

# A MAN'S RIGHT TO CHOOSE HIS SURNAME IN MARRIAGE: A PROPOSAL

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## I. INTRODUCTION

*"I have no name;  
I am but two days old."  
What shall I call thee?  
"I happy am,  
Joy is my name."  
Sweet joy befall thee!*<sup>1</sup>

The modern process of getting one's name requires multiple steps for most Americans. Parents typically give a child three names at birth.<sup>2</sup> The child's first name, also called the "given name," "forename," or "Christian name,"<sup>3</sup> and middle name are typically chosen by the parents.<sup>4</sup> The child's last name, also called the "surname," is typically inherited from the parents. As most parents share the father's surname, the child will usually also share this surname.<sup>5</sup> As children grow up and become adults, they can change their surname by both common law and statutory methods in most states. However, by far the most common time to do so is at a change in marital status.<sup>6</sup> Typically, a wife takes

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1. WILLIAM BLAKE, *Infant Joy*, in *SONGS OF INNOCENCE*, 35 (line 1) (Courier Dover Publications 1971 ed., 1789).

2. Lisa Kelly, *Divining the Deep and Inscrutable: Toward a Gender-Neutral, Child-Centered Approach to Child Name Change Proceedings*, 99 W. VA. L. REV. 1, 9 (1996). Kelly notes that the modern tradition of giving a child three names may have developed from 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." *Id.* at 9 n.23 (citing L.G. PINE, *THE STORY OF OUR SURNAMES* 11 (1965)).

3. Kelly notes:

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. *Id.* at 9 n.21 (citing ELSDON C. SMITH, *THE STORY OF OUR SURNAMES* 1 (1970)).

4. *Id.* at 9.

5. *Id.* at 9-10.

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

her husband's surname upon marriage and reverts to her maiden name upon divorce.

Despite the United States' reputation as the land of the free, a place where people chase destiny and control their story, some Americans have seen the government insert itself into their naming process. In order to pursue this American Dream, numerous men and women have immigrated to the United States. Many of them shared the experience of enjoying a grand view of the Statue of Liberty on their boat trip to Ellis Island, the entry point to the American Dream and an access gate through which men and women gained freedom and control over their lives.<sup>7</sup> Unfortunately, for many of those immigrants Ellis Island also was a place where they lost control over something that had been with them since birth—their names. Many immigrants came out of Ellis Island with a name different from the one with which they entered.<sup>8</sup> Sometimes, a surname would be altered by the clerk for spelling purposes due to phonetic differences between cultures.<sup>9</sup> Other times, the name would be changed wholesale.<sup>10</sup>

Due in large part to the Ellis Island experience of my wife's grandfather, I decided to go against the grain and take her surname.<sup>11</sup> When my wife's grandfather made the journey from his birthplace of Italy to the United States, he was aware that many of those before him had their names changed by a clerk at Ellis Island.<sup>12</sup> He desired to retain control over his name, and so taught himself to clearly pronounce and spell "Frandina" to avoid having it changed for phonetic reasons. He was successful. However, my wife and her sister are the last two members of the family with the surname Frandina. It would have died with them had I followed the western patrilineal naming tradition.

As my situation demonstrates, there are options outside the western patrilineal naming tradition. Many such options involve a legal process. Yet, statutory authority for a man to change his surname to his wife's upon marriage only exists in seven of the fifty states.<sup>13</sup> Unbeknownst to me at the time I changed my surname, it was not authorized by statute either where I was married (Colorado) or where I went through the process of getting updated personal identification documents with my new surname (Ohio).

This paper argues that the Equal Protection Clause requires that men have the right to change their surname upon a change in marital status because

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7. Kelly, *supra* note 2, at 16–17 n.60.

8. *Id.*

9. *Id.*

10. *Id.* As Kelly notes,

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 Scots. *Id.*

11. My name was previously Michael Mahoney Gardner.

12. Such as the Morelli/Murray family, *supra* note 8.

13. See *infra* note 75; see also Press Release, HT Media, Senate Floor Clears Name Change Bill (Sept. 6, 2007) (on file with author).

women already have this right. It will first discuss the importance of names by arguing that names implicate the construction of identity in various significant ways. Second, a brief history of marital and naming practices will outline how these two concepts have shifted to a primarily private issue today, as compared with the Middle Ages, when they were primarily public issues highly concerned with property matters. The modern day legal issues surrounding a man changing his name will then be summarized. Further, it will be argued that naming decisions are primarily private rights as an expression of personal autonomy, and an equal protection argument will be proposed to achieve equality in name change rights for men upon a change in their marriage status.

