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Divining the Deep and Inscrutable: Toward a Gender-Neutral, Child-Centered Approach to Child Name Change Proceedings

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DIVINING THE DEEP AND INSCRUTABLE: TOWARD A GENDER-NEUTRAL, CHILD-CENTERED APPROACH TO CHILD NAME CHANGE PROCEEDINGS

*Lisa Kelly**

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THE NAMING OF CATS

The Naming of Cats is a difficult matter,
 It isn’t just one of your holiday games;
 You may think at first I’m as mad as a hatter
 When I tell you, a cat must have THREE DIFFERENT
 NAMES.

First of all, there’s the name that the family use daily,
 Such as Peter Augustus, Alonzo or James
 Such as Victor or Jonathan, George or Bill Bailey--
 All of them sensible everyday names.

There are fancier names if you think they sound sweeter,
 Some for the gentlemen, some for the dames:
 Such as Plato, Admetus, Electra, Demeter--
 But all of them sensible everyday names.

But I tell you, a cat needs a name that’s particular,
 A name that’s peculiar, and more dignified,
 Else how can he keep up his tail perpendicular,
 Or spread out his whiskers, or cherish his pride?
 Of names of this kind, I can give you a quorum,
 Such as Munkustrap, Quaxo, or Coricopat,
 Such as Bombalurina, or else Jellylorum--
 Names that never belong to more than one cat.

But above and beyond there’s still one name left over,
 And that is the name that you never will guess;
 The name that no human research can discover--
 But THE CAT HIMSELF KNOWS, and will never confess.
 When you notice a cat in profound meditation,
 The reason, I tell you, is always the same:
 His mind is engaged in a rapt contemplation

Of the thought, of the thought, of the thought of his
name:

His ineffable effable

Effanineffable

Deep and inscrutable singular Name.

— T.S. Eliot¹

I. INTRODUCTION

I often tell the story that choosing my children's first names was delightfully meaningful and easy play compared to choosing their last. Our daughter, Mary Clare, could be named for her spirited great-grandmother who managed to convince her stern Brethren² parents that she should go to college by claiming that there she would finally learn to quilt, a skill that — try as she might — she had not mastered to the satisfaction of her central Pennsylvania kinswomen.³ Mary Clare was also named after my dear and daring friend from college who always authored her poetry under the moniker of "M.C." She had traveled to Ireland and back with nothing more than a back pack and her savings from waitressing. She returned full of stories about the distant cousins she found there. When I set out upon the adventure that would be marriage, she ventured to Botswana.

Our son, Timothy Atticus, could be named for his patient Uncle Tim who stood tall and thin, the graceful giant on the basketball court. His middle name, Atticus,⁴ reflected my love of lawyering and my hopes for the strength of his

¹ T.S. Eliot, *The Naming of Cats*, in OLD POSSUM'S BOOK OF PRACTICAL CATS 9,9-10 (1939).

² The Church of the Brethren is a Protestant denomination that endorses simple living and pacifism. The denomination resulted from the merging of the German Baptist Brethren and the more progressive Brethren Church at the turn of the century. Brethren have also been referred to as *Dunkers* or *Dunkards* because of their manner of immersion baptism. The tension between the more conservative German Baptist Church and the Brethren Church concerned whether congregations should continue the process of accommodation to the world or adhere to a more nonconforming way of life that rejected associations with the modern world and its distractions. See 1 THE BRETHREN ENCYCLOPEDIA 298-99 (1983). Today, during the Annual Conference of the Church of the Brethren one can still see the full spectrum of Brethren traditions intermingling as women with prayer caps and bearded men in simple dress debate church direction with members from urban churches who are active in progressive politics.

³ Mary Gehman, still reading and writing at ninety-five, has not learned to quilt yet. She says that her mother and aunts finally stopped insisting. Her stitches were never short or uniform enough. She did, however, enjoy a teaching career.

⁴ See HARPER LEE, *TO KILL A MOCKINGBIRD* (1960). Atticus Finch is the protagonist lawyer in Harper Lee's classic. *Id.*

character.⁵ It also bore witness to the new roots I had found in the South. For my husband, Timothy Atticus echoed his passion for philosophical dialogue; Titus Atticus being “Cicero’s great friend . . . with whom he corresponded for many years, . . . a cultivated man of literary and philosophical interests.”⁶

We paid a great deal of attention to the music of their names. A love of language was something my husband and I shared, and we knew — with the certainty that only new parents possess — that, of course, any child of ours certainly would share in our affinity for words. What a blend of aspirations and honors we heaped lovingly on their newborn shoulders!

But what of the last name? When my husband and I married, I retained my name, which was in fact my name by adoption. My biological father had died when I was only a year old, and my mother later remarried. As a very young child, I had become part of a new family with a new name. Even though “Kelly” became something that I wrote without thought at the top of every Spelling test and book report, I sometimes felt that my name lied about me. Especially on St. Patrick’s Day, I hid the secret that I am not the least bit Irish from my Catholic school well-wishers who fancied my eyes and stature to be those of a leprechaun. In fact, I am Hungarian as far back as I know on both sides, and my father arrived here from “the old country” as a displaced person after World War II. But when I stopped to ponder the varied names that I could claim—my husband’s, my “first” father’s, my “second” father’s, my mother’s — I realized that all of them were rooted in a man’s name. My mother’s name was really her father’s name, my grandmother’s name was really her father’s name. My mother was not the least bit Irish either, and yet she was transformed from *Yasko* to *Toth* to *Kelly* on the walks she took down church aisles. Trying to locate women’s identity in names proved a slippery thing, and I decided that names really reflected social constructions, not necessarily the people who inhabited them. On the other hand, I knew from experience that names given by whatever convention could take on an individual meaning or could be as uncomfortable as an ill-fitting shoe. Nevertheless, by the time I married, I had worn *Kelly* for so long that somehow, despite its contradictions, I had made it my own, and the thought of changing again in response to the emergence of yet another

⁵ Atticus Finch is idealized and idolized by lawyers and law professors as the noble lawyer who courageously persists in doing what is right in the face of community opprobrium. He is also depicted as a gentle man and wise father, characteristics I had certainly hoped would rain down upon a son so named. However, the more I practiced law in a rural African-American community in the South the less comfortable I felt with the novel’s depiction of African-Americans as helpless dependents, relying upon the generosity of noble white men like Atticus Finch. Nevertheless, Atticus’s moral strength remains a positive value worthy of honor. For a symposium issue analyzing the nuances of Atticus and the complexities of the rural south as depicted in *To Kill a Mockingbird*, see Symposium *To Kill A Mockingbird*, 45 ALA. L. REV. 389 (1994).

⁶ See R.H. BARROW, *THE ROMANS* 72 (1949).

important man in my life did not sit well with my feminist sensibilities. I already was both wary and weary of recreating identity by marriage.

My husband held fast to his, a name which is well-known perhaps nowhere but in German Brethren circles and the small town in Pennsylvania where he was raised, but is embedded there on church keystones, archives of local school board minutes, and gleaming basketball trophies enshrined in high school trophy cases. His identity was wrapped positively in the folds of those letters. I learned that men did not have the same sense of possibility about the transitory nature of names or identity in relation to others. He was born a *Berkey* and would always be one.⁷ In any event, we saw no need for either of us to shed who we were individually to become who we were together. We gave little thought to our future children's surnames as we purposefully signed our wedding gift thank you cards with separate last names, our complete identities still intact.

When our daughter was born, however, we found ourselves having to make identity choices for a new generation, and the weighty stare of the ancestors became fixed upon us. "What will you do *now*?" the collective force of family, friends, and society seemed to ask as we gathered about the hospital incubator that had — without thought or question — ascribed a last name to the infant curled there in her bleached white hospital linens.⁸

The fact that my husband and I even stopped to think, indeed, deliberate over this question reflects something about the times into which our children were born.⁹ Surnames have not always been with us, but ever since their arrival, they

⁷ The thought of a man changing his name upon marriage is so unique as to be newsworthy and is often met with serious resistance by befuddled clerks and bureaucrats who are the fiercest watchdogs of custom and tradition. See Kevin Z. Smith, *What's in a Name? Red Tape; City Couple Find System Works Differently for Men in Marriage*, DOMINION POST, July 29, 1995, at A1 (relating story about husband who sought to take his wife's name after marriage and the difficulties encountered in using his wife's name without a formal name change); Nick Trujillo, *Comment: On Male Maiden Names*, WORKING WOMAN, July 1984, at 42 (telling male's story of the difficulties he and his wife encountered when he attempted to add her last name to his with a hyphen and the difficult choice he had to make about what name to assume upon their divorce).

⁸ Our daughter was actually dubbed "Baby Kelly" because the nursery staff took her name from my admission form. This naming reflected the assumption that the mother's name and the child's name will always be the same either because the mother has taken the name of the husband/father or because she is not married and the child born outside of marriage will assume her surname. For an explanation of the history of these assumptions in detail, see *infra* part III.

⁹ The issue of choosing a surname for baby is widespread among those couples who have kept their individual names upon marriage. The proliferation of options tried vary from: adopting the father's name; hyphenating the child's name with both the father's and the mother's surnames; naming the female children with the mother's surname and the males with the father's; combining syllables from both the mother's and father's names to come up with a new name for the child. See Linda Lefland, *Finding a Surname for Baby*, N.Y. TIMES, Dec. 28, 1986, at C11.

have reflected societal values and conveyed messages about how the family is or should be governed. Names have also served to construct or conform ethnic identities to the dominant cultural norms. Just as a Hungarian can be transformed magically into an Irishwoman through the institution of marriage and its concomitant reliance upon patriarchy, so too can the dominant culture operate in other ways to enforce or encourage name changes upon whole groups of ethnic outsiders.

While largely a matter of social convention, the surnames that children bear have been regulated by the law as well. In certain circumstances, the law has attempted to regulate the surnames given to children at birth, but more often the law has come into play when a change of name is sought for the child. It is at this point that the law dictates to family members what it values and what it will forbid as the law goes about the business of enforcing societal norms. This article will look at the role of naming and name changing and the ways in which the law of child name change now stands at that crossroads of deliberation where the social norms once taken for granted are being critically examined.

In Part II, a brief history of the origin of surnames will be explored. To a large extent, the history of surnaming originated in response to a state need to name and lay claims upon its citizenry. Not only did surnaming enable the state to account for and regulate its citizens; a conforming structure of surnaming also imposed the dominant culture upon that citizenry. The custom of surnaming reflected and shaped both the structure of the child's relationship to the family and the acculturation of outsider ethnic groups into dominant society.

In Part III, I will survey the legal conceptualization of the status of the child as it is revealed ultimately in naming practices and name change contests. I will examine the ways in which the standards employed dating from English common law effectuate gender-determinative decisions in what the law often stages as a battle between a father and mother to name and thereby claim authority over the child. Historically, children born in the context of marriage have been viewed as children of the father, while children born outside of marriage have been viewed as children of the mother. Naming conventions continue to reflect these configurations.

In Part IV, I will focus upon those gender-neutral, child-centered approaches which have been adopted in other states. Three basic approaches exist, some of which have been more successful in achieving gender-neutral, child-centered results than others. The first approach requires the application of the vague "in the best interest of the child" standard. While apparently gender-neutral and child-centered on its face, this standard in most states has resulted in the consideration of gender-specific factors, and the child's interest is lost in the struggle between father and mother. The next approach that I will consider is what I call the "best-interest approach with factors." Under this approach, judicial discretion is directed toward an examination of those factors which the courts or legislators have decided are

relevant to the child's best interest in the name change context. In order to determine whether these factors actually are relevant to the child's interest in his or her name, I will look at the literature from a variety of sources which attempts to divine the deep and inscrutable value of names for children. Finally, I will examine an approach recently adopted in New Jersey which holds that decisions regarding the child's name should reside primarily with the child's custodian. Under this approach anyone seeking to argue against the custodian's choice should bear the burden of proving by a preponderance of the evidence that the chosen name is not in the best interest of the child.¹⁰

Finally, in Part V, I will look at West Virginia's law governing child name change and will propose reforms in the standards that are presently in use. I will show that West Virginia's law of child name change has lagged behind the child-centered, gender-neutral way that children's interests within the family are otherwise considered under West Virginia case law. I will propose a new standard for child name change in West Virginia that is grounded in the principles underlying the law presently in place for custody determinations. West Virginia has led the way nationally in developing child-centered, gender-neutral standards in the custody area. I will argue that these same principles can be applied to the law of child name change in order to free naming from the law's propensity to characterize children as property of either the father or mother.

II. THE HISTORY AND PRACTICE OF NAMING

The world contains a wealth of possible naming systems. The use of surnames is not known world-wide. Until recently, outside of the western world, surnames were rare. The Himalayan Bhutanese, for example, while matrilineal, typically carry no surnames at all.¹¹ In Thailand, surnames did not exist until the turn of this century when King Vajiravudh declared that everyone should have one. Like the appearance of many surnaming systems, the Thai edict is believed to have arisen because of the King's desire to assimilate the Chinese population within Thailand's borders. Since then, by edict or by petition to the government, people in Thailand have been acquiring surnames very slowly, but in everyday life the practice of being known by one's first, nickname or relational name still holds more powerful sway.¹²

Those cultures that do bestow more than one name on their children do not

¹⁰ See *Gubernat v. Deremer*, 657 A.2d 856 (N.J. 1995).

¹¹ See *In Her Hands*, MOTHER JONES, Sept.-Oct. 1995, at 40.

¹² See Nick B. Williams, Jr., 'What Do I Call You?'; *Name Game is Real Puzzler Around Asia*, L.A. TIMES MIRROR, July 15, 1987, at A1.

all follow the system common to most Americans. Natives of Fiji have neither an exclusively patrilineal nor matrilineal preference in naming. There, names are narrative. Children are given names which describe important events in another significant person's life, sometimes the one who is given the privilege of naming the child. The person who names the child is not necessarily a parent or even a family member, but nevertheless is honored with the right to bestow the child's name upon him or her. As in America, the child likely will have two or three names, each one related to a story of an important person in the family or community.¹³

The indigenous people of America have used a variety of naming systems. Under one common practice, names are bestowed by the chief.¹⁴ However in many Indian nations, while the chiefs may be male, the women select the chief, thereby creating a system of gendered checks and balances in the power to name and carry out other important functions in the life of the community.¹⁵ Still other indigenous cultures were explicitly matrilineal and often marked naming with potlatching ceremonies.¹⁶

In China and Japan, name order seems to be reversed to Americans because family name comes first.¹⁷ Both China and Japan are patrilineal in their naming constructs. In Japan, a patrilineal system even more rigid than the current American system is in place; under the law, each couple is permitted to use only one surname. This rule is gender-neutral but, in practice, its effect has been to deprive women of the option of retaining their birth names upon marriage. Nevertheless, an estimated 2% of married women do persist in using their birth names after marriage. The one-couple-one-surname rule is only recently being questioned.¹⁸

¹³ See Andrew Arno, *Personal Names as Narrative in Fiji: Politics of the Lauan Onomasticon*, 33 ETHNOLOGY 21 (1994).

¹⁴ See Kenneth D. Tollefson, *Potlatching and Political Organization Among the Northwest Coast Indians*, 34 ETHNOLOGY 53 (1995).

¹⁵ See Robert A. Williams, Jr., *Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace*, 82 CAL. L. REV. 981 (1994).

¹⁶ See William Kowinski, *Giving New Life to Haida Art and the Culture it Expresses*, SMITHSONIAN, Jan. 1995, at 38.

¹⁷ See Williams, *supra* note 12, at A1.

¹⁸ See *One Couple, One Surname*, DAILY YOMIURI, Nov. 23, 1993, at 6; Mayo Issobe, *Woman Fights Japan to Keep Maiden Name*, ST. LOUIS DISPATCH, Mar. 26, 1991, at 1D. While the existing civil law in Japan expressly provides that upon marriage a wife must take the husband's name, reforms have been proposed, and it remains to be seen whether this strict rule will begin to bend. See *Married Couples in Japan May Get to Keep Their Own Surnames*, STRAITS TIMES (Singapore), Aug. 21, 1994, at 7.

In China, Korea and Japan, the problem of family names becomes even more confusing due to the popularity of certain surnames.¹⁹ In China, reformers have suggested that new surnames should be assigned to families or old ones should be reinvigorated in order to avoid the serious blunders that occur when the wrong patient is given another's medication or the authorities arrest the wrong person.²⁰

As can be seen, there is a world of naming conventions out there, each with its own attractions and possible foibles. In Western Anglo-Saxon culture, one or both parents present a child shortly after birth with the first name. The first name is referred to as a "forename," "given name," or in historical circles, a "Christian name."²¹ The child may also receive a middle name,²² and will surely have a last name or surname.²³ The Western patrilineal surnaming²⁴ system is characterized by

¹⁹ Williams, *supra* note 12.

²⁰ *Id.*; *In China, Too Many Have Same Name, Study Says*, THE SAN DIEGO UNION-TRIBUNE, Dec. 15, 1994, at A35.

²¹ The term "Christian name" derives from early Christianity. The first converts to Christianity took on new names to symbolize their new lives in Christ at baptism. A "Christian name" was likely a corruption of "christened name." In England the term, "Christian name," became so common an appellation that it was even used to describe the first names of those who were not Christians. See ELSDON C. SMITH, *THE STORY OF OUR SURNAMES* 1 (1970). The terminology used to describe names, as well as the naming rules themselves, reveal the way that the dominant culture acts to redescribe and confine those who deviate from the norm to the norm. The application of "Christian name" to the identities of those who were obviously not Christian is just one example of this.

²² In Colonial America, the use of a middle name was rare. Many of the first middle names in America were surnames. Middle names may have developed in order to further distinguish individuals with common names from one another. Today, most people are expected to have a middle name. Government forms have become dependent upon them. In the early years of World War II, the Army gave those soldiers with no middle initial three middle initials — N.M.I. — to denote "No Middle Initial." *Id.* at 15-16.

²³ This practice of three names may have its roots in the Roman system of naming. "A Roman normally had three names. There was the *praenomen*, which corresponded to our Christian or forename; this was followed by the clan or race name, and last of all came the *cognomen* or surname." L.G. PINE, *THE STORY OF OUR SURNAMES* 11 (1965).

²⁴ The first historians of surnames contended that the word "surname" had no masculine derivations as many then assumed. "But the French and we termed them Surnames, not because they are names of the sire, or the father, but because they are super added to Christian names, as the Spaniards call them Renombres, as Renames." CAMDEN, *REMAINES OF A GREATER WORKE CONCERNING BRITAINNE* (1605), *quoted in* SMITH, *supra* note 21, at 27.

the assumption that, if other norms are being observed,²⁵ the child will inherit the name of her or his father.

American naming practices have their roots in the Anglo-Saxon traditions as they developed in England. Even in England, however, surnames did not exist widely until the thirteenth or fourteenth centuries.²⁶ England initiated the adoption of surnames slowly as a result of the Norman Conquest which occurred in 1066. With the Conquest, the old Saxon given names were driven out and replaced by a limited list of first names which resulted in confusion because, out of every hundred men, twenty would be named *John* and another fifteen *William*. There were only fourteen other male names from which to choose.²⁷ For women, the Norman choices were even more limited. Six names predominated — Alice, Agnes, Lucy, Mabel, Margery and Maud.²⁸ Thus, the origin of the need for surnames arose, in part, from the problems created by conquest and the imposition of one culture upon another.

English surnames may have first originated among the aristocracy because it was they who traveled more broadly about the countryside and hence needed to be distinguished from others with identical first names outside of their home boroughs or villages. However, local government also needed to keep account of those in the lower classes of feudal society, particularly in order to pay the equivalent of today's taxes. Therefore, the local constabulary would need to denote or describe the person in some way.²⁹

Over time, four distinct types of surnames developed: 1) place names, for example John Hill; 2) patronyms (or others based on personal names), such as Harry Williamson or John Thomas; 3) occupational names, hence the ever-popular John Smith; and 4) descriptive names, for instance, Walter Biggs.³⁰

The development of women's names is not as well documented. Some evidence does exist concerning women's last names in medieval times. Women

²⁵ The normative expectation is that the child will be born within the context of a state-sanctioned marriage. Children who are not born within such marriages are viewed differently for naming purposes. See *infra* part III.B.

²⁶ See PINE, *supra* note 23, at 12.

²⁷ See SMITH *supra* note 21, at 28. The Norman Conquest is marked by the defeat of King Harold of England by William, Duke of Normandy in 1066. *Id.*

²⁸ *Id.* at 36.

²⁹ *Id.* For a description of the abundant sources available for researching the lives of the medieval peasant societies with an emphasis upon the lives of women in them, see FRANCES GIES & JOSEPH GIES, *WOMEN IN THE MIDDLE AGES* 143-64 (1978).

³⁰ J.N. HOOK, *FAMILY NAMES: HOW OUR NAMES CAME TO AMERICA* 13 (1982).

frequently were defined in relation to others, often males. For instance, the patronymic form originally also employed a reference for girl children in the thirteenth and fourteenth centuries. Girls were sometimes given names such as *Margaret Wilkesdaughter* or *Mabel Tomsdaughter*. However, these names did not survive in great numbers because once surnames became standardized, women often lost their names at marriage and adopted those of their husbands.³¹ Women were also known by other relational names, particularly as “widow of” or “wife of”. The old English form, therefore, would be to record a woman as *Mabel Gudsonwyf*, which would translate today into Mabel, the wife of Gudson. If Gudson were no longer alive, she might be known as *Mabel Wedue* or, perhaps in the Latin church records, *Mabel Relicta Gudson*.³²

However, for wealthy women who owned property in their own right, they might be known by specific place or estate names. If it were the wife who owned the property, thirteenth and fourteenth century rolls reveal that upon marriage her husband would sometimes assume her name in order to align himself with her estate. Similarly, children would often assume the name of the propertied mother. Some hypothesize that the first model of hereditary surnames arose from the nobility’s desire to claim rights to property. Surnames, at this point, could come from either the father or the mother, depending upon from whose estate the child hoped to inherit.³³

At first, particularly among those who did not hold property, surnames were not passed down from generation to generation. John Armstrong might have had a daughter named Alice Weaver. Peter Carpenter might be the father of a Henry Short.³⁴ Indeed, Henry Short might be known by different names, depending upon the context or his stage in life. He also might be Henry Westfield if he came to live in the westernmost field or some might know him as Henry Peterson, if they knew his father, Peter.³⁵ Eventually, however, surnames even among the landless class became hereditary due in large measure, to the edicts which required the registration of all citizens by parish. This standardization occurred during the fourteenth

³¹ SMITH, *supra* note 21, at 53.

³² PERCY H. REANEY, *THE ORIGIN OF ENGLISH SURNAMES* 82-83 (1967).

³³ *Id.* Reaney draws upon names listed on rolls and quotes from the fourteenth century court book of Chertsey Abbey in Surrey to prove this point. *Id.* at 85. “When heiresses marry, they so often keep their maiden names, while their husbands change theirs to their wives’ names . . . In one entry, a woman takes her husband’s name, but when her father dies and she inherits his property, they both change to the father’s name.” *Id.*

³⁴ SMITH, *supra* note 21, at 37.

³⁵ *Id.* at 44.

century, and thus many of the most common English names capture some of the more important functions of medieval life. For example, the predominance of the English surnames *Bishop* and *Abbott* reflect the role of the Church in providing occupations in the retinues of high clerics, in recording the names of the citizenry, and in actually siring children.³⁶

The fact that naming grew out of a mixture of custom, convenience and law has resulted in a kind of legal flexibility with regard to naming in our country, so long as the limits of certain cultural norms are not pushed to their extremes and tested. The common law of naming has been at times contradictory, but has almost always reflected the dominant cultural spirit of the times.

Naming has operated in America to conform newcomers to the dominant culture. Sometimes naming has also served to reinforce the position that the newcomer was to assume within the social hierarchy.³⁷ The use of naming by slaveholders is perhaps the clearest example of naming as cultural domination. For instance, slaveholders gave slaves first names only; these names were recorded most often on property lists that the slaveholder provided as security for loans or planned to devise by will.³⁸ These given names were sometimes ostentatious Roman or

³⁶ *Id.* at 43. Other scholars also point out that many twelfth century bishops had mistresses and even wives. Among the parish clergy, marriage and nonmarital relations were common through the end of the thirteenth century. Thus, it is possible that the commonality of last names such as *Parsons* and *Vickers* may have more to do with familial relationship than occupation. REANEY, *supra* note 32, at 93-94. For a history of the widespread existence, status and treatment of the offspring of clergy from the Middle Ages through the Renaissance, see JOHN BOSWELL, *THE KINDNESS OF STRANGERS: THE ABANDONMENT OF CHILDREN IN WESTERN EUROPE FROM LATE ANTIQUITY TO THE RENAISSANCE* 252-55, 302-03, 341-42, 391, 403 (1988).

³⁷ Frank Nuessel, a scholar of naming theory, has pointed out the extent to which relationships characterized by power dominance almost always also include the power of the dominant to name the person or place over which he exercises power. This is true, Nuessel points out, in all master-slave, parent-child, conqueror-conquered, and master-pet relationships. FRANK NUESSEL, *THE STUDY OF NAMES: A GUIDE TO THE PRINCIPLES AND TOPICS* 3-5, 23 (1992). For a treatment of the theory of detecting African naming practices among African-American institutions, see J.L. DILLARD, *BLACK NAMES* (1976).

