's "core identity." ALFORD, *supra* note 10, at 52, 141 (stating that while surnames "place an individual in a family group," which has a certain social significance, "it is the first names, for the most part, that symbolize personal identity"); *see also* Wilbur G. Gaffney, *Tell Me Your Name and Your Business; or, Some Considerations Upon the Purposeful Naming of Children*, 19 NAMES 34, 35 (1971) (positing that one's character [and one's profession] is determined by the first name under which one grew to adulthood); Holt, *supra* note 10, at 296 (explaining that the first name or nickname is one of the words which individuals use to refer to oneself after ego development). Other authors' sweeping statements about how a name is the "most important anchorage to our self-identity throughout life" are often in the context of first names. *See, e.g.*, GORDON W. ALLPORT, PATTERN AND GROWTH IN PERSONALITY 117 (1937) (citing O. Strunk's research that people who dislike their own first names generally do not like themselves).

427. *See* ALLPORT, *supra* note 426, at 115 ("He hears constantly 'Where is Johnny's

Guardo and Bohan did not ask separately about first and last names.[428] Finally, a court should ascertain whether any discontinuity would in fact be harmful. Guardo and Bohan reached no conclusion as to whether discontinuity itself had harmful consequences (or, rather, whether some children perceive discontinuity as a positive status change). For example, it seems that young girls receive the message that their last names will change at marriage, and they perceive that this change will lead to discontinuity.[429] If girls view this as a positive change, then perhaps they will not be disturbed by a name change upon their parents' divorce, even though the situations differ dramatically. In fact, some writers speak of the ease with which children undergo a change of name, which may mean that children do not find discontinuity troublesome.[430] A child's sense of identity may be resilient because it is potentially grounded not solely upon his or her surname, but also upon other factors such as the continuity of care from a custodial parent.[431] Overall, merely looking at the length of time a child has used a surname would inaccurately assess harm to

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nose?' 'Where are Johnny's eyes?' 'Good Johnny,' 'John naughty.' By hearing his name repeatedly the child gradually sees himself as a distinct and recurrent point of reference. The name acquires significance for him in the second year of life. With it comes awareness of independent status in the social group."); *see also* Falk, *supra* note 100, at 651 ("Names, which form so important a part of identity from the very beginning of life, when the mothering person addresses the baby by his name, or 'name of affection' (diminutive) as pet names are called in Hebrew, come to symbolize the identity of the person."); Mary V. Seeman, *Name and Identity*, 25 CAN. J. PSYCHIATRY 129, 129 (1980) (suggesting that many of identity's attributes—e.g., ethnic tradition, religion, ancestry, gender, social class, birth order, etc.—are reflected in the first name given to a child at birth).

428. Similarly, the work by Jean Piaget asked only about first names. *See* PIAGET, *supra* note 421, at 63, 81.

429. *See* Guardo & Bohan, *supra* note 418, at 1919.

430. *See* Holt, *supra* note 10, at 297-98. Holt explains:

> He [a child of five or six] is aware of that as *his name*; that is what is attached to him and an inseparable part of him, just as the brilliant thing in the sky *is* the sun. The most complete identification, and ego-involvement, with a name, then, does not necessarily mean, in a child, that the name is the felt core of his personality and center of his inmost self. The ease with which children undergo a change of name shows this. The name may as easily be altered as any other mental set in the plastic mind of the child. It is an identification based on a naive conception of the world, which Piaget has so admirably set forth, and only a little different from identification of other things and their names.

Id. Holt also relates that a child's name may become an object of importance when the child enters school and the whole name is used frequently. *See id.* at 298-99.

431. *Cf.* LOUIS BREGER, FROM INSTINCT TO IDENTITY: THE DEVELOPMENT OF PERSONALITY 333 (1974) ("The self develops by modeling, imitating, and eventually internalizing—making a part of itself—persons of emotional significance."); Barbara Bennett Woodhouse, *"Out of Children's Needs, Children's Rights": The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 339 (1994) (suggesting children's identities are determined by their "own experiences of family attachment").

the child from changing the surname.

A myopic focus on the length of time a child has borne a surname also disadvantages. First, such an approach accords undue deference to the initial naming decision.[432] Custom dictates that a child usually receives the paternal surname at birth, and often little or no thought goes into that decision. By according great importance to the child's prior use of a surname, the court reduces the possibility that a child will ever bear the matrilineal surname. Second, the emphasis on the importance of surname stability for children results in penalizing women for society's custom that women change their surnames upon marriage. Some courts fear that if they allow a child to bear his or her mother's surname, the mother may remarry shortly thereafter, and then the mother's and child's surnames will again differ, or worse yet, the mother may then seek yet another name change for the child.[433] Some courts disbelieve a mother who proclaims that she will not change her surname upon a subsequent marriage if the petition to change the child's name is granted.[434] Rather, these courts speculate about a mother's future relationships, discount the mother's intentions with regard to her own surname, and assume that a further name change for the child will be harmful.

In sum, the courts' emphasis on the length of time that the child has used a surname leads to a gender-biased, and at times inaccurate, application of the best interest standard. The length of time a child has used a surname is a poor proxy for determining the harm the child may encounter, if any, from a surname change. This temporal criterion accords undue priority to the initial naming decision, with the effect that it "freezes" in time the practice of patronymy followed by most marital parents. The temporal test also perpetuates patro-

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432. A court, however, may focus on the length a child has used a name adopted informally. *See supra* note 416 and articles cited therein. In such a case, the inquiry can benefit the custodial parent.

433. *See, e.g., In re* Mattson, 608 N.E.2d 1284, 1288 (Ill. App. Ct. 1993) (non-marital child) ("Should her mother get married and, as is customary, adopt her husband's surname, Kimberly would once again be in the position of having a different name from her mother."); Hauge v. Asmussen, No. C9-91-154, 1991 WL 151369, at *4-*5 (Minn. Ct. App. Aug. 13, 1991) (finding reasonable trial court's determination that mother's, but not father's, surname might change on remarriage and that, therefore, child should bear father's surname); Jarrells v. Epperson, No. 2-96-12, 1996 WL 562052, at *2 (Ohio Ct. App. Oct. 1, 1996) (non-marital child) (same); *see also In re* Marriage of Douglass, 252 Cal. Rptr. 839, 844 (Ct. App. 1988) ("Father's assumption mother may again change her name, while speculative, is not unreasonable in view of her history."); Hamby v. Johnson, 769 P.2d 273, 280 (Utah Ct. App. 1989) (mentioning and rejecting trial court's reasoning on this point).

434. *See, e.g.*, Morris v. Morris, 926 S.W.2d 87, 89 (Mo. Ct. App. 1996) (non-marital child); *see also supra* note 433 and cases cited therein.

nymics by encouraging courts to assess the likelihood that a child's name will be changed again in the future and by assuming that such a change would be harmful to the child.

3. Child's Interest in Avoiding Stigma of Illegitimacy

Many courts applying the best interest test inquire into whether a surname subjects the child to stigma or ridicule. Courts not only consider stigma arising from a true fact (for example, that the child's father is a notorious criminal), but also stigma arising from the inference, whether true or false, that a child who bears his or her mother's surname is illegitimate.[435] Children of unmarried mothers customarily take their mothers' surnames,[436] although many non-marital children take their fathers' surnames.[437] Statutes in some states still require that a non-marital child assume the mother's surname absent an agreement between the parents, or at least until legitimization occurs or paternity is established.[438] Fathers who are litigating surname

435. *See* LEBELL, *supra* note 32, at 31 (stating that it is the fear the child will be labeled "illegitimate" that contributes to patronymics generally); MacDougall, *supra* note 24, at 152 ("One of the spoken and unspoken objections to recognizing a child's right to bear its mother's surname has been that, because customarily non-marital children are known by their mothers' surnames, society will stigmatize marital children as 'illegitimate' if they also carry their mothers' surnames."); Maclean, *supra* note 100, at 98 (arguing one obtains symbolic illegitimacy by public rejection of the father's name); *cf. In re* Maliszewski, 615 N.Y.S.2d 977, 978 (Sup. Ct. 1994) (changing child's surname would wrongly imply to third parties that the child is the natural or adopted daughter of the custodial parent's current husband).

436. *See* CLARK, *supra* note 142, at 202; *see, e.g.*, Cardinal v. Perch, 611 A.2d 515, 517 n.2 (Del. Fam. Ct. 1991) (explaining that before 1989, when the State Solicitor made explicit that the practice was not to continue, "Delaware hospitals frequently refused to allow mothers of illegitimate children to give the children any surname except their own."); Secretary of the Commonwealth v. City Clerk of Lowell, 366 N.E.2d 717, 720 (Mass. 1977) (noting that for over two hundred years, this was the custom and practice in Massachusetts with respect to the recording of births by city and town clerks); Bobo v. Jewell, 528 N.E.2d 180, 183-84 (Ohio 1988) (stating that at early common law "it became the custom that an illegitimate child assumed the mother's surname at birth").

437. *See* Furstenberg & Talvitie, *supra* note 10, at 40-41 (stating that it was "common practice" for the child to assume the fathers' names prior to wedlock in couples where the mother married the father after delivery, and that 43% of the boys and 46% of the girls assumed their fathers' last names even when their parents remained unmarried throughout the study); *see also* LEBELL, *supra* note 32, at 31-32 ("Whether or not a child's mother keeps her maiden name, parents tend to give their children their father's last name even when the parents are not married.").

438. *See, e.g.*, D.C. CODE ANN. § 6-205(e)(1)-(5) (1996); GA. CODE ANN. § 31-10-9(e)(1)-(5) (1996); IND. CODE ANN. § 16-37-2-13 (West 1996); LA. REV. STAT. ANN. § 40-34(B)(1)(a)(iv) (West Supp. 1997); N.D. CENT. CODE § 23-02.1-13(6) (1995); OHIO REV. CODE ANN. § 3705.09(F) (Anderson 1995); S.D. CODIFIED LAWS § 34-25-13.3 (Michie 1994); TENN. CODE ANN. § 68-3-305(b)(1)-(2) (1996); WYO. STAT. ANN. § 35-1-411(d) (Michie 1994). For cases discussing the various state statutes that require or re-

disputes sometimes assert that if the child adopts the maternal surname, the child will suffer societal opprobrium as an apparent "bastard."[439] When courts accept the equation between the matronym and illegitimacy, they engage in a subtle, but real, form of sexism.

Many judges have expressed the concern that a child might be labeled illegitimate if the child does not bear the patronym. For example, upon the establishment of paternity in one case, the trial court felt "very strongly" that the child should have the father's surname:

> I want you to understand how I feel about that .... I think in this society it's obvious to everyone who wants to give her difficulty about it that she was born out of wedlock. My feeling is it's just one more cross that she shouldn't have to bear. If she has her mother's name she may as well have CBOW [child born out of wedlock] tattooed on her forehead.[440]

Other judges have expressed similar sentiments.[441] Yet courts' con-

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quired the practice, see, e.g., *In re* Pizziconi, 868 P.2d 1005, 1007 (Ariz. Ct. App. 1993); M.D. v. A.S.L., 646 A.2d 543, 545 (N.J. Super. Ct. Ch. Div. 1994); *Bobo*, 528 N.E.2d at 184; *In re* Lott, No. 02A01-9507-JV-0015, 1996 WL 383299, at *2 (Tenn. Ct. App. July 10, 1996).

439. *See infra* note 441.

440. Garrison v. Knauss, 637 N.E.2d 160, 161 (Ind. Ct. App. 1994) (citing trial court). While the appellate court found that the trial court's views were unsupported by the record, the appellate court did not indicate that the view was inappropriate. *See id.* at 161-62.

441. *See, e.g.*, *In re* Marriage of Schiffman, 620 P.2d 579, 586 n.1 (Cal. 1980) (en banc) (Clark, J., dissenting) (noting that "use of mother's surname may subject the child to the unjustified stigma of illegitimacy"); D.R.S. v. R.S.H., 412 N.E.2d 1257, 1264 (Ind. Ct. App. 1980) (stating that changing the non-marital child's name to that of his father would avoid a "fair indication that the child is illegitimate"); Lassiter-Geers v. Reichenbach, 492 A.2d 303, 307 (Md. 1985) (holding that child should bear father's surname); Cohee v. Cohee, 317 N.W.2d 381, 384 (Neb. 1982) (rejecting trial court's reasoning on this matter and ordering that child bear hyphenated surname); MacDonald v. MacDonald, 608 N.Y.S.2d 477, 481 (App. Div. 1994) (changing child's surname to father's "merely reinforces the principle of legitimacy"); Keegan v. Gudahl, 525 N.W.2d 695, 701 (S.D. 1994) (Henderson, Retired J., concurring in part and dissenting in part) (stating that natural mother's name choice for child meant that "the child's birth name would be illegitimate"); *In re* Harris, 236 S.E.2d 426, 429 (W. Va. 1977) (commenting that "a child's bearing a woman's maiden name does give fair indication that the child is illegitimate"); *see also* Thornton, *supra* note 42, at 307 ("Governmental interests purportedly advanced by requiring a legitimate child to assume a particular surname include ... in the case of paternal surname laws, avoiding a presumption of illegitimacy that might arise if the child were given the mother's birth-given surname...."); *cf.* Beyah v. Shelton, 344 S.E.2d 909, 910 (Va. 1986) (refusing to allow non-marital child who had father's surname to change to mother and stepfather's surname even though mother contended it would prevent others from embarrassing the child with questions about the child's origin); Katharine Tummon, *Re Paula and Wright: Children's Surnames and the Equality of Married Women*, 1 CAN. J. WOMEN & L. 547, 548

cerns about the stigma of illegitimacy are ironic when a dispute involves a marital child. Courts tend to deny name change petitions instituted by fathers of non-marital children who want their children to bear their surnames.[442] So while courts "protect" marital children from the stigma of illegitimacy by requiring these children to bear their fathers' surnames, even though these children are legitimate, the courts continue to allow non-marital children—who, according to the argument, need the protection—to bear their mothers' surnames and to be labeled as illegitimate.

Moreover, determining a child's birth status from the child's surname is an exercise fraught with complications. Of course, some marital children bear their mothers' birth names or their mothers' remarried names; both of these names probably differ from the names of the children's biological fathers. To confuse matters further, non-marital children can bear their fathers' surnames.[443] As one judge wisely observed:

> The use of mother's maiden name is not an indication of illegitimacy without knowledge that, in fact, the surname is the mother's maiden name. People who know the mother

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(1986) (explaining that a requirement that married women give their children their husband's surnames, later held to violate the Canadian Charter of Rights and Freedoms, was based upon this concern). *But see In re* Toelkes, 545 P.2d 1012, 1013 (Idaho 1976) (reversing trial court decision denying petition to change child's name to mother's surname); *In re* Wheat, 794 S.W.2d 710, 714 (Mo. Ct. App. 1990) (rejecting assumption that it is detrimental for a child and mother to have the same surname); Hamby v. Jacobson, 769 P.2d 273, 280 (Utah Ct. App. 1989) (concluding that it was in the best interest of the children to have their mother's surname); Lufft v. Lufft, 424 S.E.2d 266, 268 (W. Va. 1992) ("[T]here is little reason to fear the stigma of illegitimacy today.").

442. *See* Doll, *supra* note 27, at 245-46 & nn.128-29 ("[The] times when women succeed in such disputes are more often situations in which the father asks for the change of a non-marital child's name to his, either in a separate action or during a paternity proceeding. On the other hand, women tend to lose contests for the modification of their marital children's name when the parties are divorced."); *see id.* at 246 nn.128-29 (finding that out of 15 reported appellate cases involving non-marital children between 1985 and 1990, women succeeded in 10 of them; in 14 cases involving marital children during the same time period, women succeeded in only 6 of them). Doll attributes this phenomenon to the fact that "traditions die harder in cases of divorced couples" and "nonmarital children usually have never borne the patronymic [so] the father's interest, if any, cannot be as extensive as when the children have used his surname." *Id.* at 247. An additional reason women may prevail is that the father normally bears the burden of proof in these non-marital child cases. *See, e.g.*, Durham v. McNair, 659 So. 2d 1291, 1293 (Fla. Dist. Ct. App. 1995). Of course, women do not always prevail in disputes over non-marital children's surnames. In fact, the Indiana Court of Appeals recently issued an opinion that strongly supports giving a non-marital child the father's surname if the father pays support, exercises visitation, and participates in the life of his child. *See In re* Paternity of Tibbitts, 668 N.E.2d 1266, 1269 (Ind. Ct. App. 1996).

443. *See supra* note 437.

> well enough to know her maiden name will doubtless also know whether she has ever been married and whether the child is illegitimate. Others, who do not know mother so well, will not be aware that the name shared by mother and child is actually mother's maiden name and will not be surprised by the fact that mother and child have the same surname. Rather, a child bearing a different name from the mother is as likely, if not more so, to raise inquiry as to the circumstances resulting in the name discrepancy.[444]

Courts and others have, at times, failed to grasp this complexity.[445]

Even assuming that one can infer a child's legitimacy from his or her surname, severe legal "stigma" no longer attaches to the non-marital child status.[446] Sixteen states have adopted the Uniform Parentage Act,[447] which eliminates distinctions between non-marital and marital children, and three states have adopted substantially similar

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444. *D.R.S*, 412 N.E.2d at 1268 (Shields, J., dissenting).

445. For example, in computing census data, the California Division of Vital Statistics has gone so far as to assume illegitimacy if the mother and father have different surnames, even if the child bears the paternal surname. *See* Ann Bancroft, *What's in A Name? Legitimacy*, L.A. DAILY NEWS, May 4, 1996, at N8.

446. Writer Marie Maclean has suggested that illegitimacy, coupled with use of a mother's surname, actually benefits children because it is "an oppositional force, contained by society but nevertheless individually enabling." Maclean, *supra* note 100, at 103. This "double exclusion" has been for some people "positive freedom from the law of the Father." *Id.* at 100; *see also id.* at 100-01 (arguing that the names of two mythic female bastard revolutionaries, Olympe de Gouges and Flora Tristan, gave them power to reject the patriarchal order). She summed up the value of the double exclusion:

> Instead of the schizoid divisions and rigid gendering of conventional social codes, delegitimization involves a conscious exploitation of difference and multiplicity. My argument runs something like this: one can look at naming, and hence at genealogy, in two ways, either as a direct line, the male name, law, the arbitrary, convention; or one can look at it as a line of flight, in which the name of the mother, because it constantly shifts sideways, and can never be grasped, is the ground of *difference* and not merely of absence.
>
> What illegitimacy does, by making the line of flight tangible and by breaking the continuity of the name, is to actualize transgression, but also to point to a way of using drift for one's own purposes. So one can argue that matriarchy merely substitutes another form of the symbolic order in its law, whereas illegitimacy, especially when not socially reintegrated, offers a genuine discontinuity. Myths of ex-centricity [sic], of boundaries and extremes, of inclusion and exclusion, encourage the enactment, in discourse or in life, of the belief that the exception [bastardy] can always overcome the rule.

Id. at 105-06.