## II. THE IMPORTANCE OF NAMES

The common experience of mankind, whether parents, agonizing over a name for their newborn child, or grandparents trying to participate in the naming process, or grown children living with the names their parents gave them, points up the universal importance to each individual of his own very personal label.<sup>14</sup>

One's own very personal label is not a trivial matter to most persons. In fact, naming involves important issues in the construction of one's identity. Parents brood over naming their children, fully aware that a name typically remains with their children for their entire lives.<sup>15</sup> Names represent one's sense of self and express one's social identity.<sup>16</sup> They also implicate identity through ethnic and familial history, as powerfully demonstrated by the Ellis Island experience.<sup>17</sup> Judges have even come close to calling the ability to name one's child a fundamental right under the Constitution.<sup>18</sup>

Sojourner Truth's story both highlights how a name can affect one's sense of self and implicates history. Sojourner Truth was named Isabella by her parents James and Betsey.<sup>19</sup> She had no last name because she was a slave

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

15. *See, e.g., id.* *See also* Michael Rosensaft, Comment, *The Right of Men to Change Their Names Upon Marriage*, 5 U. PA. J. CONST. L. 186, 189 (citing Melissa Fyfe, *Monitoring Those Monikers*, AGE (MELBOURNE), May 27, 1997, at 1 (describing parents' agony about children's name because of their realization that names are "usually a tag for life")).

16. *See* ELSDON C. SMITH, *THE STORY OF OUR NAMES* 38 (1950) ("For most of us, a name is much more than just a tag or a label. It is a symbol which stands for the unique combination of characters and attributes that define us as an individual. It is the closest thing that we have to a shorthand for self-concept."). *See also* Doll, *supra* note 6, at 231 (1992) (stating that a woman changing her surname upon marriage has profound implications on her sense of self).

17. Rosensaft, *supra* note 15, at 190. *See also* Section I, *supra* (discussing the Ellis Island experience of many U.S. immigrants).

18. *See Jech*, 466 F. Supp. at 719. *See also* *Henne v. Wright*, 904 F.2d 1208, 1217 (8th Cir. 1990) (Arnold, J., dissenting) ("There is something sacred about a name. It is our own business, not the government's."). *But see* *In re Kayaloff*, 9 F. Supp. 176, 176 (S.D.N.Y. 1934) ("It is my judgment that none of [the many married professional women of note and standing who are known in private life by the surname of their respective husbands have] been damaged professionally by the fact that, upon marriage, she took the surname of her husband. I am not convinced that any loss will accrue to petitioner if she be denied a certificate in her maiden name.").

19. Kelly, *supra* note 2, at 16.

owned by the Ardinburgh family.<sup>20</sup> After she escaped, a white family took her in. This led to her first name change as she took the surname "Van Wagener" from the white family.<sup>21</sup> Later, she changed her name a second time to signal her spiritual call to travel and spread her message of truth and hope.<sup>22</sup>

Another example is the story of the Rhinelander name in Earl Lewis and Heidi Ardizzone's book, *LOVE ON TRIAL*.<sup>23</sup> *LOVE ON TRIAL* tells the intriguing tale of a romance between Kip Rhinelander and Alice Jones. The Rhinelander family was one of the wealthiest families in America<sup>24</sup> and Alice Jones was the daughter of immigrants from Britain. Alice's race played a critical role in the book: her father's precise ethnic ancestry was unknown, but it was obvious that he was "colored."<sup>25</sup> The two were married, but afterwards Kip sought a divorce on the theory that Alice misled him into believing she was "white." Ultimately, the jury disagreed and the marriage stood<sup>26</sup>; the two sought separation soon afterward. In return for receiving a favorable separation agreement, Alice agreed never to use the Rhinelander name, a promise she kept until her death when she had her headstone marked Alice Rhinelander.<sup>27</sup> This story shows how important the name was to the Rhinelanders—they would not accept a "colored" using their name and were willing to pay compensation to prevent her from doing so.