³⁸ See HOOK, *supra* note 30, at 289 (“[O]ne name was usually regarded as enough for a slave, although when two or more shared a name a distinguisher such as Big or Old or the name of a former owner or the place of purchase might be added.”). Dorothy Spruill Redford, who recounts her genealogical search to trace her own family’s connections to a Somerset, North Carolina plantation, found herself enmeshed in property listings and accounts of slaves owned that were often given for the purpose of devise or security. See DOROTHY S. REDFORD, *SOMERSET HOMECOMING* 89-92 (1988). Judge A. Leon Higginbotham, Jr. has also outlined the Colonial-era debate over the nature of the property that slaves were — real estate or chattel — as being central to the manner of execution allowed by creditors. A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR, RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 50-53 (1978). The debate continued with varying results among the states until the Civil War. See THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860* at 61-80 (1996).

Greek names, clearly the conjuring of a master who named slaves as he would pets; hence, the names Caesar, Pompey, Jupiter or Plato are found in many slave name listings.³⁹ A scarce few names may have retained a hint of their African character, such as Cuff, which may have come from Cuffee, a common African name derived from the practice among some African people of naming children based upon the day of the week upon which they were born. Boys born on Friday were named Kofi, Cuffee or Coffie; girls, Pheba or Phibba.⁴⁰ However, the most common slave names were simple American names like Mary or the now-dreaded, Tom.⁴¹

The non-African names stripped Africans of their prior cultural identities.⁴² The people who comprised the slave population of America were gathered

The prominent historian, Eugene D. Genovese, has said that when slaves had surnames, often those surnames were chosen and used by the slaves themselves within their own social interactions. Few masters outside of Louisiana were prone to give or acknowledge surnames for the slaves they claimed to own. EUGENE GENOVESE, *ROLL JORDAN ROLL: THE WORLD THE SLAVES MADE* 444-45 (1974) Louisiana was one of the few Southern states that recognized that "slaves being men . . . are to be identified by their proper names." *Id.* at 444. However, the Tennessee Court at emancipation stated that it was not to be presumed that recently emancipated slaves had last names. *See Boyd v. State*, 47 Tenn. (7 Cold.) 69 (1869).

Some of those held in slavery outside of Louisiana used surnames in reference to themselves, particularly in those areas of the South where plantations were largest and had the greatest degree of stability. There, communities characterized by a measure of familial stability were more possible. Even then, often the slaves did not assume their masters' surnames to refer to themselves. GENOVESE, *supra* at 445-446.

³⁹ GENOVESE, *supra* note 38, at 447; HOOK, *supra* note 30, at 290. Sojourner Truth's narrative provides one specific example of an "old slave" named Caesar, who was Sojourner Truth's uncle, who was "set free" in his old age, as was the common practice, because such "emancipation" actually served to set the master free of the obligation to care for a slave who had ceased being productive from the master's point of view. *See NARRATIVE OF SOJOURNER TRUTH* 12 (Margaret Washington, ed. 1993).

⁴⁰ GENOVESE, *supra* note 38, at 448-49; *see also* SPRUILL REDFORD, *supra* note 38, at 89-92 (uncovering the property lists of former slaveholders in Somerset, North Carolina; discovering African names such as Cuff, Quaminy, Tass, Cag, Eggy, and Abijac); HOOK, *supra* note 30, at 286-89 (providing the reader with an exhaustive list of African names found in slaveholders' records).

⁴¹ HOOK, *supra* note 30, at 289-90 (revealing that Jack and Tom were the most common names given male slaves, while Bet and Mary topped the list for women); GENOVESE, *supra* note 38, at 448.

⁴² For a fictional account of the loss of African culture through slavery and the power of a name, see JOHN E. WIDEMAN, *DAMBALLAH*, 15-26 (1981). In the foreword, Wideman explains the power of the name, Damballah, good serpent of the sky. "One song invoking Damballah requests that he 'Gather up the Family.'" *Id.* at Introduction.

intentionally from diverse African populations with diverse naming traditions.⁴³ Accordingly, the naming traditions among them would have been diverse. For example, the Akans of Ghana wait until after the seventh day following the birth of the child to name him or her. Each child has a birthday name corresponding to the day of the week when the child was born, and a positional name corresponding to his or her birth position within the family.⁴⁴ The Bobo of Mali, on the other hand, give their children three different names at different stages of their lives. The first is the name the child is given seven days after birth; the second is bestowed when the child starts walking; and the third is given during the initiation ceremony when the child becomes an adult member of the community.⁴⁵ The Goun-Foun of Dahomey have a naming ceremony at seven days, if the child is female, or nine days, if the child is male. The naming day is the first day that the mother is permitted to see the sun after giving birth, and the ceremony is a time of great celebration. The child receives several names which refer to events surrounding his or her birth. Aunts often help in the giving of names. The mother is the arbiter of the name that the child will use in daily life, but if the grandfather is still alive his choice will prevail over the mother's.⁴⁶

The failure to assign last names to slaves, from the Western point of view, also made clear the slaveholder's lack of concern for the slaves' familial relations.⁴⁷ Ignoring family structure among African people ran counter to the culture of those seized. As the naming patterns above suggest, the African relation of the child to his or her family and to the larger community was central.⁴⁸

Nor was the slave allowed to be considered part of or in anyway similar to

⁴³ For a discussion of the diverse generally West African populations from which those enslaved came, see PETER KOLCHIN, *AMERICAN SLAVERY: 1619-1877*, at 18-19 (1993). For an historical novel detailing the experience of those in the holds of slave ships, see CHARLES JOHNSON, *THE MIDDLE PASSAGE* (1990).

⁴⁴ IHECHUKWU MADUBUIKE, *A HANDBOOK OF AFRICAN NAMES* 103-04 (1976).

⁴⁵ *Id.* at 127.

⁴⁶ *Id.* at 129.

⁴⁷ The slave census rolls produced in Dorothy Spruill Redford's work do show some last names given to some slaves. This was not the rule, however, even in Ms. Spruill Redford's archives. It appears that last names were most often given to distinguish one slave named Amy from another, and may have signified the accrual of identically named slaves by purchase. See SPRUILL REDFORD, *supra* note 38, at 84-87.

⁴⁸ For additional discussion about the strength of the African family and its intergenerational ties, see ANDREW BILLINGSLEY, *CLIMBING JACOB'S LADDER: THE ENDURING LEGACY OF AFRICAN-AMERICAN FAMILIES* (1992).

the master's family. The inferior status of the slave in relation to the master was made clear by the practice of not allowing slaves to use the first names of their masters or their master's children. This rule was so strict that slaves were forced to change their names when the master had a new child who was given a name that the slave held prior to the birth of the child. Punishment could be severe for those slaves who persisted in using the name of the master's son or daughter.⁴⁹

Self-naming is also a form of empowerment⁵⁰ and, at times, an act of rebellious living. For example, evidence exists that the names that slaves used to refer to each other out of the hearing of the master may not have been the same as those listed on the master's slave rolls. The main evidence of this comes from the names that the freedmen and women claimed after Emancipation. Freedmen Bureaus catalogued the names of former slaves as they claimed last names for themselves and attempted to reconstruct the families that were denied or destroyed by slavery.⁵¹ In these rolls there are virtually no Jupiters or Platos. Sometimes frustrating for those who now seek to reconstruct family genealogies from paper records, neither first nor last names from the Freedmen's Bureaus perfectly matched with the property listings of the former slaveholders.⁵² By the time of Emancipation, however, the distinctly African names were also few and far between.⁵³

Contrary to the common perception that freedmen claimed the names of their former masters, freedmen and women were more likely to claim the names that would either bring honor to their family, such as Freeman or Liberty, or those that would aid them in the reconstitution of their families separated by the cruelties of

⁴⁹ GENOVESE, *supra* note 38, at 445.

⁵⁰ A wealth of books exist for African-American parents-to-be to choose African names for their children in the belief that choosing an Afrocentric name will help the children to develop self-esteem and reject the Western worldview which has marked them as inferior. These books also provide guidance for African-American adults on how to proceed to formally change their names. See JULIA STWEART, *AFRICAN NAMES* (1993); MOLEFI KETE ASANTE, *THE BOOK OF AFRICAN NAMES* (1991); IHECHUKWU MADUBUIKE, *A HANDBOOK OF AFRICAN NAMES* (1976); OGOONNA CHUKS-ORJI, *NAMES FROM AFRICA: THEIR ORIGIN, MEANING, AND PRONUNCIATION* (1972).

⁵¹ See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at 82-84 (1988) (noting the important role that the Freedman's Bureau played in attempts to reunite families separated by the sales of former masters).

⁵² HOOK, *supra* note 30, at 291-95; GENOVESE, *supra* note 38, at 447.

⁵³ Hook claims that, of the lists that he studied, three percent of male African-Americans in the South retained or readopted African forenames after obtaining their freedom. A similar percentage of the freedwomen also bore first names that looked toward Africa. See HOOK, *supra* note 30, at 293.

slavery.⁵⁴ Sojourner Truth, who changed her name twice during her life, exemplified name changing to claim a name associated with a more honorable white family as well as the more symbolic name change to claim a new identity apart from any white associations. Originally named Isabella, the daughter of James and Betsey, “owned” by the Ardinburgh family, Sojourner Truth was born with no last name.⁵⁵ She later took the surname “Van Wagener” from the family who sheltered her after she escaped the Dumont family, a subsequent “owner” who had broken his promise to give her free papers after the completion of a full year of service.⁵⁶ Finally, she changed her name to Sojourner Truth to signal her spiritual call to travel and spread her message of truth and hope.⁵⁷

To the extent that freedmen and women did claim former slaveholder names, some were met by legal resistance from those former masters. It appears that some former masters wanted to be clear that former slaves were *not* members of their family and were *not* entitled to lay claim to their property. Former slaveholders who sued to enjoin the adoption of their surnames by freedmen, were not successful.⁵⁸ Freedmen and women were free, as other citizens were free, to choose to be known by whatever names they wished. These decisions did make clear, however, that a name did not entitle its bearer to the riches of another similarly named.⁵⁹

Still other examples of the ways in which surnaming has served as a mirror for cultural struggle in America can be found in virtually every immigrant group that has mounted the shores or crossed over the borders into this country. The Ellis Island experience is a common one. Immigrant ethnic identities were altered with

⁵⁴ Hook posits that as for the names that were not clearly allegorical in nature, freedmen chose American names that belonged to families that were highly regarded within the white and, sometimes black, communities. *Id.* at 291-96. Genovese and Redford hypothesize that the pull toward reuniting families divided by slave sales caused freedmen and women to choose surnames that would facilitate these reunions. See GENOVESE, *supra* note 38, at 446-47; REDFORD, *supra* note 38, at 169.

⁵⁵ See NARRATIVE OF SOJOURNER TRUTH, *supra* note 39, at 3.

⁵⁶ *Id.* at 26-30.

⁵⁷ *Id.* at 79-80.

⁵⁸ See *Du Boulay v. Du Boulay*, 16 Eng. Rep. 638, 647 (1861) (family members unsuccessfully sought to enjoin illegitimate son of former family slave on St. Lucia plantation from using their family name as his own); see also G.S. Arnold, *Personal Names*, 15 YALE L.J. 227, 232-33 (1905-06) (noting with disapproval the three cases, including *Du Boulay*, with similar facts and holdings, noting that such results resulted in “confusion of both the individuals and the government, and . . . detriment of the original name holders”).

⁵⁹ *Du Boulay*, 16 Eng. Rep. at 647.

a clerk's pen as spellings and whole names were changed to assimilate newcomers into the melting pot of America.⁶⁰ Some immigrants of this era sought to change their names formally from their original ethnic names in order to erase the memories of persecution in their native countries⁶¹ or to avoid persecution or disadvantage in this one.⁶² Others had their identities changed for them. Hispanic Americans whose naming system provides for retaining both mother's and father's names have been abbreviated by a world of government and business forms that require the simple first, middle, and last name.⁶³

Cultural name change issues lap American shores like the waves that bring forth new Americans with each historical tide, but no social issue has remained so consistently with the law and practice of naming as the issue of what it means to be

⁶⁰ Because diverse languages produce diverse phonetics often from the same alphabets, American immigrants often had the choice of either having their name pronounced correctly but spelled wrong or spelled correctly but pronounced wrong. Sometimes these choices were made by the bearers, but they often were made by the officials who granted them entry. See HOOK, *supra*, note 30, at 27-48. For instance, phone books will reveal many Hungarians named Kiss but many more named Kish. In fact, both names come from the same Hungarian name correctly spelled "Kiss" but pronounced "Kish." See BELL ATLANTIC OF PENNSYLVANIA, GREATER PITTSBURGH PHONE BOOK 773-74 (1995-96) (showing 101 listings with the last name *Kish* and 26 with the last name *Kiss*). Thus, many immigrant names have generated two different names in the United States. If Kish were translated from Hungarian to its English synonym, the Hungarian would be renamed into the very British-sounding "Little." See HOOK, *supra* note 30, at 249. Other European immigrants were given names by United States Immigration officials that totally changed their ethnicity in the effort to make the name simpler. For example, I have a very Italian cousin, by marriage, whose last name is Murray. His grandfather, who immigrated to the United States during the 1920's explained to my cousin that the family name was actually Morelli, but that the official who granted him entry dubbed him "Murray," a name which finds its roots with the Scotts. See HOOK, *supra* note 30, at 87. Again, if "Morelli" had been translated literally to its descriptive roots, my cousin would have been named "Dark." *Id.* at 197.

⁶¹ See *In re Lipschutz*, 32 N.Y.S.2d 264 (App. Div. 1941) (granting application for name change for husband, wife and infant children, recently emigrated from France because they feared persecution).

⁶² See *In re Falcucci*, 50 A.2d 200, 203 (Pa. 1947) (granting petition of brothers to change their names from Falcucci to Frame over objection of a person also named Frame; remarking that, "[i]t is a common occurrence for citizens of this country with alien-sounding names to desire to Americanize those names. Such a change of name is entirely reasonable and invites no criticism."); *In re Cohen*, 255 N.Y.S. 616 (App. Div. 1932) (involving father of nineteen year old boy seeking to change the young man's name from *Cohen* to *Conason* because the boy was to seek admission to a "famous old New England University" where the name, Cohen, is "un-American" and relating that Judge Levy took offense at this particular theory of the case, pointed out the esteemed meaning of *Cohen* in Hebrew, but nevertheless granted the application on the condition that the reference to "un-American" would be removed from the petition).

⁶³ For a detailed discussion of the treatment of the Latino surname in the United States, see Yvonne M. Cherena Pacheco, *Latino Surnames: Formal and Informal Forces in the United States Affecting the Retention and Use of the Maternal Surname*, 18 T. MARSHALL L. REV. 1, 1-40 (1992).

a family and the child's place within it. The social forces at work here have to do with gender roles, normative definitions of the ideal family, and the status of children in relation to their parents and the state. The next Part will look more deeply into the history of names and name change as it relates to family roles in the United States.

III. CHILD NAME CHANGE IN HISTORICAL PERSPECTIVE: THE LAW'S CONCEPTUALIZATION OF THE FAMILY HIERARCHY

Under common law, children were considered to be "of two sorts, legitimate and illegitimate."⁶⁴ The place the child had within the family, if any, and which parent or adult had control over the child hinged upon which of these two "sorts" of children he or she was. The surname a child might bear and the freedom which the child or his custodian had to change it was circumscribed by whether the child was born outside or within a marriage.

In Sections A and B that follow, I will examine the history of the child's position within the family and the effect that his status at birth has had on the names that he may assume or later adopt.

⁶⁴ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 147 (William H. Browne, ed. 1897). The terms *legitimate* or *illegitimate* obviously establish marriage as the desired context for the birth of children. In the normative sense, the terms punish the parents by stigmatizing the child, and that stigmatization is countenanced as proper in order to punish the undesirable sexual conduct of the parents.

Bastard is also used by Blackstone to denote children born outside of marriage. *Id.*; see also WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK THE FIRST 434 (Dawsons of Pall Mall, eds. 1966) ("Children are of two sorts; legitimate, and spurious, or bastards.") The fact that the word *bastard* carries with it such negative connotations as to be considered a fighting word or slur also reinforces not only the extent to which childbirth in the context of marriage is socially favored but also the historical level of opprobrium directed toward children whose parents are not married. See GEOFFREY HUGHES, SWEARING: A SOCIAL HISTORY OF FOUL LANGUAGE, OATHS AND PROFANITY IN ENGLISH 32, 189 (1991) (pointing out that *bastard* is a severe insult in American and in British English, a term that is associated with murderers and other evildoers, but is capable of connoting a fine fellow in Australian English).

When I am talking about children, I will use the terms "children born outside of marriage" or "children born of a marriage" because I think that these terms reflect the legally significant facts at a somewhat lower level of disapproval or endorsement. At times, for convenience, I will use the distinction "marital" or "nonmarital."

A. *The Child of the Marriage, the Child of the Father*

1. A History of the Status of the Marital Child in Relation to Her or His Family

Nothing is more gratifying to the mind of man than power or dominion; and this I think myself amply possessed of, as I am the father of a family. I am perpetually taken up in giving out orders, in prescribing duties, in hearing parties in administering justice, and in distributing rewards and punishments. To speak the language of the centurion, I say to one, Go, and he goeth; to another, Come and he he cometh; and to my servant, Do this, and he doeth it. In short, sir, I look upon my family as a patriarchal sovereignty, in which I am myself, both king and priest.
— *The Spectator* (1712)⁶⁵

The legal status of the child of the marriage was bound up in the family hierarchy rooted in English common law. The common law made clear the relation of mother, father and child to one another within the married family. The doctrine of coverture was the foundation upon which the early legal structure of the nuclear family was built.

The doctrine of coverture was imported to the colonies from English common law. As the colonies developed their own doctrines governing family law, they wrestled with coverture, a legal fiction which provided that, in marriage, the wife's legal identity became subsumed by the husband's. She could not sue or be sued, own property or contract in her own name. Her husband assumed all of her property and all of her debts.⁶⁶

Just as the married woman had no independent legal existence in marriage

⁶⁵ The *Spectator* was an English journal widely read by colonial Americans. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* 5 (1985).

⁶⁶ Blackstone stated that:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing and protection and *cover*, she performs every thing; and is therefore called in our law-french a *feme-covert*; is said to *covert-baron*, or under the protection of her husband, her *baron*, or lord; and her condition during marriage is called her *coverture*.

WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, BOOK THE FIRST, *supra* note 64, at 430.

under the common law, neither did she have any legal rights, powers or duties as a mother to the children of the marriage. Blackstone cited ancient Roman law which empowered the father with the exclusive right to decide whether his children should live or die and which also provided that the son could acquire no property of his own during the life of his father, that all of the child's profits should flow to the father until the father's demise.⁶⁷ The fair inference from Blackstone's sole reference to the *son's* property is not that the daughter could keep the profits from her property, but that the daughter would not or could not own property at all.

Blackstone noted that under English law much of the harshness of Roman law had been abrogated, but nonetheless the essential family hierarchy remained intact. The father remained the parent charged with the duty to discipline his child.⁶⁸ The reach of the father so outstripped the mother that he could delegate his parental authority to a tutor or schoolmaster who would then act *in loco parentis* toward the child, without first obtaining the consent of the mother.⁶⁹ The father remained in control of the child even after death insofar as he alone had the power to appoint a testamentary guardian. A mother was, according to Blackstone, "only entitled to reverence and respect."⁷⁰

Needless to say, should a marriage break down and dissolve under Blackstone's common law, custody of the child was easily resolved in favor of the father. A strict patriarchy governed all custody disputes of marital children; this was a patriarchy which adhered to the "sacred right of the father over his own children."⁷¹

The history of the legal status of married women in America has been a slow and steady march from this rigid patriarchy toward the attainment of a separate

⁶⁷ *Id.* at 440.

⁶⁸ The father's right to discipline children continued into the English common law. *Id.* This right to discipline was a logical extension of the husband's right to control the actions of his wife as well. Again, Blackstone stated that:

The husband also (by the old law) might give his wife moderate correction. For as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children; for whom the master or parent is also liable in some cases to answer.

Id. at 433.

⁶⁹ *Id.* at 441.

⁷⁰ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK THE FIRST, *supra* note 64, at 441.

⁷¹ W.R. CORNISH & G. N. CLARK, LAW AND SOCIETY IN ENGLAND: 1750-1950, at 370 (1989).

legal identity and sphere of control.⁷² The common law family hierarchy and the woman's subservient or non-existent place within it remained in control from the colonial period through the early nineteenth century. However, by the middle of the nineteenth century, the early feminist movement succeeded in urging the passage of Married Women's Property Acts in most states. Under these acts, the doctrine of coverture was repudiated, and married women were permitted to hold property and to enter into contracts as individuals.⁷³

Even though Married Women's Property Acts seemed to set married women free to engage in commerce, the Victorian ethos had evolved to idealize married women as the keepers of the home and the nurturers of children.⁷⁴ As a consequence of endowing women with a hallowed place in the home, however, women in divorce gained ground in successfully claiming the custody of their children.

The socially accepted characterization of women as nurturers resulted in the development of the tender years doctrine, under which women were given first the custody of their female infant children and finally of young children of both genders. Often, however, older male children were separated from younger siblings by being awarded to their fathers in order to be raised in a "more masculine

⁷² Some scholars have argued that the status of married women in America was never quite so dire as that depicted by Blackstone, who chose to ignore colonial law in his effort to keep alive the legacy of the British common law. For instance, Richard B. Morris argued that the effect of the Protestant Revolution on those who forged the American colonies was so strong as to result in a more liberal view of marriage and the roles and responsibilities of marriage partners. Morris's view was that the Protestant Revolution reinvisaged marriage as a social contract entered into freely and in which both the husband and wife had mutual rights to consortium. The attitude toward wives and their husbands' responsibilities toward them was one of "humane paternalism . . . without precedent in common law." See RICHARD B. MORRIS, *STUDIES IN THE HISTORY OF AMERICAN LAW* 126-27 (1930). Michael Grossberg describes the Blackstone common law stance toward married women as present but short-lived in America. By Grossberg's account, while the harshness of the common law did not survive much past the colonial era, "patriarchy retained its legal primacy." See GROSSBERG, *supra* note 65, at 4-27.

However, still other recent scholars argue that Blackstone's description of the status of married women accurately depicted the limits of their power both before and after the Revolution. Cases and other documentary evidence from the period certainly support that at least in some of the colonies, married women had no right to exercise control over the disposition of their children. See *WOMEN IN AMERICAN LAW: VOLUME I FROM COLONIAL TIMES TO THE NEW DEAL* 86-87 (Marlene Stein Wortman, ed. 1985). For a review of the debate over the precise status of married women in early America, see KERMIT L. HALL, ET AL., *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* 30-33 (1991).

⁷³ See LEO KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 40 (1969).

⁷⁴ "By the middle of the nineteenth century, Anglo-American society had formulated a moral code based on three related principals — the permanency of marriage, the sacredness of the home, and the dependence of civilized life upon the family." GROSSBERG, *supra* note 65, at 10.

environment.”⁷⁵

The tender years doctrine eventually broadened into a more generalized maternal preference that resulted in the placement of daughters of whatever age with the fit mother.⁷⁶ Finally, by the last quarter of the nineteenth century, a decided maternal preference reigned in most custody decisions without regard to the age or gender of the children.⁷⁷ While maternal preference bestowed upon women the previously unrecognized legal status of parent, mothers remained imbued with a gendered concept of women as operators within the domestic sphere. The economic needs of the family, however, remained dependent upon the father's earning power and access to wealth,⁷⁸ and fathers remained charged with the duty of support.⁷⁹

Obviously, whether the child is conceptualized as being under the father's control in the intact married family or under the mother's in the late nineteenth century divorced family, the place of the marital child in the family hierarchy has been situated clearly *under* one parent or the other. By the end of the nineteenth century and into the twentieth, the child's place had changed only insofar as the

⁷⁵ GROSSBERG, *supra* note 65, at 249. The courts' first movements toward granting mothers custody required the mother to show the father's unfitness. As the enshrinement of the mother's role solidified in the mid-nineteenth century, feminists fought for the rights of women to gain custody of their children by using the rhetoric of the times. They urged for the repeal of decisions that favored fathers in custody battles by appealing to a woman's natural right and nature's command that she be with her children. While the legislatures rejected action at the feminists' urgings, the courts ever so slowly moved toward the tender years doctrine which gave children below puberty to the mother unless she was proven to be unfit. *Id.* at 245-46, 249-53.

⁷⁶ *Id.* at 248.

⁷⁷ *Id.* at 253. This maternal preference reigned unless the mother was proven to be unfit. The activities of a mother which constituted unfitness reflected the chaste view of motherhood that made it difficult for women who had engaged in adultery during marriage to obtain custody of their marital children. *Id.* at 252.

⁷⁸ GROSSBERG, *supra* note 65, at 250.