447. UNIFORM PARENTAGE ACT § 2, 9B U.L.A. 301 (1987). The following states have adopted the *Uniform Parentage Act*: Alabama, California, Colorado, Delaware, Hawaii, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Rhode Island, Washington, and Wyoming. *See* UNIFORM LAW COMM'RS, NATIONAL CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 101 (1996-97 Reference).

legislation.[448] Various United States Supreme Court cases have applied intermediate scrutiny to legal distinctions drawn between children based upon the marital status of their parents.[449] The Child Support Enforcement Act has helped further erode state law distinctions.[450] Social stigma also has been minimized, in part, due to the increase in the number of non-marital children.[451]

A court's refusal to allow a marital child to bear the mother's surname for fear that the child will be labeled a bastard builds upon the double standard that attends an unmarried mother's predicament. While society generally tolerates men who engage in non-marital sex,[452] women are upbraided for their sexual transgressions.[453] Unmarried fathers escape public condemnation, but unmarried pregnant women, with their "protruding profile," represent a more obvious financial burden on taxpayers and thus a more obvious target.[454] Society allows these women to remedy their transgression of society's double standard by accepting a man into their lives, if not through marriage, then at least by their children's use of the patronym upon establishment of paternity.[455] As one author explained, "The notion of illegitimacy is a convention by which a woman and her child are to be despised unless they acknowledge the role, the

448. *See* UNIFORM LAW COMM'RS, *supra* note 447, at 101 (citing Illinois, Ohio and Texas).

449. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988); Gomez v. Perez, 409 U.S. 535, 538 (1973).

450. *See* 42 U.S.C. § 666(a)(5)(A) (1994).

451. In 1990, of the children living in female-headed households, approximately 32% had a mother who had never married. This percentage has increased steadily across the last four decades. The percentage was 3.9% in 1960, 9.3% in 1970, and 15.5% in 1980. *See* BLANKENHORN, *supra* note 335, at 18 tbl. 1.2.

452. *See* CLARK E. VINCENT, UNMARRIED MOTHERS 3-4 (1961).

453. *See id.* at 3-5. In 1980, scholars noted, "[L]ittle has changed during the past two decades." Furstenberg & Talvitie, *supra* note 10, at 31.

454. *See* VINCENT, *supra* note 452, at 4; Martha L. A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2192 (1995) ("Intimate groups that do not conform to this model [the nuclear family] historically have been labeled 'deviant' and subjected to explicit state regulation and control justified by their nonconformity .... The broad general target is unmarried women with children, and the attacks on these mothers are the opening salvo of a reactionary plan to discipline women who do not conform to the roles they are assigned within the traditional scheme of the family."); *id.* at 2197 (explaining that unwed mothers are singled out as the cause of crime, poverty, and societal decadence); *see also* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 106 (1995) (describing how unmarried mothers on public assistance are characterized as "constituting the cause as well as the effects of poverty"); *id.* at 101-18 (discussing the perceptions regarding unmarried mothers and poverty).

455. *See supra* text accompanying note 438.

fact of the father. And this is done by conferring the father's name on the child."[456] To require a marital child to bear the patronym resurrects all of these sentiments, albeit in a context in which they are totally inapposite.

A woman seeking to change her marital child's surname to her own surname probably will confront, either explicitly or implicitly, a court's bias against the non-marital child status. When the best interest inquiry is skewed by an assumption that the maternal surname carries the stigma of bastardy, the supposed gender-neutrality of the best interest standard is highly suspect.

4. Motives of Moving Parent

While it may appear unexceptional for the court to evaluate the moving parent's motives for instituting a name change action, this consideration can actually work a hardship upon women. The mother is almost invariably the moving party.[457] The court rarely questions the motives of the nonmoving party, who is usually the father, although this information is as relevant to the best interest inquiry as are the mother's motives. Even when both parents need to explain their motives, courts sometimes devalue mothers' statements about their motives, making it unlikely that courts will find mothers' reasoning persuasive. In contrast, fathers' claims of "tradition," "custom" and "right" still hold some sway with courts.

A woman seeking to change her child's surname is typically the custodial parent.[458] She frequently wants the child's surname to match her own surname or the surname of other household members for the purpose of demonstrating physical propinquity.[459] But courts have never considered this notion of associationalism to be a "fundamental interest" or a "right," nor have they even made it an enumerated factor to consider under the best interest inquiry. As a consequence, and because women's views are often devalued in general,[460] a woman's articulation of her motive sounds more like a mere

456. LEBELL, *supra* note 32, at 42.

457. *See supra* note 51 and accompanying text.

458. *See supra* note 49.

459. *See supra* text accompanying notes 262-69.

460. *See* Chodorow, *supra* note 60, at 174-76; *see, e.g.*, BECKER ET AL., *supra* note 60, at 563 (stating that throughout the law and policy debates over the birth and care of children "one theme reappears: the legal, economic and social devaluation of the work of raising children—either because the care of children has traditionally been 'women's work' or because child care is undervalued in its own right and has therefore become women's work. Yet women themselves value their relationship to their children with an intensity the economic system does not share."); West, *supra* note 60, at 58 ("Nurturant, intimate

description of her family's living arrangement: it rings hollow.

Because associationalism is sometimes given little or no weight by the courts,[461] particularly because the advantages of associationalism have not been translated into benefit for the child, women at times emphasize secondary considerations for their petitions. For example, women claim that changing their children's surnames would make the women's lives "less confusing" or would reduce their "embarrassment."[462] While these considerations may be salient for many women, Kupper's investigation of why women keep their birth names upon marriage suggests that these arguments are "generally cited only as secondary factors in women's decisions. Usually, the primary factors involved more positive convictions."[463] In Kupper's study, the positive convictions included, among other things, the desire to declare publicly a connection to the woman's birth family.[464] Various factors suggest that women may also have "more positive convictions" for changing their children's surnames than their expressed motives sometimes reflect, including a woman's own naming experience, the custom that a child in the intact family bears the parents' surname, a woman's social validation as mother, and the benefit of associationalism for children.[465] I believe the most powerful, positive, and sometimes unspoken motivation for women in these contests is their commitment to associationalism: the belief that a surname functions as a highly symbolic instrument to proclaim physical propinquity.

When a woman emphasizes her secondary reasons for changing her children's surname, the persuasiveness of her argument declines. Not only is her enthusiasm for a common surname tempered by the

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labor is neither valued by liberal legalism nor compensated by the market economy."). The general devaluation of things female may also have an essential component. *See, e.g.*, CHODOROW, *supra* note 60, at 185 (stating that exclusive maternal care "creates men's resentment and dread of women" and through this process "men come to reject, devalue, and even ridicule women and things feminine").

461. *See infra* text accompanying notes 502-05; *see also supra* text accompanying note 413.

462. *See, e.g.*, Neal v. Neal, No. 20469, 1996 WL 507218, *2 (Mo. Ct. App. Sept. 6, 1996) (" 'I think it would be confusing when he gets in school and my name is Gintz and his isn't.' "(quoting mother in trial transcript)), *rev'd* No. 79376, 1997 WL 133418, at *4 (Mo. Mar. 25, 1997) (en banc); *infra* note 466. Women also emphasize their children's embarrassment. *See infra* Section IV.B.5.

463. KUPPER, *supra* note 54, at 48. Kupper found that arguments such as convenience, simplicity, credit, or laziness were only secondary factors in women's decisions. *See id.* at 47-48.

464. *See id.* at 33.

465. *See supra* notes 50, 121, 250, 271 and accompanying text; *infra* text accompanying notes 479-87, 615-24.

omission or deemphasis of her associationalist justification, but the "convenience" and "embarrassment" arguments carry little weight in the best interest inquiry, especially when counter-balanced by a father's "right" to have his child bear his surname.[466] The father's interest is considered historical and important, while the mother's interest is considered pedantic, if not selfish.[467]

Even if a judge accords substantial weight to the woman's secondary arguments, the court may resolve the mother's concerns to the mother's detriment. For example, in *Neal v. Neal*,[468] the court accepted that it might be embarrassing and inconvenient for a custodial mother and child to bear different surnames, but remedied the problem by ordering that the child's name be changed to the father's surname and that the custodial mother be denied restoration of her

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466. *See* D.R.S. v. R.S.H., 412 N.E.2d 1257, 1265 (Ind. Ct. App. 1980) ("Several courts have rejected the argument that a child should forfeit the paternal surname to lessen maternal inconvenience or confusion; the father's interest in having the child bear the paternal surname is deemed more significant than the mother's interest in avoiding embarrassment." (citations omitted)); *see, e.g.*, Laks v. Laks, 540 P.2d 1277, 1280 (Ariz. Ct. App. 1975); *In re* Trower, 66 Cal. Rptr. 873, 874 (Ct. App. 1968), *overruled by In re* Marriage of Schiffman, 620 P.2d 579 (Cal. 1980) (adopting best interests test); *In re* Marriage of Presson, 465 N.E.2d 85, 89 (Ill. 1984); *In re* Mattson, 608 N.E.2d 1284, 1287-88 (Ill. App. Ct. 1993) (non-marital child); *In re* Paternity of Tibbitts, 668 N.E.2d 1266, 1268 (Ind. Ct. App. 1996) (non-marital child); Likins v. Logsdon, 793 S.W.2d 118, 122 (Ky. 1990); West v. Wright, 283 A.2d 401, 404 (Md. 1971); Lawrence v. Lawrence, 538 A.2d 779, 781 (Md. Ct. Spec. App. 1988); Hall v. Hall, 351 A.2d 917, 926 (Md. Ct. Spec. App. 1976); Robinson v. Hansel, 223 N.W.2d 138, 141 (Minn. 1974); *In re* Seif, 243 N.Y.S.2d 172, 173 (Sup. Ct. 1963); *In re* Simon, 148 N.Y.S.2d 14, 16-17 (City Ct. 1955); *In re* Otis, 126 N.Y.S.2d 651, 654-55 (N.Y. Sup. Ct. 1951); Halloran v. Kostka, 778 S.W.2d 454, 456 (Tenn. Ct. App. 1988); Keegan v. Gudahl, 525 N.W.2d 695, 701 (S.D. 1994) (Henderson, Retired J., concurring in part, dissenting in part); Beyah v. Shelton, 344 S.E.2d 909, 911 (Va. 1986) (non-marital child); Flowers v. Cain, 237 S.E.2d 111, 113 (Va. 1977); Karnezis, *supra* note 51, at 1095 ("Because the father's interest in having the child bear the paternal surname is usually given significant consideration in weighing his opposition to the name change, the contention that a child's name should be changed merely to save the mother from inconvenience, embarrassment, or confusion is ordinarily given little or no consideration."); Shipley, *supra* note 51, at 915 (same).

467. For example, when a woman remarried less than two weeks after her divorce decree was entered, the court attributed to the mother's self-serving interests her application on behalf of her two minor children. The judge wrote:

> I had the distinct impression that she wished to hide the failure of her first marriage, and that her convenience would be promoted more than her children. I can see no reason why this court should serve the interests of those who arrange their marriage relationship for their own convenience and seek our aid to relieve them of the embarrassment it gives them.

In re Simon, 148 N.Y.S.2d at 16.

468. No. 20469, 1996 WL 507218 (Mo. Ct. App. Sept. 6, 1996), *rev'd* No. 79376, 1997 WL 133418, at *4 (Mo. Mar. 25, 1997) (en banc).

birth name.[469] Absent was any sort of recognition, implicit in associationalism, that the shared surname should be one of the custodial parent's choice.

In sum, the standard requirement that a moving party state a "motive" is not as gender-neutral as it appears on its face. Women's motives are scrutinized more often than are men's, and women's concerns are accorded less weight than those of men.

5. Child's Interest in Avoiding Embarrassment or Discomfort

In the best interest analysis, courts consider whether the child might feel embarrassment or discomfort bearing a surname different from the rest of the custodial family. This factor arguably overlaps with the concept of associationalism,[470] although the two considerations are distinct. The concepts differ because the "discomfort factor" focuses on the problems a child encounters from bearing a particular surname, as opposed to the salutary reasons to label household family members with one surname. The discomfort factor also does not aid in achieving a common surname for the custodial family if the child is ambivalent about sharing the custodial family's surname or if the child wants to retain the non-custodial parent's surname.

While a child's embarrassment or discomfort is obviously important to the best interest inquiry, courts do not always accept the argument that a particular child's emotional well-being requires that the child bear the same cognomen as his or her custodian.[471] The ar-

469. *See id.* at *4.

470. *See, e.g., In re* Marriage of Douglass, 252 Cal. Rptr. 839, 844 (Ct. App. 1988) ("The mother's argument centered around the fact that she and her two sons, aged six and eight, all share the same last name.... She expressed concern the child will bear an embarrassment or discomfort from having a surname different from the rest of his family members with whom he resides.").

471. *See* Degerberg v. McCormick, 187 A.2d 436, 440 (Del. Ch. 1963) ("In the absence of such misconduct on the part of the father as to bring shame and disgrace upon the child, this defense [that it would be embarrassing and humiliating to the child to carry the father's surname] has been consistently rejected by the courts.... So, also, has the argument that refusal to permit a change of name to coincide with other members of the stepfather's household would give the child a feeling of insecurity."); *In re* Mattson, 608 N.E.2d 1284, 1288 (Ill. App. Ct. 1993) (holding that teasing of young non-marital child on three occasions by classmates that caused some confusion and embarrassment "is insufficient to demonstrate clearly that a change is in her best interest"); *In re* Spatz, 258 N.W.2d 814, 815 (Neb. 1977) (rejecting psychiatrist's testimony that it would be best for children to bear mother's and stepfather's name because "they were sensitive children who were in need of a stable home situation and identity and it would be detrimental to their personality growth and development for them to be called by a name other than Laflan"); Michael D.L. v. Martha P. and Charles P., 203 N.Y.L.J. 28, col. 5 (May 11, 1990) (App. Div. 1990)

gument has had the least impact in states like New York, where courts require a compelling reason to change a child's name: Confusion and psychological disadvantage to the child are insufficient, without more, to justify the name change.[472]

Courts that have minimized the importance of the "discomfort"

(dismissing child psychiatrist's testimony about the dire consequences that would befall the children if they took the surname of their non-custodial father; there would be no change in the composition of their family unit and the prediction seemed unlikely, especially " '[i]n this day of divorce and remarriage' " (quoting guardian ad litem in the case)); Nitzberg v. Board of Educ., 104 N.Y.S.2d 421, 423 (Sup. Ct. 1951) (rejecting mother's argument that "child will lack a sense of security unless he can 'completely identify himself with his own home' " and instead stressing the "usual custom" of succession to the paternal surname and the possible barrier between father and child); *Simon*, 148 N.Y.S.2d at 16-17 (rejecting claim that children feel insecure from having father's surname and not stepfather's and mother's surname because "[t]here can be no stronger bulwark for their character or greater aid to their emotional maturity than to identify themselves with a father who loves them"); Dolgin v. Dolgin, 205 N.E.2d 106, 110 (Ohio Ct. App. 1965) (ordering reinstatement of father's surname after mother changed children's names to that of stepfather); Plass v. Leithold, 381 S.W.2d 580, 581 (Tex. Civ. App. 1964, writ granted) (denying name change application despite uncontested psychologist's testimony that "change of name would benefit the minor in that it would relieve him of the embarrassment and emotional upset involved in explaining why he has a different name than that of the household in which he lives"); *see also* Thornton, *supra* note 42, at 326 ("Courts usually deny name changes when they are requested primarily for the purpose of integrating a child into a new family unit, reasoning that the biological father's interest in maintaining his relationship with the child is of greater importance."). *But see* Clinton v. Morrow, 247 S.W.2d 1015, 1017 (Ark. 1952) (affirming trial court's decision to allow name change to child's stepfather's name); Delaney v. Appeal from Probate, No. Cv9305212095, 1993 WL 328611, at *2 (Conn. Super. Ct. Aug. 17, 1993) (allowing name change to mother's birth name based in part on psychological testimony); Binford v. Reid, 63 S.E.2d 345, 346 (Ga. Ct. App. 1951) (permitting name change to mother's birth name); Jones v. Roe, 604 N.E.2d 45, 48 (Mass. App. Ct. 1992) (refusing to allow name change of non-marital child to name of natural father); Aitkin County Family Serv. Agency v. Girard, 390 N.W.2d 906, 909 (Minn. Ct. App. 1986) (refusing to allow name change of non-marital child to non-custodial father's surname); *In re* Andrews, 454 N.W.2d 488, 490 (Neb. 1990) (allowing divorced mother to change children's names to her premarital surname); *In re* Shawn Scott C., 520 N.Y.S.2d 821, 821 (App. Div. 1987) (refusing to allow name change of non-marital child to natural father's surname); *In re* Robinson, 344 N.Y.S.2d 147, 150 (Civ. Ct. 1972) (granting application to change child's name from her natural father's name to her stepfather's name); Newman v. King, 433 S.W.2d 420, 423-24 (Tex. 1968) (upholding trial court's decision to allow first name and surname change of child, so that child used stepfather's surname); Hamby v. Jacobson, 769 P.2d 273, 279 (Utah Ct. App. 1989) (allowing name change to custodial mother's surname).

472. *See In re* Maliszewski, 615 N.Y.S.2d 977, 978 (Sup. Ct. 1994); *see also* Good v. Stevenson, 448 N.Y.S.2d 981, 983 (Fam. Ct. 1982) ("Embarrassment from having a different name than the mother and inconvenience therefrom to the mother have been held to be an insufficient basis for changing a child's name."); *Simon*, 148 N.Y.S.2d at 14 ("The children can never be confused or embarrassed by the use of the name of their father who loves them and is willing to spend time and effort in their guidance."); *Nitzberg*, 104 N.Y.S.2d at 421 (finding without merit the argument that the child "will lack a sense of security" unless he took his stepfather's surname).

criterion have done so for a variety of reasons, including the following: other jurisdictions' hostility to the argument and the apparent lack of academic literature supporting the argument. One court observed that " 'the cases of other jurisdictions almost uniformly have rejected contentions that a child's psychological health requires that his name conform to that adopted by his mother on remarriage.' "[473] Another court found no academic literature to help it determine what the psychological effects might be.[474] Even psychological testimony that a child would benefit from a name change has been discounted in the absence of academic research on this topic.[475] The court in one case went so far as to dismiss a psychologist's opinion because it was not based on any medical research, studies, or treatises.[476] Another court exhibited a distrust of psycho-social evidence generally.[477]

A review of the psychological literature establishes that courts have correctly recognized the lack of academic studies specifically addressing this particular point.[478] Yet some available research does indicate that a child's psychological well-being may benefit from sharing the physical custodian's surname. For example, social science literature suggests the importance to children of coherent blended families that accept them,[479] as well as the benefit of a secure custodial parent-child bond after divorce.[480] As some courts have

473. *In re* Marriage of Omelson, 445 N.E.2d 951, 957 (Ill. App. Ct. 1983) (quoting *In re* Lone, 338 A.2d 883, 887 (N.J. Super. Ct. Law Div. 1975)).

474. *See Lone*, 338 A.2d at 887.

475. *See, e.g., In re* Saxton, 309 N.W.2d 298, 300 (Minn. 1981) (discussing testimony that name change would be beneficial for child's self-esteem); Halloran v. Kostka, 778 S.W.2d 454, 455-56 (Tenn. Ct. App. 1988) (discussing testimony that child might experience embarrassment or anxiety if she were forced to use a different surname from that used by her mother and adopted sisters).

476. *See Halloran*, 778 S.W.2d at 456.

477. *See* Dolgin v. Dolgin, 205 N.E.2d 106, 109 (Ohio Ct. App. 1965).

478. The review of the literature was done primarily through reviewing GRETA W. STANTON, CHILDREN OF SEPARATION: AN ANNOTATED BIBLIOGRAPHY FOR PROFESSIONALS (1994).

479. *See, e.g.*, GOLDSTEIN ET AL., *supra* note 345, at 14 ("As much as anything else, he [a child] needs to be accepted, valued, and wanted as a member of the family unit consisting of adults as well as other children."); Lucile Duberman, *Step-Kin Relationships*, 35 J. MARR. & FAM. 283, 292 (1973) ("Solidarity, the concept of themselves as one functioning unit, must be carefully cultivated if it is to be achieved."); Patsy Skeen et al., *Blended Families: Overcoming the Cinderella Myth*, YOUNG CHILDREN, Jan. 1984, at 64, 68 ("Solidarity must be reestablished, and status, duties and privileges must be redefined in the context of the new family system." (citation omitted)).