⁷⁹ Traditionally, the obligation to support children born during a marriage falls primarily on the father, regardless of his means or the earning capacity of the mother or child. *See Dunbar v. Dunbar*, 190 U.S. 340, 351 (1903) (refusing to discharge a debt in bankruptcy constituting child support due the debtor's former wife and children and stating that “[a]t common law, a father is bound to support his legitimate children, and the obligation continues during their minority.”); *Hampshire v. Hampshire*, 223 P.2d 950, 952 (Idaho 1950) (“It is the duty of the husband [with exceptions not here necessary to discuss] to support his wife and child, and not the duty of the wife to support him, and if he now finds himself involved in entanglements the net was knotted by his own voluntary acts.”); *Brosam v. Brosam*, 437 S.W.2d 694, 696 (Mo. Ct. App. 1969) (holding that it is the “basic rule of common law . . . that a father has the primary duty to support his minor children There is no absolution from that duty even if the mother may have independent means . . . or even though the children may have property of their own.”).

pendulum had swung from the father to the mother.

It was not until the late nineteen-seventies and early eighties that the tender years doctrine began to give way to the general and gender-neutral "best interests of the child" standard.⁸⁰ Even with the trend toward gender-neutrality in custody decisions, most children are placed in the custody of their mothers at divorce.⁸¹

2. Naming and the Marital Child, Perpetuating Patriarchy

Both practice and law surrounding the surnaming of marital children has lagged behind developments concerning children's status within the family. Perhaps because naming is so rooted not only in the social conventions of the present but in the history of past family generations, it seems to perpetuate itself unnoticed. So woven into the fabric of who we are as a family and a culture, how we name our children can swim past us unscrutinized. The nurse who fills out the card that slides into the hospital bassinet does not give much thought to the labelling. The child is "Baby Jones" or "Baby Smith" without so much as a question having been asked.

However, the common American practice of surnaming reflects common law conceptualizations of the family as described by Blackstone. The man and woman become one and the name at marriage reflects that unity of identity as being situated in the husband.⁸² If children are born during the marriage, the children bear

⁸⁰ See Freed and Foster, *Family Law in the Fifty States: An Overview as of September 1982*, 8 Fam. L. Rep. (BNA) 4065, 4090 (1982); *Jones v. Jones*, 577 S.W.2d 43, 45 n.1 (Ky. Ct. App. 1979) (noting that as of March 1978 Kentucky statutes were amended to require that both parents be given equal consideration in custody disputes); *Ex parte Devine*, 398 So. 2d 686, 695 (Ala. 1981) (holding that the tender years doctrine is an unconstitutional gender-based classification which discriminates against fathers and mothers in child custody proceedings solely on the basis of gender).

⁸¹ According to 1993 Census data, 71% of children lived with both of their parents. Nine percent of children lived with their mothers only as a result of divorce. Six percent lived with their mothers only with the husband absent. One percent lived with their mothers only because their fathers were deceased, and finally eight percent lived with their mothers who had never been married. Only three percent of children lived with their fathers alone. The paternal figures are not broken down by former or current marital status as they are for the mothers. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1994, at tbl. 80 (1994) (hereinafter, "ABSTRACT"). Approximately 90% of all children living with a single parent live with their mother. CENTER FOR THE FUTURE OF CHILDREN, CHILDREN AND DIVORCE 4 (1994).

⁸² This name loss calls to mind the formal introduction of women (which is now in certain circles no longer politically acceptable, but remains in use in certain others) as, for instance, "Mrs. John W. Smith." In this appellation the woman loses all identity in her husband. The only letter in the whole introduction which belongs to her is the "s" in "Mrs.," and even that could easily be read as the possessive form of "Mr.'s" See 65 C.J.S. *Names* §§ 3, 5 (1966) ("There is authority, however, which holds that by custom a married woman is designated by the use of the Christian name, or names, if he

the father's name as well. Marital children are marked as children of the father, and the family is once again reassembled by a structure that theoretically died with the doctrine of coverture.

The above describes the social convention or practice. But what of the *law* of naming and name changing as it relates to members of a married family? Does or has anything constrained us from doing otherwise? The answers to these questions are not simple because the law of names derives in large part from the common law, and the history of the common law of names has been revised and reinvented with each successive era.

Perhaps these sea changes occur because "common practice has always made common law,"⁸³ and individuals within different generations engage or attempt to engage in new practices. A slow evolution must take place before the common law recognizes a pattern of common practices and reconstitutes itself to recognize those practices as possible customs instead of deviant, unlawful aberrations. When family and gender roles are at the heart of the common law inquiry, that law is often shaped — or perhaps, muddled — by the judiciary's hopes, nostalgia and biases concerning what the common practice is, was or should be.⁸⁴ This dynamic synergy between common custom and common law surely describes the tension between what the law has permitted and what it has prohibited in the area of the surnaming of married family members.

The common law of names often has been phrased permissively. The general common law rule allows "a person [to] adopt and abandon at will any surname he or she might choose so long as the change [is] not made for any fraudulent purposes."⁸⁵ While name change statutes may have been in place at the turn of the century, these statutes were not held to limit the generous common law rule.⁸⁶ However, as applied to married women, this common law rule was invoked very early on to support the notion that a married woman need not formally change her name to that of her husband but may through mere marriage and use of her

has more than one, of the husband, together with the appellative abbreviation "Mrs.," prefixed to the surname, and that generally her identification is more perfect and complete by the use of her husband's Christian name or names than by the use of her own.").

⁸³ *In re Reben*, 342 A.2d 688, 699 (Me. 1975) (Dufresne, C.J., dissenting).

⁸⁴ Naming issues almost always arise before judges as opposed to juries. The judiciary continues to be populated in the vast majority by men. In West Virginia, for instance, name change petitions are heard by circuit court judges. W. VA. CODE § 48-5-1 (1995). In West Virginia, only two circuit judges are women.

⁸⁵ See 57 AM. JUR. 2D *Name* § 3 (1988).

⁸⁶ See Arnold, *supra* note 58, at 229.

husband's name come to abandon her birth⁸⁷ name in favor her husband's.⁸⁸

By the late nineteenth and early twentieth centuries in America, however, the custom of a woman assuming her husband's name had hardened into law in many places,⁸⁹ and deviations from that customary law were not well tolerated. When the issue put was whether a married woman could do otherwise but act consistently with the custom of adopting her husband's name, the common law was stated in the restrictive rather than the permissive sense:

For several centuries by the common law among all English speaking people, a woman upon marriage takes her husband's surname. That becomes her legal name, and she ceases to be known by her maiden name.⁹⁰

The common law obviously could not act as a censor, rooting out every impermissible use of a married woman's birth name in routine social interactions. However, statutes and practices regulating the conduct of governmental business often forbade women from using any surname other than their husbands', and the common law was relied upon by the courts to sustain those statutes and practices. For instance, in 1945, a married woman sought mandamus to require the Board of Elections Commissioners to allow her to vote although she had not re-registered under her husband's surname. Mandamus was denied holding that the common law required the married woman to act using her husband's surname. In effect, the court subordinated the right to vote to the state's interest in having a woman bear her

⁸⁷ I use the term "birth name" as opposed to "maiden name" because maiden name seems to feed into the no longer important legal dichotomy between women who are married and those "maidens" who are not. "Birth name" is more descriptively accurate.

⁸⁸ See *Cowley v. Cowley*, App. Cas. 450, 460 (H.L. 1901). In *Cowley*, heard before the House of Lords, Lord Cowley unsuccessfully sued his ex-wife who had remarried a commoner to restrain her from bearing his "name and arms." *Id.*

⁸⁹ See 2 BISHOP, MARRIAGE AND DIVORCE § 704a (6th ed. 1881), which states: "Name — the rule of law and custom is familiar, that marriage confers on the woman the husband's surname."

⁹⁰ *Chapman v. Phoenix Nat'l Bank of New York*, 85 N.Y. 437, 449 (1881). *Accord Freeman v. Hawkins*, 14 S.W. 364 (Tex. 1890) (holding that a judgment against a married woman based upon service by publication in which she was designated by her maiden name, instead of her husband's surname, was not binding against her or admissible in evidence against her in any other suit); *Cloud v. McK'y*, 216 S.W.2d 285 (Tex. Civ. App. 1948) (following precedent of *Freeman* to void tax judgment because debtor was not noticed in her married name).

husband's name.⁹¹ On similar grounds, at the turn of the century, married women were forbidden, over their objections, to register cars in their birth names,⁹² to be licensed to practice law in their birth names,⁹³ and to hold certificates of naturalization in their birth names, even if they used their birth names publicly and were well-known by them.⁹⁴

As late as 1972, the United States Supreme Court, in *Forbush v. Wallace*,⁹⁵ summarily affirmed a three-judge federal district court panel which held that the common law of Alabama provided that a married woman's legal name must be that of her husband's. In so doing, the Court held that Alabama's unwritten rule requiring married women to apply for their driver's licenses under their husbands' names was not unconstitutional. In 1976, the Supreme Court denied certiorari from a Sixth Circuit decision which relied upon *Forbush* to uphold a virtually identical

⁹¹ See *People ex rel. Rago v. Lipsky*, 63 N.E.2d 642, 646 (Ill. App. Ct. 1945) ("Since the right to register and vote is not an inherent right but a conditional privilege which may be exercised only upon compliance with the law, it seems clear to us that section 6-54 prescribes how that conditional privilege may be exercised by directing a single course of action and implying a prohibition of the exercise of the privilege in any other way."). The unique facts of a Louisiana case tested and defined the limits of the rule that a woman shall bear her husband's surname in Louisiana. *Wilty v. Jefferson Parish Democratic Executive Comm.*, 157 So. 2d 718 (La. 1963). In *Wilty*, a woman who had contended that she should be permitted to register as a candidate for the Office of Assessor as "Mrs. Vernon John Wilty, Jr.," was denied the right to do so because she was running against her husband for that office. *Id.* Mr. Wilty objected to her use of his name, even though she had been registered to vote and had been known by that name for twelve years. *Id.* The Court sided with the husband despite its lengthy discussion of the law and custom of married women's names in which it was stated that:

At marriage the wife takes the husband's surname which becomes her legal name. Her maiden name is absolutely lost, and she ceases to be known thereby . . . There is authority . . . which holds that by Custom a married woman is designated by the use of the Christian name, or names, if he has more than one, of the husband, together with the appellative abbreviation of 'Mrs.,' prefixed to the surname, and that generally her identification is more perfect and complete by the use of her husband's Christian name or names than by the use of her own.

Id. at 723. Future estranged husbands attempting to enjoin their wives from using their names had less luck than Mr. Wilty. See *Welcker v. Welcker*, 342 So. 2d 251 (La. Ct. App.), *cert. denied*, *Welcker v. Little*, 343 So. 2d 1077 (La. 1977).

⁹² See *Bacon v. Boston Elevated Ry.*, 152 N.E. 35, 36 (Mass. 1926) (holding that the failure of a woman to re-register her automobile in her married name resulted in the automobile not being "legally registered and was a nuisance on the highway").

⁹³ See *In re Hanson*, 198 A. 113 (Pa. 1938).

⁹⁴ See *In re Kayaloff*, 9 F. Supp. 176 (S.D.N.Y. 1934).

⁹⁵ *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd*, 405 U.S. 970 (1972).

practice in Kentucky.⁹⁶ The United States Supreme Court has never reversed the *Forbush* decision.

The Supreme Court's holding in *Forbush* notwithstanding, married women in the 1970's continued to push their claims to use their birth names.⁹⁷ A spate of law review articles put forth the more permissive view of the common law on names,⁹⁸ and newly discovered nuggets were unearthed to support the rights of married women to operate in the public sphere using whatever names they chose.⁹⁹ Consequently, many courts revised their views concerning the dictates of the common law. Some courts, in granting women the right to use their maiden names, still looked for evidence of the husband's permission before granting a wife's petition.¹⁰⁰ Courts either distinguished¹⁰¹ or ignored¹⁰² the Supreme Court's holding

⁹⁶ See *Whitlow v. Hodges*, 539 F.2d 582 (6th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

⁹⁷ See *In re Halligan*, 361 N.Y.S.2d 458 (App. Div. 1974) (reversing decision of lower court denying married woman's petition for name change to establish her right to be known for all purposes by her birth name, in reaction to the U.S. Passport Office's refusal to allow petitioner to use her birth name on her U.S. Passport); *Custer v. Bonadies*, 318 A.2d 639 (Conn. Super. Ct. 1974) (granting mandamus action to compel voting registrars to register women in their birth names).

⁹⁸ See Shirley Biysewicz & Gloria MacDonnell, *Married Women's Surnames*, 5 CONN. L. REV. 598 (1973); Marija Hughes, *And Then There Were Two*, 23 HASTINGS L.J. 233 (1971); Priscilla R. MacDougall, *Married Women's Common Law Right to Their Own Surnames*, WOMEN'S RTS. L. REP., Fall/Winter 1972/73, at 2; Comment, *The Right of a Married Woman to Use Her Birth-Given Surname for Voter Registration*, 32 MD. L. REV. 409 (1972-73).

⁹⁹ For opinions which made use of the history captured by the law review articles and which recited with care the history of surnames with a permissive spin on the common law, see *Malone v. Sullivan*, 605 P.2d 447, 448-50 (Ariz. 1980) (involving woman who had never adopted her husband's surname who successfully brought action to consider her petition for dissolution of marriage using her birth name); *Dunn v. Palermo*, 522 S.W.2d 679, 680-88 (Tenn. 1975) (granting married woman a declaratory judgment that she was not required to register to vote under the surname of her husband); *In re Natale*, 527 S.W.2d 402, 403-05 (Mo. Ct. App. 1975) (granting married woman's petition for change of name to her surname for professional reasons).

¹⁰⁰ See *In re Reben*, 342 A.2d 688 (Me. 1975) (noting that the petitioner's husband had appeared as her attorney, thereby demonstrating his support of her requested change of name to return to her birth name); *In re Lawrence*, 337 A.2d 49, 52 (N.J. Super. Ct. App. Div. 1975) (noting that husband had consented to his wife's resumption of her birth name).

¹⁰¹ See *Davis v. Roos*, 326 So. 2d 226, 228 (Fla. Dist. Ct. App. 1976) (granting writ of mandamus to woman petitioning to be issued a driver's license in her maiden name and distinguishing *Forbush* as representing the common law of Alabama, but not of England or Florida); *Dunn v. Palermo*, 522 S.W.2d 679, 685 (Tenn. 1975) (*Forbush* distinguished as holding only "that the requirement that a married woman obtain a driver's license under her husband's surname found a rational basis in administrative convenience" and *Dunn* involving a married woman's right to register to vote under her

in *Forbush*. By 1982, even the Alabama Supreme Court repudiated *Forbush* by holding that the court had been mistaken in its enunciation of Alabama's and England's common law.¹⁰³ Married women could, indeed, operate like men to assume or use any name they chose so long as the name was not used for fraudulent purposes.

Today, the majority of women upon marriage continue to assume their husbands' surnames. This norm continues to be reflected in the persistent reactions of governmental agencies to women who choose to use their birth names after marriage. For instance, when a woman seeks United States citizenship either for herself or her husband based upon the marriage itself, if she has not changed her name to her husband's at marriage, the Immigration and Naturalization Service will view her decision as a "red flag" necessitating inquiry into the validity of the marriage.¹⁰⁴ The Internal Revenue Service too seems to continue to have difficulty accepting the practice of women retaining their birth names after marriage. The Internal Revenue Service is unable to transmit tax information correctly to the Social Security Administration when spouses file jointly and the wife with self-employment income retains her birth name. Accountants advise women in these situations to request earnings statements from the Social Security Administration to

birth name.)

¹⁰² For cases which were decided in favor of petitioning married women post-*Forbush* and which omitted its mention, see *Malone v. Sullivan*, 605 P.2d 447 (Ariz. 1980); *In re Natale*, 527 S.W.2d 402 (Mo. Ct. App. 1975); *In re Halligan*, 361 N.Y.S.2d 458 (App. Div. 1974).

¹⁰³ In *State v. Taylor*, the Supreme Court of Alabama rectified what they perceived to be the federal district court's misconstruction of the common law of England and of Alabama and stated that:

Our research has convinced us that *Forbush v. Wallace* does not accurately state the common law on names, and that the case of *Kruzel v. Podell*, 67 Wis. 2d 138, 226 N.W.2d 458 (1975), 67 A.L.R.3d 1249, correctly holds that the common law of England could be summarized as follows:

"When a woman on her marriage assumes, as she usually does in England, the surname of her husband in substitution for her father's name, it may be said that she acquires a new name by repute . . . the change of name is in fact rather than law, a consequence of the marriage."

State v. Taylor, 415 So. 2d 1043, 1047 (Ala. 1982).

The Court finally held that the state could not require the married women of Alabama to register to vote in their husband's surnames without violating the constitutional rights of those married women who wished to register under their birth names. *Id.*

¹⁰⁴ See Judith Patterson, et. al., *IRCA, IMFA, and SDCEA: What Does this Alphabet Soup Spell?*, 39 BAYLOR L. REV. 413, 456 (1987).

make sure that their earnings have been reported correctly.¹⁰⁵

Nevertheless, despite these sometimes serious inconveniences occasioned by rigid bureaucracies, women today are not likely to be told by any governmental agency that they cannot use their birth names in transacting governmental business.

The link between the names that married women bear and the names that marital children bear can be seen in divorce statutes that have limited a woman's right to resume the use of her former name upon divorce if there are children of the marriage. In West Virginia, for example, until 1980, divorce statutes precluded the restoration of a woman's former name upon divorce if there were living children of the marriage. However, if the woman had no living children by the marriage which was the subject of the divorce, but did have children by a former marriage, she would be allowed to be restored to the name of her former spouse.¹⁰⁶ Florida also maintained this type of restrictive divorce statute.¹⁰⁷

The exception to the rule that divorced women could assume their former names unless there were children of the marriage betrayed the following set of assumptions: 1) that marital children had their father's names from birth; 2) that at divorce they would continue to bear their father's names; and 3) that having a mother with a different surname would not be in the best interests of the children of the marriage. The last assumption was not without its contradictions because it was also expected that divorced women who remarry would assume the names of their subsequent husbands without regard to whether children of a former marriage are residing with them. Nevertheless, the children of the marriage would continue to bear their father's names and, if the mother had custody, reside in a family in which neither adult shared that last name with them. If the children did not live with their mother after divorce, then such statutes seemed to assume that even having a non-custodial mother with a different name would somehow damage the children.¹⁰⁸

¹⁰⁵ See James N. Calvin, *Self-Employeds' Use of Maiden Name Causes Problems*, 17 TAX'N. FOR LAW. 383 (1989).

¹⁰⁶ See W. VA. CODE § 48-2-23 (1995).

¹⁰⁷ See *In re Harris*, 236 S.E.2d 426 (W. Va. 1977) (involving a petitioner who had been denied her name change in Florida where she had been divorced because of the existence of a child born of the marriage).

¹⁰⁸ Even though the divorce statutes seemed to assume that harm would befall children with renegade divorced mothers who did not assume the names of their former or current husbands, curiously enough, the possible embarrassment, confusion or perceived stigma to children as a result of the mother having a different surname from that of her husband has been held *not* to be a sufficient ground for denying a married woman to change her name outside of the divorce context. See *In re Hauptly*, 312 N.E.2d 857 (Ind. 1974); *In re Miller*, 243 S.E.2d 464 (Va. 1978). The telling case of *In re Strikwerda*, made clear the extent to which children of the marriage are children of the father even when a woman is allowed to maintain her birth name during the marriage. See *In re Strikwerda*, 220 S.E.2d 245 (Va.

As to original surnames bestowed upon marital children at birth, early case law held that "the right to name a child belongs to its parents, and ultimately to its father."¹⁰⁹ Until fairly recently, it was assumed that the legal surname of a marital child would be the surname of his father. Often, this legal rule was set forth in cases involving divorced fathers seeking injunctions against custodial mothers who were using the surnames of their subsequent husbands to enroll the children in school. In most of these cases, the father's petition for injunction was granted.¹¹⁰

However, the contest need not be waged in terms of the father's name versus the stepfather's — one in which the stepfather's surname still frequently loses.¹¹¹ Sometimes it is not even a contest between the custodial mother's birth

1975). In *Strikwerda*, Virginia held that the lower court may not deny a married woman's petition to resume her maiden name based upon its concern for the best interests of future children of the marriage, where an agreement had been reached between the husband and wife that any children of the marriage would take the father's surname and where the husband affirmatively supported the wife's petition. *Id.* This case clearly placed both the wife and the as yet not born children under the husband's symbolic control.

¹⁰⁹ *Eaton v. Libbey*, 42 N.E. 1127 (Mass. 1896); *see also Roberts v. Mosier*, 132 P. 678 (Okla. 1913).

¹¹⁰ *See Brown v. Carroll*, 683 S.W.2d 61, 63 (Tex. Ct. App. 1984) (enjoining permanently custodial mother from using any surname other than their father's surname and ordering her to instruct the children that they use only the legal surname of their father); *Montandon v. Montandon*, 52 Cal. Rptr. 43, 46 (Dist. Ct. App. 1966) (enjoining custodial mother from enrolling the children in school under the name of the stepfather and stating that, "[f]rom time immemorial it has been the custom for male children to bear the family name of their father throughout life"), *overruled by In re Marriage of Schiffman*, 620 P.2d 579 (Cal. 1980); *Dolgin v. Dolgin*, 205 N.E.2d 106 (Ohio Ct. App. 1965) (holding that the father of a child born in wedlock furnishes the child's surname and the mother has no legal right to select a different surname when enrolling the child in school); *Sobel v. Sobel*, 134 A.2d 598, 600 (N.J. Super. Ct. Ch. Div. 1957) ("The legal name of a child born in lawful wedlock is the child's Christian name and the surname of his natural father and where the mother has been awarded custody, there is no authority for her to change the surname of the child to that of the mother's subsequent husband, unless there are extenuating circumstances."); *Kay v. Bell*, 121 N.E.2d 206, 208 (Ohio Ct. App. 1953) (announcing that, "[i]t has been the custom in our country since the time 'when memory of man runneth not to the contrary' to give a child the name of his father"); *Kay v. Kay*, 112 N.E.2d 562, 567 (Ohio Ct. C.P. 1953) ("From time immemorial it has been the custom for male children to bear the family name of their father throughout life."); *Clinton v. Morrow*, 247 S.W.2d 1015, 1018 (Ark. 1952) (affirming injunction by noting "the natural and commendable desire of the father to have his children bear and perpetuate his name").

¹¹¹ For a discussion of the ways in which, either by statute or common law, the use of the stepfather's name is usually not allowed over the father's objection, *see MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW* 153-59 (1994). Professor Mahoney catalogues many cases in which the request for a change of name to the stepfather's surname has been denied. *Id.* For cases that have allowed informal name changes to stepfathers' surnames, *see In re Shipley*, 205 N.Y.S.2d 581 (App. Div. 1960) (finding children ranging in age from eleven to eighteen to be competent to choose to use their stepfather's name and denying father's request for injunction); *Bruguier v. Bruguier*, 79 A.2d 497, 499 (N.J. Super.

name and the father's. In one case, the court enjoined a custodial mother from using a hyphenated name reflecting both the mother's birth name which she had assumed after divorce and the father's name.¹¹² An example of even more rigid adherence to the father's name can be found in the case of *Ouellette v. Ouellette*,¹¹³ decided in 1966. In *Ouellette*, the father brought suit to make sure that his children's last names were spelled correctly after the divorced custodial mother had begun using the name "O'Let" for both herself and the children of the marriage. His concern even ran to the labelling of the children's things. The Court granted the father's injunction and ordered the mother "to instruct and inform school officials having control over the children and church officials where the children might attend church, and any other persons who heretofore have carried or do carry the names of the children, or any of them, under the erroneous spelling, to change all of their records and documents to the correct spelling."¹¹⁴

The common law rule governing a minor's right to change his or her own name was surprisingly just as permissive as it was for adults. It has been stated, but rarely permitted in a contested case, that a minor may on his or her own initiative exercise the common-law right to change his or her name, without any legal formality and by mere public declaration.¹¹⁵

The case of *Hall v. Hall*,¹¹⁶ decided in Maryland in 1976, provides one of the better examples of a court stating the permissive common law rule and creating exceptions to swallow it. In *Hall*, the father sought and was awarded an injunction

Ch. Div. 1951).

¹¹² See *Laks v. Laks*, 540 P.2d 1277 (Ariz. Ct. App. 1975).

¹¹³ *Ouellette v. Ouellette*, 420 P.2d 631 (Or. 1966).

¹¹⁴ *Id.* at 632.

¹¹⁵ For instance, in *Laks*, the Arizona Court of Appeals stated that "a common law right of a minor to change his name without legal formality has been recognized." *Laks*, 540 P.2d at 1279. However, in that case, the court granted the father's injunction to prohibit the custodial mother from using the hyphenated name Eliot-Laks for the children. *Id.* Similarly, in the case of *In re Staros*, the court recognized, "It is also generally accepted that at common law a minor had the right to change his or her name without legal formality." *In re Staros*, 280 N.W.2d 409, 411 (Iowa 1979). Nevertheless, the court held that in this case the state's name change statute governed and, therefore, the child's name could not be changed to a hyphenated form that would include both his father's name which was his since birth and his mother's maiden name which she had resumed after the divorce. *Id.* The court held that this result was required because the child name change statute provided that a child's name could not be changed unless a parent was also petitioning for a change of name. *Id.* *Accord* *Burke v. Hammonds*, 586 S.W.2d 307, 308 (Ky. Ct. App. 1979).

¹¹⁶ *Hall v. Hall*, 351 A.2d 917 (Md. Ct. Spec. App. 1976).

against the custodial mother from allowing and encouraging the parties' daughter from using the surname of her stepfather. The injunction was granted even though the only evidence as to the child's wishes was that she desired to be called by her stepfather's surname. After a summary of the development of the custom and practice of naming and the historical permissiveness with regard to the common law right to change one's name, the court specifically noted, "Furthermore, generally the right to change one's name is not encumbered by the ordinary disabilities attendant upon minority. Thus, the right has been available to minors as well as adults by common law and statute."¹¹⁷

The court in *Hall* recognized all common law rights inherent in both the child and the adult to change one's name so long as fraud was not the object of the change.¹¹⁸ The court further found that no fraud was attendant in these circumstances and that the only evidence was that the child desired to use the name "Williams." Further, the child was free to use the name without resorting to a formal statutory name change because statutory provisions do not pre-empt common law, but only serve to supplement it.¹¹⁹ However, the court proceeded to hold that "the common law right is not absolute as to a minor in face of proper opposition."¹²⁰ Proper opposition is a father's opposition, unless that father has abandoned or committed serious misconduct.¹²¹ The court also found that it was important to look to the best interest of the child,¹²² as one would do in a custody decision. In this case, the court held that, given the absence of any gross misconduct on the part of the father, the child's best interest was best served by enjoining the use of the stepfather's name. Thus, in much the same way that earlier courts had treated a married woman's petition to use her birth name, the court first recited the permissive rule and then granted the restrictive injunction to prohibit its exercise.¹²³

Until very recently, petitions to change the name of a child born during the course of a marriage from that of his or her father most often were denied unless

¹¹⁷ *Id.* at 923.

¹¹⁸ *Id.* at 925-26.

¹¹⁹ *Id.* at 926.

¹²⁰ *Id.*

¹²¹ *Hall*, 351 A.2d at 926.

¹²² *Id.* at 923. Other cases have stated the best interest standard but have also concerned themselves with vindicating the father's protectible interest in preserving his surname. *See Laks v. Laks*, 540 P.2d 1277, 1279-80 (Ariz. Ct. App. 1975); *Clinton v. Morrow*, 247 S.W.2d 1015, 1018 (Ark. 1952).

¹²³ *Hall*, 351 A.2d at 923.

either the father was dead¹²⁴ or some extreme circumstances existed in which the father had committed an act so notoriously vile or violent, often to someone close to the child, that wearing the father's name became a constant reminder of that traumatic experience.¹²⁵ Of course, in cases where the father failed to object, name changes may have been granted and no appeal taken. The number of such cases is difficult to ascertain given the scarcity of published trial court opinions.¹²⁶

In summary, the line of cases enjoining custodial mothers from allowing or encouraging their children to be known by names other than those precisely identical to their fathers persisted throughout the nineteen-seventies and into the

¹²⁴ See *In re Morehead*, 706 P.2d 480 (Kan. Ct. App. 1985).

¹²⁵ *Accord Ouellette v. Ouellette*, 420 P.2d 631, 633 (Or. 1966) (holding that "the courts have generally recognized that the father, who is ordinarily the objecting party, has a protectible interest in having a child bear the parental surname in accordance with the usual custom, even though the mother may have been awarded custody of the child. . . . However, 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 rights or where his name is positively deleterious to the child, the change may be permitted."); see *In re Rossell*, 481 A.2d 602 (N.J. Super. Ct. Law Div. 1984) (granting mother's petition to change child's name to her maiden name following divorce where marriage was of brief duration, child was young, father had only visited the child for 35 minutes during the two year period since the parties' separated and during the marriage the father had been violent to both mother and child and had threatened to throw the child out of the window); *In re Christjohn*, 428 A.2d 597, 599 (Pa. Super. Ct. 1981) (holding that the court's usual hesitancy to grant a child's name change was overcome when the opposing parent has engaged in misconduct so deplorable that the best interests of the child would be served by the name change and finding that where the father had murdered the child's stepfather such misconduct was so deplorable as to allow the child's name change to her stepfather's name, the name which her mother also used); *In re Yessner*, 304 N.Y.S.2d 901 (Civ. Ct. 1969) (acknowledging that depriving the son of a father's surname is a "serious and far-reaching action but holding that change of name to mother's maiden name was warranted where father had been convicted of manslaughter for choking the child's maternal grandfather to death); *W. v. H.*, 246 A.2d 501 (N.J. Super. Ct. Ch. Div. 1968) (holding that a change in name was warranted where the father had engaged in sexual relations with both of his daughters thereby resulting in his conviction and imprisonment and the daughters' physical and psychological harm); *In re Fein*, 274 N.Y.S.2d 547 (Civ. Ct. 1966) (granting application of wife to change her name and the name of her three children to that of her birth name where father had been sentenced to life imprisonment following a murder trial which aroused wide notoriety and where father had also had extensive association with prostitutes, and failed to support children since the time of his trial).

¹²⁶ For an example of one such case decided at the trial level with a recorded opinion, see *In re Harris*, 43 N.Y.S.2d 521 (Sup. Ct. 1943) (granting application of mother to change formally the name of her eighteen year old son to her maiden name where the son desired the formal change and in fact had been using his mother's maiden name for at least three years prior and noting that under statute, given child's age, it was permissible to not provide father with notice and that father did not appear to object). *But see In re Wittlin*, 61 N.Y.S.2d 726 (Civ. Ct. 1946) (denying application of mother to change to name sixteen and a half year old son's name to that of his stepfather, even though the boy joined in the petition, where the father had been active in his son's life since the separation).

eighties,¹²⁷ and affirmative petitions to change the name of a child born of the marriage have been granted only rarely.¹²⁸ The theoretically gender-neutral, child-centered “best interest of the child” standard has been in place for some time, but often these are the very cases that recite the time honored interest of the father to have his progeny bear his name before denying the petition. The dramatic facts that it takes to override the presumption in favor of the father’s name highlight the extent to which “the best interest of the child” standard has been highjacked by the father’s interest in his name.

Recently, a few jurisdictions have begun to look at the child name change contests with a more self-consciously gender-neutral eye. These decisions and statutes will be reviewed in greater detail in Part IV below, but first, I will review the development of the law surrounding the status of the child born outside of marriage and the ways in which that child’s status has been reflected in the area of naming and name change.

B. Child Born Outside of Marriage: Child of No One, Child of the Mother

1. A History of the Status of the Non-marital Child

Though in legal contemplation a bastard has no relations, yet his mother is considered his natural guardian, has the custody and control of him, and is bound to educate and maintain him. In a moral view, he is considered the child of his mother, so far as their intermarriage would be unlawful, and sexual intercourse between them unlawful. The putative father has no power or control.

— Zaphaniah Swift, *Digest and the Law of Evidence*, Vol. 1:47-48 (1810)¹²⁹

Blackstone declared that the “rights [of bastards] are very few, being only such as he can acquire. He can inherit nothing, being looked upon as *nullus filius*, no man’s son. He may gain a surname by reputation, though he has none by inheritance.”¹³⁰ The American development of the law of bastardy, as it was then called, reveals in striking relief that the child born outside of marriage was clearly either the child of no one or, later, the child of the mother.

¹²⁷ In addition to the cases already noted, see also *In re Marriage of Presson*, 465 N.E.2d 85 (Ill. 1984); *Norton v. Norton*, 595 S.W.2d 709 (Ark. Ct. App. 1980).

¹²⁸ See *Robinson v. Hansel*, 223 N.W.2d 138 (Minn. 1974); *West v. Wright*, 283 A.2d 401 (Md. 1971).

¹²⁹ GROSSBERG, *supra* note 65, at 207.

¹³⁰ See BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, *supra* note 64, at 152.

The colonies inherited and adopted England's common law of bastardy. The underlying policy of the common law had three primary objectives. First, the law sought to repel attacks against legitimate family order. The marital state was sanctioned as the only "legitimate" place for the rearing of children, and contrary behavior should be punished. Second, the property of legitimate families should be protected against the claims of illegitimate outsiders. Third, the law sought to prevent the public from being saddled with the costs of rearing the children of no one.¹³¹

These purposes at times were compatible, but often they struggled in conflict to resolve just who would be responsible for the child of no one. Being nobody's child might mean that neither parent was responsible for the child. During the early middle ages, this often was the case, and abandoned children or foundlings were often illegitimate. These children died of exposure or were rescued by caring people who took the child as their own.¹³² As the common law developed, however, some mercy was shown the nonmarital child. The child born outside of the marriage, if not received by the mother, became the responsibility of the parish or settlement into which he or she was born.¹³³ The child of no one would likely become the child of the state, and hence the law's concern for the state's fiscal health emerged. Given the law's conflicting interests with regard to who should share responsibility for the child, compromises had to be struck between protecting legitimate family property and preserving the public purse.¹³⁴

In the colonies, the initial approach to illegitimacy was to punish those who

¹³¹ GROSSBERG, *supra* note 65, at 197-98.

¹³² Historians claim that illegitimate children shared the same plight as the legitimate children of the poor during the early Middle Ages. In times of poverty and plague, the numbers of the abandoned, both legitimate and illegitimate, rose. It was left to the "kindness of strangers" to take the children in and raise them as their own. See JOHN BOSWELL, *THE KINDNESS OF STRANGERS: THE ABANDONMENT OF CHILDREN IN WESTERN EUROPE FROM LATE ANTIQUITY TO THE RENAISSANCE* (1988).

¹³³ See BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND, BOOK THE FIRST*, *supra* note 64, at 447. Grossberg also notes that under early common law, "The bastard had no recognized legal relations with his or her parents, particularly not those of inheritance, maintenance, and custody. Nor did the illicit couple have any rights or duties toward their spurious issue." GROSSBERG, *supra* note 65, at 197.

¹³⁴ As one reads the early colonial history and debates concerning the responsibility for children born outside of wedlock, one cannot help but be struck by the ways in which the rhetoric of yesterday sounds so like the rhetoric of today's "family values" and "welfare reform" talk. However, a full and, I suspect, enlightening, exploration of those parallels is outside of the scope of this article.

had engaged in the sinful conduct.¹³⁵ Punishment was followed by support enforcement against the parents in an effort to reimburse or at least not further drain the public coffers. Eventually, the punitive took second seat to the emphasis upon maintaining support for the child. With the focus upon the public good, paternity actions, which were initially quasi-criminal, did not result in changing the status of the child with respect to his or her place within the family's structure. Under the common law in place in colonial times, the child still could not inherit from either his father or mother.¹³⁶ However, the courts could prosecute both father and mother to provide support and thereby place the financial cost of raising the child back upon the parents.¹³⁷

The financial burden of illegitimacy was also diminished by redefining what a "bastard" was so that fewer children fell into that category. These measures also sacrificed the punitive purpose for the preservation of the purse. Lord Mansfield's Rule, perhaps the oldest such measure, concerned itself not so much with the actual, biological paternity of the child, but with the marital status of the child's mother at its birth. Unless the husband was able to prove that he had been "out of the kingdom for above nine months,"¹³⁸ the child was presumed to be his legitimate son or daughter.¹³⁹

Still more rules evolved in the newly formed states to reduce the number of children who would be considered illegitimate. By the nineteenth century, states began reversing harsh rules that previously had "bastardized" children who were born of marriages which had ended in annulment or divorce.¹⁴⁰ At around the same

¹³⁵ Even in the latter half of the twentieth century, some state continue to view paternity actions as criminal in nature. See *D.R.S. v. R.S.H.*, 412 N.E.2d 1257, 1261 (Ind. Ct. App. 1980) (noting that in several states paternity actions are criminal matters).

¹³⁶ See GROSSBERG, *supra* note 65, at 197, 207.

¹³⁷ *Id.* at 198-99

¹³⁸ BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, *supra* note 64, at 151.

¹³⁹ *Id.* at 151-52.

¹⁴⁰ See *Heckert v. Hile*, 18 S.E. 841 (Va. 1894) (holding that, by statute, children of marriages that have been annulled or dissolved are legitimate); *Buchanan v. Harvey*, 35 Mo. 276 (1864) (holding that under Missouri statutes the children of all marriages that have been declared void are nonetheless legitimate); *Graham v. Bennet*, 2 Cal. 503 (1852) (holding that where a marriage sufficient in form is rendered void by reason of the husband having a living wife, it is "deemed null in law" and the issue are legitimate under the act declaring that the issue of all marriages deemed null in law or dissolved in divorce shall be legitimate); *Sneed v. Ewing*, 28 Ky. (5 J.J. Marsh) 460 (1831) (holding that issue of a void marriage are nonetheless legitimate and able to inherit property from their father as if born of a lawful marriage).

time, states very slowly began to adopt the rule that parents could legitimize their children by marrying even after their birth,¹⁴¹ which was a major departure from the English common law which specifically forbade such leniency.¹⁴² Finally, common law marriages where no formal state-sanctioned marriage had taken place were also recognized in order to legitimate the children of those unions, and link them firmly to their fathers.¹⁴³

In the spirit of allowing the nonmarital child access to some wealth but only that to which his natural father would cede him or her, some states allowed men to claim their children born out of wedlock so that they could inherit from their father's estates at a later time.¹⁴⁴ The move toward legitimacy through acknowledgment

Interesting racial debates raged at the time that these statutes were being passed and cases decided. Opponents argued that the same rule would result in children of void interracial marriages being able to declare their legitimacy as well. However, those who supported the results of the cases involving white individuals — who usually had property because the cases arose most often in the context of estate contests — calmed the fears of their opponents by assuring them that the terms of the new law were to be “construed and understood in relation only to those persons to whom that law relates; and not to a class of persons clearly not within the idea of the legislature when contemplating the subjects of marriage and legitimacy.” GROSSBERG, *supra* note 65, at 203. Children of slave unions or of interracial couples during the period of slavery had been considered outside the contemplation of legitimacy. *See Timmins v. Lacy*, 30 Tex. 115 (1867).

¹⁴¹ *See* GROSSBERG, *supra* note 65, at 204-05; *Monson v. Palmer*, 90 Mass. (8 Allen) 551 (1864) (holding that state statute would find that if the parents of illegitimate children marry, the children are made legitimate by all intents and purposes); *Town of Rockingham v. Town of Mount Holly*, 26 Vt. 653 (1854) (holding that by statute the subsequent marriage of the parents of illegitimate children to one another makes the children legitimate).

¹⁴² English common law as enunciated by Blackstone did not require that the child be conceived during marriage, but did insist that the child be born during the marriage. *See* BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND*, *supra* note 64, at 150-151.

¹⁴³ *See Eubanks v. Banks*, 34 Ga. 407 (1866) (recognizing the existence of a common law marriage with legitimate issue where the father had been married before the union of the parents and that marriage had never been dissolved and where the parents of the legitimate children of the common law marriage had lived together for nineteen years and held themselves out as man and wife).

¹⁴⁴ *See McGunnigle v. McKee*, 77 Pa. 81 (1874) (finding that the averment of parentage in the special act passed by the Pennsylvania legislature legitimizing child was prima facie evidence of its truthfulness, and that the legislature had the power to remove the taint of illegitimacy for purposes of future inheritance); *Beall v. Beall*, 8 Ga. 210 (1850) (finding that the legislature of the state of Georgia has the power to make bastard children legitimate and capable of inheriting); *Perry v. Newsom*, 36 N.C. (1 Ired. Eq.) 28 (1840) (finding that a special act of the North Carolina legislature had legitimated a child born outside of marriage).

initially did not meet with wide judicial acceptance,¹⁴⁵ and was the cause of much estate litigation during the late nineteenth century.¹⁴⁶ This line of cases did not allow the child to claim against his or her father's estate unless the father had obviously gone to great lengths to acknowledge the child,¹⁴⁷ often by petition resulting in public acts of the legislature.¹⁴⁸ The property interests of the "legitimate" families remained protected from the father's unwanted or unknown heir.¹⁴⁹

By the end of the nineteenth century, courts became more accommodating of fathers who were willing to claim their otherwise "illegitimate" offspring, even as against the objections of the "legitimate" family who preferred not to share the family's wealth with the outsider.¹⁵⁰

What of the children who were not legitimated, who remained children outside of the marriage? From whom could they inherit? Under early English common law, the child could inherit from no one, neither father nor mother.¹⁵¹

¹⁴⁵ See GROSSBERG, *supra* note 65, at 205-07.

¹⁴⁶ See *supra* note 144.

¹⁴⁷ See *In re Jessup*, 21 P. 976 (Cal.) (holding that the father, who had never married, had acknowledged his illegitimate son by taking charge of him from birth, naming him after his favorite uncle, providing him with the best nurses, sending him to school and college, dressing him expensively, speaking of him often and introducing him to his friends as his son and often declaring his intention to leave him all of his property), *rev'd*, 22 P. 976 (Cal.), *motion to vacate denied*, 22 P. 1028 (Cal. 1889).

¹⁴⁸ The wording of such legislative acts of legitimacy were strictly construed when they were used for purposes of claiming against the estate of the putative father. See *Edmonson v. Dyson*, 7 Ga. 512 (1849).

¹⁴⁹ See GROSSBERG, *supra* note 65, at 205-07.

¹⁵⁰ *Id.*

¹⁵¹ Blackstone pronounced the harshness of the common law as follows:

The incapacity of a bastard conflicts principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for being *nullius filius*, he is therefore kin to nobody, and has no ancestor from whom any inheritable blood can be derived . . . and yet the civil law, so boasted of for it's [sic] equitable decisions, made bastards in some cases incapable of even a gift from their parents.

See BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK OF THE FIRST, *supra* note 64, at 447. This harshness was reflected in early eighteenth and nineteenth century American case law. See *Kingsley v. Broward*, 19 Fla. 722 (1883) (denying enforcement of conveyance of life estate in land to A. with a remainder to C. and to her issue or if she should die without legal issue, then to her illegitimate children and not permitting the illegitimate children of C. to take); *Woodward v. Duncan*, 41 Tenn. (1 Cold.) 562 (1860) (holding that illegitimate children do not inherit from legitimate children

However, America was to soften this harshness. In the late eighteenth century, Virginia led the way with a statute supported by Thomas Jefferson which took the then-radical position that "bastards shall be capable of inheriting or transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother."¹⁵² By the mid-nineteenth century, most of the states had adopted some version of this statute, although some restricted from whom on the mother's side the child could inherit.¹⁵³

The vesting of some form of property rights in the nonmarital child through his mother laid the groundwork for the mother of the nonmarital child to claim superior custodial rights as against the father. The common law bestowed paternal authority only over the child of the marriage.¹⁵⁴ In the United States, some cases in which fathers attempted to gain custody of their nonmarital children did arise. However, in these cases, mothers prevailed, and the rule was firmly set that the putative father of an illegitimate child had no right to custody of the child as against the mother.¹⁵⁵ A few courts wavered on this rule if the father had been forced to put

of the same mother); *Davis v. Houston*, 2 Yeates 289 (Pa. 1798) (holding that bastards have no inheritable blood and save by express statutory enactment cannot take by descent).

¹⁵² GROSSBERG, *supra* note 65, at 211-12; *see also* *Stevenson's Heirs v. Sullivant*, 18 U.S. (5 Wheat.) 207 (1820) (noting and strictly construing the law of descents of Virginia (Act Jan. 1, 1787) sec. 18 as declaring that "bastards shall be capable of inheriting or of transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten").

The admission of the bastard into the estate of the mother also played upon the cult of maternal domesticity that was evolving in mid-nineteenth century America. These sentiments are evident in the words of one Pennsylvania judge who stated his support for the law allowing the child born outside of marriage to inherit from the mother: The judge stated that:

While the law leaves them the frown of society and bitterness of shame, it is unwilling to add beggary to their misery by refusing them a share in the property of that one parent who is often more sinned against than sinning, and whose mother's heart yearns toward the child of her misfortune.

GROSSBERG, *supra* note 65, at 224.

¹⁵³ GROSSBERG, *supra* note 65, at 224.

¹⁵⁴ That portion of Blackstone which speaks to the father's right to discipline the child and to control those who would educate him is found only in the section governing legitimate children. The section governing illegitimate children does not address the issues of discipline and education at all. *See* BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, *supra* note 64, at 149.

¹⁵⁵ *See* *Pratt v. Nitz*, 48 Iowa 33 (1878); *Robalina v. Armstrong*, 15 Barb. 247 (N.Y. App. Div. 1852); *People v. Kling*, 6 Barb. 366 (N.Y. App. Div. 1849); *In re Doyle*, 1 Cl. Ch. 154 (N.Y. Ch. 1839); *Hudson v. Hills*, 8 N.H. 417 (1836); *Carpenter v. Whitman*, 15 Johns. 208 (N.Y. 1818); *People v. Landt*, 2 Johns. 375 (N.Y. 1807); *Wright v. Wright*, 2 Mass. 109 (1806). For a thorough discussion of the early *Landt* and *Wright* decisions, *see* GROSSBERG, *supra* note 65, at 208-09.

up security bond or pay support for the illegitimate child,¹⁵⁶ but the weight of the authority favored the mother.

The courts were also divided as to the fate of the child born outside of marriage upon the mother's death. Some held that the mother's sole right to custody and control of the child was so complete that, upon her death, the child was regarded an orphan without regard to whether the putative father might be alive.¹⁵⁷ These courts held that the father, if he wished to parent the child, would have to formally legitimate the child after the mother's death.¹⁵⁸ However, if the result of declaring the child an orphan would be to place the child in the custody of the state, with its attendant costs, then some courts relented in favor of the putative father.¹⁵⁹

Gender-role reversal was the order of the day with regard to children born outside of the marriage. While the father of children born within a marriage was permitted to contract out the services of his child or otherwise transfer his parental rights to another,¹⁶⁰ the mother of the child born outside of marriage could do the same with her child.¹⁶¹ The status of the child determined who would be the sole

¹⁵⁶ There is evidence that on some occasions the father's claim to custody of the child may have been a ploy to avoid paying the state-ordered support. See *Dehler v. State*, 53 N.E. 850 (Ind. App. 1889) (holding that the defendant was the father of the three month old infant and was required to support the child, but was not entitled to custody of the child as against the mother); *Wright v. Bennett*, 7 Ill. (2 Gilm.) 587 (1845) (holding that by Illinois statute, the father, after giving bond for the maintenance of his illegitimate child, had a right to the control and possession of it and that if the mother refused to deliver it to him, he was discharged from his liability). But see *Acosta v. Robin*, 7 Mart. (n.s.) 387 (La. 1829) (holding that the natural father, even when he has acknowledged the child, cannot compel the mother to part with its possession); *Falls v. Belknap*, 1 Johns. 486 (N.Y. 1806) (holding that a surety on a bond given to indemnify a town for the support of a bastard child has not right to custody of such child). When a child was not in the custody of the mother, but was in state custody, the posting and payment of the bond did give the father the right to custody and control of the child. See *Adams v. Adams*, 50 Vt. 158 (1877).

¹⁵⁷ See *Friesner v. Symonds*, 20 A. 257 (N.J. Prerog. Ct. 1890). Vestiges of this rule could be found in statutes still in place in the mid-twentieth century which provided that upon the death of the mother of an illegitimate child, the child should be taken as a ward of the state. Peter Stanley successfully challenged just such a statute under the Fourteenth Amendment to the United States Constitution. *Stanley v. Illinois*, 405 U.S. 645 (1972).

¹⁵⁸ See *In re Celina*, 7 La. Ann. 162 (1852).

¹⁵⁹ See *County of Dodge v. Kemnitz*, 49 N.W. 226 (Neb. 1891) (deciding whether the father should still be required to pay the amount of the judgment owed to the state for past support), *aff'd on reh'g*, 57 N.W. 385 (Neb. 1894).

¹⁶⁰ See BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, *supra* note 64, at 149; GROSSBERG, *supra* note 65, at 259.

¹⁶¹ See *Perry v. State*, 39 S.E. 315 (Ga. 1901).

arbiter of the child's fate.

Of course, holding that the mother clearly had custody of the child born outside of marriage worked to the advantage of the state. By recognizing a family for the child, the state could transfer public maintenance duties to private individuals. Courts that established the mother's right to custody also clearly established that the mother had the duty to maintain the child.¹⁶² These decisions did not necessarily absolve the state from all responsibility to assist the child and its mother if they were poor, but they did place the child in a home with a parent who would have immediate responsibility for the child. At the same time, the state remained free to pursue putative fathers for support.¹⁶³

The intervention of the state in the lives of mothers and their nonmarital children had its beginnings in the common law of England, but continued through the nineteenth century and proceeds into the twentieth. The child of no one was a child whose life could be effected by both the state's independent right to sue to establish paternity and by the mother's primary custodial power.

The burgeoning of the social work profession at the turn of the century furthered the state's role in the life of the mother and the "fatherless" child.¹⁶⁴ With

¹⁶² See *Commonwealth v. Fee*, 6 Serg. & Rawle 255 (Pa. 1820); *Inhabitants of Somerset v. Inhabitants of Dighton*, 12 Mass. 383 (1815); *Inhabitants of Petersham v. Inhabitants of Dana*, 12 Mass. 429 (1815); *People v. Landt*, 2 Johns. 375 (N.Y. 1807); *Wright v. Wright*, 2 Mass. 109 (1806).