480. *See, e.g.*, GOLDSTEIN ET AL., *supra* note 345, at 17, 20, 31; *see also* Wallerstein & Tanke, *supra* note 335, at 311 ("All of our work shows the centrality of the well-functioning custodial parent-child relationship as the protective factor during the post-

recognized, bearing the same surname as the custodial parent may contribute to a child's feelings of acceptance and security.[481] In addition, a shared surname may help some children adjust to divorce and/or a new stepfamily. One study noted that same-surname stepfamilies experienced fewer painful consequences from the step-relationships or from the process of adjustment.[482] These families also "may have been permitted to pass as 'normals' and allowed greater privacy than they would have had if they were seen as stepfamilies."[483] Another study reported that seventy-one percent of its adolescent subjects who lived in stepfamilies had different surnames from other family members, and that eighteen percent felt that the lack of a shared surname was stressful.[484] Children in stepfamilies who keep their non-custodial fathers' names "often feel embarrassed, particularly at school or church where the difference becomes conspicuous. The child suddenly finds himself or herself having to explain why he or she has a different name than his or her own mother!"[485] Furthermore, common sense indicates that it can be very important for a child to have the same surname as those with whom he or she lives. As one court explained:

> A child whose name is not changed may feel rejected by the mother's resumption of her maiden name ... or the mother's assumption of the surname of a new husband .... Mother may be considered "deserving of rejection or contempt" for the failure to share her new name with her child. That same failure may be construed to be "an attempt by his mother to deceive him as to his true identity," namely, the child of his mother. It may be considered " 'a statement by his mother and step-father that his true identity is a sham

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divorce years. When courts intervene in ways that disrupt the child's relationship with the custodial parent, serious psychological harm may occur to the child as well as to the parent.").

481. *See* Aitkin County Family Serv. Agency v. Girard, 390 N.W.2d 906, 909 (Minn. Ct. App. 1986) (non-marital child); *see also* Magiera v. Luera, 802 P.2d 6, 8 (Nev. 1990) (finding that non-marital child may experience "confusion about her identity, difficulties in school and society, and embarrassment among friends" unless she bears custodial mother's surname).

482. Rachel Filinson, *Relationship in Stepfamilies: An Examination of Alliances*, 17 J. COMP. FAM. STUD. 43, 57 (1986) ("Two-thirds of the stepfamilies had the same last name although only a minority of stepchildren had been legally adopted by a stepfather." (emphasis omitted)) (studying children who were related by blood to only one of the unmarried heterosexual adults cohabiting in the household).

483. *See id.*

484. *See* Patricia Lutz, *The Stepfamily: An Adolescent Perspective*, 32 FAM. RELATIONS 367, 372 (1983).

485. HAROLD H. BLOOMFIELD, MAKING PEACE IN YOUR STEPFAMILY 75 (1993).

and embarrassment to them and others.' "[486]

Finally, the psychologists' testimony in the various cases tells a fairly compelling story about the harm children can experience when their surnames differ from their custodial parents' names.[487]

Children themselves often indicate that they want to share the same surname as their custodial parents. As one court noted, "Children, as they grow older, generally prefer to use the name of the parent with whom they live."[488] Yet children's preferences are often ignored by courts.[489] Disregarding children's views conveys to

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486. *In re* Rossell, 481 A.2d 602, 605 (N.J. Super. Ct. Law Div. 1984) (quoting *In re* Lone, 338 A.2d 883, 887 (N.J. Super. Ct. Law Div. 1975)); *accord Rothstein Petition*, 28 Pa. D. & C.2d 665, 669 (C.P. Montg. 1962) (finding that childish curiosity, comment, and derision when a child has a different name than her mother are "bound to" adversely affect child's personality).

487. *See, e.g.*, Johnson v. Coggins, 184 S.E.2d 696, 696 (Ga. Ct. App. 1971) (stating that medical testimony showed older child suffered emotional disturbance because name differed from mother's); Newman v. King, 433 S.W.2d 420, 423-24 (Tex. 1968) (citing pediatrician's testimony that there is " 'quite a bit of emotional trauma to a child when he suddenly finds out . . . that he doesn't have the same name as the family,' " and psychologist's testimony that he thought it " 'psychologically . . . possible and probable that there will be some impairment to the child if his name is changed back to William C. King III' "); Plass v. Leithold, 381 S.W.2d 580, 581 (Tex. App. 1964, writ. granted) (citing psychologist's testimony that "change of name would benefit the minor in that it would relieve him of the embarrassment and emotional upset involved in explaining why he has a different name than that of the household in which he lives"); Hamby v. Jacobson, 769 P.2d 273, 274 (Ut. 1989) ("[D]ifferent surnames in a family disrupt the children's identity with themselves and their family, divide family unity, adversely affect security and could hinder development."); *see also supra* notes 471, 475.

488. Spence-Chapin Servs. to Families & Children v. Tedeno, 421 N.Y.S.2d 297, 300 (Sup. Ct. 1979) (non-marital child).

489. *See, e.g.*, Lazow v. Lazow, 147 So. 2d 12, 14 (Fla. Dist. Ct. App. 1962) (disregarding twelve-year-old child's preference); *In re* Marriage of Presson, 465 N.E.2d 85, 88 (Ill. 1984) (disregarding seven-year-old child's preference); *In re* Marriage of Omelson, 445 N.E.2d 951, 955 (Ill. App. Ct. 1983) (disregarding eight-year-old child's preference); Likins v. Logsdon, 793 S.W.2d 118, 120 (Ky. 1990) (disregarding twelve- and fourteen-year-old children's preferences); Mark v. Kahn, 131 N.E.2d 758, 761-62 (Mass. 1956) (minimizing importance of ten- and thirteen-year-old children's preferences); *In re* Thomas, 416 S.W.2d 52, 56 (Mo. Ct. App. 1967) (minimizing importance of nine-and-a-half-year-old child's preference); *Lone*, 338 A.2d at 885 (minimizing importance of six-year-old child's preference); *In re* Sakaris, 610 N.Y.S.2d 1007, 1013 (Civ. Ct. 1993) (disregarding evidence of five-year-old child's preference); Kay v. Kay, 112 N.E.2d 562, 567 (Ohio C.P. 1953) (disregarding seven-year-old child's preference); Replogle v. Replogle, No. 01-01-9312-cv-00516, 1994 WL 228227, at *2 (Tenn. Ct. App. May 27, 1994) (rejecting evidence of seven-year-old child's preference); Halloran v. Kostka, 778 S.W.2d 454, 456 (Tenn. Ct. App. 1988) (minimizing importance of six-year-old child's preference); Brown v. Carroll, 683 S.W.2d 61, 63 (Tex. Ct. App. 1984, no writ) (minimizing importance of eleven- and fourteen-year-old children's preferences); *In re* Wilson, 648 A.2d 648, 651 (Vt. 1994) (noting that trial court disregarded five- and ten-year-old children's express preferences because the " 'children tend to say what they believe the questioner wants to hear' " (quoting trial transcript)).

children that society gives little weight to the view that a name is an associational label.[490] In the end, the law frequently rebuffs children in the same way it ignores their mothers.

Courts would benefit from a study assessing the importance to the child of a shared surname with the custodial parent. However, the absence of such research should not stop courts from accepting the fact that children can suffer when their surnames differ from their custodial parents' surnames. The lack of social science support (or even expert testimony in some cases) has not hampered courts from accepting the argument that the bond between non-custodial parents and their children is affected by a name change. As one court observed, it offends notions of equality to deny that a child's psychological health may require changing the child's surname to correspond with the rest of his family when the opposite argument is readily accepted.[491] While a court might elect to accept neither argument (or both arguments) until more research exists, it would be rational for a court only to accept the "discomfort" argument. The message implicit in the father-child bond argument (that love depends on a label) is problematic, while the same is not true of the discomfort argument (that a name has associational significance). Yet numerous courts do exactly the opposite. They readily accept the parental-child bond argument, and ignore the discomfort argument. Consequently, these courts fail to recognize that associationalism (articulated by some children as discomfort) should be at least as important, if not more important, than the parent-child bond argument in assessing the best interest of the child.

6. Any Other Factor Relevant to Child's Best Interest

A court's ability to consider any other factor relevant to the child's best interest is a double-edged sword. On the one hand, this criterion allows courts to cloak further their preference for the paternal surname by finding obscure reasons to justify their choice. On the other hand, the criterion potentially allows for consideration of

490. For a possible implication of such socialization, see David J. Herring, *Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children*, 26 LOY. U. CHI. L.J. 183, 236-38 (1995) (arguing that families are essential for developing children's associational skills which are necessary for the proper functioning of a pluralistic democracy).

491. *See In re* Rossell, 481 A.2d 602, 605 (N.J. Super. Ct. Law Div. 1984). That court, mocking fathers' traditional argument, stated: "It certainly could be concluded 'that the realities are that the ... [mother's] name represents the ... [child's] identity, his ... [maternity] and a remaining bond with his ... [mother].' " *Id.* at 605 (quoting *Lone*, 338 A.2d at 887-88).

associationalism, but some courts decline this opportunity because associationalism is not specifically enumerated or defined as a best interest criteria (nor even raised by litigants in many cases).

Judges will almost certainly bring their personal beliefs to bear when permitted to consider "any factor" they deem relevant. The mostly male judiciary tends to harbor the same beliefs that are common to men generally.[492] In addition, some judges exhibit outright hostility towards the perceived feminist influence behind nontraditional naming decisions. For example, a federal judge in Oregon ordered an attorney to use her husband's surname and to drop the appellation "Ms."[493] The transcript in another case revealed that the judge stated, " 'I absolutely think [giving a child his or her mother's surname] is absolutely wrong. I am violently opposed to it. If they want to play women's lib, then let them call it all by themselves.' "[494] Other judges have a hard time departing from the traditional cultural pattern. As one judge stated,

> I need to be convinced that it is not in the best interest of the child to bear his father's name. I've said many times that it's the American way for a child to bear his father's name, to grow up with the father's name. All of us have our Father's name, everyone in the courtroom today.[495]

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492. Most state court judges are men. *See generally* Marianne Githens, *Getting Appointed to the State Court: The Gender Dimension*, 15(4) WOMEN & POL. 1, 8 (1995) (reporting that in 1989 nine percent of judges sitting on Maryland's state courts were women). Men tend to be less inclined than women to accept nontraditional naming decisions. *See* Scheuble & Johnson, *supra* note 67, at 753 (finding in study of college students that "women are both far more accepting of nontraditional marital name choices and more tolerant of choices made by others than are their male counterparts"). Yet just like men in the general population, some male judges' views diverge from the "typical" male view. For example, Judge Douglas Ginsburg married Hallee Morgan in 1981, an obstetrician-gynecologist. Their daughter, born in 1985, is also named Hallee Morgan. Ginsburg explained his daughter's name by saying, "It is a modern marriage taken to the ultimate." *See* Jacob V. Lamar, Jr., *If at First You Don't Succeed: Reagan Picks Another Conservative for the Court—or So He Hopes*, TIME, Nov. 9, 1987, at 52, 52.

493. *See* Tara Bradley-Steck, *Judicial Decorum's Hit and Ms.*, OREGONIAN, July 14, 1988, at A14. The judge subsequently apologized. *See* Tara Bradley-Steck, *Judge Apologizes for Ms.-Treatment*, OREGONIAN, July 15, 1988, at A20.

494. D.R.S. v. R.S.H., 412 N.E.2d 1257, 1269 (Ind. Ct. App. 1980) (Shields, J., dissenting) (quoting trial court); *see also* Keegan v. Gudahl, 525 N.W.2d 695, 701 (S.D. 1994) ("In this day of law by acceleration and whirl, augured by the feminist movement in the field of domestic relations, why not make an inaccurate certificate!") (chastising mother who omitted father's name from child's birth certificate and gave child mother's surname) (Henderson, Retired J., concurring in part, dissenting in part).

495. *In re* Lott, No. 02A01-9507-JV-0015, 1996 WL 383299, at *2 (Tenn. Ct. App. July 10, 1996); *see also* Hall v. Hall, 351 A.2d 917, 920 (Md. Ct. Spec. App. 1976) (" 'I just think that it is just horrendous that a parent who has been divorced from her husband would

Numerous gender bias reports hint at the fact that these examples may not be isolated.[496]

Even if appellate courts vigilantly disallow favoritism for the male surname when it is brought to their attention, litigants rarely appeal. The following news report captures the slight probability that a trial court's prejudice will be corrected by an appellate court:

> Judge Harvey Moes, 65, of Hillsdale County First Judicial Court in Michigan, refuses to let divorcing mothers stop using their ex-husbands' names, saying that mothers shouldn't have names different from their children. Judge Moes appears to know his policy violates a Michigan law that allows a woman to return to her birth name, since he invites women to appeal, promising they'll win. "But," says a local lawyer, "the majority of women in our county can't afford the thousands in appeal costs."[497]

In addition, cases like *Dattilo v. Groth*[498] indicate that an appeal does not always work, even when an error seems manifest. The trial judge in *Dattilo* added the father's surname to a child's middle name over the vehement opposition of both the child and the mother. While the appellate court found that the trial court had incorrectly required the mother to prove that the change would be harmful to the child (even though the father had instituted the name change petition), it concluded that the evidence supported the ultimate result.[499] The dissenting judge disagreed, finding that the father presented *no* evidence that satisfied Illinois' statutory requirement of clear and convincing proof. The trial court, in fact, had admitted that "[t]here has not been a great deal of evidence along those lines" and

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even attempt to change that child's name and, in a sense, cut off the parental rights of the father. I was very upset about it.' " (quoting circuit court of Baltimore City chancellor)); MacDougall, *supra* note 24, at 158 ("Courts at all levels rarely evidence a judicial detachment in ruling on the issue. To the contrary, they all but openly express their clear desire to retain the traditional presumption of the paternal surname, particularly where children are older."); Dannin, *supra* note 42, at 170 ("Many judges have been influenced by personal bias . . . ."); *cf. Judge Rules "—person" is Non Grata*, N.Y. TIMES, Oct. 19, 1976, at 41 (Justice John Scileppi, Suffolk County, denied petition to change name from Ellen Donna Cooperman to Ellen Donna Cooperperson stating: " 'This would truly be in the realm of nonsense.' ").

496. *See, e.g.*, Judith M. Billings & Brenda Murray, *Introduction to the Ninth Circuit Gender Bias Task Force Report: The Effects of Gender*, 67 S. CAL. L. REV. 739 (1994) (documenting states' efforts to eliminate gender bias in their court systems).

497. Sheila Weller, *More of America's Most Sexist Judges*, REDBOOK, Dec. 1994, at 88-90. *But see* notes 468-69 and accompanying text (describing case where trial court denied woman permission to resume use of birth name, but was reversed on appeal).

498. 584 N.E.2d 196 (Ill. App. Ct. 1991).

499. *See id.* at 198.

that it did not hear "evidence to warrant that it would be in the best interest of the child ... that the name be changed."[500] The trial court's decision, and the appellate court's affirmance, seemed to be based on the fact that "99% of the children in the United States bear the name of their father .... It is something that is done."[501] *Dattilo v. Groth* illustrates that judicial bias for the father's surname exists among both trial and appellate judges.

While the open-ended best interest inquiry theoretically permits courts to consider associationalism, not all courts do so. When a court does discuss associationalism in its decision, the concept is not usually employed in a manner consistent with women's views of its meaning. For example, courts, at times, use associational language synonymously with the parent-child bond argument.[502] Or courts entertain the belief that the relevant association may be between the child and the non-custodial parent's relatives.[503] Some courts believe "association" means any parental connection, and require that the child use a hyphenated name to "associate" the child to both parents.[504] These interpretations of "association" do not mirror the

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500. *See id.* (Greiman, J., dissenting).

501. *Id.* at 199 (Greiman, J., dissenting).

502. For example, one court stated:

> A name, in addition to furnishing a means of identifying a person, signifies a particular relationship between and among people .... The paternal surname tends to identify the relationship between a father and his children .... The courts should not interfere with the usual custom of succession of the parental surname except under circumstances warranting a change for the best interest of the minor.

Carroll v. Johnson, 565 S.W.2d 10, 14 (Ark. 1978); *see also In re* Tubbs, 620 P.2d 384, 387 (Okla. 1980) (noting that a surname is an important component of the parent-child bond); Sheppard v. Wright, 895 P.2d 748, 748 (Okla. Ct. App. 1995) (arguing that a name change may create a barrier between child and father).

503. *See, e.g.*, Sobel v. Sobel, 134 A.2d 598, 600 (N.J. Super. Ct. Ch. Div. 1957) ("The surname of Sobel is a family name, and when Daniel and Leonard were born, they were born into the family name in common with other members of the Sobel family."); *In re* Grimes, 609 A.2d 158, 161 (Pa. 1992) (remanding case where mother had testified that boy wanted the same name as mother and brothers to "cement his feeling of being a part of the same family unit" and father testified that child should be encouraged to continue his identification with his paternal relatives).

504. In over one third of the cases mentioned *infra* in note 506, where the associational argument prevailed, the child was made to use both the custodial and non-custodial parents' names. An excellent example of how some courts interpret "associationalism" differently than most women appears in the case of *Michel D.L. v. Martha P. and Charles P.*, N.Y.L.J., May 11, 1990, at 28 (Sup. Ct. 1990). After using equitable estoppel to find that the mother's first husband was the children's father (he was not the biological father), the court ordered that the children receive a hyphenated surname. *See id.* at 29. The court explained that the use of both names acts as "an indicia" of each parent's "meaningful association" with the child. *See id.* (citation omitted). The court continued, "Despite the

understanding of most women that a shared surname should be borne by family members who presently live together.

Even courts that consider the associationalist argument from the woman's perspective rarely let this consideration trump other concerns, especially a father's desire to maintain the parent-child bond through his child's use of the patronym. As the California Supreme Court stated: "The symbolic role that a surname other than the natural father's may play in easing relations with a new family should be balanced against the importance of maintaining the biological father-child relations."[505] In the end, courts usually accord more weight to the maintenance of the father-child bond than to the "symbolic role" of associationalism.

Yet some cases do exist in which the courts consider the importance of the surname as an associational label for those family members living together, and some courts have given significant weight to this consideration.[506] For example, the court in *In re Craig*[507] granted the name change petition based almost entirely on the testimony of a twelve-year-old girl:

> Lisa testified that she wanted to change her last name so that she could have the same last name as her brothers, who will attend the same school. She stated that she is very close to her stepbrothers and that she wants to be known as

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technical and legal reasons for permitting this hyphenated name, the result is also to preserve and signify the relationship of the children both to their legal father ... and to the parents with whom they live...." *Id.* The court valued participation by the father that differed from the physical proximity that most women require for a shared surname. The psychiatrist testified that the father "did not play a greatly significant role in these children's lives," but the court emphasized his financial contribution. *See id.* at 28-29.

505. *In re* Marriage of Schiffman, 620 P.2d 579, 583 (Cal. 1980) (en banc).