¹⁶³ Originally, the father owed no duty of support to his illegitimate child. However, by statute the states could create such a duty and it could be enforced either by the mother or what was then termed "the overseer of the poor." See *Glidden v. Nelson*, 15 Ill. App. 297 (App. Ct. 1884); *Allen v. Davison*, 16 Ind. 416 (1861) (holding that Indiana statutes of 1832 allowed suit to be brought against putative father for support by either the mother or the overseer of the poor); *Warren v. Glynn*, 36 N.H. 424 (1858) (relating that where the mother of a bastard neglects or refuses to prosecute the putative father, the town in which she dwells may rightfully institute and carry on proceedings against him for the purposes of obtaining indemnity against liability for its maintenance); *Simmons v. Bull*, 21 Ala. 501 (1852) (holding that the father of an illegitimate child has no duty to support that child unless prescribed by statute); *Hollister v. White*, 2 Conn. 338 (1817) (providing that where the mother fails to prosecute bastardy proceedings, a town may prosecute in its own name).

Grossberg described the purpose and intent of nineteenth century paternity hearings brought by the state as follows:

The preoccupation of these hearings with paternal support underscored the state's vital interest in fixing paternity upon some man and thus obtaining child support. Despite growing maternal rights, paternity hearings (as the name implies) continued to rest on the assumption that support was a male obligation, which the republican faith in domesticity only reinforced. Explicit legislation and established common law rules protected taxpayers more than children.

GROSSBERG, *supra* note 65, at 215.

¹⁶⁴ For a history of the development of the social work profession at the turn of the century through the work done at maternity homes, see REGINA KUNZEL, *FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK, 1890-1945* (1993).

the rise of the social work profession, the focus shifted away from the state's interest in protecting the public's purse to the state's interest in protecting illegitimate children from their unfortunate fate. Nevertheless, old purposes die hard and the tension between favoring the marital state and treating the children born outside marriage with sympathy were difficult for the social work profession to resolve.¹⁶⁵

The new social work profession, which was supported by state-created Children's Bureaus, eventually resolved this tension in the early twentieth century by encouraging the unwed mothers who found themselves in maternity homes to place their children for adoption.¹⁶⁶ In this way, the multiple interests of bastardy law and the social work profession could be met. Through adoption, the sanctity of the marital family structure would be preserved; the assets of the legitimate families would not be expended on the illegitimate; and the state would be relieved of its financial obligation completely as children were placed securely with acceptable families. Adoption also played into the concern that social workers felt for the welfare of children who would be raised by women whom the profession regarded as, by definition, irresponsible.¹⁶⁷

Obviously, the urgings of social workers notwithstanding, not all mothers of children born outside of wedlock chose to place their children through adoption. Those mothers who chose to maintain their children in their own homes had the custody and control of them. As the social work profession grew and the state's interest in protecting children from their parents became more widely recognized,¹⁶⁸ often the only competitor for the control of the child born outside of marriage in the early half of this century was the state itself. The state's concomitant interest in not expending public funds made it an ambivalent competitor.

¹⁶⁵ See GROSSBERG, *supra* note 65, at 231-33.

¹⁶⁶ Social work had its early roots in the evangelical women's movement. The evangelicals believed that a mother and child should be kept together if possible because the child would serve "as an anchor for the giddy girl and evoke in her some sense of responsibility." KUNZEL, *supra* note 164, at 128. Florence Crittenton Homes, established early on by evangelicals, however, were the only maternity homes that maintained policy of doing all that was possible to keep the mother and child together after the mother had given birth at the home. They were far from the norm, and even among Florence Crittentons, by the 1940's, most homes were routinely arranging for the adoption of babies. Social workers, by contrast to the early evangelicals, favored adoption, and although they claimed to support the fundamental right of the unmarried mother to make her own decision, often pressured them to place their children for adoption. *Id.* at 89, 128-29.

¹⁶⁷ *Id.* at 129.

¹⁶⁸ *Id.* Both the parent's fundamental interest in parenting and the state's *parens patriae* interest in the welfare of children were recognized in the early part of this century. See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

Until the latter half of this century, the law was most concerned with the father's duty of support toward his child born outside of marriage. His parental rights were not widely recognized. In 1972, the Supreme Court first held that it was a violation of Equal Protection for states to treat fathers of nonmarital children differently from their mothers or from the fathers of marital children.¹⁶⁹ Consequently, the judicial establishment of paternity today has more far-reaching consequences for both the child and the father than it did in the eighteenth and nineteenth centuries. Now, the child whose paternity is established may inherit from both her father and her mother.¹⁷⁰ The establishment of paternity also gives fathers the right to claim custody or visitation, and these related issues are sometimes adjudicated simultaneously with the establishment of paternity.¹⁷¹

¹⁶⁹ See *Caban v. Mohammed*, 441 U.S. 380, 388-95 (1979) (holding unconstitutional a New York statute which gave an unwed mother, but not an unwed father, the power to veto adoption of their child simply by withholding consent and finding that "maternal and paternal roles are not invariably different in importance"); *Stanley v. Illinois*, 405 U.S. 645, 649-58 (1972) (declaring an Illinois statute unconstitutional under the equal protection and due process clauses of the Fourteenth Amendment because it failed to provide an unwed father a hearing on his parental qualifications before his children were removed his custody).

¹⁷⁰ Many states have passed statutes that allow children born outside of marriage to inherit from both biological parents if paternity has been established or can be established by clear and convincing evidence or if the father acknowledged paternity. See *Greene v. City of New York*, 675 F. Supp. 110 (S.D.N.Y. 1987); *Cotton v. Terry*, 495 So. 2d 1077 (Ala. 1986); *Ross v. Moore*, 758 S.W.2d 423 (Ark. Ct. App. 1988), *rev'd*, 785 S.W.2d 243 (Ark. Ct. App. 1990); *In re Estate of Evjen*, 448 N.W.2d 23 (Iowa 1989); *Majors v. Smith*, 776 S.W.2d 538 (Tenn. Ct. App. 1989); *Woods v. Fields*, 798 S.W.2d 239 (Tenn. Ct. App. 1990).

¹⁷¹ See ARIZ. REV. STAT. ANN. § 12-843(B)-(C) (1995) (allowing any party in a paternity proceeding, except the state, to request that custody and visitation be determined as part of that proceeding and finding that the parent with physical possession of the child for the greater part of the last six months shall have legal custody unless otherwise ordered by the court); ARK. CODE ANN. § 9-10-113(b) (Michie 1993) (allowing biological father who has established paternity to petition for custody); CAL. FAM. CODE § 7571(e) (West 1996) (requiring that voluntary declarations of paternity at hospital be accompanied by notice to both parents that such declarations give the father the right to claim custody or visitation with the child); DEL. CODE ANN. tit. 13, § 804(a)(5)(e) (1993) (requiring that voluntary declarations of paternity at hospital be accompanied by notice to both parents that such declarations give the father the right to claim custody or visitation with the child); IDAHO CODE § 7-1102 (1995) (vesting district courts with original jurisdiction to establish paternity and in those actions to determine custody and support); MASS. ANN. LAWS ch. 209c, § 1 (Law. Co-op. 1994) (declaring state purpose to be the establishment of paternity and the custody and support of all children born out of wedlock); MINN. STAT. ANN. § 257.541(2)(b) (West Supp. 1996) (allowing father's rights to custody or visitation may be determined in the paternity proceeding); N.Y. FAM. CT. ACT § 511 (Consol. 1994) (giving family court jurisdiction to establish paternity and in those proceedings where paternity is established, custody of the child born out of wedlock); N.D. CENT. CODE § 14-09-05 (1994) (declaring that when paternity and maternity of an illegitimate child are established, then custody rights are equal); OR. REV. STAT. § 109.103 (1995) (declaring that either parent may bring an action for custody once

Under the Uniform Parentage Act,¹⁷² which has been adopted in whole or in part in at least eighteen states,¹⁷³ the distinctions between children born inside and outside of marriage have been obliterated. The Act was drafted to accord all children substantive legal equality and to erase the stigma associated with being born outside of marriage.¹⁷⁴

However, the scope of these relatively new paternal rights remains, at this time, ill-defined and often incapable of definition. How does one qualify to be "father?" Does biology determine whether parental rights will vest in a man who claims this status? Or must the putative father take further steps in order to exercise his parental rights?¹⁷⁵ The debate rages most fiercely in the adoption context when

paternity has been established); W. VA. CODE § 48A-6-1 (1995) (providing that all dependent claims relating to the paternity action may be resolved upon the establishment of paternity); WIS. STAT. ANN. § 48.422(6)(c) (West 1995) (requiring that when paternity is adjudicated, the court may make and enforce such orders for the suitable care, custody and support of the child).

¹⁷² The Uniform Parentage act was drafted by the Commission for Uniform Laws in response to the Supreme Court's holdings that found it a violation of the Fourteenth Amendment for states to distinguish between unwed mothers and unwed fathers with regard to their children. *See* UNIF. PARENTAGE ACT, 9A U.L.A. 579 (1979).

¹⁷³ The Uniform Parentage Act has been adopted in eighteen states. *See* 1 LEGAL RIGHTS OF CHILDREN § 7.18 (Donald T. Kramer ed., 2d ed. 1994); ALA. CODE §§ 26-6-1 to -17-21 (1992 & Supp. 1996); COLO. REV. STAT. ANN. §§ 19-4-101 to -129 (West Supp. 1995); DEL. CODE ANN. tit. 13, §§ 801-819 (Supp. 1994); HAW. REV. STAT. §§ 584-1 to -26 (1993); ILL. ANN. STAT. ch. 750, para. 45/1 to 45/26 (Smith-Hurd 1993); KAN. STAT. ANN. §§ 38-1110 to -1130 (1993); MINN. STAT. ANN. §§ 257.5-.74 (West 1992); MO. ANN. STAT. §§ 210.817-.852 (Vernon Supp. 1996); MONT. CODE ANN. §§ 40-6-101 to -135 (1995); NEV. REV. STAT. ANN. §§ 126.011-.371 (Michie Supp. 1995 & 1996); N.J. STAT. ANN. § 9:17-59 (West 1993); N.M. STAT. ANN. §§ 40-11-1 to -23 (Michie 1978); N.D. CENT. CODE §§ 14-17-01 to -26 (Supp. 1995); OHIO REV. CODE ANN. §§ 3111.01-.19 (Anderson Supp. 1995); R.I. GEN. LAWS §§ 15-8-1 to -27 (1988); WASH. REV. CODE ANN. §§ 26.26.010-.905 (West Supp. 1996); WYO. STAT. §§ 14-2-101 to -120 (Supp. 1996).

¹⁷⁴ *See* 1 LEGAL RIGHTS OF CHILDREN 380-81 (Donald T. Kramer, 2nd ed. 1994).

¹⁷⁵ Exactly what a man must do to qualify as the father of an illegitimate child is still the subject of much debate. In *Lehr v. Robertson*, the Supreme Court rejected an unmarried father's challenge to New York's adoption statute under which he failed to receive notice of his child's adoption by her mother's husband. 463 U.S. 248 (1983). In *Lehr*, the judge who granted the adoption was aware that the father had a paternity action pending to adjudicate his rights. However, the father had failed to fall into any of the many categories of fathers who should receive notice, including those who had entered their names in New York's "putative father registry."

The formalistic approach that the Court took in *Lehr* has left many states to grapple with how to categorize fathers whose rights must be recognized. Most states hold that mere biology will not place a man within the legal definition of parent for notice purposes in the adoption context, but they are divided as to exactly how much a man must do to protect his status as presumed father. *See In re Sarah C.*, 11 Cal. Rptr. 2d 414, 417 (Dist. Ct. App. 1992) (finding that in accordance with California

a child born outside of marriage is placed for adoption without the knowledge or consent of the putative father.¹⁷⁶

Nevertheless, most children born outside of marriage today are not placed for adoption. They are not embroiled in custody battles between their putative fathers and their mothers. They are not claimed as wards of the state. Most children born outside of marriage today reside with their mothers,¹⁷⁷ often without paternity having been established.¹⁷⁸ They remain children of the mother,¹⁷⁹ and to the extent

statutes, a man is presumed to be a child's father only when he is married or has attempted to marry the child's mother or when the man has acknowledged the child as his own by legally establishing paternity or promptly coming forward to assume his parental responsibilities); *In re Raquel Marie X.*, 559 N.E.2d 418, 420 (N.Y. 1990), (holding unconstitutional state statute that required the unwed father's consent to adoption of his infant child only where he has openly lived with the child or the mother for six continuous months prior to the child's placement for adoption, openly acknowledged his paternity during such period, and paid reasonable pregnancy and birth expenses in accordance with his means), *cert. denied*, *Robert C. v. Miguel T.*, 498 U.S. 984 (1990).

¹⁷⁶ For recent articles discussing the putative father's currently ill-defined status and the offering of solutions for the havoc wreaked in adoption proceedings as a result, see Susan Swingle, *Rights of Unwed Fathers and the Best Interests of the Child: Can These Competing Interests Be Harmonized? Illinois' Putative Father Registry Provides an Answer*, 26 LOY. U. CHI. L.J. 703 (1995); Carolyn R. Seabolt, *In Re Baby Girl Clausen: Can the Baby Jessica Nightmare Happen in Georgia?*, 11 GA. ST. U. L. REV. 737 (1995); Brooke A. Gershon, *Throwing Out the Baby with the Bath Water: Adoption of Kelsey S. Raises the Rights of Unwed Fathers Above the Best Interests of the Child*, 28 LOY. L.A. L. REV. 741 (1995); Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60 (1995); Anne R. Schiff, *Frustrated Intentions and Binding Biology: Seeking Aid in the Law*, 44 DUKE L.J. 524 (1994); Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967 (1994).

¹⁷⁷ Eight percent of all children in the United States, or 5,351,440 children, live with a mother who has never been married. Only three percent live with their fathers. The paternal statistics do not account for the marital status of the fathers who serve as single parents. Therefore, it is difficult to tell whether these children reside with their fathers as the result of a custody decision in a divorce as opposed to an award in a paternity action. ABSTRACT, *supra* note 81, at tbl. 80.

¹⁷⁸ In 1992, the Child Support Enforcement Units charged with the responsibility of establishing paternity in all AFDC cases, established the paternity of 517,000 children nationally. Only 12.3% of all AFDC cases resulted in any child support collection in 1992. *Id.* at Hol. 606.

¹⁷⁹ Some state statutes specifically provide that the mother is the legal custodian of children born out of wedlock, at least until paternity is established. See ARIZ. REV. STAT. ANN. § 13-1302A (1995); ARK. CODE ANN. § 9-10-113(a) (Michie Supp. 1994); IOWA CODE ANN. § 600B.40 (West 1994); MINN. STAT. ANN. § 257.544(1) (West 1994).

that the state is involved through Aid to Families with Dependent Children,¹⁸⁰ the state's interest in their support carries on much as it did in the eighteenth and nineteenth centuries. The child born outside of the marriage today may have a father with greater rights, should he choose to exercise them, but the child remains largely the child of the mother.

2. Naming the Non-marital Child: The Child of the State and the Child of the Mother

At common law, the child born outside of marriage had no surname at birth, and could acquire one only by reputation.¹⁸¹ However, as the law began to evolve to allow children born outside of marriage to inherit from their mothers and as their mothers became charged with their custody and primary duty of support,¹⁸² nonmarital children began to acquire their mothers' surnames at birth.¹⁸³

The fact that the law sanctioned, and indeed, at times strictly enforced the custom of giving the mother's surname at birth to the child born outside of marriage is reflected in past and some present-day statutes governing the completion of birth certificates. Today, some state statutes reflect the presumption that the child born

¹⁸⁰ Aid to Families with Dependent Children, or AFDC, commonly referred to as "welfare," is a partnership between the federal government and the states to provide minimal monthly subsistence payments to families with children who meet established need-based eligibility standards. 42 U.S.C. § 601 (1994). For a narrative description of the interplay between AFDC, state-ordered paternity establishment, and child support under the current system, see Lisa Kelly, *If Anybody Asks You Who I Am: An Outsider's View of the Duty to Establish Paternity*, 6 YALE J.L. & FEMINISM 297-312 (1994).

¹⁸¹ See BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, *supra* note 64, at 152.

¹⁸² See *Commonwealth v. MacKenzie*, 334 N.E.2d 613 (Mass. 1975); *Commonwealth v. Hall*, 78 N.E.2d 644 (Mass. 1948).

¹⁸³ See *Donald J. v. Evna M.W.*, 147 Cal. Rptr. 15, 20 (Ct. App. 1978) (noting that the common law of the state is that the father of a child born in wedlock has the primary right or protectible interest in having that child bear his surname, while the mother of a child born out of wedlock has a primary right or protectible interest in having that child bear her surname); *Pintor v. Martinez*, 202 S.W.2d 333, 335 (Tex. Civ. App. 1947) (noting that "the better reasoning [is] that the illegitimate child takes the surname of the mother"); *Buckley v. State*, 98 So. 362, 363 (Ala. Ct. App. 1923) (noting that the custom is to give the child born out of wedlock the mother's surname). Some states maintained rigid birth recording systems under which legitimate children were only allowed to take their father's surnames and illegitimate children were only permitted to be registered under their mother's surnames. When the parents of illegitimate children married, the child then was registered under the father's surname to reflect the child's legitimated status. See *Secretary of Commonwealth v. City Clerk*, 366 N.E.2d 717, 720 (Mass. 1977) (relating system of recording births successfully challenged by parents of both legitimate and illegitimate children).

outside of marriage will be named if not *after* the mother,¹⁸⁴ at least *by* her. Some states explicitly give the mother the right to name the child.¹⁸⁵ Others explicitly accord her the exclusive right to amend the given name of the child on the birth certificate.¹⁸⁶ Still others assume that the child born out of wedlock bears the surname of the mother which would be changed to the father's should the parents marry¹⁸⁷ or, if the mother consents, after the adjudication of paternity.¹⁸⁸

In at least one state, the mother of the nonmarital child does not face the obstacles that the mother of children born within a marriage must encounter when attempting to change the name of the child to that of the child's stepfather. In New Jersey, instead of the judicial process that would surround a similar change for a child of a marriage, the mother can easily change that child's name to the name of an unrelated male whom she later marries simply by joining in her husband's

¹⁸⁴ Louisiana statutes require that the illegitimate child *shall* take the mother's maiden name for a surname if the natural father is unknown. If the father is known and the mother so desires, the child shall be named with the father's surname. If both the father and mother agree, the child may bear a combination of the mother's and father's surnames. *See* LA. REV. STAT. ANN. § 40:34(B)(1)(a)(iv) (West 1995).

¹⁸⁵ *See* HAW. REV. STAT. § 574-3 (1994).

¹⁸⁶ *See* ALA. CODE § 22-9A-19(c)(1)-(2) (Supp. 1996) (allowing mother of child born out of wedlock who was not provided a given name at birth the right to add the given name to the birth certificate up until the child reaches the age of five; and allowing the mother of a child born out of wedlock to change the given name of the child and amend the birth certificate until the child reaches his first birthday); NEB. REV. STAT. § 71-640 to -641 (1994) (establishing provisions identical to Alabama's statute); OHIO REV. CODE ANN. § 3705.22 (Anderson 1995) (necessitating only the signature of the mother of the child born out of wedlock in order to amend the child's given name).

¹⁸⁷ *See* GA. CODE ANN. § 19-7-20(c) (Harrison 1991) (requiring that when the mother and reputed father of a child born out of wedlock marry, the child shall be rendered legitimate and *shall immediately* take the surname of his father); IND. CODE ANN. 16-37-2-16(a) (Burns 1993) (allowing the child's surname to be changed to that of his father's on the birth certificate after the marriage of his parents, if either parent requests the change within six months of marriage); N.J. STAT. ANN. § 26:8-40(a) (West 1996) (requiring the state registrar to amend the birth certificate of a child born out of wedlock upon the marriage of his parents on the request of both parents).

¹⁸⁸ *See* COLO. REV. STAT. ANN. § 25-2-115(1) (West 1989) (allowing child's surname to be amended on birth certificate at the time that the child's paternity is established, if consent of both parents accompanies request); CONN. GEN. STAT. ANN. § 19a-42(c) (West Supp. 1996) (allowing child name change from the mother's maiden name to father's surname if request accompanied by the written consent of both parties); IDAHO CODE § 39-250(b) (1993) (allowing amendment of birth certificate to show child's name as father's upon request of both parents); N.Y. PUB. HEALTH LAW § 4135-b(4), 4138(1)(e) (McKinney 1995 & Supp. 1996) (allowing the issuance of a new birth certificate with changed surname to that of the father after the adjudication of paternity if the mother and father both consent).

request to the local registrar of vital statistics to do so, provided that the natural father's paternity has not been established. If the father's paternity has been established, the request can still be processed through the local registrar but it must be evident that the natural father does not object.¹⁸⁹

In the very recent past, the laws governing how children should be named on birth certificates were often very rigid and prescriptive. Many states clearly required that children born outside of marriage must be given the surnames of their mothers while children born within marriage were to receive the names of their fathers.¹⁹⁰ Often, deviations were not tolerated even when both mother and putative father were in agreement as to the surname that should be given.¹⁹¹ Some statutes or practices took the position that once paternity was established, the child's name on the birth certificate had to be changed from that of the mother's to that of the established father.¹⁹²

¹⁸⁹ See N.J. STAT. ANN. § 26:8-40.11 (West 1996) (allowing the procedure as described so long as there is no presumed natural father or so long as the natural father does not oppose the change); see also *Beyah v. Shelton*, 344 S.E.2d 909 (Va. Ct. App. 1986) (disallowing mother's petition to change name of child born out of wedlock from the natural father's name to the stepfather's name where natural father objected and had been active in the child's life); *In re Dunston*, 197 S.E.2d 560 (N.C. Ct. App. 1973) (allowing the mother of an illegitimate child, whose father was unknown, to change the child's name to that of the stepfather, without the consent of the stepfather).

¹⁹⁰ See *Brill v. Hedges*, 783 F. Supp. 340 (S.D. Ohio 1991) (challenging Ohio statute that required unmarried mother's to register their children in their surname); *Sydney v. Pingree*, 564 F. Supp. 412, 413 (S.D. Fla. 1983) (challenging statute that required child born in wedlock must be registered in father's surname); *O'Brien v. Tilson*, 523 F. Supp. 494 (E.D.N.C. 1981) (challenging North Carolina statute which required that children of the marriage be registered on their birth certificates under their father's surnames); *Jech v. Burch*, 466 F. Supp. 714, 715, 717 (D. Haw. 1979) (challenging Hawaii statute that required that children born in wedlock shall be registered in their father's name and that all children born out of wedlock shall bear their mother's name); *Doe v. Hancock County Bd. of Health*, 436 N.E.2d 791, 792 (Ind. 1982) (challenging Indiana statute that required that children born out of wedlock be registered in their mother's surname only); *Rice v. Department of Health & Rehabilitative Servs.*, 386 So. 2d 844 (Fla. Dist. Ct. App. 1980) (challenging requirement that children born of a marriage must bear the father's surname on the birth certificate); *Secretary of Commonwealth v. City Clerk*, 366 N.E.2d 717 (Mass. 1977) (bringing action to resolve the controversy that arose when city clerks refused to register children born within marriage in surnames other than their fathers and children born outside of marriage in surnames other than those held by their mothers).

¹⁹¹ See *Henne v. Wright*, 904 F.2d 1208, 1209 (8th Cir. 1990), *cert. denied*, 498 U.S. 1032 (1991); *O'Brien*, 523 F. Supp. at 496; *Jech*, 466 F. Supp. at 715; *City Clerk*, 366 N.E.2d at 720-21.

¹⁹² *Accord State ex rel. Spence-Chapin Servs. to Families & Children v. Tedeno*, 421 N.Y.S.2d 297 (Sup. Ct. 1979) (explaining that the order of filiation to which the mother had consented resulted in a change of the child's name from the mother's to the father's, even though the mother objected); see *Jones v. McDowell*, 281 S.E.2d 192 (N.C. Ct. App. 1981) (seeking to enjoin the Secretary of Human

These statutes reveal a number of underlying state policies. Certainly those statutes that required strict adherence to paternal or maternal names depending upon the marital status of the child's mother at the time of his or her birth reflected the deep distinction that had existed between the "two sorts" of children delineated since the time of Blackstone. The states that stood in defense of these policies usually attempted to justify them based upon hundreds of years of custom and the need to be able to trace familial chains through public records.¹⁹³ Some claimed an additional interest in prohibiting mothers of children born outside of marriage from insinuating an unproven declaration of paternity by giving the child his or her putative father's surname without paternity actually having been established.¹⁹⁴ These state interests can be seen as extensions of the long-standing goal of "bastardy" law to protect the status of "legitimate" families as against the claims of "illegitimate" outsiders.

Those statutes that allowed or required the child's name to be changed after paternity was established reflected other state policies that evolved in the early law of "bastardy." First, and foremost, the requirement that the child bear the father's surname demonstrated the state's desire to firmly cement the father to his child for purposes of support.¹⁹⁵ As the absent father became the explanation for the economic and social ills that beset the female-headed household, the courts also gave voice to a hope that the father's name would be a talisman in the father's absence; its mere utterance fostering a relational bond to nurture the much-needed father-child relationship.¹⁹⁶

Most of the policies favoring changing a child's name on his or her birth certificate automatically upon the finding of paternity supported the old concern that the public costs of illegitimacy should be reduced by linking natural fathers with their children. The bureaucratic nature of the name change accomplished by the state's executive branch also reinforced the historical fact that the mother was not in total control of the child born outside of marriage. The state continued to make

Resources from changing child's surname to father's upon establishment of paternity).

¹⁹³ See *Brill*, 783 F. Supp. at 339; *Jech*, 466 F. Supp. at 720; *Doe*, 436 N.E.2d at 794; *Rice*, 386 So. 2d at 850; *City Clerk*, 366 N.E.2d at 721, 724, 729.

¹⁹⁴ See *Brill*, 783 F. Supp. at 342; *Doe*, 436 N.E.2d at 794 (dissenting).

¹⁹⁵ In *Jones*, the state claimed that the requirement that the child's name be changed upon a finding of paternity facilitated administrative convenience in that the child whose paternity had been established ought to be treated as the child of a marriage. *Jones*, 281 S.E.2d at 196.

¹⁹⁶ For an anthropological view of the dangers posed by "the growing rate of illegitimacy in America," which the author contends "threatens to bring down the nation as a whole," see David W. Murray, *Poor Suffering Bastards: An Anthropologist Looks at Illegitimacy*, 68 POL. REV., Spring 1994, at 9.

decisions not only about what name the child should be given, but could, without the mother's consent, change the name of a child in her custody as a result of a paternity establishment. The state's intrusiveness in this regard was heightened by the fact that if the mother and child were receiving public assistance, the state likely would be the party initiating the paternity proceeding in the first instance.¹⁹⁷ Therefore, it cannot be said that the child's name change was a cost that the mother had weighed and agreed to assume as one of the costs of paternity establishment.

In the early 1980's, mothers, sometimes joined by fathers, rebelled against the rigid naming and name changing requirements surrounding birth certificates. Their objections, usually on state or federal constitutional grounds, resulted in a spate of inconsistent holdings in state and federal courts. Many courts held that a fundamental parental right to name one's child should be protected by the constitution,¹⁹⁸ but the decisions reflected different degrees of tolerance for departures from traditional naming customs.¹⁹⁹ Other courts based their decisions on equal protection grounds. Statutes requiring a change in the child's surname upon the finding of paternity or that allowed the father to change the child's name without the consent of the mother violated the Equal Protection Clause.²⁰⁰

Beginning in the late seventies, federal child support enforcement requirements, upon which the continued flow of federal AFDC and Medicaid dollars were conditioned, resulted in a more concerted effort on the part of the states to establish paternity. Not only were the states required to establish paternity, but, even more critically, they were required to establish and enforce support obligations. The child support payments would go to reimburse state and federal governments for their costs expended on AFDC benefits.²⁰¹

The proliferation of child support establishment and enforcement actions prompted an increase in litigation over a variety of issues surrounding paternity, including name change proceedings in which the father asked that his child's surname be changed from the mother's to his. These requests might be made at various stages of the proceedings. Sometimes the father asked for the change as part

¹⁹⁷ See Kelly, *supra* note 180 at 297, 305-06.

¹⁹⁸ See Sydney v. Pingree, 564 F. Supp. 412, 413 (S.D. Fla. 1983); O'Brien v. Tilson, 523 F. Supp. 494, 496 (E.D.N.C. 1981); Secretary of Commonwealth v. City Clerk, 366 N.E.2d 717, 722-23 (Mass. 1977).

¹⁹⁹ See Henne v. Wright, 904 F.2d 1208, 1212 (8th Cir. 1990) (finding no fundamental right to give a child a surname at birth with which the child has no legally established parental connection), *cert. denied*, 498 U.S. 1032 (1991).

²⁰⁰ See Brill v. Hedges, 783 F. Supp. 340, 345 (S.D. Ohio 1991); Jones, 281 S.E.2d at 194-96.

²⁰¹ See Kelly, *supra* note 180, at 305-06 n.1.

of the initial paternity proceeding itself;²⁰² sometimes he asked later when support was being enforced,²⁰³ and sometimes he petitioned on his own without any state catalyst.²⁰⁴

Most of these cases involving fathers' requests for name changes arose after the Supreme Court's decisions bestowing upon unwed fathers some measure of constitutionally protected parental rights²⁰⁵ and after some state and federal courts had invalidated certain birth certificate naming practices on either equal protection or fundamental rights grounds.²⁰⁶ Consequently, many of these name change cases were decided by judges already conscious of the need to apply gender-neutral standards that recognized the parental rights of the unwed father. Not surprisingly, many courts were careful to declare that neither parent of an illegitimate child had

²⁰² See *Pizziconi v. Yarbrough*, 868 P.2d 1005, 1007 (Ariz. 1993); *Levine v. Best*, 595 So. 2d 278, 278 (Fla. Dist. Ct. App. 1992); *Cobb v. Cobb*, 844 S.W.2d 7, 8 (Mo. Ct. App. 1992); *D.K.W. v. J.L.B.*, 807 P.2d 1222, 1223 (Colo. Ct. App. 1991); *Gleason v. Michlitsch*, 728 P.2d 965 (Or. Ct. App. 1986); *Daves v. Nastos*, 711 P.2d 314, 315 (Wash. 1985); *Brooks v. Willie*, 458 N.Y.S.2d 860 (1983); *D.R.S. v. R.S.H.*, 412 N.E.2d 1257 (Ind. Ct. App. 1980); *Kirksey v. Abbott*, 591 S.W.2d 751, 752 (Mo. Ct. App. 1979).

²⁰³ *Bell v. Bell*, 500 N.Y.S.2d 387, 388 (App. Div. 1986) (involving child born while parties were separated and given mother's name and relating that mother sought increase in child support and father cross-petitioned to terminate child support until the child's surname was changed to reflect his own); *Dana A. v. Harry M. N.*, 449 N.Y.S.2d 851 (Fam. Ct. 1982) (relating that in an effort to enforce support by the mother, the father files a motion to change child's name to his and contending "that he should not be made to support a child that does not bear his name.").

²⁰⁴ See *Jones v. Roe*, 604 N.E.2d 45, 46 (Mass. App. Ct. 1992) (relating that father first filed petition for paternity and subsequently filed to change child's name); *Dattilo v. Groth*, 584 N.E.2d 196 (Ill. App. Ct. 1991) (relating that father filed petition to change name after the child asked him why he didn't have his father's name as other kids at school did); *In re Stollings*, 583 N.E.2d 367, 368 (Ohio Ct. App. 1989) (involving father who married mother after the child was born and following a subsequent divorce from the mother, father filed a petition to change the child's name to his); *In re Shawn Scott C.*, 520 N.Y.S.2d 821 (1987) (relating that father filed petition to change name of his child born out of wedlock).

²⁰⁵ See *Stanley v. Illinois*, 405 U.S. 645 (1972).

²⁰⁶ For cases decided upon parental fundamental rights grounds, see *Sydney v. Pingree*, 564 F. Supp. 412, 413 (S.D. Fla. 1983); *O'Brien v. Tilson*, 523 F. Supp. 494, 496 (E.D.N.C. 1981); *Jech v. Burch*, 466 F. Supp. 714, 719 (D. Haw. 1979); *Secretary of Commonwealth v. City Clerk*, 366 N.E.2d 717, 722-23 (Mass. 1977). For cases decided on equal protection grounds, see *Brill v. Hedges*, 783 F. Supp. 340, 345 (S.D. Ohio 1991); *Jones*, 281 S.E.2d at 194-96.

a superior right to name the child.²⁰⁷ Unsure of how to resolve such a conflict in a gender-neutral way, many courts fell happily into invoking the familiar “best interests of the child” standard.²⁰⁸

Some courts were better than others at keeping gendered concerns out of their consideration. However, many allowed gendered concerns to dictate the best interests of the child. In some of the cases in which the father’s request was granted, the court took the Supreme Court’s recognition of unwed father’s rights to mean that the unwed father should have the same rights and privileges as the married father. The best interest of the child who had been legitimized through paternity proceedings was considered very much like the child of the marriage; the father’s protectible interest in having his child bear his name was also found to serve the best interest of the child.²⁰⁹ Indeed, the father’s name was considered even more important in these cases because through it the child could be lifted from the category of illegitimacy and washed clean of the stigma that was presumed to reside in the mother’s name.²¹⁰

Some fathers boldly enunciated a kind of *quid pro quo* claim under which they argued that the father who pays support is entitled to enjoy the same privilege

²⁰⁷ *Accord* Pizziconi v. Yarbrough, 868 P.2d 1005, 1008 (Ariz. 1993) (holding that father does not have presumptive right to give child paternal surname and that such presumptions may run afoul of the equal protection clause); *see* Jones, 604 N.E.2d at 47; Cobb v. Cobb, 844 S.W.2d 7, 9 (Mo. Ct. App. 1992); Daves v. Nastos, 711 P.2d 314, 318 (Wash. 1985); Kirksey v. Abbott, 591 S.W.2d 751, 752 (Mo. Ct. App. 1979).

²⁰⁸ *See* Cobb, 844 S.W.2d at 9; Daves, 711 P.2d at 318.

²⁰⁹ *Accord* Brooks v. Willie, 458 N.Y.S.2d 860, 863 (1983) (noting that the quantity and the quality of the father’s contacts with the child were quite similar to those that are normally associated with “legitimate” fathers); *see* D.R.S. v. R.S.H., 412 N.E.2d 1257, 1263 (Ind. Ct. App. 1980) (noting that “significant interest is given to the father’s interest in having his child bear the paternal surname in accordance with tradition,” while at the same time stating that the child’s best interest is of “paramount consideration”).

²¹⁰ *Accord* Doe v. Dunning, 549 P.2d 1, 2 (Wash. 1976) (relating where a mother of a child born outside of marriage petitioned the court to obtain a certified copy of her child’s birth certificate instead of merely the birth registration card that was the policy of the clerk to give out for illegitimate children and stating that the reason given for this policy was that the birth certificate would reveal the maiden name of the mother and the identity between the child’s and mother’s name and thus cast the stigma of illegitimacy upon the child, and therefore even the child’s mother was not permitted to have a copy of such certificate); *see* Cobb, 844 S.W.2d at 9 (granting father’s petition in paternity proceeding where child was “still very young” and the appellate court believed that his best interest would be served by shielding him from being “set apart from the other children in his community if he did not bear his father’s surname”); Brooks, 458 N.Y.S.2d at 863 (granting father’s petition for change of name in paternity proceeding where it was found that the best interest of the child would be served to remove the stigma of illegitimacy that would result from the retention of the mother’s surname).

of having a child bear his name as the father who supports his legitimate children.²¹¹ Under this theory, the rights of unwed fathers again were equalized with the rights of married fathers, albeit at the expense of the rights of unwed mothers. This was less a best interest of the child theory than a best interest of the father theory, and just a few appellate courts accepted it although it seemed quite popular with many trial courts²¹² from which mothers took their appeals.

However, some appellate courts did accept the theory that the name change served the best interests of the child because of the administrative convenience which would result when the child would claim benefits flowing from his or her paternity such as claims against the father's estate, pension benefits, Social Security, Veterans' Benefits, and the like.²¹³ This theory falls prey to gender bias because it is assumed that the child benefits from his or her father's name apparently more than from his or her mother's.²¹⁴

More often, the father's petition to change the child's name ultimately was denied. Those courts which decided in favor of the custodial mother²¹⁵ arrived at their conclusions using one of three approaches. A few enunciated a generalized best interest test which resulted in the mother's name prevailing over the father's. These cases reflect a desire to maintain the status quo which, in effect, favors the

²¹¹ *Bell v. Bell*, 500 N.Y.S.2d 387, 387 (App. Div. 1986) (relating father's argument that the family court had jurisdiction to change the child's surname as incident to its jurisdiction to decide child support issues); *Dana A. v. Harry M. N.*, 449 N.Y.S.2d 851, 857 (Fam. Ct. 1982) (relating father's contention that he should not be made to support a child that does not bear his surname, even when he was the undisputed father of such child).

²¹² *See Gleason v. Michlitsch*, 728 P.2d 965, 966 (Or. Ct. App. 1986) (court below held that it was in the best interest of the child to allow the father the same parental rights as though there had been a marriage here, and thereby changed the child's name from that of its mother to its father); *J.L.A. v. T.B.S.*, 430 N.E.2d 433, 434 (Ind. Ct. App. 1982) (reporting that the court below had held that "the man who is going to support the children should have the children in his name unless there is some strong reason, like he is a murderer or a criminal of some kind that would keep the children from revering his name").

²¹³ *See D.R.S.*, 412 N.E.2d at 1263.

²¹⁴ Mothers, of course, might have an estate, pension, Social Security survivor's benefits, veteran's benefits and a host of other possible benefits that could accrue to the child. The fact that these are ignored by the courts that adopt this policy reflects the extent to which they have been blinded either by the gendered assumption that it is only the father's responsibility to support the child or that the mother does not operate in any sphere outside of the domestic one.

²¹⁵ Further evidence of the fact that the growth of this name change litigation was fueled by child support enforcement efforts is that the overwhelming number of these cases involve the father proceeding against the objections of the mother who has custody of the child.

mother's surname.²¹⁶

Other courts adopt the view that favors the child bearing the name of his or her custodian who usually happens to be the mother.²¹⁷ These cases frequently take note of the existence of other half-siblings in the mother's custody who bear the mother's surname as well. In these cases, the courts often hold that the best interests of the child are served by blending him or her into the existing family unit.²¹⁸ While these cases do have the effect of favoring the mother by virtue of the fact that she is most often the custodian, they demonstrate the potential, nevertheless, to be more child-centered because the rationale that often underlies them is that the child's interest in preserving a sense of family identity is best served by allowing the child to retain the name that his or her daily family unit bears.

Still other courts set forth a number of gender-neutral, child-centered factors that are applied to the facts of each case in order to discern the child's best interests.²¹⁹ Some of these decisions also include custodial deference or family unit concerns among several factors to be considered.²²⁰ However, the approach is more flexible than simply relying upon the custodian to decide the issue because a factor analysis allows the court to view a panoply of concerns that are not usually

²¹⁶ See *Levine v. Best*, 595 So. 2d 278, 279 (Fla. Dist. Ct. App. 1992) (holding that the child's best interest was served by retaining the mother's surname by which everyone, including his doctors, knew him).

²¹⁷ See *Gleason v. Michlitsch*, 728 P.2d 965, 966 (Or. Ct. App. 1986) (endorsing decisions from other jurisdictions which hold that the best interest of the child is served by considering the identity of the custodial parent when determining the surname which the child should bear).

²¹⁸ Accord *Pizziconi v. Yarbrough*, 868 P.2d 1005, 1008 (Ariz. 1993) (finding that the child's best interests would be served by continuing to use the name shared by her custodial mother and half-brother with whom she also resided).

²¹⁹ See *id.*, 868 P.2d at 1008 (listing five factors); *Jones v. Roe*, 604 N.E.2d 45, 47 (Mass. App. Ct. 1992) (listing four factors); *Dattilo v. Groth*, 584 N.E.2d 196, 197 (Ill. App. Ct. 1991) (listing seven factors to be considered under Illinois case law); *D.K.W. v. J.L.B.*, 807 P.2d 1222, 1223 (Colo. Ct. App. 1991) (gathering seven factors from various cases); *In re Stollings*, 583 N.E.2d 367 (Ohio Ct. App. 1989) (listing five factors to be considered); *Daves v. Nastos*, 711 P.2d 314, 318 (Wash. 1985) (listing five factors to be considered); *J.L.A. v. T.B.S.*, 430 N.E.2d 433, 434 n.3 (Ill. App. Ct. 1982) (listing six factors to be considered as evidence of the child's best interest).

²²⁰ Accord, *Jones v. Roe*, 604 N.E.2d 45, 48 (Mass. App. Ct. 1992) (finding that the child's best interest was served by retaining the custodial mother's surname which was also the surname of her half-sister who resided with her); *D.K.W.*, 807 P.2d at 1224 (finding that the child's best interest would be served by retaining the custodial mother's surname where the mother lived in Colorado near her extended family and the father lived in North Carolina); see *In re Stollings*, 583 N.E.2d at 370 (considering among the five factors, "the embarrassment, discomfort or inconvenience that may result when a child bears a surname different from the custodial parent's).

associated exclusively with one parent or the other. Therefore, these cases come closer to achieving the child-centered, gender-neutral ideal.

These three approaches, i.e. an unguided best interest test, custodial parent deference, and a best interest test with factors, form the basis for the gender-free approaches that will be examined in greater detail in Part IV below. The most gender-neutral approaches have developed in the context of name changes for nonmarital, as opposed to marital, children. The emergence of gender-neutrality in the nonmarital child context reflects a number of interesting societal norms. The rigid commitment to maintaining the father's name in the marital context is not matched by a similar commitment to the mother in the nonmarital context. Law and the dominant culture's commitment to preserving this female sphere of power over the nonmarital child has always been ambivalent at best. After all, the power of the mother arose almost by default, there being no father to vest with control. The strength of the law's resistance to intrusion upon maternal control over the child born outside the marriage never has reached the heights of protectionism accorded the father's right to authority over the child born of the marriage. Some support for the mother's authority whispers in statutes about birth certificates or in the rumors of the way that the law used to be, but it weakens in response to challenge. The state has always been involved to punish, then to enforce support, and finally to reconstruct the outlaw family that consists of the duo of single mother and child.

IV. GENDER-NEUTRAL, CHILD-CENTERED APPROACHES TO CHILD NAME CHANGE PROCEEDINGS

In recent years, courts have become more concerned with expunging obviously gendered standards from family law. At the same time, challenges to the conceptualization of children as legal nonpersons have been interposed to assert that children should have individual rights within the family.²²¹ Consequently, within the child name change context, many states have moved toward gender-neutral, child-centered approaches to decide when a child's name should be changed. The three standards that have developed which are at least facially gender-neutral and arguably child-centered are: 1) the best interest of the child standard; 2) the best interest of the child standard guided by factors; and 3) the custodial parent deference standard. I will discuss and evaluate each of these three standards in this part of the article.

²²¹ See Suellyn Scarnecchia, *Imagining Children's Rights*, 12 COOLEY L. REV. 1 (1995); Barbara B. Woodhouse, "Out of Children's Needs, Children's Rights": *The Child's Preference in Adjudicated Custody Decisions*, 8 B.Y.U.J. PUB. L. 321 (1994); Katherine H. Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DEPAUL L. REV. 983 (1993).

A. *The Best Interest of the Child*

The best-interest-of-the-child standard is not new to family law. It has been and remains the standard upon which custody disputes are decided in many states. Some contend that in fact the roots of the rule can be traced as far back as the eighteenth century and Lord Mansfield.²²² However, the doctrine took root in the mid-nineteenth century as the courts began to consider the mother as the more proper custodian. Thus, the best-interest-of-the-child doctrine operated as a kind of leverage against the law's traditional, explicit favoring of the father.²²³

The best-interest-of-the-child standard as an arbiter of custody disputes has been the subject of much criticism. Its vagueness carries with it many dangers, not the least of which is that gendered concerns will creep into the decision-making process. It has been criticized as being unpredictable and, therefore, costly as both parties laying claim to the child employ experts to determine the child's best interests. The best-interest standard also may result in powerplays in which claims to custody are made insincerely in order to gain leverage in the overall divorce or support negotiation.²²⁴ Consequently, in custody matters, many states, including West Virginia,²²⁵ have left the best-interest-of-the-child standard behind in favor of more specific standards with more predictable and just results.

In the area of child name change, the undifferentiated best-interest standard carries with it the same dangers. Nevertheless, many states, often by statute, adopt a general best-interest standard to decide child name change petitions.²²⁶ It has been

²²² Grossberg contends that the first case using the best interest of the child standard was decided by Lord Mansfield in 1763 concerning a dispute over the custody of a seduced eighteen year old apprentice. In deciding the writ of habeas corpus, Mansfield instructed the lower courts that "they are not bound to deliver them [infants or minors] over to anybody nor give them any privilege. This must be left to their discretion according to the circumstances that shall appear before them." GROSSBERG, *supra* note 65, at 209-10.

²²³ *Id.* at 210.

²²⁴ See Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168 (1984); Lenore J. Weitzman & Ruth B. Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 473 (1979).

²²⁵ See *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981).

²²⁶ See ALA. CODE § 26-11-3 (1992); ARIZ. REV. STAT. ANN. § 12-601 (Supp. 1994); CONN. GEN. STAT. § 52-11 (1991); HAW. REV. STAT. § 574-5 (1993); NEV. REV. STAT. ANN. § 41.270 (Michie Supp. 1996); N.Y. CIV. RIGHTS LAW § 62 (McKinney 1993); S.C. CODE ANN. § 15-49-10 (Law. Co-op. Supp. 1995); TEX. FAM. CODE ANN. §§ 45.001-.005 (West 1996); VA. CODE ANN. § 8.01-217 (Michie 1994).

demonstrated in the cases discussed in Part III above how the best-interest standard favors either the father or the mother in child name change proceedings depending upon whether the child was born within or outside the marriage. As is the case in many child custody proceedings, the judge's perceptions of the roles of fathers and mothers wind up dictating the result. In the case of child name change, the norms of custom and practice, which are in themselves embedded with gendered expectations dictate which name will be in the child's best interest.

In sum, while the best-interest-of-the-child standard is facially gender-neutral and, by its very terms, child-centered, its application to family matters, such as name change, where centuries of gendered expectations have governed custom and practice can produce anything but gender-neutral, child-centered results. Therefore, other standards must be considered if the goal is to decide child name change controversies in a gender-neutral, child-centered manner.

B. The Best Interest of the Child with Factors

Given the limitations inherent in the vague best-interest standard, many states have developed, either by case law or statute, a best-interest standard that is guided by factors determined to be relevant to child name change proceedings. Obviously, such a standard is only as good as the factors which are chosen to guide the court's discretion. I will list and evaluate the factors most commonly used. In evaluating the factors, I will look at how well they describe the child's interest in the name change proceeding.

1. The Commonly Used Factors

The most frequently cited source from which states have drawn some or all of their standards is the Uniform Parentage Act [hereinafter, "UPA"], proposed by the Uniform Law Commission. The UPA was drafted with the stated purpose of eradicating the legal disabilities of children born outside of marriage. Therefore, the UPA factors should apply with equal force to name changes for children born within and outside of marriage. The UPA sets forth the following factors to be considered in a name change proceeding: 1) the length of time the child has used his or her current surname; 2) the potential impact of the requested name change on the child's relationship with each parent; 3) the child's preference; 4) any misconduct by the parent that would justify a name change; 5) the motivation of the parties in seeking a name change; 6) the identification of the child with a particular family unit; 7) any embarrassment, discomfort, or inconvenience that may result if the child's surname differs from that of the custodial parent; and 8) whether a different name will cause

insecurity or lack of identity.²²⁷

Few states have adopted all of the Uniform Parentage Act factors.²²⁸ Some have developed their own list of factors that place a slightly different spin on or overlap with the UPA list. For instance, Indiana's statute gives special consideration to the child's preference if the child is over fourteen and also looks to the child's gender in determining whether to grant the name change.²²⁹ The Indiana statute is also more directly solicitous of the wishes, welfare and concerns of parents.²³⁰ In Illinois, the statute directs courts not only to consider the child's wishes but also the reasons for those wishes as expressed in chambers. Illinois' statute also specifically contemplates the effect of a name change upon the child's relationship to step-family members.²³¹

Not all factors are statutorily derived. Some courts have adopted a best interest standard and have proceeded to adjudicate the factors that they considered relevant to that interest. Again, many of these interest factors overlap with those stated above. Some of the factors not specifically included in the statutory lists are: 1) the name by which the child customarily has been called;²³² 2) the degree of community respect associated with the present and proposed surname;²³³ and 3) the existence of property owned by the child by a particular surname with private or public entities.²³⁴

²²⁷ See DONALD T. KRAMER, 1 THE LEGAL RIGHTS OF CHILDREN 384-85 (2d ed. 1994); see also D.K.W. v. J.L.B., 807 P.2d 1222 (Colo. Ct. App. 1990).

²²⁸ See CAL. CIV. PROC. CODE §§ 1276-1278 (West Supp. 1995).

²²⁹ These factors are derived from the state code which includes many of the same factors previously listed. IND. CODE ANN. § 34-4-6-4 (Burns 1986).

²³⁰ *Id.* The Indiana statute directs the court to look toward the wishes of the child's parent or parents, and the mental and physical health if all individuals involved.

²³¹ The four foregoing factors are taken from the Illinois statutes. ILL. ANN. STAT. ch. 735, para. 5/21-101 (Smith-Hurd Supp. 1996).

²³² See *In re Marriage of Presson*, 465 N.E.2d 85, 88 (Ill. 1984). The Illinois Supreme Court included this factor among many already previously named. This factor recognizes that children may operate in their social circles as adults do, using a name that may be different from the one reflected on their birth certificate, and the change of name petition is an effort to formalize the name that the child has been using; see also *J.L.A. v. T.B.S.*, 430 N.E.2d 433 (Ct. App. Ind. 1982).