506. *See In re* Marriage of Douglass, 525 Cal. Rptr. 839, 844-45 (Ct. App. 1988); Don v. Don, 114 A.2d 203, 204 (Conn. 1955); Delaney v. Appeal from Probate, No. CV930521209S, 1993 WL 328611, at *1-*2 (Conn. Super. Ct. Aug. 17, 1993); Cardinal v. Perch, 611 A.2d 515, 517 n.2 (Del. Fam. Ct. 1991) (non-marital child); Aitkin County Family Serv. Agency v. Girard, 390 N.W.2d 906, 909 (Minn. Ct. App. 1986) (non-marital child); *In re* Andrews, 454 N.W.2d 488, 493 (Neb. 1990); M.D. v. A.S.L., 646 A.2d 543, 546 (N.J. Super. Ct. Ch. Div. 1994) (non-marital child); K.K. v. G., 530 A.2d 361, 336-37 (N.J. Super. Ct. Ch. Div. 1987) (non-marital child); Spence-Chapin Serv. to Families and Children v. Tedeno, 421 N.Y.S.2d 297, 300 (Sup. Ct. 1979) (non-marital child); *In re* Williams, 381 N.Y.S.2d 994, 996 (Civ. Ct. 1976); Aylsworth v. Adams, 736 P.2d 225, 226 (Or. Ct. App. 1987) (non-marital child); Gleason v. Michlitsch, 728 P.2d 965, 966 (Or. Ct. App. 1986) (non-marital child); *In re* Grimes, 582 A.2d 1386, 1387 (Pa. Super. Ct. 1990); *In re* Richie, 564 A.2d 239, 241 (Pa. Super. Ct. 1989) (non-marital child); Rothstein Petition, 28 Pa. D. & C. 2d 665, 669 (C.P. Montg. 1962); G.K. v. K.A., 936 S.W.2d 70, 73 (Tex. Ct. App. 1996, n.w.h.) (non-marital child); Pintor v. Martinez, 202 S.W.2d 333, 335 (Tex. Civ. App. 1947, writ ref'd n.r.e.) (non-marital child); Hamby v. Jacobson, 769 P.2d 273, 279-80 (Utah Ct. App. 1989); Doe v. Dunning, 549 P.2d 1, 3 (Wash. 1976) (en banc) (non-marital child).

507. 518 N.E.2d 728 (Ill. App. Ct. 1987).

> their sister. She also testified that she loves her stepfather, and desires to have his name and the name of her family. She stated that she did not want to change her name to dis-associate herself from her natural father.[508]

No other reasons were advanced for the name change apart from Lisa's long-standing desire to change her name.[509] Cases where associationalism is valued, like *In re Craig*, provide persuasive authority for the many courts that never consider the associational argument, misinterpret the argument, or diminish its importance in a best interest inquiry.[510]

Overall, the best interest standard, while touted for its gender neutrality, is problematic for women. The standard incorporates factors that reflect the male view of the importance of surnames, and deemphasizes or omits those components that reflect the female view of the importance of surnames.

C. *Custodial Parent Presumption*

In response to claims that the standards governing name change disputes were gender-biased,[511] the custodial parent presumption developed. The custodial parent presumption affords legal protection to the surname chosen by the custodial parent; the presumption generally makes the custodial parent's decision binding unless the other parent meets the requirements of the state's name change statute. While some states have enacted statutes that apply the presumption to the naming of non-marital newborns,[512] or to the naming of marital newborns whose parents are separated or divorced at the time of the child's birth,[513] the presumption has only recently been adopted to

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508. *Id.* at 728.

509. *See id.*

510. The associational argument has been the most persuasive to courts when the facts of the case do not involve a married couple who had lived together at the time of the child's birth. Of the cases where women made an associational argument, *see supra* text accompanying notes 262-69 & 506, and then prevailed, approximately 65% of those cases involved non-marital children or children born after the father and mother had separated. For a possible explanation why fathers tend to lose these cases, *see supra* note 442.

511. *See, e.g., supra* text accompanying notes 24-27 & 385.

512. *See, e.g.*, FLA. STAT. ANN. § 382.013(5)(b) (West 1993) ("If the mother is not married at the time of birth, the person who will have custody of the child shall select the given names and surname of the child."); KY. REV. STAT. ANN. § 213.046(8)(a) (Michie 1995) ("The surname of the child shall be any name chosen by the mother and father. If there is no agreement, the child's surname shall be determined by the parent with legal custody of the child.").

513. *See, e.g.*, KY. REV. STAT. ANN. § 213.046(7)(a) (Michie 1996) (stating that if mother was married at time of either conception or birth "[t]he surname of the child shall

resolve name change petitions. While advocates had suggested the use of the presumption in name change disputes from the 1940s onward,[514] it was not until Justice Mosk's 1980 concurrence in *In re Schiffman*[515] that the judiciary seriously considered the presumption as an option in these cases.[516] Since *Schiffman*, commentators have advocated the widespread adoption of the presumption.[517] However,

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be any name chosen by the parents; however, if the parents are separated or divorced at the time of the child's birth, the choice of surname rests with the parent who has legal custody following birth"); N.H. REV. STAT. ANN. § 126:6-a(I)(a) (1996) ("[I]f the parents are separated or divorced at the time of the child's birth, the choice of surname rests with the parent who has actual custody following birth."); N.J. ADMIN. CODE tit. 8 § 8:2-1.3(a)(1) (1993) ("Where either parent is unavailable for any reason, the choice of a child's name(s) rests with the parent who has custody of the newborn child."); 28 PA. CODE § 1.7(b) (1975) ("If the parents are divorced or separated at the time of the child's birth, the choice of surname rest with the parent who has custody of the newborn child.").

514. *See In re* Trower, 66 Cal. Rptr. 873, 874 (Ct. App. 1968) (applying the presumption when the father does not object), *overruled by In re* Marriage of Schiffman, 620 P.2d 579 (Cal. 1980) (adopting best interests test); Montandon v. Montandon, 52 Cal. Rptr. 43, 45 (Dist. Ct. App. 1966); *In re* Cohn, 50 N.Y.S.2d 278, 278 (Sup. Ct. 1943); Nitzberg v. Board of Educ., 104 N.Y.S.2d 421, 423-24 (Sup. Ct. 1951); Reed v. Reed, 338 P.2d 350, 353-54 (Okla. 1959); *see also* Leavitt, *supra* note 42, at 115, 119-20 (suggesting adoption of the custodial parent presumption). *But see* MacDougall, *supra* note 24, at 146 (explaining that attorneys began advocating for this standard in the mid-1970s).

515. 620 P.2d 579 (Cal. 1990).

516. *See id.* at 584-85. While Justice Mosk claimed that the Supreme Court of Louisiana upheld the application of a rebuttable presumption in an almost identical case, *see id.* at 584, Justice Mosk's characterization went far beyond the holding of the Louisiana court in *Webber v. Parker*, 167 So. 2d 519 (La. Ct. App. 1964). The *Webber* court held that a father petitioning to change the name of a child born during the parties' separation and named by the mother must allege "a sound reason why the name given would prove detrimental to the present or future welfare of the child." *Webber*, 167 So. 2d at 521. The father's motion failed to give "any valid reason" why the change would be beneficial to the child; rather he rested his argument on what he said was his "absolute legal right to name the child." *Id.* at 522-23. Consequently, the father never met the burden of production, and the burden of persuasion was not before the court. In Justice Mosk's concurrence, on the other hand, he states that in *Webber*, "the burden of proof was unequivocally placed by the court on the non-custodial parent." *Schiffman*, 620 P.2d at 584-85 (Mosk, J., concurring). In addition, the *Webber* court merely placed the burden of production on the party moving for the change of a child's name. The custodial parent presumption as conceived by Justice Mosk would shift the burden of production and proof to the non-custodial parent when a custodial parent moves to change the child's name. *See Shiffman*, 620 P.2d at 584-85.

517. *See, e.g.*, Doll, *supra* note 27, at 261 (arguing that the divorce court already determined by its custody award that the "custodian represents the child's best interests" and that the custodial parent "probably understands better the child's preferences"); MacDougall, *supra* note 24, at 157 ("[L]egislatures must also be asked to address the custodial parent presumption as a solution to resolving disputes between parents over their children's names"); Urbonya, *supra* note 44, at 819-22 (advocating for the custodial parent presumption unless the non-custodial parent can show new facts or changed circumstances that would bar such a name change, such as remarriage or relocation, or unless the parents had joint custody, in which case the court should determine a name dispute according to

with only one exception, every court that has considered the standard in the name change context has rejected it.[518] Courts initially rejected the presumption because the patronym was considered essentially immutable;[519] more recently, courts reject the presumption because of the strong preference for the best interest analysis.[520] When rejecting the presumption, courts have tried to differentiate, rather unsuccessfully, the naming decision from other decisions relegated to the legal custodian.[521]

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the child's best interests); Laura Anne Foggan, Note, *Parents' Selection of Children's Surnames*, 51 GEO. WASH. L. REV. 583, 598 (1983) (arguing that adoption of the custodial parent presumption would "properly recognize the custodial parent's child rearing authority," lend predictability to name disputes, and discourage litigation between parents).

518. *See* Hamby v. Jacobson, 769 P.2d 273, 277 (Utah Ct. App. 1989) ("[M]ost recent court decisions have both rejected the notion that there is a preference for the paternal name and failed to adopt a preference for custodial parent choice."); *see, e.g., In re* Schiffman, 620 P.2d 597, 583-84 (Cal. 1980); Montandon v. Montandon, 52 Cal. Rptr. 43, 45 (Dist. Ct. App. 1966); Cohee v. Cohee, 317 N.W.2d 381, 384 (Neb. 1982) (We refuse to suggest or hold that a presumption exists in favor of the custodial parent."); *In re* Wilson, 648 A.2d 648, 650 (Vt. 1994) (rejecting argument that best interest analysis should be guided by a rebuttable presumption in favor of the custodial parent's preference); *cf.* Lassiter-Geers v. Reichenbach, 492 A.2d 303, 306 (Md. Ct. App. 1985) (holding that because mother alone named child at birth, dispute over child's name was not a name change dispute, which would be governed by a presumption for the status quo, but rather an initial name dispute governed by the best interest of the child test, and child would receive father's surname); *In re* Cohn, 50 N.Y.S.2d 278, 279 (Sup. Ct. 1943) (rejecting argument that selection of children's surname was an incident of mother's general guardianship). *But cf.* J.N.H. v. G.A.H., 659 N.E.2d 644, 646-47 (Ind. Ct. App. 1995) (concluding that consent of purported father of non-marital child was not required for name change because paternity had not yet been established); Aitkin County Family Serv. Agency v. Girard, 390 N.W.2d 906, 909 (Minn. Ct. App. 1986) (custodial parent's preference is relevant in best interest inquiry absent evidence that change is detrimental to non-marital children's relationship with father).

519. *See, e.g., Cohn*, 50 N.Y.S.2d at 279 (arguing that the children "remain members of the father's family," and "[t]hat status has been in no wise [sic] altered").

520. These courts state that it is solely the child's interest, and not the custodial parent's preference, that should govern a determination. *See, e.g., Hamby*, 769 P.2d at 277 (noting that the child's best interests are "the paramount consideration"); *Wilson*, 648 A.2d at 650 (same); *cf.* MacDougall, *supra* note 24, at 156 ("Because of the spoken and unspoken fear that women will, as men have, impose their surnames on children irrespective of the children's best interests, it appears highly unlikely that legislatures will adopt a comprehensive custodial parent presumption.").

521. For example, in *Montandon*, 52 Cal. Rptr. at 45, the court rejected the presumption and claimed that a name decision is unlike a religious, cultural, educational, or disciplinary decision, because the latter all "unite to reach a desired result without unnecessary traumatic experiences for the child." *Id.* The court felt that it was unnecessary to allow the child's surname to be selected solely by the custodian, and the court feared that a presumption would give a temporary legal custodian who was unrelated to the child enormous power, potentially increasing the ward's traumatic experience. *See id.* The first rationale is weak considering that a naming decision can have less impact on the child than a decision where to send the child to school, or which religion, if any, to practice. The second rationale disappears if a court limits the use of the presumption to parents. In *Wil-*

Bucking the trend, the Supreme Court of New Jersey recently and unanimously adopted the custodial parent presumption to resolve a name change petition brought by the child's father. *Gubernat v. Deremer*[522] involved a non-marital child who was given the mother's surname at birth.[523] The father, although initially refusing to acknowledge paternity, later sought joint custody, increased visitation, and a change of the child's surname.[524] The father wanted his son to bear his surname because

> I would want my son to recognize who his father is .... It is important for me when he deals with other children as he gets older to see that he, yes he does have a father and he has a father who cares and will always be there for him.[525]

The trial court ruled in the father's favor, except that it allowed the mother to retain primary physical custody.[526] In ordering that the child assume the father's surname, the trial court emphasized "the father's interest in maintaining his relationship with his child for their mutual benefit"[527] and the "father's desire to have progeny and

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son, 648 A.2d at 650, the court rejected the presumption and said that name changes, unlike decisions about religion and education, are overseen in the first instance by the court. The *Wilson* court's explanation is unpersuasive if one considers the ability at common law to change a name independent of court involvement. Laks v. Laks, 540 P.2d 1277, 1279 (Ariz. Ct. App. 1993) ("Under the common law a person had a right to change his name without legal formality.... Statutes ... merely affirm and are in aid of the common law rule."); Application of Sakaris, 610 N.Y.S.2d 1007, 1010 (Civ. Ct. 1993) (statute "does not diminish an individual's common law right to select an appropriate name"); *see infra* note 641. In addition, these other decisions made by the legal custodian can be brought to the court's attention. *See, e.g.*, *Schiffman*, 620 P.2d at 584 (Mosk, J., concurring) (commenting on how "the noncustodial parent can seek a corrective court order if the child's health, education or control are deleteriously affected by the abuse of custodial care"); Von Tersch v. Von Tersch, 455 N.W.2d 130, 136 (Neb. 1990) (holding that "a custodial parent ... may determine the nature or extent of the education for a child legally affected by the dissolution proceeding unless there is an affirmative showing that the custodial parent's decision has injured or harmed, or will jeopardize, the child's safety, well-being, or health, whether physical or mental"); Rust v. Rust, 864 S.W.2d 52, 56 (Tenn. Ct. App. 1993) ("The courts should not countermand [the custodial parent's education] decisions unless they (1) are contrary to an existing custody order, (2) impose an increased, involuntary burden on the noncustodial parent, (3) are illegal, or (4) will affirmatively harm the child"). Even if the distinction made by the *Wilson* court is legitimate, the court in a name change case could still give significant weight to the custodial parent's naming decision in exercising its oversight.

522. 657 A.2d 856 (N.J. 1995).

523. *See id.* at 857.

524. *See id.* at 858.

525. *Id.*

526. *See id.* at 857.

527. *Id.*

also to have someone carry on his name."[528] The trial court stated, "It's a right that the father has."[529] The Appellate Division remanded for clarification of the facts and conclusions leading to a determination that the name change was in the best interest of the child, but it later affirmed.[530] The Appellate Division stated that preserving the child's paternal identity and the "resulting bond with his father" ineluctably meant that the child's best interest required the patronym.[531]

The Supreme Court of New Jersey reversed.[532] After detailing the history of naming, the court emphasized that the law had begun to accord greater respect for gender neutrality, particularly in the area of parental rights.[533] The court acknowledged the widespread dissemination of the best interest inquiry into "almost every legal disposition involving minors," and stated that the best interest standard would govern this dispute as well.[534] Yet the court acknowledged that the best interest test had been, at times, synonymous with the father's best interest, and that the paternal surname should have no preference in determining the child's best interest.[535] The court rejected the myth that the strength of the father-child bond depends upon the surname that the child bears.[536] The court claimed that it could apply the best interest of the child standard "free of gender-based notions of parental rights."[537] To attain gender neutrality, the court adopted the following formulation:

> The non-custodial parent bears the burden of demonstrating by a preponderance of the evidence that despite the presumption favoring the custodial parent's choice of name, the chosen surname is not in the best interests of the child. Courts should examine scrupulously all factors relevant to the best interests of the child and should avoid giving weight to any interests unsupported by evidence or rooted in impermissible gender preferences.[538]

Although attractive at first blush, the New Jersey court's for

528. *Id.* at 859.
529. *Id.*
530. *See id.*
531. *See id.*
532. *See id.* at 870.
533. *See id.* at 865-66.
534. *Id.* (citation omitted).
535. *See id.* at 867.
536. *See id.*; *see also supra* text accompanying notes 356-57.
537. *Gubernat*, 567 A.2d at 867.
538. *Id.* at 869.

mulation of the custodial parent presumption (which was similar to Justice Mosk's formulation in *In re Schiffman*) is potentially limited in several respects. First, it is unclear if the standard applies outside the non-marital child context—*Gubernat* involved a non-marital child, and fathers traditionally lose these cases.[539] While *In re Schiffman* involved a marital child, *Schiffman* looked like a non-marital child case: The child was born five months after the parties had separated (only months before the parties divorced), and the mother had entered her own surname on the birth certificate.[540] Courts may be reluctant to extend the reasoning of *Gubernat* to marital child cases where both parents played (or are presumed to have played) an active role in raising their children prior to the divorce.

Second, it is unclear if the standard applies outside of the infant context. In originally recommending the adoption of the custodial parent presumption, Justice Mosk stated that the presumption should be used when the name selection involves "the original name, or a name change for a child of tender years."[541] The child in *Gubernat* was of tender years: He was three years old when the supreme court's decision was handed down.[542] The implicit assumption is that a name change for an older child is presumptively disadvantageous (perhaps due to the length of time the child has used the surname).

Third, it is unclear if the presumption applies when a custodial mother seeks to change the child's birth name from the patronym to her surname. While the language of *Gubernat* may be broad enough to cover that situation, *Gubernat* involved a non-custodial father who sought to change his child's surname from the matronym.[543] Similarly, in *Schiffman*, the child already bore the mother's surname. Society's preference for the patronym and courts' emphasis on nominal stability may make a court reluctant to apply the presumption when a custodial mother has decided to change the child's surname from the patronym.

Fourth, the custodial parent presumption does not necessarily

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539. *See supra* note 442; *see also* J.S. v. D.M., 667 A.2d 394, 394-95 (N.J. Super. Ct. App. Div. 1995) (applying *Gubernat* in context of four-year-old non-marital child).

540. *See In re* Marriage of Schiffman, 620 P.2d 579, 580 (Cal. 1980) (en banc).

541. *Id.* at 584 (Mosk, J., concurring); *see also* Halloran v. Kostka, 778 S.W.2d 454, 457 (Tenn. Ct. App. 1988) (distinguishing case of name change for six-year-old child from *Schiffman*, where the mother gave the child at birth her name).

542. *See Gubernat*, 657 A.2d at 857.

543. *See id.* at 858; *see also J.S.*, 667 A.2d at 395 (applying *Gubernat* to reject non-custodial father's attempt to change non-marital child's surname).

eliminate bias for the patronym. The New Jersey Supreme Court characterized the custodial parent presumption as "strong," but "not irrefutable."[544] Justice Mosk called the presumption "rebuttable."[545] In fact, the presumption, as described in *Gubernat*, is rather weak.[546] It is a dressed-up version of the best interest test and shares many of that test's shortcomings. The New Jersey court stated,

> [W]e readily envision circumstances in which the presumption could be rebutted. A young child who has used the non-custodial surname for a period of time, is known to all by that surname, expresses comfort with the continuation of that surname, and maintains frequent contact with the non-custodial parent might be ill-served by the presumption that the assumption of the custodial surname would be in his or her best interests.[547]

Justice Mosk also said that the presumption could be "contested on the ground that it is not in the child's best interest."[548]

As many of the best interest factors incorporate a male conception of surnames (including those specifically mentioned by the *Gubernat* court in the foregoing quotation), it appears doubtful that the custodial parent presumption can completely eliminate the pro-patronymy bias. The failure to specify exactly what evidence permits refutation of the presumption means that judicial preference for the patronym can still be easily cloaked, especially as the non-custodial parent need only prove "by a preponderance of the evidence that[,] despite the presumption[,]" the custodial parent's choice of name is not in the child's best interest.[549] Thus, the current formulation of the custodial parent presumption is feckless.

Moreover, while the New Jersey Supreme Court cautioned that lower courts should "avoid giving weight to any interests . . . rooted in impermissible gender preferences,"[550] the supreme court did not identify what all those impermissible gender preferences might be. The court's comments certainly did not extend as far as this Article's observations. Consequently, lower courts applying the new standard

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544. *Gubernat*, 657 A.2d at 869.

545. *Schiffman*, 620 P.2d at 584 (Mosk, J., concurring).

546. One author has framed the custodial parent's decision as being impervious to challenge by the non-custodial parent. *See* Seng, *supra* note 24, at 1346. However, this is not the formulation that has been adopted by the courts.

547. *Gubernat*, 657 A.2d at 869.

548. *Schiffman*, 620 P.2d at 584 (Mosk, J., concurring).

549. *Gubernat*, 657 A.2d at 869.

550. *Id.*

lack guidance on how to comply with the supreme court's edict.

In addition, language at certain points in the New Jersey Supreme Court's opinion and in Justice Mosk's concurrence may undermine the attempt to neutralize the sex bias attending the best interest inquiry. For example, when the New Jersey court criticized the widely held assumption that the parent-child bond can be affected by a child's surname, the court also implied that if empirical or circumstantial evidence had been produced, the inference might have been permissible.[551] The court did not indicate what sort of evidence would suffice. Similarly, Justice Mosk, imagining that most litigants' children would already be using the custodian's surname, suggested that a court's orientation be in favor maintaining the status quo. He cited *Donald J. v. Evna M.* for authority:

> [W]here a child has used a particular surname for a substantial period of time without objection by either natural parent, the court, upon petition, of one of the natural parents to change the child's surname over objection of the other natural parent, should exercise its power to change the child's surname reluctantly, and only where the substantial welfare of the child requires the change.[552]

This conservatism favors nominal stability—a value not held by most women—and may work against the outcome women seek. In fact, it is probably more common that women have acquiesced in their children's use of paternal surnames than vice versa.

Finally, the new presumption does not require that a court consider the merit of associationalism when the non-custodial parent tries to rebut the presumption. Consequently, the presumption is fundamentally inadequate: there is no guarantee that associationalism will be valued, or even considered, at all.

Since this new standard is touted as a plausible alternative to the best interest test, it is worth exposing another major problem with the standard, as formulated by the New Jersey Supreme Court.[553] Simply, the presumption blurs the line between physical and legal custody, and does so with no coherent theoretical justification. *Gubernat* allocates the presumption to "the parent who exercises physical custody *or* sole legal custody."[554] A joint legal custodian, like Mr. Gubernat, is put in the same position as a father with no le-

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551. *See id.* at 870.

552. *Schiffman*, 620 P.2d at 585 (Mosk, J., concurring) (quoting Donald J. v. Evna M., 147 Cal. Rptr. 15, 20 (Ct. App. 1978) (non-marital child)).

553. For additional criticism, see Seng, *supra* note 24, at 1347.

554. *Gubernat*, 657 A.2d at 869 (emphasis added).

gal custody.[555] The court justifies giving the physical custodian so much power because it "is rooted in a basic principle of family law—that the parent having physical custody of the child is generally accorded broad responsibility in making daily child-rearing decisions."[556] Yet normally the physical custodian can only make minor day-to-day decisions.[557] The New Jersey Supreme Court itself has stated that legal custody involves the "authority and responsibility for making 'major' decisions regarding the child's welfare" and "is often shared post-divorce by both parents,"[558] while physical custody involves "responsibility for 'minor' day-to-day decisions."[559] The court is disingenuous when it equates a child's surname change with a minor day-to-day child-rearing decision; even women who see a surname as fungible and labile do not change their surnames daily, or see their name changes as "minor." Other courts have characterized the choice of a child's surname as "a major decision that must be shared under a joint custody agreement."[560]

The *Gubernat* decision would not be so aberrational if it allocated the presumption to the parent with physical custody *and* joint legal custody. *Gubernat* would then be similar to other New Jersey cases in various respects. For example, the New Jersey courts treat physical custody subject to visitation in a joint custody decree the same as sole custody for removal purposes[561] and for child support spending decisions.[562] Nor would the *Gubernat* decision be so extraordinary if it allocated the presumption to the parent or parents with legal custody, regardless of who had physical custody. A Penn-

555. *See id.* at 857. Joint legal custody is now a fairly common practice. *See* MACCOBY & MNOOKIN, *supra* note 49, at 107 (citing "overwhelming tendency" for California divorce decrees to provide for joint legal custody); Catherine R. Albiston et al., *Does Joint Legal Custody Matter?*, 2 STAN. L. & POL'Y REV. 167, 167 (1990) (claiming that approximately 80% of divorced parents have joint legal custody in California); Scott, *supra* note 12, at 635 ("Joint legal custody . . . is now the prevailing norm in some jurisdictions.").

556. *Gubernat*, 657 A.2d at 868.

557. *See* Linda Hallmark & Laura Cheger Barnard, *Recent Trends in Family Law: Joint Custody and Third-Party Standing*, 73 MICH. B.J. 642, 642 (1994) ("The primary physical custodian may make routine decisions regarding the child, however a trial court may not relinquish its authority to determine the best interests of the child to the primary physical custodian.").

558. Pascale v. Pascale, 660 A.2d 485, 491 (N.J. 1995) (citing Beck v. Beck, 432 A.2d 63, 66 (N.J. 1981)).

559. *Id.* at 491-92.

560. Hazel v. Wells, 918 S.W.2d 742, 744 (Ky. Ct. App. 1996).

561. *See* Christopher-Frederickson v. Christopher, 538 A.2d 830, 832 (N.J. Super. Ct. App. Div. 1988).

562. *See Pascale*, 660 A.2d at 491-92 (citing *Beck*, 432 A.2d at 63).

sylvania statute that allocates the choice of surname at birth to the parent with custody of the newborn (when the parents are separated or divorced) has been held to refer "clearly" to "legal custody."[563] Perhaps the most principled approach would have been for the New Jersey court to emphasize that Ms. Deremer had physical custody *and* sole legal custody when she named her son, since Mr. Gubernat denied paternity. But the court's apparent desire to give the physical custodian decision-making power in this area, even when the parents share legal custody, meant that the case could not be decided in this way.[564] Of course, the court could have explicitly engaged in law reform and held that the physical custodian's authority should be expanded in the context of children's name changes because of the unique associational significance of a surname. That was not the New Jersey Supreme Court's approach, but it is the solution advocated below.

The *Gubernat* court's use of the disjunctive leaves ambiguous the allocation of the burdens of production and proof when one parent has sole physical custody and the other parent has sole legal custody,[565] or when the parents have joint physical custody.[566] If future decisions limit *Gubernat's* odd formulation by confining its holding to its facts (for Ms. Deremer did have physical custody and sole legal custody when she named her son), the case has no utility for the sole physical-joint legal custodian, or the sole physical-no legal custodian, or even the joint physical custodian, who seeks to

563. *See In re* Schidlmeier by Koslof, 496 A.2d 1249, 1253 (Pa. Super. Ct. 1985). *See supra* note 513 (setting out Pennsylvania statutory provision).

564. The court may have wanted to shield the name selection from a future challenge by Mr. Gubernat. The trial court had awarded Mr. Gubernat joint legal custody simultaneously with its resolution of the naming issue. *See* Gubernat v. Deremer, 657 A.2d 856, 857 (N.J. 1995). By allocating the presumption to the parent with physical custody or sole legal custody, Ms. Deremer's decision would remain insulated by the presumption.

565. This is a possible, although rare, situation. As the court in *Schidlmeier*, 496 A.2d at 1253, explained, "[a]lthough the child may be in mother's physical custody, legal custody may well rest with the natural father in cases of death or disability of the mother, agreement between the parents, or perhaps by court order." *Id.* (clarifying that "custody" in 28 PA. CODE. § 1.7 (1986) refers to legal custody); *see, e.g.*, Pyfrom v. Commissioner of the Dep't of Public Welfare, 659 N.E.2d 1206, 1209 (Mass. App. Ct. 1996) (awarding temporary physical custody to father after mother's attempted suicide, but mother retained legal custody, thereby entitling her to AFDC benefits); *cf.* Powell v. Powell, 249 P.2d 630, 632 (Kan. 1952) (upholding trial court's transfer of legal custody of child from mother to father, but leaving physical custody with a third party who had been taking care of child for years).

566. *Cf.* Lombard, *supra* note 15, at 131 (raising issue in the context of a rule which would permit the custodial parent to name the child at birth).

change her child's surname.[567]

For all of the reasons discussed, the existing version of the custodial parent presumption appears inadequate to eliminate gender bias. The standard may not apply to disputes involving marital children, older children, or a custodial parent who wants to change the child's surname from the patronym. A more serious problem is that the presumption does not eliminate the bias that exists for the patronym; the presumption allows the existing best interest factors to rebut the presumption by a mere preponderance of the evidence. There is no requirement that associationalism even be considered, or that the custodial parent be encouraged to give the child a name matching the name of the child's custodial family. Finally, the standard, as formulated, complicates the law of custody by blurring the traditional line between legal and physical custody without a coherent justification for doing so.

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567. If the presumption applies when a sole physical-joint legal custodian seeks to change the child's birth name, then the naming decision would receive less deference from the New Jersey courts than decisions by the sole physical-joint legal custodian on issues of child discipline, medical care, and child support. *See* Pascale v. Pascale, 660 A.2d 485, 493 (N.J. 1995) ("[W]hen joint custody is merely legal in nature, the primary caretaker should be accorded autonomy over the day-to-day structure of the new family in which he or she is the primary caretaker.") (how to spend child support); Brzozowski v. Brzozowski, 625 A.2d 597, 600 (N.J. Super. Ct. Ch. Div. 1993) ("[T]he residential custodial parent has been afforded somewhat more authority to decide issues in the event of a disagreement.... [A]ny court should be reluctant to substitute whatever limited expertise it may have for the empirical knowledge and day-to-day experience of the parent with whom the child lives, except where there is a clear showing that an act or omission will contravene the best interests of the child.") (deciding to uphold physical custodian's decision regarding surgery for minor child over joint legal custodian's disagreement); Pogue v. Pogue, 370 A.2d 539, 540-41 (N.J. Super. Ct. Ch. Div. 1977) ("Only when moral, mental and physical conditions are so bad as seriously to affect the health or morals of children should the courts be called upon to act." (citing Sisson v. Sisson, 2 N.E.2d 660, 661 (N.Y. 1936))) (refusing to honor father's request to pull the boy out of basketball until his grades improved).

On the other hand, the naming decision might be treated more favorably than a decision by a sole physical-joint legal custodian to remove a child from the jurisdiction. In New Jersey, the custodial parent must "establish (1) that there is a real advantage to that parent in the move, and (2) the move is not inimical to the best interest of the children." Christopher-Frederickson v. Christopher, 538 A.2d 830, 833 (N.J. Super. Ct. App. Div. 1988). After these threshold requirements are established, the court decides whether the "parent has sufficient cause to permit removal," considering:

> (1) the prospective advantage of the move as either maintaining or improving the general quality of life of both the custodial parent and children, (2) the integrity of both the custodial parent's motives in seeking to remove the children and the non-custodial parent's motives in seeking to restrain such move, and (3) whether a realistic and reasonable visitation schedule can be reached if the move is allowed.

Id. It is difficult to predict exactly how the New Jersey courts would view the name change decision.

V. ALTERNATIVES FOR REFORM

I will now survey possible solutions to the problem, including equal protection litigation, the education of judges, and a legislative proposal. A review of equal protection challenges in name change cases reveals that such challenges are successful against facially discriminatory classifications, but are unsuccessful against gender-neutral classifications (unless these classifications are applied in such a way as to evidence an intent to discriminate on the basis of sex). Because of the substantial impediments to an equal protection challenge, I will argue that education and/or legislative reform present more attractive options for the future.

A. Equal Protection Litigation[568]

Equal protection arguments have proven successful in challenging explicit gender-based classifications such as statutes requiring that a child bear the patronym,[569] or case law to that effect.[570] Facing the widespread infiltration of equal protection doctrine into family law,[571] the emphasis on "equal rights" by the women's movement,[572]

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568. I appreciate Jean Love's very helpful comments on this section.

569. *See, e.g.*, Roe v. Connecticut, 417 F. Supp. 769, 782-83 (M.D. Ala. 1976) (challenging ALA. CODE, §§ 26-12-1 to 9 (1975) (repealed 1984)); Sydney v. Pingree, 564 F. Supp. 412, 413 (S.D. Fla. 1982) (challenging FLA. STAT. ch. 382.16(5)(a) (renumbered as ch. 382.013 and amended 1987)); O'Brien v. Tilson, 523 F. Supp. 494, 496 (E.D.N.C. 1981) (challenging N.C. GEN. STAT. § 130-50(e) (repealed 1983)); Jones v. McDowell, 281 S.E.2d 192, 197 (N.C. Ct. App. 1981) (declaring unconstitutional N.C. GEN. STAT. § 49-13 (1996)).

570. *See, e.g.*, Hazel v. Wells, 918 S.W.2d 742, 745 (Ky. Ct. App. 1996) (non-marital child); Rio v. Rio, 504 N.Y.S.2d 959, 964 (Sup. Ct. 1986); *cf. In re* Marriage of Schiffman, 620 P.2d 579, 582-83 (Cal. 1980) (en banc) (finding that legislative reform to eliminate gender bias in family law generally indicated a legislative intent to treat the sexes equally in resolving petitions to change a child's surname and trial court should not honor custom of the father's "primary right" to have his child bear his surname).

"The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment." Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (citing Shelley v. Kraemer, 334 U.S. 1, 14 (1948); *Ex parte* Virginia, 100 U.S. 339, 346-47 (1880)). A judge may violate the equal protection clause either by announcing a "judicial rule" that contains a facial sex-based classification or by deciding the particular case in such a way as to make gender the "sole" or "primary" factor when there is no "important governmental objective" for doing so.

571. *See, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Orr v. Orr, 440 U.S. 268, 278-79 (1979); Califano v. Westcott, 443 U.S. 76, 89 (1979); Califano v. Goldfarb, 430 U.S. 199, 204-17 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975); Stanton v. Stanton, 421 U.S. 7, 14 (1975).

572. *Cf.* KUPPER, *supra* note 54, at 133 (attributing women's views about the need to keep using their birth name upon marriage to the women's movement of the past twenty years).

the emergent concept of the family as an institution composed of individuals with individual rights,[573] and scholars' criticism,[574] courts have recognized the mother's right to have a facially gender-neutral test applied in adjudicating whether her children will bear her surname.[575] Successful equal protection challenges have been raised in both federal court (e.g., the federal court strikes down a state's statute or a state court's judicial rule)[576] and state court (e.g., a state appellate court reverses a lower court).[577]

Several examples of these victories are informative. In *Jones v. McDowell*,[578] for instance, the North Carolina Court of Appeals upheld an equal protection challenge by the mother and invalidated a North Carolina statute that required the State Registrar of Vital Statistics to change a non-marital child's surname on his or her birth certificate to that of the father upon an order legitimating the child.[579] The court found that the statute did not "bear a close and substantial relationship to the important governmental objective underlying the statutes."[580] The valid purpose of establishing a filial relationship between non-marital children and their fathers was in no way furthered by the surname requirement.

Less than two months later, a federal court in *O'Brien v. Tilson*[581] struck down a North Carolina statute that required marital children to be given their fathers' surnames. The statute prohibited one couple from following Swedish custom and giving their child a surname which combined the father's first name with the suffix "son." The statute also prohibited another couple from following Spanish custom and giving their child a hyphenated combination of

573. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52, 70 (1976); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

574. *See supra* text accompanying notes 24-27 & 385.

575. *See, e.g.*, O'Brien v. Tilson, 523 F. Supp. 494, 496-97 (E.D.N.C. 1981); *In re* Marriage of Schiffman, 620 P.2d 579, 583 (Cal. 1980) (en banc); *In re* Marriage of Douglass, 252 Cal. Rptr. 839, 843 (Ct. App. 1988); Hazel v. Wells, 918 S.W.2d 742, 744 (Ky. Ct. App. 1996); *In re* Andrews, 454 N.W.2d 488, 491 (Neb. 1990); Cohee v. Cohee, 317 N.W.2d 381, 384 (Neb. 1982); K.K. v. G., 530 A.2d 361, 363 (N.J. Super. Ct. Ch. Div. 1987); Rio v. Rio, 504 N.Y.S.2d 959, 963-65 (N.Y. Sup. Ct. 1986); Halloran v. Kostka, 778 S.W.2d 454, 457 (Tenn. Ct. App. 1988); Hambry v. Jacobson, 769 P.2d 273, 277 (Utah Ct. App. 1989); Lufft v. Lufft, 424 S.E.2d 266, 269 (W. Va. 1992); *see also supra* text accompanying notes 386-89.

576. *See, e.g.*, Sydney v. Pingree, 564 F. Supp. 412, 413 (S.D. Fla. 1982); *O'Brien*, 523 F. Supp. at 497; Roe v. Connecticut, 417 F. Supp. 769, 782-83 (M.D. Ala. 1976).

577. *See, e.g.*, Hazel v. Wells, 918 S.W.2d 742 (Ky. Ct. App. 1996).(non-marital child).

578. 281 S.E.2d 192 (N.C. Ct. App. 1981).

579. *See id.* at 195-97.

580. *Id.* at 197.

581. 523 F. Supp. 494 (E.D.N.C. 1981).

both parents' surnames, and it prohibited a third couple from giving their child a hyphenated surname.[582] Without designating the applicable level of scrutiny, the court held that North Carolina's purported justifications for the statute did not meet even a rational basis test.[583] The court found unpersuasive the state's claim that the statute was needed for the accurate and timely recording of births or for the screening of newborns for health problems.[584]

Some litigants also have successfully challenged a judge's explicit preference for the patronym. In *Hazel v. Wells*,[585] for example, a non-marital child was given the mother's surname. The father petitioned to establish paternity and change the child's surname to his own surname. After the parties agreed, among other things, to paternity and joint custody, the trial court ordered that the child's surname be changed to the father's surname. The trial court said,

> The parties have joint custody of their only child . . . And the law is unclear as to which parent should be allowed to determine [her] surname. While it may appear gender biased, our society has traditionally had children carry the surnames of their fathers. Because the Court has no clear-cut answer to this question, it will require [the mother] to follow societal norms and change [the child's] surname to [the father's surname].[586]

The appellate court reversed. The appellate court read the relevant statute as not requiring that a child bear the declared father's surname.[587] To interpret the statute otherwise "would result in a violation of the Equal Protection Clause."[588] The court continued, "In these times of parental equality, arguing that the child of unmarried parents should bear the parental surname based on custom is another way of arguing that it is permissible to discriminate because the discrimination has endured for many years."[589] The court held that the child's best interest must determine the outcome and re-

582. *See id.* at 495.

583. *See id.* at 496.

584. *See id.* at 496-97.

585. 918 S.W.2d 742 (Ky. Ct. App. 1996) (non-marital child).

586. *Id.* at 744 (emphasis omitted).

587. The statute read: "In any case in which paternity of a child is determined by a court order, the name of the father and surname of the child shall be entered on the certificate of birth in accordance with the finding and order of the court." *Id.* at 743-44 (quoting KY. REV. STAT. ANN. § 213.046(8)(c)).

588. *Id.* at 745.