²³³ See *Daves v. Nastos*, 711 P.2d 314, 318 (Wash. 1985). This factor is the flipside of the UPA factor which examines the degree of community opprobrium brought upon a child for the name that he or she carries or proposes to carry.

²³⁴ See *J.L.A.*, 430 N.E.2d at 433.

In sum, the factors fall into the following categories: 1) the child's wishes; 2) the child's identity; 3) the effect of the name on the child's relationship with others, including the community and various family units; 4) the effect on the child's property interests; 5) the effect of the name change on the parents; 6) parental misconduct; and 7) motivations underlying the name change.

2. Evaluating the Factors: What Is in a Name?

Before one can evaluate the above factors, it is first necessary to look at the child's interest in his or her name. This requires an inquiry into what a name means to a child before one can determine how well these rules of law have succeeded in considering the effect of naming and name changing upon children. Not much has been written about the role of naming and name changing in child development literature generally,²³⁵ but much has been offered by philosophers, psychoanalysts, literary critics, educators, religious texts and those who have devoted time to the study of names. I will look briefly at the insights offered by these scholars and sources in an effort to discern what a child's name might mean to him or her.

Those who have devoted their scholarly lives to the study of "proper names" and naming systems, known as onomastics, have had much opportunity, of course, to consider why such names and naming systems are worthy of such intense study. Names are distinguished from nouns on a number of levels. A name exists only in the singular form and has no determiner such as *this*, *a*, *some*, or *each*. A proper name is always definite and describes a "species of object that contains only one specimen."²³⁶ A name, therefore, primarily exists to enable reference — the person named knows him or herself by his name as others know him or her. The name is a threshold requirement for one's private and public existence.²³⁷

Philosophers have looked at names as a unique form of linguistics linked to human identity formation. The message and charge of the post-modernists has been to deconstruct the world by looking to the ways in which human beings construct their own social and cultural realities. This charge takes many into the realm of linguistics and the recognition that through words, we name our reality and learn to

²³⁵ Experimental psychologists have done some work on the effect of first name choice upon the temperament of children as well as upon how the child is viewed by others. See Albert Mehrabian, *Interrelationships Among Name Desirability, Name Uniqueness, Emotion Characteristics Connoted by Names, and Temperament*, 22 J. APPLIED PSYCHOL. 1797-808 (1992); Charles E. Joubert, *Individuals' Ratings of Their Given Names on Several Dimensions*, 131 J. OF SOC. PSYCHOL. 301-02 (1991). Very little has been said among experimental psychologists or child development psychologists about the role of a last name in childhood identity formation.

²³⁶ See FRANK NUESSEL, *THE STUDY OF NAMES: A GUIDE TO THE PRINCIPLES AND TOPICS* 2 (1992).

²³⁷ *Accord id.* at 14-15.

move through it. By looking at reality through words, the paradox of reality as both subjective and externally imposed can be explored.²³⁸ Jacques Lacan, a structural-linguistic psychoanalyst, contended that the name is the center around which verbal self-constitution evolves. On the one hand, it is the name that enables the child to identify himself or herself as someone different from others. On the other hand, the fact that a child's name is given to him or her, as opposed to being chosen by him or her, for Lacan, demonstrated the extent to which a child's ego is socially formed. The child is placed through his or her name within the social web of family and community. A child's identity which attaches through his or her name, then, attributes to him or her important social information — kinship, ethnicity, religion and race.²³⁹

Others have looked more closely at the differences in the naming reality for men and women, given the traditions surrounding naming in our western culture. Literary critic, Marie MacLean has argued that the usual commentary about the importance of having a name and of the identity that builds and hardens around it proceeds mainly from a traditional male perspective.²⁴⁰ Given the fact that girls have traditionally obtained their names from their fathers and that many have been conditioned to think about changing their names early in their lives,²⁴¹ MacLean asserts that:

²³⁸ See STEVEN BEST & DOUGLAS KELLNER, *POSTMODERN THEORY: CRITICAL INTERROGATIONS* 18 (1991).

²³⁹ See JACQUES LACAN, *ECRITS: A SELECTION* (1977). For a discussion of Lacanian psychoanalysis, see BEST & KELLNER, *supra* note 238, at 18, 24, 31, 87; PATRICK C. HOGAN, *Bessie Head's 'A Question of Power': A Lacanian Psychosis*, *MOSAIC*, June 1994, at 95.

²⁴⁰ MacLean quotes Jean Starobinski, a male literary critic, as distilling the male position on naming. "Our name awaits us in advance. It was there, before we knew it, like our body. The common illusion consists in thinking that our destiny and our truth are inscribed in it. Thus we confer on the name the dignity of an essence." MARIE MACLEAN, *The Performance of Illegitimacy: Signing the Matronym*, *NEW LITERARY HIST.*, Winter 1994, at 95 (quoting JEAN STAROBINSKI, *STENDAHL PSEUDONYME* 193 (1961)).

²⁴¹ I think of summer days spent with my childhood friend (whose last name has since changed) as we played house, with changed names. "Who are you going to be?" was often the first question we asked one another. The *who* always meant another name. We, of course, would dream up fantastic first names possessed only by princesses, saints, or our own imaginations and last names that belonged to our imagined husbands. I don't think that our brothers began their play with the same question unless they were transforming themselves into Spiderman or Batman, who had no last names. Even their momentary, "And The Bird goes to the boards" as they imagined the roar of the crowd surrounding the playground basketball hoop did not seem to have the same meaning as the extended play of the newly reconstituted girls who went about the business of feeding baby, burping baby and going out on romantic dates with the fantasized Prince Charming. In any event, our brothers' heroic new identities were not contingent upon their relationships with others in quite the same way that ours were.

For women in a patriarchal society, a change of name used to be seen as natural if not inevitable. Whether they became brides of Christ or merely brides, ninety percent of women have traditionally experienced at least two public names in their lifetime . . . Women therefore had from the first a certain protean quality. If one change is possible, then all other changes become thinkable.

A very ambivalent attitude toward marriage resulted, one which still causes major problems to feminists. Was each new name to be seen as the death of an old identity or the birth of a new one? . . . Some women adopted the prevalent male attitude whereby an identity was seen as fixed and centered in the patronym, and the loss of a name was seen as a form of castration, a loss of selfhood. The new name appeared merely as a symbol of woman's powerlessness, as she was transferred as property from one male to another. On the other hand, for many women the new name represented liberty of choice, and female freedom to choose was contrasted with male limitation to the patronym.²⁴²

Under MacLean's view, the transitory nature of female identity found in the name functioned as a kind of mask. The names women are given at birth relate not really to any female identity. They relate to a male mask that women know they can wear and, if they want, change. Sometimes the mask is oppressive as it reflects meanings from which the wearer feels alienated. Sometimes the mask is freeing as the wearer is at liberty to choose the next mask and is also at liberty to realize the name is not ultimately descriptive of her. She is the person who lives beneath it. MacLean argues also that changing or claiming one's matronym, one's mother's maiden name, often serves — particularly for the male artists whom she discusses, such as Picasso — as a declaration of nonconformity, a renunciation and a voluntary marginalization of oneself to the "illegitimate" world of the mother, even though undoubtedly the mother's maiden name derives from her father. Viewed from this particular feminist perspective, then, names are transitory and their transitory nature can be freeing. We are no longer fixed in the inertia of socially dictated identity.

Naming is so essential that it is bound up even with the western understanding of god. In the Judeo-Christian tradition, naming has a mystical power. Names are bound with blessings and missions or curses and ill-fated destiny; naming is knowing and often name changing is accomplished by the divine to signify the transformation of the individual who finds a new identity or hope. The angel calls Hagar by name, thereby bringing her out of the margins of the Old

²⁴² MACLEAN, *supra* note 240, at 99-100.

Testament story, to tell her that she will bear a son to A'bram and his name shall be Ishmael, "And he will be a wild man, his hand will be against every man, and every man's hand against him."²⁴³ When A'bram is ninety years old, God enters into a covenant to make him the father of many nations and to signify that covenant God changes A'bram's name to Abraham. The name of Sa'rai, Abraham's wife, is changed also and God tells them to expect a son whom God names Isaac.²⁴⁴ In this tradition, the divine knows and calls us each by name, but there are limits placed upon our ability to likewise know God. Moses sought to know the name of the voice that speaks to him from the burning bush, but the profound answer is given, "I am who am," or Yahweh, an appellation both all-encompassing and beyond the scope of a name, beyond perfect knowing.²⁴⁵ Later, Moses would be given the ten commandments which include the prohibition against taking the name of the Lord in vain.²⁴⁶ The name of God is to be feared, not even spoken.

In the New Testament, the importance of names and name changing continues. An angel tells Mary to name her son Jesus, and Mary's sister, Elizabeth, names her son John in defiance of the elders who believe the child should be named for his father.²⁴⁷ Jesus changes Simon's name to Peter, meaning rock, and declares that upon this rock he will build his church.²⁴⁸ Saul becomes Paul when he is transformed from persecutor to Christian.²⁴⁹ And so the mystery of naming and name changing proceeds from the Old Testament to the African-American spiritual that intones, "I told Jesus it would be all right, if he changed my name."²⁵⁰ This tradition reveals something about the ethos of names as relational ties. Viewed from the theological or the mythical, depending upon one's point of view, the human race is linked to one another by the genealogy of Adam to Jesus, the Son of David, and linked to God who shall know them by changing their names, "who shall give them

²⁴³ Genesis 16:9-15.

²⁴⁴ Genesis 17:1-19.

²⁴⁵ Exodus 3:14-15.

²⁴⁶ Exodus 20:7.

²⁴⁷ Luke 1:31, 59-63.

²⁴⁸ Matthew 16:18.

²⁴⁹ Acts 9:1-18, 13:9.

²⁵⁰ NARRATIVE OF SOJOURNER TRUTH, *supra* note 39, at the front page.

an everlasting name, that shall not be cut off."²⁵¹

The onomastic, post-modern and Judeo-Christian view that names are a basic part of human identity and connection is reflected in the work of the United Nations. Among those nations participating in the United Nations, the importance of a name as a critical prerequisite to the acknowledgement of a child's simultaneous private and public existence has been recognized in the Convention on Rights of the Child. First enshrined in the Declaration of the Rights of the Child in 1959, the United Nations has declared that the right of a child to a name is fundamental.²⁵²

Whether one adopts the male position which vests the name with stable importance or a more transient and relational female position that sees names as transitory masks, whether one accepts the Judeo-Christian view that naming is a powerful force imparting knowing and understanding, or the international law view that the right to a name is a basic human right, all of these perspectives can and should inform the meaning of a name for a child. Central to most of these perspectives, is that learning one's name is an important part of the identity formation process, whether that identity is in flux or permanent, public or private.

Sociological and educational research has confirmed that in the real lives of young children names and identity formation are knit together. For example, sociologists have learned that children with unusual last names tend to identify with the ethnicity of that name, even when they have dual ethnicities.²⁵³ Lacan's notion of a name as transmitting external social information to children at an early age is supported by this study in ethnic identity. In another example from educational research, it has been postulated that even for children who cannot hear their names, the learning of their names and the association of their names with themselves is critical to learning. This study of hearing impaired and deaf children concluded that when a child learns to associate his or her name with his or herself, self-esteem increases, an appreciation of language is enhanced and literacy skills begin to develop.²⁵⁴

What does it mean then to change one's name? Names, while imposed by others and while critical to identity formation, can, do and sometimes should change. They change in response to altered family composition, governmental edict, choice, and coercion. Whether the changes are helpful or harmful to children

²⁵¹ Isaiah 56:5.

²⁵² GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 117 (1995).

²⁵³ See ROGELIO SAENZ, ET AL., *Persistence and Change in Asian Identity Among Children of Intermarried Couples*, SOC. PERSP., Summ. 1995, at 175.

²⁵⁴ See CLAIRE J. ROTTENBERG & LYNDON W. SEARFOSS, *How Hard-of-Hearing and Deaf Children Learn Their Names*, 138 AM. ANNALS DEAF, Oct. 1993, at 358.

certainly varies from situation to situation. How well do the factors suggested by the law consider the child's perspective?

Perhaps the most critical change in the law accomplished by these factors is that for the first time in the long history of the naming of children, the child is actually consulted in the name change process. The inclusion of this seemingly obvious factor is of no small moment. Until the development of these standards, the child's voice had not been heard. The child's name has been treated more often as a label denoting a possessory interest held by the parent than as a threshold marker of the child's identity and existence. Those factors which look toward the child's wishes are laudable and should be retained.

Many of the factors also take into account the child's sense of identity residing in the original name as well as the assumed name. These factors, too, are consistent with the meaning of a name for a child. It is also consistent to say that the child's identity is shaped by family structure and relations to others — the original family, the reconfigured family, the community and the school. Children live and grow in communities of one sort or another. In small communities, names can carry with them long histories and embedded connotations, either for good or ill, that can have a tremendous effect upon the child's future.²⁵⁵

Whether children live in small communities or large, mostly all live in relationship with families that are either static in composition or changing and evolving. Much of the current debate around what constitutes a family swirls around the question of whether the law will recognize only those families constituted by two biological parents and child or whether the family is something that can be constructed and reconstructed outside of that traditional nuclear family.²⁵⁶ If Lacan is correct and names reflect the social place of the child within his or her world, then it should not be surprising that some children may desire to change their names as new attachments form and new adults or siblings come to take

²⁵⁵ Again, *To Kill A Mockingbird* comes to mind. In Maycomb, much was explained by the mention of the child's last name. When the new befuddled school teacher from out of town attempts to make sense of her pupils who have come to her, some dirty, some planning to stay only for the day before sitting the rest of the school year out, she remains utterly confused by the social structure that has come to be expected by all but her. When poor Miss Caroline wonders about the remark of a child who states after the first day that he "has done done" his time, "one of the members of the class explains for her, 'He's one of the Ewells, ma'am.'" LEE, *supra* note 4, at 31-32. For a further exploration of the meaning of names in Maycomb, see Teresa G. Phelps, *The Margins of Maycomb: A Rereading of To Kill A Mockingbird*, 45 ALA. L. REV. 511 (1994). Today, I have no doubt that many teachers in many small towns have learned the lesson that Miss Caroline eventually learned, as they watch and wait with set expectations for the talented children of one family and the blighted who bear less acceptable names. Perhaps, being relieved of such expectations would be a boon to many children who carry a name that has come to carry with it lowered expectations or a history of bad acts.

²⁵⁶ For a good summary of the law's treatment of the reconstituted nuclear family through step-parenting, see MARGARET M. MAHONEY, *supra* note 111.

places of meaning in their lives. In today's society, children's experiences are often like the relations described by MacLean — families are fluid and so is one's identity in relation to others. The family that gives a child his or her original surname may not be identical in composition or name to the family that cares for the child as he or she continues to grow. Perhaps the child may only seek to add a new name to represent the reconstructed self growing in the new family. Or perhaps the child wants to remain connected to the former family and has come to identify so strongly with his or her birth name that changing it would be undesirable. It is also possible that the child has become so alienated from his or her name and the person associated with it, that a change would serve the child's best interest. In such a case, a new name would serve much the same purpose as it did for the freedmen who chose "Freeman" or "Sojourner Truth" as they left the cruel world of slavery behind.²⁵⁷

It is impossible for the law to anticipate the many narratives that each name change petition brings with it, but by directing the courts to look to the child's wishes, the child's sense of identity in either the old or proposed name and the effect of those names upon the child's relationship with his or her community, the law is at least assured that the significance of the name and the name change remains focussed upon a child's eye view of the matter.

However, the child is not usually the legal actor who instigates a petition for a change of name. In fact, only a few states specifically allow children to bring their own petitions.²⁵⁸ Many states assume or explicitly require that the petition will be brought by the child's parent or guardian.²⁵⁹ Still others require that both parents'

²⁵⁷ The state of Washington is one of the few states that recognizes the possibility that a child name change may actually be necessary for protection of the custodial parent and/or child. Washington allows name change petitions to be sealed where the petitioner is a survivor of domestic violence and fears for his or her safety or the safety of his or her child or children. WASH. REV. CODE ANN. § 4.24.130 (West Supp. 1996).

²⁵⁸ See IOWA CODE ANN. § 674.6 (West 1987) (allowing a minor to petition for change of name and requiring the child's written consent if brought by an adult and if the child is over 14 years of age); MICH. COMP. LAWS ANN. § 711.1 (West 1995) (requiring the child over fourteen's written consent before a name change is granted and requiring court consultation with a child under fourteen); N.M. STAT. ANN. § 40-8-1 (Michie 1994) (allowing any resident over the age of fourteen to petition for a name change); VT. STAT. ANN. tit. 15, § 812 (1989) (requiring the consent of a child over fourteen to any name change petition); WIS. STAT. ANN. § 786.36 (West Supp. 1995) (allowing any resident, whether minor or adult, to petition for a name change and requiring that petitions for children under the age of 14 to be brought by parents or legal guardians).

²⁵⁹ See ALA. CODE § 26-11-3 (1992) (contemplating a father bringing a petition to change the child's name when seeking to have legitimacy declared or any time after declaration); MONT. CODE ANN. § 27-31-101 (1995) (requiring that if the petition is to change the name of a minor, it must be signed by a parent); OKLA. STAT. ANN. tit. 12, § 1631 (West 1993) (allowing a minor to file a petition for a

consent in writing before a child's name change will be granted.²⁶⁰ Given the fact that children are most often not the petitioners in their own name changes, factors that examine the motives of the parties bringing the name change are critical to safeguard against the guardian who seeks to change a child's name for punitive or other improper purposes.²⁶¹

Not all of the factors that courts and statutes have listed are clearly child-centered. For instance, Indiana's statute which gives specific attention to the wishes of the child's parents could be taken as an invitation to accord undue weight to the customary interests in naming held by fathers within the marriage context or mothers outside of it. The UPA standards that look to the impact of the name change on the child's relationship with his or her parents place the focus more closely upon the child's interest in the matter.

Similarly, while the child's age may be relevant, it is perhaps inviting stereotyping to allow consideration of the child's gender. Again, one suspects that traditional gendered norms are at work. The concept of handing down the family name through the male line may be the explanation for concern over the gender of the child in question. The practice of naming boys for their fathers in both the first and last name, thereby creating a "junior" may also underlie such a factor. It is possible that a son's identity is complicated by the appellation, "junior." The impact of the appellation might be either positive or negative depending upon many things, including the relationship of the father and son. In some ways the consideration of

change of name through a guardian or next friend); VA. CODE ANN. § 8.01-217 (Michie 1994) (requiring that if the petition is to change the name of the minor, then it must be signed by the parent or guardian); W. VA. CODE § 48-5-1 (1995) (allowing a child to petition for a change of name through her parent or guardian).

²⁶⁰ See GA. CODE ANN. § 19-12-1 (1995); HAW. REV. STAT. § 574-5 (1993) (requiring parental consent or lack of response to a written notice of the requested change); KY. REV. STAT. ANN. § 401.020 (Baldwin 1995) (allowing parents to change the name of a child if both parents consent or the nonconsensual parent is served with notice of the petition); N.C. GEN. STAT. § 101-2 (1995) (requiring both parents to consent to the name change unless it is found that the nonconsenting parent has abandoned the child); OHIO REV. CODE ANN. § 2717.01 (Baldwin 1995) (requiring consent of both parents to change name of a minor or proof that notice was served upon the nonconsenting parent as required by the statute).

²⁶¹ It is hard to ignore the element of control that surfaces in many of the cases in which the father attempts to change the name of a child born outside of marriage to his own. To the extent that these cases include stories of the real lives of the parties, hints of domestic violence often exist as well as the *quid pro quo* that arises when either a mother or the state seeks to enforce a duty to support. Similarly, in some of the stepfather cases in which the mother is seeking to change the name of the child to that of her new husband it seems that the real harm that the court is guarding against is the vindictive mother who seeks to literally write the father out of her children's lives. Looking to the motives of the moving parties ought to provide the protection against the exploitation of children in disputes between parents.

gender does feed into the recognition that for women naming traditionally also has been complicated by patriarchy. However, the law should allow individuals to deviate from the gender-specific norms of society, not consign them all to repeat the traditions that many reject. In any event, it seems that legitimate concerns could be addressed under any of the factors that look toward the individual child's preference, identity or the effect of the name change upon the child's relationship with his or her family members. The reference to gender is simply unnecessary and may invite judicial speculation conditioned by stereotypes.

Parental misconduct is another factor that may or may not be child-centered. If the change of name is viewed as a punishment for the "bad" parent, then the child's interest is likely to be lost in adjudicating that punishment. However, if the inquiry is focussed on the child so that the parental misconduct is investigated to determine whether it is a cause for the child to feel alienation from his or her name, then parental misconduct may be a relevant area of inquiry.

In sum, the best-interest plus factors standard is superior to a simple and vague best-interest-of-the-child test. By setting up factors that require a child-centered focus, the judicial inquiry can be a more disciplined one. Not only are the factors more child-centered and gender-neutral, they also work to eradicate the distinctions between children born within and outside of marriage.

C. *Custodial Deference Standard*

A third approach, adopted in 1995 by New Jersey's Supreme Court in *Gubernat v. Deremer*,²⁶² is what I call the custodial deference standard. Under this standard, the custodian is deemed to act in the child's best interest in whatever name the custodian chooses for the child.²⁶³ The noncustodial parent, therefore, bears the burden of demonstrating by a preponderance of the evidence that the custodial parent's choice of name is not in the child's best interest, despite the presumption in favor of the custodial parent's choice.²⁶⁴ In considering the child's best interest, the court specifically prohibited giving weight to any interest rooted in impermissible gender preferences.²⁶⁵

The *Gubernat* opinion is a relatively lengthy and assuredly scholarly one. It delves into the history of naming. It recognizes and rejects the traditional gender-based customs and preferences that have characterized the naming of children. Its

²⁶² *Gubernat v. Deremer*, 657 A.2d 856 (N.J. 1995).

²⁶³ *Id.* at 868.

²⁶⁴ *Id.* at 869.

²⁶⁵ *Id.*

rejection of patriarchal structure is remarkable, clear and an important moment in family law. There is no doubt that both the intent and likely effect of the opinion will be to remove the favor that fathers have received in being assured that children will always and forever bear their surnames.

However, lest too much be made of this decision, it is important to note that this case involved a child born outside of marriage who had been named for the mother at birth. The father had initially denied paternity, and it was only after paternity was proven and he was ordered to pay child support that he sought a name change for the child.²⁶⁶ This opinion's mettle will be tested more fully when the court confronts the situation in which a custodial mother of a child born during marriage seeks to change her child's name from that of her former husband's to her birth name, or more difficult yet, to the name of the stepfather.²⁶⁷ It remains to be seen whether the courts will be able to resist the temptation to articulate and protect the father's interest in the child bearing his name within such a context.

The tragic epilogue to this opinion came in the newspapers shortly after the decision was rendered, and bore witness to the fact that the force of patriarchy is alive and well, and that a name can carry emblematic significance to parents. Despite the fact that the Court found that, "Scott is a very fortunate child, having two parents who dearly love and care for him,"²⁶⁸ during Alan Gubernat's next visitation with Scott, only 72 hours after the Supreme Court rendered its opinion, the loving father shot his son to death before killing himself.²⁶⁹ This tragic ending bears witness to the unwillingness of patriarchy to cede any ground²⁷⁰ and the imperfect ability of the courts to discern the true motives and capabilities of the parents who come before them.

While consciously and overtly gender-neutral, one might question whether *Gubernat* is child-centered. The Court undoubtedly believed that it was being child-centered by placing the power in the hands of the custodial parent.²⁷¹ After all,

²⁶⁶ *Id.* at 857.

²⁶⁷ *Gubernat* has been applied in only one published opinion, *J.S. v. D.M.*, a case in which the father of a child born outside of marriage brought a petition to change the child's name to his within the context of a case that had resulted in a domestic violence restraining order. *J.S. v. D.M.*, 667 A.2d 394 (N.J. Super. Ct. App. Div. 1995).

²⁶⁸ *Gubernat*, 657 A.2d at 869.

²⁶⁹ See Russ Bleemer, *A Death in the System*, N.J.L.J., May 22, 1995, at 1.

²⁷⁰ Mr. Gubernat had been unwilling even to consider the possibility of hyphenating Scott's last name. *Id.*

²⁷¹ *Gubernat*, 657 A.2d at 869.

through custody decisions we determine which parent will have the power and best ability to make nearly all of the other decisions that have a major impact upon the child's life. The custodial parent decides which school the child will attend, which after-school activities she will engage in, which doctor she will see and often whether she will see a doctor at all. Why should the law mistrust the custodial parent on this particular judgment? The custodial parent is presumed to know what is best for the child, and certainly most custodial parents know their children's needs better than a judge in a courtroom who might make the decision based upon his idiosyncratic notions of how a family should look and behave.

These arguments are convincing. However, the conspicuous absence of the child in this standard makes one question how truly child-centered it should be considered. In *Gubernat*, the court was not faced with an older child. Scott Deremer was only three years old when he died, and perhaps for a child of this age relying upon the custodian's judgment is more understandable. However, the development of a standard ought to be sensitive to the other cases that might follow. Furthermore, even in the case of the younger child, the *Gubernat* opinion and the consequences that flowed from it evidence the extent to which children can be converted into pawns whose individual interests are never considered in proceedings between the parents. Likely, no legal standard or rule of law could have averted the actions that Mr. *Gubernat* took in reaction to a decision that ultimately did not go his way. Attempting to develop a standard in reaction to these facts would undoubtedly result in reactionary bad law. However, standards which treat children as non-persons under the control of the custodian or which place the greater power in one parent's hands and subsume the child's interest in that particular parent's identity could be said to feed into the law's propensity to stage the resolution of conflict as a battle between the sexes over the right to control the child.