589. *Id.* (citing Bobo v. Jewell, 528 N.E.2d 180, 185 (Ohio 1988)).

manded the case for such a determination.[590]

While an explicit preference for the patronym is vulnerable to an equal protection challenge, not all such facially discriminatory laws have disappeared. For example, North Carolina still has a statute that states: "The surname of the [marital] child shall be the same as that of the husband, except that upon agreement of the husband and mother, or upon agreement of the mother and father if paternity has been otherwise determined, any surname may be chosen."[591] The only difference between this statute and the statute struck down in *O'Brien* is the caveat permitting the choice of "any surname" approved by both the mother and the father.[592] The parties in *O'Brien* had raised both an equal protection and a substantive due process objection to the North Carolina statute as it then existed.[593] The *O'Brien* court said that the statute failed to satisfy even the minimum level of scrutiny, without clearly basing its decision on either argument. While the subsequent statutory amendment may have satisfied the *O'Brien* plaintiffs (as each set of parents were united on the name they wanted to give their child), the present statute probably would not survive an equal protection challenge by a woman who

590. *See id.* at 754.

591. N.C. GEN. STAT. § 130A-101(e) (1995); *accord* LA. REV. STAT. ANN. § 40:34(B)(1)(a)(iii) (West Supp. 1997) ("Except as otherwise provided . . . the surname of the child shall be the surname of the husband of the mother if he was married to the mother of the child at the time of conception and birth of the child or had not been legally divorced from the mother of the child for more than three hundred days prior to the birth of the child, or, if both the husband and the mother agree, the surname of the child may be the maiden name of the mother or a combination of the surname of the husband and the maiden name of the mother."). Hawaii requires an adopted child receive the adoptive father's surname where the adoptive parents have different names. *See* HAW. FAM. CT. RULE 111 (Michie 1995). Several states statutorily mandate that the child's name be changed to the father's automatically upon an establishment of legitimization or paternity. *See, e.g.*, IND. CODE ANN. § 16-37-2-15 (Michie 1993) ("If the parents of a child born out of wedlock in Indiana later marry, the child shall legally take the last name of the father."); LA. REV. STAT. ANN. § 40: 46(A) (West 1992) ("If any child born in this state is legitimated by the subsequent marriage of its parents, the state registrar, upon receipt of a copy of the marriage certificate of the parents together with a notarized statement of the husband acknowledging the child's paternity, shall prepare a new certificate of birth in the new name of the child wherein the child's surname shall be that of his father or if both the father and mother agree, the surname may be the maiden name of the mother or a combination of the surname of the husband and the maiden name of the mother.").

592. *Compare* N.C. GEN. STAT. § 130A-101(e) (1995) (stating that if the mother was married at the time of conception or birth, the name of the husband—or father if paternity has been otherwise determined—will be given to the child, unless mother and husband/father agree to a different name) *with* N.C. GEN. STAT. § 130-50(e) (1981) (repealed 1983) (stating that if the mother was married at conception or birth, the name of the husband—or father if paternity was otherwise determined—shall be given to the child).

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

disagreed with her husband over their child's surname.

To resolve an equal protection challenge to the existing statute in North Carolina, a court would apply an "intermediate" level of scrutiny, the standard traditionally applied to distinctions drawn along gender lines.[594] Authors and jurists already have argued that various state justifications for a patronym preference cannot withstand intermediate scrutiny, and their reasoning is persuasive.[595] For example, a patronym preference cannot be justified by the argument that such a preference helps maintain the parent-child bond, and therefore furthers the child's best interest. While the child's best interest has been termed a substantial governmental interest in other contexts,[596] a state would have to concede that a gender-neutral pref-

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594. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976). A state might apply a higher level of scrutiny under its state constitution. North Carolina, however, applies intermediate scrutiny even for equal protection challenges arising under the North Carolina Constitution. *See* Dunn v. Pate, 431 S.E.2d 178, 182 (N.C. 1993).

595. *See, e.g., O'Brien*, 523 F. Supp. at 496-97 (holding that it was an "irrational assumption" to believe paternal surname requirement for child was necessary to prevent undue delays in filing of birth certificate); Rio v. Rio, 504 N.Y.S.2d 959, 961-65 (Sup. Ct. 1986) (showing how the paternal surname does not serve ease of inheritance, governmental convenience, genealogical and historical convenience, or promotion of marriage and family life); *see also In re* Marriage of Schiffman, 620 P.2d 579, 582 (Cal. 1980) (en banc) (listing other justifications, which have been refuted, such as that the paternal surname system formalizes long-standing custom, provides a convenient and certain surname system, makes official record-keeping easier, minimizes confusion and difficulty with public and private bureaucracies, gives one a healthy sense of family, ethnic, and religious identity, and maintains a link to an absent or non-custodial father); Secretary of the Commonwealth v. City Clerk, 366 N.E.2d 717, 724 (Mass. 1977) (stating that justification of tracing ancestral claims is "a chimera"). Some of the cases where the state's interests are criticized are substantive due process cases. *See, e.g.*, Jech v. Burch, 466 F. Supp. 714, 720 (D. Haw. 1979). *See also* Cherena Pacheco, *supra* note 42, at 22 (commenting on the government's interest in "keeping track of its citizens, recording their identities[,] documenting them for purposes of assessing rights," and ensuring that name changes aren't undertaken for fraudulent purposes); Seng, *supra* note 24, at 1318-40 (debunking the legal and sociological arguments for the paternal surname presumption); Thornton, *supra* note 42, at 311 (arguing state justifications for automatic paternal surname preference are not sufficient under an equal protection analysis). *But see* Robertson v. Pfister, 523 So. 2d 678, 679 (Fla. Dist. Ct. App. 1988) (upholding constitutionality of FLA. STAT. § 382.16 (West 1985) (repealed 1987), that required marital child to receive father's surname based upon state's interest in insuring accuracy and reliability of vital statistics).

596. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause."). In *Palmore*, the Supreme Court held it was unconstitutional to divest a natural mother of child custody because of her inter-racial remarriage. *Id.* at 432. The trial court had found that the best interest of the child standard dictated an award to the father because the child would be subjected to "social stigmatization." *Id.* The Supreme Court reversed. The Supreme Court said that the trial court "made no effort to place its holding on any ground other than race": Racial

erence for the noncustodial parent's surname would work just as well.[597] Thus it appears that an equal protection argument provides a viable means of challenging statutes, such as North Carolina's, that explicitly prefer the patronym.

Most states, however, do not have gender-specific laws. In these states, the standards governing marital children's name changes are gender neutral, although courts often interpret and apply the standards so that they favor how most men, and not most women, view surnames. Such *sub rosa* gender bias is rarely susceptible to an equal protection challenge.

The case of *Halloran v. Kostka*[598] illustrates the primary difficulty involved in mounting a successful equal protection challenge to a facially neutral standard. In that case, a marital child had been given the father's surname at birth. The mother was granted custody of the child upon divorce. The mother subsequently remarried and began using her second husband's surname as her own surname. When her ex-husband refused to allow her second husband to adopt the child, the child started using the mother's and stepfather's surname.[599] The father filed a petition for a permanent injunction barring the mother and stepfather from using their surnames to identify the child. The mother counter-petitioned and sought to change the child's name to the surname that she and her husband used, a name that the child had been using for the last four and one-half years.[600] Using the best interest standard, with the gloss that the mother had to prove "some compelling reason" why the father's surname should not be used, the trial court granted the injunction and denied the mother's petition.[601]

On appeal, the mother claimed that the trial court violated her equal protection rights under the Fourteenth Amendment by perpetuating the outdated custom of using the paternal surname.[602] The Court of Appeals of Tennessee affirmed the trial court's decision and

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prejudice was used to justify a racial classification. *Id.* Although the Supreme Court in *Palmore* found the child's best interest there was insufficient to justify the state's discrimination, the "child's best interest" may still be an adequate justification in the name change context. As the Court in *Palmore* said, race discrimination is subject "to the most exacting scrutiny." *Id.* at 432. Gender discrimination is more easily justified under intermediate scrutiny.

597. *See* Rio v. Rio, 504 N.Y.S.2d 959, 965 (Sup. Ct. 1986).

598. 778 S.W.2d 454 (Tenn. Ct. App. 1988).

599. *See id.* at 455 (noting that although child was registered with school officials by father's surname, mother requested child be called by stepfather's surname).

600. *See id.*

601. *See id.*

602. *See id.* at 456-57.

rejected the mother's equal protection challenge. The appellate court reasoned that Tennessee's statute recognized equal parental rights by providing parents with the option of giving their child at birth a surname other than the father's surname.[603] As the mother and father were married and living together when they named the child, the mother "already exercised her equal parental rights by her participation in choosing this name. Refusing now to allow her to change [the child's surname] . . . does not deprive her of any parental right that is constitutionally or statutorily guaranteed her."[604]

Halloran highlights a conceptual (and actual) problem with an equal protection challenge. Litigants must be able to identify "state action" in order to prevail. In *Halloran*, both the naming statute and the trial court's injunction were state action. But the former was gender-neutral and the latter only enforced the gender-neutral rights of parents under the statute. While all of this transpired against the backdrop of a sex-biased custom, the sex-neutral statute overrode the custom. Even when a state lacks a statute that affirmatively guarantees parents equal rights to name their child initially, there is usually no statute or case law that precludes either parent from exercising their equal rights in the initial naming decision. Therefore, an equal protection challenge to a facially neutral name change standard would almost always fail under *Halloran*'s reasoning.[605]

Women also face other problems if they choose to raise an equal protection challenge. For example, a facially neutral standard is not vulnerable to an equal protection challenge unless one can prove intent to discriminate.[606] In the context of name change disputes, where a facially gender-neutral standard usually exists, proving such intent will be difficult: Women at times do prevail when trying to change the child's name from the patronym, and non-discriminatory

603. *See id.* at 457.

604. *Id.* at 457.

605. *Cf. In re* Wilson, 648 A.2d 648, 650 (Vt. 1994) ("If, as here, the court declines to change a child's name from the father's surname to the mother's surname because such a change is not in the children's best interest, the decision does not inherently reflect gender bias merely because the parents' original naming choice followed traditional custom."). One might have a successful equal protection argument if there were a common law right of the father to have his marital child bear his surname, which a court in a name-change dispute then upheld with its facially neutral standard. Some courts have held that the common law rule was just this, absent a statute to the contrary. *See* Donald J. v. Evna M., 147 Cal. Rptr. 15, 20 (Ct. App. 1978) (arguing that the Uniform Parentage Act abrogated common law rule).

606. *See* Washington v. Davis, 426 U.S. 229, 239-42 (1976).

justifications exist for the standard.[607]

Pressing an equal protection challenge to facially gender neutral standards also may entail some long-term disadvantages for women. Such a challenge might jeopardize other facially neutral standards that tend to benefit women—for example, the presumption in favor of the primary caretaker in custody disputes.[608] The presumption for the primary caretaker favors women both in its underlying assumptions (e.g., that a child needs continuity with his or her day-to-day caretaker) and in its outcomes. Although the constitutional validity of the primary caretaker presumption does not turn on whether women prevail on equal protection challenges in the name change context, such success would provide a potentially useful analogy by which courts might more readily invalidate the primary caretaker presumption. Moreover, if the facially gender-neutral name change standards that now exist would fail under an equal protection challenge, then this Article's proposed standard would probably also succumb to an equal protection challenge.

The injection of equal protection doctrine into the name change context has helped women achieve some gains, and it should continue to help eliminate explicit preferences for the patronym. Yet an equal protection argument probably can do little to eradicate the subtle bias favoring the paternal surname. The limited usefulness of an equal protection challenge, and the tactical disadvantages associated with this approach, suggest an alternative solution is needed.

B. Education of Judges

A possible solution short of law reform would be to educate

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607. *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 270-71, 275 (1979) (upholding state law that created an absolute hiring preference for military veterans applying for state jobs although, at the time that the litigation commenced, over 98% of the veterans in Massachusetts were male, over one fourth of the Massachusetts' population were veterans, and the impact of the Massachusetts' plan on women was "severe"). In addition, the variety of decision makers and the fact-specific inquiry called for by the various name change standards would impede the usefulness of statistics in establishing discriminatory purpose. *See* McCleskey v. Kemp, 481 U.S. 279, 294-98 (1987) (upholding Georgia death sentencing process because inference from general statistics to a specific decision in trial and sentencing did not warrant inference of unconstitutional discrimination given numerous entities and variables relevant to statistics).

608. *See* CLARK, *supra* note 142, at 800-02 (defining the presumption as one where a court awards custody to the parent who, before the divorce proceeding, has had primary responsibility for the day-to-day care of the child, "who has fed him, clothed him, arranged for his medical care, taken him to and from school, taught him in the home and been responsible for his discipline"). For an example of the presumption, see *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981).

courts so that they apply the existing standards without gender bias. This remedy requires, however, a fortitude that may prove difficult for some judges given society's deep and entrenched preference for patronymy.[609] Yet if my analysis helps some courts move in that direction, one of my goals will have been accomplished. Education would be valuable if it led judges to value more highly the symbolic function of a surname as an announcement of physical propinquity. Education should also strive to discredit the argument that a shared surname is crucial to the noncustodial parent-child bond and the idea that a stable identity requires a stable name. In general, education should attempt to make judges more comfortable with name alterity.

C. A New Legal Standard: The Family Association Rule

A more thought-provoking alternative, however, is the possible adoption of a "family association rule" to govern disputes over children's name changes.[610] The family association rule is similar to, yet crucially different from, the New Jersey Supreme Court's custodial parent presumption. Unlike New Jersey's weak version of the custodial parent presumption, the family association rule would require the court to resolve a name change dispute by allowing the surname selected by the parent who is the physical custodian to become the child's surname, so long as an associational justification for the surname existed, unless the non-custodial parent proved by clear and convincing evidence that serious harm to the child would result. The most likely associational justifications would be that the name chosen for the child is the physical custodian's surname or the surname of another family member who lives in the household (e.g., a step- or half-sibling). If no associational justification existed, the case would be decided under the state's existing name change standard.[611] If the

609. Some of these reforms were suggested in the 1970s and have yet to take effect. *See, e.g.*, Thornton, *supra* note 42, at 329-30 (suggesting, *inter alia*, that courts "attach greater weight to the function of a surname in identifying the child as part of a current family unit").

610. The proposal is one possible way to help guarantee that associationalism is considered and valued. I welcome other suggestions for doing the same.

611. To the extent that legal argument adjusts to adaptations in the law, I suspect that few cases would fall into this residual category. This proposal is not meant to discourage a state from adopting a new standard for resolving the cases which fall into this residual category. I do not mean to imply by my proposal that all three existing standards are equally appealing absent change. My focus has been to indicate that all the current standards are problematic, and not to choose among them. To the extent that "association" should always be the paramount consideration, the best interest standard, out of all the existing standards, probably gives courts the greatest opportunity to consider and value associational concerns. Other authors have looked at the existing standards and have cho-

parents have joint physical custody and either parent desires to change the child's surname, each parent could select a surname for the child so long as that name had an associational justification.[612] The child would then bear a hyphenated combination of the parents' chosen surnames, in alphabetical order, unless an objecting parent could prove by clear and convincing evidence that serious harm to the child would result.[613] In all cases, the court must explicitly consider associationalism in determining whether an objecting party proved by clear and convincing evidence that serious harm to the child would result from the change.

This proposal offers several advantages. First, the proposal would—somewhat ironically—bring the law of name change disputes closer in line with traditional Anglo-American naming practices. Generally, nuclear family members who live together and follow Anglo-American tradition tend to bear the same surname. Not only do members of a marital couple usually use the same surname, but a child in an intact family typically bears the surname of his or her custodial parents. A non-marital child also commonly bears the name of his or her custodial mother.[614] If the law of name change disputes is to be consonant with this tradition, then a child in a dissolved family should also have the same surname as his or her custodial parent or other members of the custodial family. Society (and the parties) would receive those benefits that attend the following of tradition.[615]

Second, a number of practical benefits will result from the proposal. For example, the child's and society's safety are increased when a child is readily identifiable with his or her custodial parent. The shared surname also helps minimize the inconvenience, embar-

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sen between them; their analyses appear helpful for selecting a standard to govern the residual cases. *See supra* notes 44; *infra* note 637.

612. This situation would probably arise infrequently, as the number of people with joint physical custody is small. *See* MACCOBY & MNOOKIN, *supra* note 49, at 112 (finding that of the 933 families in California studied in 1989, approximately 80% had joint legal custody and 20% had joint physical custody); W.P.C. Phear et al., *An Empirical Study of Custody Arrangements: Joint Versus Sole Legal Custody*, *in* JOINT CUSTODY AND SHARED PARENTING 142, 147 tbl. 6 (Jay Folberg ed., 1984) (determining that of the 500 families in Massachusetts, only 10% had joint legal and physical custody).

613. While I am not wedded to any one definition of serious harm, I imagine an objecting party would have to prove something like probable negative changes in the child's health resulting from the infliction of physical or mental injury.

614. *See supra* note 436 and accompanying text; *but see supra* note 437 and accompanying text.

615. There is an economic benefit to following tradition. *Cf.* Robert C. Clark, *Contracts, Elites, and Traditions in the Making of Corporate Law*, 89 COLUM. L. REV. 1703, 1730-36 (1989); *id.* at 1731 ("Traditions greatly reduce the very high costs of repeated discovery, learning, and rational decisionmaking by individuals.").

rassment and discomfort often mentioned by custodial parents and children whose surnames differ.[616] In addition, a common surname allows the family members to reveal the family's history to others on the family members' own terms, thereby minimizing the chance that the family will encounter hostile attitudes or pejorative labels, such as "dysfunctional."[617] In fact, the proposal recognizes the importance of a common surname to a functional family. The practical necessity for the family association rule is best proven through an examination of demographic data. One-parent households and blended families are so common that these family forms alone warrant adoption of the proposal. Given current rates of divorce and remarriage, half of all children are expected to live in blended families by the year 2000.[618] When a couple divorces and the mother obtains custody, she and her child (and the stepfather or the mother's partner, if one exists) are a functional family. They "share affection and resources, think of one another as family members, and present themselves as such to neighbors and others."[619] Giving members of this group the same surname helps society recognize them for what they are—a family.[620]

Third, the family association rule is preferable to current standards because it brings the most important values to the forefront in disputes over children's name changes occurring in the aftermath of family breakup. The family association rule reflects a preference for symbolic unity among physically proximate family members, rather than notions of a surname's importance to a person's sense of a stable identity, immortality, dominion, or the parent-child bond. Symbolic unity is a preferred value in this context.

The male paradigm has little meaning for a child, with the possible exception of a name's relation to the parent-child bond or to a child's sense of a stable identity.[621] Rather, the concerns raised by

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616. *See, e.g.*, *supra* notes 462, 466, 468, 471, 487 and accompanying text. For other possible benefits see text accompanying *supra* notes 344-45.

617. Of course, it is possible that a name change will also elicit questions.

618. *See* Paul L. Glick, *Remarried Families, Stepfamilies, and Stepchildren: A Brief Demographic Profile*, 38 FAM. REL. 24, 26 (1989). Glick's estimate includes as children of blended families "all persons (adults as well as young children) who were born before one or the other of their parents entered into a second or subsequent marriage...." *Id.* "There are an estimated 25 million stepparents ... and 6.5 million children live in stepfamilies." Patsy Skeen et al., *supra* note 479, at 64 (citations omitted).

619. Martha L. Minow, *Redefining Families: Who's In and Who's Out*, 62 U. COLO. L. REV. 269, 270 (1991).

620. *See id.* at 271 ("[U]nless we start to make family law connect with how people really live, the law is either largely irrelevant or merely ideology: merely statements of the kinds of human arrangements the lawmakers do and do not endorse.").