One might argue that the clarity of the standard with regard to privileging the custodial parent with the right to make these decisions in the first instance has the virtue of predictable results. Certainly the vague best interest standard does not have such predictable results. Even the factors approach may not be as predictable as the custodial parent deference standard. One never knows how the judge will hear the evidence on the particular factors, how the factors will be weighed, or what the child might say in chambers.²⁷² Predictability does have its virtue in all legal matters, and particularly in matters involving children. Litigation between parents can have ill effects on children. Uncertainty can be anxiety producing, and a child

²⁷² Depending upon one's view on child testimony, it could be argued that a standard which relies too heavily upon a child having to testify, whether in chambers or not, is not child-centered at all. Some might argue that children, because they are children, should be protected from having to participate in the conflicts that their parents create. There is merit in this argument, and surely not every child will want to or should be heard in every name change proceeding. However, all children should not be foreclosed from being heard and their wishes should be considered.

should not be visited with confusion about something so basic as his name for lengthy periods of time. Predictability of result also has the advantage of discouraging frivolous claims, because most lawyers will refuse to pursue them.

On the other hand, one could argue that gender-specific standards are perhaps the most predictable of all, but that doesn't mean that they are good for the child or society at large. Looking to the individual child's interest through the factors approach may not be as predictable but it does have the advantage of keeping the judicial focus where it should be — on the child's real interest in his or her name.

In sum, while the *Gubernat* standard with its attendant gender-neutral language and effort to serve the child's best interests through the custodial parent's wisdom is certainly better than old standards which privileged either the mother or father's right to name the child and is most likely better than the vague best interest standard, it is less child-centered than the factors approach. A trade-off in adopting the factors approach over the custodial deference standard in these cases, however, is that the results are not nearly as predictable specifically because the standard is so child-centered.

V. REFORMING WEST VIRGINIA'S LAW OF CHILD NAME CHANGE

West Virginia's approach to child name change issues is rooted in the law's historical dichotomy between children of the father and children of the mother. It is imbued with gender stereotypes and parental interests in the child's name. In the first section of this Part, I will lay out and critique West Virginia's current law surrounding child name change issues. In the second section, I will look for new standards that are supported by principles underlying West Virginia's treatment of other issues involving children.

A. *West Virginia's Current Law of Child Name Change*

Like most states, West Virginia's law pertaining to child name change is a blend of statutory and common law. West Virginia's statute pertaining to change of name gives little guidance for child name changes, and consequently, the Courts have developed a scant body of law addressed to minors. This section will review both the statutory and case law.

The only mention of children in the West Virginia Article governing name change is found in the preliminary provision describing who may file a petition for change of name. Specifically, the statute provides:

Any person desiring a change of his own name, or that of his child or ward, may apply therefor to the circuit court or any court of record having jurisdiction of the county in which he resides . . . by

petition setting forth that he has been a bona fide resident of such county for at least one year prior to the filing of the petition, the cause for which the change of name is sought, and the new name desired²⁷³

The Article also requires notice in the form of publication,²⁷⁴ provides any person objecting to the change of name with an opportunity to be heard,²⁷⁵ and sets forth the standard to be applied in considering whether the change of name should be granted. The standard the court is to apply provides that a name change should be granted when the court is "satisfied that no injury will be done to any person by reason of such change, that reasonable and proper cause exists for changing the name of petitioner, and that such change is not desired because of any fraudulent or evil intent on the part of the petitioner."²⁷⁶ Finally, the Article provides for the recordation of the new name²⁷⁷ and makes criminal the use of an assumed name for an unlawful purpose.²⁷⁸

In 1977, the Supreme Court of Appeals of West Virginia had the opportunity to construe this statute in the context of a child name change petition in the *Harris*²⁷⁹ case. *Harris* came to the court as the result of a petition by Cynthia Louise Harris who sought not only to change her son's name, but also her own. Ms. Harris was born Cynthia Louise Struble and later married James Edward Harris, Jr. At the time of her marriage, she assumed the name Harris. James Edward Harris, III was born of the marriage. Mr. and Ms. Harris subsequently divorced in the state of Florida, but Ms. Harris was denied her request to resume her maiden name at the time the divorce was granted. Florida, like West Virginia in 1977, had a statute which directed that a woman's request to resume her maiden name should not be granted where there were children born of the marriage.²⁸⁰

At issue in the *Harris* case was whether, given the prohibition in the divorce

²⁷³ W. VA. CODE § 48-5-1 (1995).

²⁷⁴ *Id.*

²⁷⁵ W. VA. CODE § 48-5-2 (1995).

²⁷⁶ W. VA. CODE § 48-5-3 (1995).

²⁷⁷ W. VA. CODE §§ 48-5-4 to -5 (1995).

²⁷⁸ W. VA. CODE § 48-5-6 (1995).

²⁷⁹ *In re Harris*, 236 S.E.2d 426 (W.Va. 1977).

²⁸⁰ *Id.* at 426-28.

statutes, a divorced woman could change her name using the general name change statute and whether the child's name could also be changed in this circumstance. The court below had rejected Ms. Harris's request on both issues.²⁸¹

The West Virginia Supreme Court, with Justice Neely writing for the Court, readily and without much discussion held that a divorced woman may avail herself of the provisions of the general name change statute, even if she has living children by her former marriage.²⁸²

Justice Neely lingered longer on the issue of whether Ms. Harris's petition to change the name of her son should have been granted. Finding that the issue presented "a classic case for the application of equitable principles,"²⁸³ Justice Neely went way beyond the statutory language to create new standards and notice procedures that should be applied in a child name change proceeding.

Justice Neely began his analysis with the pronouncement, "We are concerned at the outset lest a valuable parental right be terminated in a cavalier and careless manner."²⁸⁴ The name that a child bears is pegged as "a father's interest."²⁸⁵ The opinion is imbued with traditional concepts of the father's right and the father's duty with regard to his children born of the marriage dating back from the days of Blackstone. It ultimately upholds the "long-standing social convention [which] has made the surname of a child the same as that of a father."²⁸⁶

The opinion sings the praises of the father's name as a benefit to the child, and thereby identifies the child's best interest with the father's valuable right. Justice Neely points to the value in a father's name in securing Social Security, G.I. or other benefits that might flow from the father. He values the father's name for the reputation it carries with it into small towns and communities throughout the counties of West Virginia. He acknowledges that such "benefits could theoretically pass through the female line, but it is not customary."²⁸⁷

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* at 428.

²⁸⁴ *Harris*, 236 S.E.2d at 428.

²⁸⁵ *Id.* at 429.

²⁸⁶ *Id.*

²⁸⁷ *Id.* The reader of the *Harris* opinion cannot appreciate the full irony of the *Harris* case. In fact, Ms. Harris was from West Virginia, and the Strubles had lived in Berkeley Springs for many years. It was Mr. Harris's name that meant nothing in Morgan County. At the time that the petition for a change of name was filed, Mr. Harris resided in Florida, and his son was being raised by his mother and maternal

In order to protect the father's right and the child's best interest, the Court held that before a petition for change of name could be considered, "actual notice must be given to the father if his whereabouts are known or with reasonable diligence could be ascertained."²⁸⁸ Further protections were ensconced in the high standard that the court enunciated should apply to child name change cases. Because the father's protectible interest in having his children bear his name as conceptualized by the Court is "one quid pro quo of his reciprocal obligation of support and maintenance,"²⁸⁹ the Court holds that "where a father is supporting his child, takes an interest in the child's welfare, and is in anyway performing the parental responsibility which both the law and social norms impose upon him, or where a father who has exercised his parental rights and discharged his parental responsibilities is dead, the name of the child may not be changed absent a showing by clear, cogent, and convincing evidence that such change will significantly advance the best interests of the child."²⁹⁰

This extremely difficult standard is further heightened by the Court's final pronouncement that "in no event shall proof of abandonment for name change purposes be less than that required to divest a father's parental rights under the adoption statute."²⁹¹ In fact the standard that the Court enunciated for name change has been cited repeatedly in adoption cases as the definition of abandonment required for termination of parental rights.²⁹² Therefore, the standard to change a child's name from that of the father's to another is virtually identical, both in terms of the facts necessary and the burden of proof imposed, to the standard used to terminate parental rights.

The Court's treatment of child name change in *Harris* reflects many of the norms and traditions that have been discussed at length in Part III. It places the father of a child born during the marriage as the sole interest holder in the child's name. The child's interest is assumed to reside with the father. The opinion explicitly creates a *quid pro quo* formulation of the father's right to have a child bear

grandmother in Morgan County, West Virginia. Telephone Interview with anonymous source. For a study of the origins of common surnames in West Virginia, see WILLIAM E. MOCKLER, WEST VIRGINIA SURNAMES: THE PIONEERS (1956).

²⁸⁸ *Harris*, 236 S.E.2d at 428.

²⁸⁹ *Id.* at 429.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 430.

²⁹² See *In re Adoption of Mullins*, 421 S.E.2d 680, 681 (W. Va. 1992); *In re Adoption of Schoffstall*, 368 S.E.2d 720, 722 (W. Va. 1988).

his name if he is paying for it. Finally, like the Blackstonian conception of the rights of the father as superior to the rights of the mother, the father's right to dictate the name of his child follows him even beyond the grave. Even in death, the father's interest in his name lives on without regard to the child's interest or the mother's power to decide to the contrary.

The Court did not touch upon the child name change issue for another fifteen years. It was not until *Lufft v. Lufft*,²⁹³ decided in 1992, that the Court added anything to the law surrounding child name changes. If *Harris* was emblematic of a traditional treatment of children born within the marriage, *Lufft*, in some ways, was typical of a case involving a child born outside of marriage.

Samantha Campbell was a child born outside of marriage to Erin Campbell and James Lufft in 1988. Her surname on the birth certificate was Campbell, even though James Lufft acknowledged paternity. A year after Samantha's birth, Erin and James married, but their marriage was brief and characterized by domestic violence. Ms. Campbell filed for divorce in 1990 and during one of the hearings in the divorce proceeding before the family law master, Mr. Lufft requested that Samantha's name be changed from Campbell to Lufft. The family law master granted Mr. Lufft's request and the circuit court judge adopted the family law master's recommendation in this regard. Ms. Campbell appealed.²⁹⁴

Unlike *Harris*, *Lufft*, therefore, presented a situation in which the father sought to change the name of a child born outside of marriage to his. He argued that he did not want Samantha to be "tarred forever with the stigma of illegitimacy."²⁹⁵ The Court rejected Mr. Lufft's argument by citing to West Virginia law protecting illegitimate children from discrimination²⁹⁶ and changing social mores concerning birth outside of marriage.²⁹⁷

The Court further found that the name change violated the name change statute because the family law master: 1) failed to order publication of Mr. Lufft's petition; 2) failed to provide Ms. Campbell and others an opportunity for hearing on their possible objections; and 3) failed to apply even the minimal standards set forth

²⁹³ *Lufft v. Lufft*, 424 S.E.2d 266 (W.Va. 1992).

²⁹⁴ *Id.* at 267.

²⁹⁵ *Id.*

²⁹⁶ The Court primarily relied upon *Adkins v. McEldowney*, an estate case that found that allowing legitimate children to inherit through both mother and father and restricting illegitimate children to inherit only through their mothers was discriminatory and offended article III, section 17 of the West Virginia Constitution. *Adkins v. McEldowney*, 280 S.E.2d 231 (W. Va. 1981).

²⁹⁷ *Lufft*, 424 S.E.2d at 268.

in the statute to the name change request.²⁹⁸

The Court also discussed *Harris* and, in what could be characterized as a profound understatement of the *Harris* case, found that “although the *Harris* case was weighted toward the child retaining the father’s surname, we believe that it is equally applicable to any name change, including one changing a child’s last name from the mother’s maiden name to the father’s surname. *Harris* requires that any name change involving a minor child be made only upon clear, cogent, and convincing evidence that the change would significantly advance the best interests of the child.”²⁹⁹ The Court then proceeded to note that Mr. Lufft has not abandoned his child, as contemplated by *Harris*, but that the case was factually distinguishable from *Harris* in that Samantha did not bear her father’s name even when her parents were married. The Court ultimately held that the father advanced no reasons that would meet the level of clear, cogent and convincing evidence that a change of the child’s name at this point would serve her best interest.³⁰⁰

Accordingly, when one considers *Lufft* side by side with *Harris*, one comes away with the impression that two standards, similar but not identical, are at work in child name change proceedings in West Virginia. One is the more stringent standard calling for proof of abandonment and another burdensome, still, but not requiring abandonment for children born outside of marriage. In many ways these two standards reflect the common law’s traditional treatment of children born within and outside of marriage, *Lufft*’s protestations to the contrary notwithstanding. The interest of the father in his name continuing through his child born within marriage is zealously guarded by *Harris*, and the right of the mother as custodian of the child born outside of marriage is also protected, though with less force, in *Lufft*. Neither approach does much to look toward the child’s real interest in his or her name, although, as between the two, *Lufft* at least makes some minimal attempt. These dual but overlapping standards hardly pass muster as either gender-neutral or child-centered.

B. *Reforming West Virginia Law of Child Name Change*

As demonstrated in Part III above, the law of naming and name changing

²⁹⁸ *Id.* at 269. Another issue, not addressed by *Lufft*, was whether the family law master had jurisdiction to hear the father’s request to change the child’s name in the first place. West Virginia statute sets forth those matters which a circuit court shall refer to the family law master. W. VA. CODE § 48A-4-6(a) (1995). (The matters referred do not include child name changes pursuant to the name change statute.

²⁹⁹ *Lufft*, 424 S.E.2d at 269.

³⁰⁰ *Id.*

is often the last area of family law to reflect norms that have been repudiated in other areas. This is certainly true in West Virginia where in virtually every other area involving children and families, the law has been altered to reflect a more gender-neutral and child-centered approach. Many of the principles that have developed in these other areas, particularly in custody, can and should be imported to child name change proceedings.

1. Gender-Neutral, Child-Centered Principles Underlying West Virginia Law of Child Custody

Prior to 1980, West Virginia employed the “tender years doctrine” which rested upon a strong maternal presumption when deciding the custody of young children.³⁰¹ In 1980, the legislature amended the statutes governing custody to eliminate any gender-based presumption.³⁰²

In 1981, the Supreme Court of Appeals of West Virginia filled out the contours of the standard to be used in determining custody disputes in the landmark case of *Garska v. McCoy*.³⁰³ *Garska* is significant because it avoided the vague and unpredictable best-interest standard that most states had employed to date and fashioned, instead, the primary caretaker standard. Many scholars have praised the primary caretaker standard for its gender-neutral, child-centered approach to determining the best interest of the child,³⁰⁴ and it has found its way into most

³⁰¹ See *J.B. v. A.B.*, 242 S.E.2d 248 (W. Va. 1978), superseded by statute, David M. V. Margaret M., 385 S.E.2d 912 (W.Va. 1989).

³⁰² See W. VA. CODE § 48-2-15(b)(1) (1995).

³⁰³ *Garska v. McCoy*, 278 S.E.2d 357 (W.Va. 1981).

³⁰⁴ See Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291 (1992); Stanley Katz, “That They May Thrive” *Goal of Child Custody: Reflections on the Apparent Erosion of the Tender Years Presumption and the Emergence of the Primary Caretaker Presumption*, J. CONTEMP. HEALTH L. & POL’Y, Spring 1992, at 123; Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Marcia O’Kelly, *Blessing the Tie That Binds: Preference for the Primary Caretaker as Custodian*, 63 N.D. L. REV. 481 (1987); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984); cf. Ronald K. Henry, ‘Primary Caretaker’: *Is it a Ruse?*, 17 FAM. ADVOC. 53 (1994) (criticizing the primary caretaker standard as a most “insidious sort of bias — one that masquerades as equality” but that in fact is just a veiled form of the tender years doctrine). In fact, Justice Neely himself, the author of the primary caretaker standard and whose gender biases were evident in the *Harris* name change case, believed that what he was doing in the primary caretaker standard was developing a standard in which mothers would most often receive custody because of their roles as child-bearers and child-rearers. See Neely, *supra* note 224. However, for reasons explored more fully in the text, the primary caretaker rule need not result in mother’s receiving custody; it does, however,

treatises dealing with family law.³⁰⁵ Its notoriety has resulted in the primary caretaker standard being adopted by many other states.³⁰⁶

Under the primary caretaker doctrine, the gradual coming of age of children into adulthood is recognized. Children are divided into three age groups: 1) those under age six; 2) those between the ages of six and fourteen; and 3) those fourteen years of age and older. For children under the age of six, an absolute presumption exists in favor of the primary caregiver as custodian provided that she or he is a fit parent. For children six years old to under fourteen, the trial court has discretion to hear the child's preference on the record and out of the hearing of the parents. Finally, for children fourteen years and older, the child is permitted to choose his or her custodian so long as both parents are fit.³⁰⁷

In order to determine which parent is the primary caretaker, the trial court is directed to ascertain which parent took primary responsibility for the recurring needs of the child. By favoring the parent upon whom the child has relied to meet his or her most basic needs, the primary caretaker standard helps to reassure the child that the primary nurturing parent will continue to be available to meet the child's needs, even after the disruption of divorce. In this sense the primary caretaker standard is child-centered because it looks at divorce and its effects through the eyes of the child.

The inquiry into which parent is the primary caretaker is guided by a list of very specific factors. The list reads like a job description of the day-to-day tasks of parenting from the child's point of view. Trial courts seek to determine which parent was responsible for:

- 1) preparing and planning of meals; 2) bathing, grooming, and dressing; 3) purchasing, cleaning and care of clothes; 4) medical

Harris name change case, believed that what he was doing in the primary caretaker standard was developing a standard in which mothers would most often receive custody because of their roles as child-bearers and child-rearers. See Neely, *supra* note 224. However, for reasons explored more fully in the text, the primary caretaker rule need not result in mother's receiving custody; it does, however, insure that children will experience some continuity in their caregivers even when the calamity of divorce befalls them.

³⁰⁵ See WALTER O. WEYRAUCH, ET AL., *CASES AND MATERIALS ON FAMILY LAW: LEGAL CONCEPTS AND CHANGING HUMAN RELATIONSHIPS* 439-43, 885-88, 890 (1994); IRA M. ELLMAN, ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 510-17 (2d. ed. 1991); HOMER H. CLARK & CAROL GLOWINSKI, *DOMESTIC RELATIONS: CASES AND PROBLEMS* 1053-67, 1075-76 (1990).

³⁰⁶ See *Nickerson v. Nickerson*, 605 A.2d 1331 (Vt. 1992); *Pusey v. Pusey*, 728 P.2d 117 (Utah 1986); *Pikula v. Pikula*, 374 N.W.2d 705 (Minn. 1985); *In re Maxwell*, 456 N.E.2d 1218 (Ohio 1982); *Commonwealth ex rel. Jordan v. Jordan*, 448 A.2d 1113 (Pa. Super. 1982).

³⁰⁷ See *Garska*, 278 S.E.2d at 363; *David M. v. Margaret M.*, 385 S.E.2d 912, 924 (W. Va. 1989).

care, including nursing and trips to physicians; 5) arranging for social interactions among peers after school, i.e. transporting to friend's houses or, for example, to girl or boy scout meetings; 6) arranging alternative care, i.e., babysitting, day-care, etc.; 7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; 8) disciplining, i.e. teaching general manners and toilet training; 9) educating, i.e., religious, cultural, social, etc.; and 10) teaching elementary skills, i.e., reading, writing, and arithmetic.³⁰⁸

The main principles which can be taken from the primary caretaker standard to be applied to child name change petitions are: 1) gender-neutrality; 2) overarching child-centeredness; 3) a mistrust for the vague and unpredictable "best interest" standard with a concomitant penchant for standards which result in predictable outcomes; 4) a willingness to give the child who is able a voice in his or her important life choices; 5) the preference for the use of specific child-centered factors to guide judicial discretion in cases involving children who are too young to dictate or guide the judicial discretion themselves; and 6) deference toward the parent who performs the daily parenting duties children most need.

The precedent for giving a child who is able a voice in his or her important life choices is reflected in other West Virginia law governing children as well. For instance, in order for a child over twelve to be adopted, he or she must consent.³⁰⁹ Under the child abuse and neglect statutes of West Virginia, the parental rights to a "child fourteen years of age or older or otherwise of an age of discretion as determined by the court" may not be permanently terminated if the child objects.³¹⁰

2. Applying the Principles Underlying *Garska* to Child Name Change Proceedings

The above six principles which undergird the primary caretaker doctrine should inform the law of child name change. First, it is obvious that the current law of child name change is neither gender-neutral nor child-centered. Second, the current law in no way empowers the child within the child name change proceeding. Insofar as the current law under *Lufft* relies upon the best-interest-of-the-child standard, it also runs afoul of West Virginia's rejection of this vague and unpredictable standard. Therefore, at the next opportunity, either the Court or

³⁰⁸ *Garska*, 278 S.E.2d at 363.

³⁰⁹ See W. VA. CODE § 48-4-3(e) (1995).

³¹⁰ See W. VA. CODE § 49-6-5(a)(6) (1995).

legislature should consider applying the principles which underlie *Garska* to child name change proceedings.

What type of reform should flow from the current philosophy of the Court with regard to children? Of the three types of gender-neutral and child-centered approaches discussed in Part IV above, it is clear that the unguided "best interest" test should be discarded in order to be consonant with West Virginia's well-established law regarding children. Both the best-interest test with factors and the custodial deference standard are consistent with some of the values inherent in West Virginia's primary caretaker standard. The best-interest test with factors has the virtue of being gender-neutral and child-centered. The factors are also geared to both the child's preference and to the child's interest in his or her name. The custodial deference standard, however, perhaps has a higher predictability quotient given the weighting of the burdens. The custodial deference standard also is consistent with placing trust in the hands of the parent who provides the child with day to day nurturing and who consequently should have the best insight into which name is in the child's best interest. However, as noted previously, the child's preference is virtually irrelevant in the custodial deference standard and it has the tendency to disempower the child in favor of the custodial parent, without regard to the child's age.

Therefore, only a melding of the two approaches, taking the best from each, results in a standard that meets with the ideals of West Virginia's primary caretaker standard. I propose the following: For children below the age of six, the custodial deference standard articulated in *Gubernat* should apply. Specifically, a presumption should exist in favor of the custodial parent's choice of name for the child. This presumption can only be overcome by the noncustodial parent's showing by a preponderance of the evidence that the name chosen by the custodial parent is not in the child's best interest. However, in determining whether the noncustodial parent has met his or her burden of proof the court must look for evidence using a set of child-centered, gender-neutral factors. These factors should include: 1) the length of time that the child has used his or her current name; 2) the name by which the child has customarily been called; 3) whether a name change will cause insecurity or identity confusion; 4) the potential impact of the requested name change on the child's relationship with each parent; 5) the motivations of the parties in seeking a name change; 6) the identification of the child with a particular family unit, giving proper weight to step-parents, step-siblings and half-siblings who comprise that unit; 7) any embarrassment, discomfort, or inconvenience that may result if the child's surname differs from that of the custodial parent; and 8) the degree of community respect associated with the present and proposed surnames.

For the child between the ages of six and fourteen, the court should make a determination concerning the child's ability to state a preference and should hear such preferences in chambers, on the record, and outside the presence of the parents. The court should then consider the child's preference along with the above

enumerated factors in determining whether to change the child's name.

The wishes of the mature child should always be respected on a matter so basic as his or her name. Therefore, for the child over fourteen, the child's preference should control and no petition for name change should be allowed without the consent of the child.

This three-fold standard mirrors the primary caretaker standard's recognition that a child under six is quite different from a child over fourteen and that one standard should not be made to fit all. However, all standards at each age tier are child-centered, gender-neutral and provide for honoring the child's preference whenever possible. The new standard not only would be grounded in the current values undergirding West Virginia law pertaining to children but also is consistent with precedents being followed in many other states. While West Virginia has not been afraid to create untested standards in the past, such courage is not even required here. The standard I propose blends the best of West Virginia law with the best of the law nationally and would go a long way toward reforming the somewhat muddled child name change law that is presently in place.

VI. CONCLUSION

The custom and law of naming has often been associated with domination. Cultures change the names of various members of the citizenry to assimilate them. Masters have changed the names of slaves to claim them as property. Husbands have changed the names of wives to claim them, and parents, in turn, do the same to their children. Within family law, the common law of naming has reflected the family hierarchy at any given time.

At the same time, names also carry with them a power and mystery, deep and inscrutable, tied to our individual identities and to our changing identities in relation to others. In this article, I have attempted to divine the deeper meaning of names and to unlock the issue of child name change from the power struggle that too often ensues between mother and father. The hopeful observation is that the law is moving, as custom is moving, from the notion of naming as claiming a property right in another toward naming as claiming an identity. The law now offers many ways to reconfigure child name change as a gender-neutral, child-centered inquiry, and it is hoped that West Virginia, and other states as well, will consider these possibilities in future cases.