621. *See supra* Sections IV.A. & IV.B.2.

the male paradigm relate more to the life of an adult male. Most young children, even young boys, do not have a "public identity" akin to an adult's public identity that necessitates a stable surname. Nor does a father's interest in surnominal immortality have relevance for a child who will carry a family name forward, even if it is the mother's surname. In contrast, the female view of associationalism can be as pertinent, if not more pertinent, to the child as to the adult. Associationalism reflects the day-to-day lived reality of both parent and child. In fact, "kids themselves seem to identify who is a family based on who lives together and has daily contact."[622]

Even if both paradigms are equally valid for a child experiencing family breakup (assume, for example, that the child's surname is important to the child's sense of identity), associationalism seems a superior value to promote in cases where the child will not suffer serious harm from the name change. Certainly a child may find it unsettling to face either the loss of his or her surname or nominal disconnection from the custodial parent. When the law is forced to choose between these two outcomes, the law should prefer linking the custodial parent and child together through a common surname, rather than differentiating them. Otherwise a child appears particularly isolated in the context of family breakup—disconnected nominally from the custodial parent and disconnected physically from the non-custodial parent. Reinforcing with symbolism the actual connection that now exists among household members can give a child comfort, whether or not it can strengthen the actual connections among those physically proximate. In addition, allowing the custodian to change the child's name can aid the custodian's own transition after divorce, and some evidence suggests that easing the custodial parent's transition from the marriage helps the child as well.[623] Moreover, the proposal signals to children that one's identity is not independent of one's custodial family, and that family relationships are just as important as individual notions of identity.[624] During divorce, when parents may be emphasizing their independent identi-

622. Minow, *supra* note 619, at 275 (citing Rhonda L. Gilby and David R. Pederson, *The Development of the Child's Conception of the Family*, 14 CANAD. J. BEHAV. SCI. 110, 117-18 (1982)); *see also supra* note 345.

623. *See* Wallerstein & Tanke, *supra* note 335, at 311-12 ("While the psychological adjustment of the custodial parent has consistently been found to be related to the child's adjustment, that of the non-custodial parent has not.").

624. It is standard feminist theory to regard relational selves as morally superior to individualistic selves. *See* Marilyn Friedman, *Feminism & Modern Friendship: Dislocating the Community in Communitarianism of Individualism*, *in* COMMUNITARIANISM AND INDIVIDUALISM 101, 101-02 (Schlomo Avineri & Avner de-Shalit eds., 1992).

ties at the expense of the family unit, it is critical that the value of family connection be emphasized.

Even leaving aside the child's interest, the male perspective is intrinsically flawed when viewed within the context of family breakup and children's name changes. The male rationale for surnominal stasis does not provide a compelling argument for rejecting a petition to change the surname of a non-custodial father's child. A man does not alter his own identity by allowing his child's surname to change. Nor should notions of "public identity" have any bearing on this issue: To the extent that a non-custodial father's public identity is "sullied," this stigma attaches because of the man's failed marriage and loss of custody, not from the secondary effect of his child's name change. The father's interest in immortality is not more weighty than the mother's comparable interest. That interest is also highly contingent, given that the continuation of a surname beyond the current generation is always a speculative venture. Moreover, to the extent that a parent has any valid interest in "demarcating dominion" through imposing his or her surname on the children, it makes more sense to allocate this power to the custodial parent when the family is in transition. Otherwise, questions may arise about who has day-to-day authority over the child. There is little merit to the concern that patronymy is necessary to preserve the bond between a non-custodial parent and his child, and in any event, a shared surname serves as a weak proxy for actual parent-child contact and support. Although the male perspective on surnames is hardly vindicated through a court's denial of a name change for his child after marital dissolution, the woman's perspective is strongly and uniquely vindicated by a court's permitting the change for associational reasons.

Fourth, the proposal provides a coherent theoretical justification for restraining judicial discretion. While not eliminating judicial discretion, the proposal provides a fairly administerable solution for narrowing the parameters in which that discretion can operate, thereby helping to constrain any judicial bias that may exist. The proposal exposes the gender implications of ad hoc decision-making and the fallacy that "the best interest of the child" standard, or any standard, is gender neutral.[625] The family association rule achieves this result without obfuscating custody law by calling a surname change a "daily" child-rearing decision; the proposal instead explic-

625. *Cf.* Fran Olsen, *The Politics of Family Law*, 2 L. & INEQ. J. 1, 17 (1984) (describing the ideological defeat involved in the fall of the tender years doctrine).

itly allocates the naming decision to the physical custodian because of a surname's unique purpose.

Although (or, perhaps, because) the proposal does not advocate radical change, a number of objections to the proposal are foreseeable. Many of the common justifications for patronymy—including ease of inheritance, governmental convenience, and genealogical and historical convenience—have already been debunked by various courts and commentators,[626] and they do not require further attention here. Rather, I will confront those objections that are unique to the present proposal.

One conceivable objection to the proposal is that it insufficiently combats patriarchy and patronymy because it leaves unaltered initial naming decisions. For practical reasons, I tailored the proposal to achieve only incremental reform. While sweeping measures that address all aspects of patronymy might best rectify the problem, far-reaching change is also more likely to meet with resistance. To attack effectively the custom that marital children receive their fathers' surnames at birth, a state would have to legislate parents' ability to give their children solely the patronym at birth, and a state might also have to restrict women's ability to take their husbands' surnames upon marriage. Such reform would be revolutionary and would meet with considerable opposition. Adoption of the family association rule is a much more modest approach, which may in turn help people think differently about adult surnames upon marriage, children's surnames upon birth, and children's surnames upon divorce.

Even assuming the state could, through legislation, eliminate the patronymic preference for children's initial surnames without regulating women's surnames upon marriage, such a reform would raise substantive due process concerns. The Fourteenth Amendment has been held to extend constitutional protection to various incidents of family life, including the parents' right to the care, custody, management, and companionship of their minor children.[627] Choosing a surname for one's child falls within the purview of substantive due process.[628] The parents' liberty interest in naming their children what

626. *See* Rio v. Rio, 504 N.Y.S.2d 959, 962-63 (Sup. Ct. 1986); *supra* notes 580, 584, 595 and accompanying text.

627. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

628. *See, e.g.*, Sydney v. Pingree, 564 F. Supp. 412, 413 (S.D. Fla. 1982) (ruling that the due process clause of the Fourteenth Amendment protects married parents' right to choose the surname of their children); O'Brien v. Tilson, 523 F. Supp. 494, 496 (E.D.N.C.

they choose is particularly strong when the parents are united against the state,[629] even though only rational basis scrutiny is applied to evaluate the constitutionality of a state's statute.[630] By prohibiting

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1981) ("The Court has no difficulty in concluding that the statute [requiring married parents to give their children the father's surname] does implicate important constitutional interests. It impinges upon decisions affecting family life, procreation, and child rearing; areas of human experience which the Supreme Court has long held must be accorded special protection."); Jech v. Burch, 466 F. Supp. 714, 719 (D. Haw. 1979) (holding that "parents have a common law right to give their child any name they wish, and that the Fourteenth Amendment protects this right from arbitrary state action"); Secretary of the Commonwealth v. City Clerk, 366 N.E.2d 717, 725 (Mass. 1977) ("We think the common law principle of freedom of choice in the matter of names extends to the name chosen by a married couple for their child."); Jones v. McDowell, 281 S.E.2d 192, 197 (N.C. Ct. App. 1981) (stating requirement that non-marital child's name be changed to the father's surname upon establishment of paternity is "arbitrary" and "denies such mothers a protected liberty interest").

629. *See* MacDougall, *supra* note 24, at 117 ("Wherever married parents are in agreement or there is a statute requiring that a marital child be given its father's surname or choice of surname on its birth certificate, parents suing jointly have prevailed in *all* challenges to mandatory state requirements."). Compare this with *Henne v. Wright*, 904 F.2d 1208, 1215 (8th Cir. 1990), where the Eighth Circuit upheld the state's restrictions on parents' options when changing their children's surnames. Here the two families challenging the law were not "traditional." One mother (Henne), although married at the time she tried to give her child a surname the state disallowed, was going through a divorce and the child was not her husband's child. *See id.* at 1210. The other mother was apparently not married and wanted her child to bear the same surname as the mother's other children, which differed from the mother's and the father's surnames. *See id.*

630. In the first reported case to raise the issue, the federal district court of Hawaii held that the Fourteenth Amendment did protect the parents' right to give their child a blended surname. *See Jech*, 466 F. Supp. at 719. While a liberty interest was at stake, it was not a "fundamental interest," and the court only applied the lowest level of scrutiny to the state's action. *See id.* at 719-29. The rational basis test was also used in the other four cases decided by federal courts: *Henne*, 904 F.2d at 1214; *Brill v. Hedges*, 783 F. Supp. 333, 339 (S.D. Ohio 1991); *Sydney*, 564 F. Supp. at 413; and, *O'Brien*, 523 F. Supp. at 496. Some courts have avoided the application of a higher level of scrutiny by differentiating the naming of children from "other incidents of parenthood." *See, e.g., Henne*, 904 F.2d at 1214 ("[The choice of a child's surname] possesses little, if any inherent resemblance to the parental rights of training and education recognized by *Meyer* and *Pierce* . . . ."); *Brill*, 783 F. Supp. at 339 (naming does "not involve important issues of education or training"). At least one court has focused on the absence of a strong historical practice supporting unconventional surnames for children. *See, e.g., Henne*, 904 F.2d at 1213 (framing the question as whether "a parent has a fundamental right to give a child a surname at birth with which the child has no legally established parental connection"). Cases which have made the right seem akin to other "fundamental" rights have not needed to classify the right and/or have been based on dubious logic. For example, *Carroll v. Johnson*, 565 S.W.2d 10 (Ark. 1978), a procedural due process case, rested heavily on the proposition that changing the paternal surname of a child can contribute to the "complete severance of the father-child relationship," *id.* at 15, analogizing a father's right to notice when an adoption petition is pending to a father's right to notice when a name change petition is pending. *Id.* While courts that have considered the issue apply rational basis scrutiny, this rational basis scrutiny has more bite than in some other contexts. *See, e.g., Sydney*, 564 F. Supp. at 413; *O'Brien*, 523 F. Supp. at 496; *Jech*, 466 F. Supp. at 720. *But see* Robertson v.

parents from following the historic practice of patronymics, a state would be repudiating a practice "deeply rooted in this Nation's history and tradition."[631] Such a prohibition might trigger the application of a higher level of scrutiny by the courts than at present. In contrast, a state should encounter few, if any, substantive due process objections when it imposes a family association rule on divorcing, divorced or unmarried parents who disagree over their children's surnames. The state wields tremendous power to promote the child's best interest when the family is not intact,[632] and this proposal—as explained above and below—furthers the child's interest better than the status quo. The rationale for the family association rule should assure that the proposal withstands the level of judicial scrutiny currently applied in this area.[633]

A second, but related, criticism is that the proposal perpetuates patriarchy and patronymics because many children will acquire their stepfathers' surnames. It is true that many children will in fact acquire their stepfathers' surnames under this proposal because women customarily take their husbands' names upon marriage and remarriage.[634] Yet sometimes the stepfather's surname is also a step- or half-sibling's name, and often it is the mother's surname too. Regardless of who else shares the stepfather's surname, it is the name the custodial parent wants to share with her child, and this choice should be honored by the courts. The benefits of associationalism identified above do not evaporate because the child will use the stepfather's surname.

A similar criticism is that the proposal may reinforce patronymics to some degree because the law "rescues" women who accommodate their husbands' wishes at the initial naming stage, making these women's acquiescence possible. Such an objection

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Pfister, 523 So. 2d 678, 679 (Fla. Dist. Ct. App. 1988) (upholding state statute requiring child conceived before parents' divorce to bear father's surname as reasonably designed to insure accuracy of vital statistics).

631. Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (discussing the test generally); *accord* Palko v. Connecticut, 302 U.S. 319, 326 (1937) (same).

632. *See* FINEMAN, *supra* note 454, at 189; *see, e.g., Robertson*, 523 So. 2d at 679 (rejecting substantive due process challenge to statute that required child receive surname of woman's husband where parties had conceived while married, although child was born after the marriage was dissolved).

633. For an example of an application of rational basis scrutiny in this area, see *Brill*, 783 F. Supp. at 339 (remanding to determine whether the defendant's statute could be reasonably related to the legitimate goal of preservation of family life).

634. *See* M.D. v. A.J.L., 646 A.2d 543, 545 (N.J. Super. Ct. Ch. Div. 1994) ("The majority of cases dealing with a requested change of an infant's surname" concern the stepfather's name.).

only applies to those women who consider the name change standards and who anticipate, at the time of giving birth, a subsequent divorce and a future desire to change the child's surname. While the critique might be true for these women, it seems only remotely possible that enough women will conform to this fact pattern to further entrench patronymics on a systematic level.

Another criticism of the standard relates to its potential ineffectiveness. Under the proposal, a court can still look at the best interest factors (e.g., the link between a surname and the child's identity) in determining whether clear and convincing evidence establishes that a child will suffer serious harm from the name change. However, the elevation of the burden of proof, the imposition of the burden of proof and production on the non-custodial parent, the requirement of an associational justification for the name change, the requirement of "serious" harm to thwart the proposed name change, and the explicit consideration of associationalism in the determination of whether serious harm will result all guarantee a change in process, and presumably outcome, from the status quo. For example, courts applying the proposal should more frequently than at present reject arguments that rest on unsupported assumptions. Notwithstanding my intent, some courts may manipulate even the proposed standard to accommodate a paternal surname preference. In the end, however, I believe that some risk of ineffectiveness must be tolerated in order to allow consideration in a particular case of all the evidence—regardless of its gendered assumptions—that may severely impact a child's welfare.

A further criticism is that the Article is parent-centered and not child-centered. For children's rights advocates,[635] there are two related critiques: (1) the empiricism focuses on the importance of surnames to adults and extrapolates the research conclusions to children and, (2) the proposal is a worse solution for children than the best interest standard or other standards that could be adopted. The first critique rests, in part, on the truism that name changes at divorce for children differ from name changes at marriage for women. Among other points of departure, a woman has a choice at marriage and her decision occurs within the context of a happy event. In contrast, a child may have no choice about his or her surname, or his or her parents' marital situation, or whether he or she experiences the

635. *See, e.g.*, James G. Dwyer, *The Parents' Religion and Children's Welfare: Debunking the Doctrine of Parent's Rights*, 82 CAL. L. REV. 1371 (1994); F. Paul Kurmay, *Do Children Need a Bill of Rights? Children as More Than Objects of the Law*, 10 CONN. PROB. L.J. 237 (1996); Woodhouse, *supra* note 431.

divorce as a tragedy. Therefore, it may be wrong to assume surnames are as labile and alterable for children as they are for their mothers. The answer to this critique lies in the thesis of this Article. I argue that the law reflects most men's views of surnames and not most women's views. This analysis is justified because the law currently equates the child's best interest with the predominantly adult male view.[636] Until the child's true interests are explored in a more empirical fashion,[637] there is just as much reason (if not more) to emphasize the women's perspective as that which is best for the child.[638] Certainly another article could explore generational bias, as opposed to adult gender bias, in the law.[639]

The second part of the children's rights critique is that the proposal is worse for children than other potential standards (e.g., a standard that would allow a child to choose his or her surname).[640]

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636. *See supra* Section IV.

637. Kelly, *supra* note 178 ("Not much has been written about the role of naming and name changing in child development literature generally . . . ." and "very little has been said among experimental psychologists or child development psychologists about the role of a last name in childhood identity formation."). Professor Kelly uses literature "from a variety of sources which attempts to divine the deep and inscrutable value of names for children." As the quotation and the title of her article indicate, the value of names to children is currently inscrutable, although Professor Kelly suggests that "learning one's name is an important part of the identity formation process." *Id.* Professor Kelly admits, however, that whether a name change is "helpful or harmful to children certainly varies from situation to situation," *id.* at 64, as the child's identity is also "shaped by family structure and relations to others." *Id.* In advocating that the law stay focused on the child's interest, Kelly advocates the standard in *Gubernat* for children under 6, the best interest standard for children between the ages of 6 and 14, and that the child's own preference governs if the child is over 14. *See id.* To the extent that one could eliminate the gender bias implicit in the standards advocated by Kelly for children under 14, her proposed reform has merit. *But see supra* Sections IV.B & IV.C.

638. For example, consider the fictional vignettes discussed *supra* in the text accompanying notes 79-87, 163, 245, 247, 344-45. 479-87 and *supra* notes 618-20, 622.

639. In fact, this is the approach of Lisa Kelly. *See* Kelly, *supra* note 180; *supra* note 637.

640. Several international instruments enshrine children's rights relating to names. For example, the *U.N. Declaration on the Rights of the Child*, states, "The child shall be entitled from his birth to a name and a nationality." DECLARATION ON THE RIGHTS OF THE CHILD, G.A. Res., U.N. GAOR, 14th Sess., Supp. No. 16, at 19, 20, U.N. Doc. A/4354 (1954) (principal 3). Article 24(2) of the *International Covenant on Civil and Political Rights* states, "Every child shall be registered immediately after birth and shall have a name." G.A. Res. 2200 A, 21 U.N. GAOR, 21st Sess., Supp. No. 16, at 55, U.N. Doc A/16316 (1966) (International Covenant on Civil and Political Rights, Part III, Article 24(2)). The *American Convention on Human Rights* states that "Every person has the right to . . . the surnames of his parents or that of one of them." American Convention on Human Rights, 36, OAS Off. Rec. OEA/Series K/XVI/1.1 Doc. 65, Rev. 1, Corr. 2 (1970) (signed Nov. 22, 1969). Article 7 of the *U.N. Convention on the Rights of the Child* states, "The child shall be registered immediately after birth and shall have the right from birth to

Under my proposal, as under the status quo, a court would have discretion whether or not to accord weight to the child's opinion.[641]

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a name...." 28 INT'L LEGAL MATERIALS 1448, 1460 (1989) (reproduced from G.A. Res. 44/25, U.N. Doc. A/44/736 (1989)). As one author commented, "although children have a right to a name, they do not have a right under international law to a name of their choice." GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHT OF THE CHILD 117 (1995).

It is worth noting that the *Convention on the Rights of the Child* also states that "States Parties undertake to respect the right of the child to preserve his or her identity, including ... name ... as recognized by law without unlawful interference." 28 INT'L LEGAL MATERIALS 1446, 1460 (1989) (ARTICLE 8(1)). Resolving naming disputes with my proposal would not constitute "unlawful interference" under this convention. The United States, while signing the *Convention on the Rights of the Child*, has not yet ratified it. Some Senators have opposed ratification of this convention because of its perceived encroachment upon "the laws and traditions of the U.S. [that] affirm the right of parents to raise their children and to transmit to them their values...." *See* S. Res. 133, 104th Cong. (1995).

641. State law is currently split over whether a minor has the same common law right as an adult to change his or her surname, assuming the child is of sufficient age and maturity to make an intelligent choice. Some states recognize such a right. *See, e.g.*, Laks v. Laks, 540 P.2d 1277, 1279 (Ariz. Ct. App. 1975); Carroll v. Johnson, 565 S.W.2d 10, 12 (Ark. 1978); Burke v. Hammonds, 586 S.W.2d 307, 308 (Ky. Ct. App. 1979); Hall v. Hall, 351 A.2d 917, 923, 926 (Md. Ct. Spec. App. 1976); Bruguier v. Bruguier, 79 A.2d 497, 499 (N.J. Super. Ct. Ch. Div. 1951); *In re* Shipley, 205 N.Y.S.2d 581, 586 (Sup. Ct. 1960); *cf.* Rappleye v. Rappleye, 454 N.W.2d 231, 232 (Mich. Ct. App. 1990). Other states require that the surname change be in the child's best interest. *See, e.g.*, Clinton v. Morrow, 247 S.W.2d 1015, 1018 (Ark. 1952); *In re* Marriage of Schiffman, 620 P.2d 579, 583 (Cal. 1980); *In re* Trower, 66 Cal. Rptr. 873, 874 (Ct. App. 1968), *overruled by Schiffman*, 620 P.2d at 579; *In re* Marriage of Presson, 465 N.E.2d 85, 87 (Ill. 1984) (citing Cohee v. Cohee, 317 N.W.2d 381, 384 (Neb. 1982)); *In re* Morehead, 706 P.2d 480, 483 (Kan. Ct. App. 1985); Hardy v. Hardy, 306 A.2d 244, 246 (Md. 1973); West v. Wright, 283 A.2d 401, 402 (Md. 1971); Mark v. Kahn, 131 N.E.2d 758, 762 (Mass. 1956). Where the court looks at the minor's best interest, the child's age and maturity influences the weight a court assigns to the child's preference. *See supra* note 489. Whether a state recognizes the child's common law right often turns on whether a statute exists which can be construed as altering the common law right, *see, e.g.*, *Morehead*, 706 P.2d at 482, and/or whether the child himself or herself adopted the new surname or whether the parent adopted it for the child. *See, e.g.*, *Shipley*, 205 N.Y.S.2d at 587 ("Where the parents are separated or divorced, policy considerations suggest that any change brought to a court's attention be closely scrutinized to determine that it is actually the infant's own decision rather than that of the parent with whom he lives...."); Kay v. Bell, 121 N.E.2d 206, 208 (Ohio Ct. App. 1953) ("While it is true.... that one 'may adopt any name he may choose so long as such change is not made for fraudulent purposes,' that does not mean that some other person may select, for a person, a name different from the name by which such person is known." (quoting Pierce v. Brushart, 92 N.E.2d 4, 8 (Ohio 1950))); *cf. In re* Staros, 280 N.W.2d 409, 410-11 (Iowa 1979) (holding that Iowa statute does not allow a minor to obtain a name change even if brought by next friend except in narrow circumstances, and court refused to address whether statute preempted common law right to change name without legal formality). *See generally*, Bugliari, *supra* note 274, at 149 (arguing that common law right to change a name applies to minors absent modifying statute although right may be subject to court scrutiny). Even if such a common law right exists, its utility is limited as "schools often request to see the child's birth certificate before registration," causing a "practical prob-

Also, under the family association rule, as exists at present, the name that the law deemed best for the child might conflict with the child's desire for an already established identity. Yet I believe the proposal is a reasonable attempt at reform, although it continues to restrict children's autonomy in selecting their surnames.

The suggested legal reform is consistent with the present status of children's rights generally. For most childrearing decisions, constitutional jurisprudence still subordinates children's rights to their parents' desires,[642] except when a parent jeopardizes a child's physical or mental health.[643] The United States Supreme Court has never decided whether a child has a liberty interest in his or her surname, independent of the parents' desires.[644] Even if one assumes that the child has a liberty interest in his or her name that grows as the child ages,[645] this interest would not necessarily be determinative.[646] At

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lem." Seng, *supra* note 24, at 1309. In addition, the child's common law right may be limited by the rights of others. At least one court has said that the father's right would be burdened by his children's use of their stepfather's surname. *See In re* Marriage of Omelson, 445 N.E.2d 951, 954 (Ill. App. Ct. 1983); *see also* MacDougall, *supra* note 24, at 108 n.40 (explaining that a child's common law right is subject to his or her parents' authority and that minors never have had a common law right to name themselves independent of their parents, even if they can do so without judicial proceedings).

642. *See* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2406 (1995) ("[T]he tradition of legal protection of parental rights has deep historical roots."). Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 989 (1993), explains how all of the Justices in *Hodgson v. Minnesota*, 497 U.S. 417 (1990), "recognize[d] that a minor's right of individual privacy is limited by the competing right of parental authority." *Cf.* Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972) (recognizing parent's traditional interests in children's upbringing); Ginsberg v. New York, 390 U.S. 629, 639 (1968) (stating that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society").

643. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 603 (1977) ("We have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.").

644. *See* MacDougall, *supra* note 24, at 157 ("[C]ourts have not been receptive to recognizing . . . children's constitutional rights in this area."). Neither has the Supreme Court decided whether a child has a liberty interest symmetrical with that of a natural parent in maintaining their relationship, *see* Michael H. v. Gerald D., 491 U.S. 110, 130 (1989), but such arguments have not always met with success. *See, e.g.*, *Kirchner*, 649 N.E.2d at 339 (refusing to recognize Baby Richard's liberty interest in relationship with adoptive parents because to do so would "overturn the entire jurisprudential history of parental rights in Illinois").

645. *See* Roe v. Connecticut, 417 F. Supp. 769, 782 (M.D. Ala. 1976) ("[T]he name change touches upon this right to maintain the integrity of established family relations.") (stating in obiter dictum that the child has a "liberty" interest at stake when his or her name is altered).

646. *Cf. In re* Wing, 157 N.Y.S.2d 333, 335 (City Ct. 1956) (denying application on behalf of 11-year-old child because it was not in her best interest to change her name, even assuming that name change was an essential part of the child's Muslim religion).

best, the child's right would have to be balanced against the parents' liberty interests.[647] My proposal is one way to strike the balance. A child can still inform the court if he or she disagrees with the custodial parent's choice. The court can protect the child from a harmful choice by the parent. In those cases where an unavoidable conflict exists between the child's wishes and the custodial parent's wishes (because the child will not suffer serious harm), society has to make a difficult choice, and for the reasons already suggested, associationalism should prevail.

Additionally, one may worry that the proposal will have a negative effect on certain subgroups of our population. For example, a Latino child often bears a hyphenated version of the parents' surnames. That child may face a loss of cultural identification if the custodial parent has only one surname and wants the child to bear only that surname. This erosion of cultural identification may, in turn, weaken the Latino community in some respect. When addressing petitions to change the names of Latino children, judges will have to determine if clear and convincing evidence establishes that serious harm would result to the child (not the community) from the lack of cultural identification that would otherwise attend the use of a hyphenated surname. A similar child-centered approach, as opposed to a community orientation, exists under the status quo's standards. It is impossible to estimate the extent to which a Latino or other community would be uniquely harmed by the adoption of the proposal, although it is possible that the proposal would actually benefit at least some Latino communities. To the extent that the proposal encourages or results in the proliferation of hyphenated names generally, society may become more tolerant and accommodating to the predominant Latino practice.[648]

The proposal may also adversely impact upon some women. These are not the women who think a stable surname is integral to a

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647. It is conceivable that a court would find that the child's liberty interest is subordinate to her parents' liberty interest in childrearing absent a finding of the parents' unfitness. *See* Bellotti v. Baird, 443 U.S. 622, 634 (1979) ("[T]hree reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in childrearing."); *cf. Kirchner*, 649 N.E.2d at 328 (stating that child's interest in family life is not independent of the child's parents' interest absent a finding of unfitness). This is especially true when there is no reason to believe that "the natural bonds of affection" will not "lead parents to act in the best interests of their children." *Parham*, 442 U.S. at 602.

648. *See generally* Cherena Pacheco, *supra* note 42, at 33-35 (explaining problems Latinos face in dominant culture because of diverse naming practices).

stable sense of identity and who obtain custody; no woman is forced to change her child's surname. Rather, there probably are some women who will lose physical custody of their children to their spouses. These women may believe that one's name is an important aspect of one's identity and vigorously oppose attempts to change their children's surnames. Yet the male custodial parent may want the children to bear only the patronym, even if the children currently bear their mothers' surnames, either alone or in hyphenated form. While women in this category will have less chance of prevailing under the proposed standard than under the status quo, the number of these women must be minuscule. More importantly, however, the merits of an associational approach are not diminished by these women's circumstances.

One might agree that associationalism is an important concept, but also believe that the proposed standard is too weak. After all, why not require that associationalism always be the guiding principle, and ensure that children who live with a parent always bear that parent's surname? The formulation proposed in this Article avoids or minimizes many of the concerns about a stricter rule. For example, a standard that required the physical custodian and the child always to bear the same surname would repress diversity, and sometimes undermine the desired associationalism. A strict requirement that the child bear the physical custodian's name would preclude a physical custodian who used her birth name from giving the child the surname of the child's step- or half- siblings. The current formulation assumes that the physical custodian is in the best position to evaluate the various aspects of associationalism, subject to the noncustodial parent's right to contest the physical custodian's selection.

One might be concerned that a child's father will reduce child support in response to his child's relinquishment of the patronym. While failure to pay support can cost a father his right to object to a surname change,[649] courts generally reject the argument that child support obligations are contingent upon the child's retention of the patronym,[650] although fathers certainly make the argument.[651] Nor do

649. *See supra* note 293.

650. *See, e.g., In re* Grimes, 582 A.2d 1386, 1388-89 (Pa. Super. Ct. 1990) ("In no case has a court decided that a name may not be changed because the father pays support...."), *rev'd on other grounds*, 609 A.2d 158 (Pa. 1992). *But see In re* Marriage of Presson, 465 N.E.2d 85, 89 (Ill. 1984) ("It would be ironic if the courts were to require [the natural father] to meet these obligations [of support] and yet not honor his wish to help maintain the parental bond under difficult circumstances by allowing the child to utilize his mother's new surname just five short weeks after her remarriage!"). Historically, courts were more receptive to this argument. *See* Montandon v. Montandon, 52 Cal. Rptr. 43, 46

most courts look favorably upon fathers' attempts to terminate child support when their children's names are changed.[652] Child support enforcement statutes will help minimize the risk that such an argument would succeed.

One might fear that the family association rule will disadvantage women by raising the stakes in custody battles. It is conceivable that fathers may vie for physical custody more often if an award of physical custody to the father essentially ensures that his children will continue to bear the patronym. Also, if physical custody is an important factor in determining a child's surname when a dispute over the surname exists, then the judicial preference for the patronym may cause women to lose more custody disputes. Neither of these possibilities appear particularly likely at present. Undertaking sole or joint physical custody is a high price for fathers to pay simply to help ensure that their children continue to bear their surnames. A father's concern would more likely be negotiated and resolved through an agreement that gave the custodial parent money or custody in exchange for her preservation of the paternal surname. Whether judges' preferences for the patronym would overcome their strong

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(Dist. Ct. App. 1966) (" 'And tho' it be ordinary to make the eldest son only to bear the name, yet it seems very reasonable that even all the younger children should bear the name if they get any Patrimony out of the family, unless they can prove they were provided Aliunde.' " (quoting Works, ii, 490 (1722)).

651. *See, e.g.*, Warshaw v. Ginsburg, 53 Cal. Rptr. 911, 913 (Dist. Ct. App. 1966); Bell v. Bell, 500 N.Y.S.2d 387, 388 (App. Div. 1986); Dolgin v. Dolgin, 205 N.E.2d 106, 108 (Ohio Ct. App. 1965); Aylsworth v. Adams, 736 P.2d 225, 226 (Or. Ct. App. 1987); *Grimes*, 582 A.2d at 1388-89.

652. *See* Ryan v. Schmidt, 633 N.Y.S.2d 558, 559 (App. Div. 1995) (holding that trial court erred in relieving father of child support obligation based solely upon the change of children's surname); *Bell*, 500 N.Y.S.2d at 389 ("[T]here is no basis in law or reason to condition the duty of support upon a child's bearing the surname of the payor parent."); *Dolgin*, 205 N.E.2d at 110 (changing of child's surname does not relieve father's child support duties); *Aylsworth*, 736 P.2d at 227 (holding that father must continue to support child despite child bearing mother's surname). *But see Warshaw*, 53 Cal. Rptr. at 914 (changing name to stepfather's name indicated eighteen-year-old no longer needed defendant's meager support); *cf.* Cohen v. Schnepf, 463 N.Y.S.2d 29, 31 (App. Div. 1983) (changing name coupled with denying father visitation for the last five years constituted abandonment of the father so eighteen-year-old son forfeited claim for support); Good v. Stevenson, 448 N.Y.S.2d 981, 982 (Fam. Ct. 1982) (noting that mother severed father-son relationship by unilaterally changing children's names and denying visitation); Jones v. McDowell, 281 S.E.2d 192, 197 (N.C. Ct. App. 1981) (holding unconstitutional statute that child bear father's surname upon establishing a filial relationship with non-marital child, regardless of mother's and child's desires, but also reversing finding of filiation, initiated by putative father, so that he could decide if he wanted to continue the action knowing that the child would bear her mother's surname and that the child would have certain rights, including the rights of inheritance).

preferences for maternal custody is hard to predict.[653] However, judges probably will recognize that few women seek to change their children's surnames upon divorce, and that the proposal would not result in an automatic name change for children. In the future, if more women petition to change their children's surnames, the situation may change. Only empirical research at that time will reveal if judges' preferences for the patronym have yielded sufficiently to recognize the merit of the family association rule.

One also may be concerned that custodial parents with base motives—for example, a desire to hurt an ex-spouse—may be able to exploit a standard based on associationalism. Because the proposed standard finds a parent's motive for changing the child's name irrelevant, unless the motive constitutes an associational justification or helps to establish that the name change will cause serious harm to the child, a small risk exists that adults with malicious motives will try to take advantage of the rule. However, under existing standards a litigant can easily evade a court's scrutiny of his or her motive by offering a socially acceptable motive in lieu of a more accurate base motive. In addition, the selfish or sullied motives of some parents do not diminish the importance of the associationalism critique or associationalism itself, and the benefits of associationalism are bestowed in spite of the parent's motives.

Finally, one may be troubled by the potential that a child's name may change if and when physical custody is modified. Such a change only is objectionable, however, if one accepts the predominantly male view that a surname should be stable. If one embraces associationalism, then the objection disappears. In any event, the family association rule would permit a judge to refuse to change a child's surname in the exceptional case, where clear and convincing evidence showed that the child would be seriously harmed by the name change.

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653. Mothers still receive custody in the overwhelming number of cases. *See* MACCOBY & MNOOKIN, *supra* note 49, at 98-114. In a study of 933 California couples, 500 of 705 uncontested cases involved a request for mother physical custody and, in 90% of the cases, the mother received sole physical custody. *See id.* at 103. Only 75% of the uncontested cases for sole father custody led to the father gaining sole custody, with 12% resulting in mother physical custody. *See id.* Only 50% of the uncontested cases for joint physical custody resulted in that outcome. The proportion resulting in mother custody was four times higher than the resulting father custody. In cases with conflicting requests, mothers' requests were granted approximately twice as often as fathers' requests. The mother was denied sole physical custody in only one third of the cases where she wanted sole physical custody and the father wanted joint physical custody. Mothers were awarded sole physical custody four times as often as fathers when both requested sole physical custody. *See id.* at 103-04.

Although it is not free of problems, the family association rule provides a better mechanism for adjudicating name change disputes than any of the existing standards. The rule would redress the status quo's long neglect of associationalism as an important criterion in resolving name change disputes. While additional reforms may also be appropriate, the family association rule offers a useful starting point for overhauling the law governing disputes over children's names.

VI. CONCLUSION

Legal disputes over marital children's surnames present a window through which one can examine society's gender relations and courts' treatment of women. Society and the courts are slowly, but generally, progressing past overt gender inequality. While most of the existing standards governing name change disputes are facially neutral, they are interpreted and applied in a manner that privileges the typical male conception of surnames, and undervalues (or ignores) the viewpoint commonly held by women. Such *sub rosa* gender bias casts doubt on courts' assertions that current legal doctrine has overcome the vestiges of sexism. In the context of family dissolution, where the predominantly male and female paradigms often clash, exposing the bias opens up a discussion about the values society may want to promote with its naming practices.

In the first half of this Article, I employed an interdisciplinary methodology to discern general differences between most men's and most women's views of surnames. Drawing from social science studies, fiction, personal narratives, and more traditional legal materials, I demonstrated that the typical male view of surnames is different from the typical female view. Because a man generally bears the same surname from birth until death, he comes to believe that his identity is inextricably bound up with his surname, and he equates changing his surname with altering his identity. Men are socialized to believe that a stable surname is vital to their public personae, because a man's surname links together his all-important accomplishments in the public sphere. Some men believe that when their children's names are changed from the patronym, the fathers' public reputations are tarnished. Many men also feel that they can achieve immortality by preserving their surnames intact and bestowing them on future generations. Some men regard surnames as markers of their apparent or actual authority over their wives and children. Many men also feel that their relationships with their children will suffer if father and child bear different surnames. Given

these deeply held beliefs, it is not surprising that many men feel a visceral opposition to name changes, either for themselves or their children.

Women usually have a wholly different conception of surnames. Many women, faced with the prevalent societal custom that women generally change their surnames upon marriage, view surnames as labile and fungible. To these women, the primary purpose of a surname is to designate present propinquity—a notion that I have termed "associationalism." Most women do not believe that one's identity would be undermined by a surname change to reflect one's present association with family members in the same household; in fact, women generally believe such a name change would affirm one's identity as a member of that household.

In the second half of this Article, I argued that the law governing disputes over children's surname changes tends to reflect (and thereby fortify) the "male" conception of surnames. The specific legal standards used by the courts for resolving children's name change disputes—the presumption for the status quo, the best interest of the child standard, and the custodial parent presumption—all are interpreted and applied in a manner that favors the typically male view of the importance of surnames, despite courts' rhetoric to the contrary. For example, the courts have shown their prejudice against surnominal change by emphasizing the length of time a child has borne his or her present surname, by presuming that a name change disrupts a child's sense of identity, by speculating that a child with the maternal surname will be viewed as a bastard, and by questioning the motives of women who submit name change petitions. To the extent that those standards address associationalism, they often focus on the child's need to associate with the absent father.

While the custodial parent presumption is somewhat more progressive than the other two standards, it offers little hope of valuing associationalism in name change disputes. The custodial parent presumption has been rejected by every court that has considered it in the context of a dispute over a child's name change, except for the maverick New Jersey Supreme Court. No court has ever applied the custodial parent presumption to adjudicate name change disputes involving marital children or older children, or even a name change petition initiated by a custodial parent. Moreover, even the New Jersey court recognized a "best interest" exception that all but swallows the rule. Beset by these limitations and others, the existing custodial parent presumption is unlikely to vindicate the associationalist values held by most women.

Nor does it appear that the current legal framework is susceptible to reform through an equal protection challenge or education of the judiciary. The facial neutrality of the existing standards, coupled with the absence of state action, pose high hurdles to any equal protection challenge. An equal protection challenge also raises a tactical problem for women's rights activists. The educational solution requires an extraordinary faith in the judiciary's commitment to recognize and eliminate gender bias. The effectiveness of education is dubious given society's entrenched preference for patronymics, the subtlety of the patronym preference, and the vast number of judicial actors.

Instead of trying to work within the existing framework, I proposed legal reform—the family association rule—which would mandate that courts take account of associationalism in disputes over children's surnames. The family association rule requires a court to resolve a dispute by allowing the surname selected by the parent who is the physical custodian to govern, so long as an associational justification exists, unless the noncustodial parent can prove by clear and convincing evidence that serious harm to the child would result. In determining whether the child would suffer serious harm, the court must explicitly consider and value associationalism.

The family association rule is no more gender neutral than the status quo. The principal contribution of the family association rule is that it represents an overt decision that associationalism should be valued highly in adjudicating disputes over children's name changes. Children and adults benefit when society recognizes that a child's present relationship to his or her custodial family is one of the most important factors in resolving a name change dispute. Surnames should unify, not distinguish, family members in the same household.