Similarly, when Hillary Clinton married Bill Clinton, her name was Hillary Rodham.<sup>28</sup> After her marriage in 1975, she retained her maiden name.<sup>29</sup> But her continued use of her maiden name became a political issue in 1978 when Bill ran for governor of Arkansas.<sup>30</sup> Bill won in 1978 but then lost his re-election campaign in 1980.<sup>31</sup> For Bill's successful 1982 campaign, Hillary went by Hillary Clinton and even Mrs. Bill Clinton.<sup>32</sup> In 1993 after she and Bill moved into the White House, she again changed her name and went by Hillary Rodham Clinton.<sup>33</sup> She decided to run for Senator under that moniker; however, during her campaign for President, she dropped Rodham and was simply Hillary

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20. *Id.*

21. *Id.*

22. *Id.*

23. EARL LEWIS & HEIDI ARDIZZONE, *LOVE ON TRIAL: AN AMERICAN SCANDAL IN BLACK AND WHITE* (2001).

24. *Id.* at 55.

25. *Id.* at 72–74. In fact, the Jones' precise ethnic ancestry remains a mystery and defies the stereotypical classification used in this country of "white" or "black". Alice's father stated that his father was from one of the British Colonies, however, it remained unknown if this was West Indies or India ancestry. *Id.* That unknown fact had scientific and legal significance. *Id.* Regardless, he was not considered "white" by the courts and thus Alice was considered "colored" (e.g., not "white") by the court.

26. *Id.* at 217.

27. *Id.* at 246–47, 259.

28. Larissa Dubecki, *So, What's in a Name? Maybe a Presidency . . .*, *THE AGE*, May 12, 2007, at 3.

29. *Id.*

30. Jennifer Christman, *The Name Game: Despite Options, 90% of Women Choose to Take Husband's Name*, *ARKANSAS DEMOCRAT-GAZETTE*, March 8, 2000, at F1.

31. *Id.*

32. *Id.*; Dubecki, *supra* note 28, at 3.

33. Christman, *supra* note 30, at F1; Dubecki, *supra* note 28, at 3.

Clinton.<sup>34</sup>

### III. A BRIEF HISTORY OF THE WESTERN PATRILINEAL SURNAMING SYSTEM

The purposes and definition of marriage depend on time and culture. In modern times, marriage is primarily centered on issues of privacy; it is focused on the couple involved in making the decision to wed. However, for over a thousand years marriage in the West was more concerned with property and was centered on issues of public, not private, matters. In Rome, a central purpose of marriage was procreation and Romans, like most of the ancient world, used marriage and inheritance as the main methods of conveying property.<sup>35</sup> The Romans were casual about legal marriage.<sup>36</sup> In any legal proceeding, the primary consideration of Roman jurists was whether the couple subjectively thought of themselves as married.<sup>37</sup> Divorce was similarly based on a person's subjective intent.<sup>38</sup>

During this time, power in the relationship was tied to property rather than to gender. For example, a man would assume the surname of his propertied wife.<sup>39</sup> Furthermore, after a divorce a wife was entitled to a percentage of the marital estate in proportion to the amount of labor she had contributed to it.<sup>40</sup>

With the Roman Empire's collapse, marriage became a crucial political tool as family ties and marital alliances were used to sort out the elite ruling class.<sup>41</sup> Marriage was used to forge alliances between rival clans and to secure heirs; thus, dozens of people were involved in setting up marriages amongst nobility.<sup>42</sup> Polygamy was widespread and used to secure more alliances and to guarantee a male heir.<sup>43</sup>

While the framework of forming and dissolving marriages was developed in response to the needs of the elite ruling classes, that framework also began to govern marriages amongst the lower social classes.<sup>44</sup> Marriage was normally a public affair for most peasants as well<sup>45</sup> because property and marriage played a

34. Dubecki, *supra* note 28, at 3.

35. STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 78 (2007). In other words, people would pass their property onto their children conceived in wedlock.

36. *Id.* at 79. Coontz notes that the Roman marriage did follow some rules: Romans had to get special permission to marry foreigners, they could not marry slaves or prostitutes, and they must have the consent of their father. *Id.*

37. *Id.* at 80.

38. *Id.*

39. Kelly, *supra* note 2, at 11.

40. COONTZ, *supra* note 35, at 105.

41. *Id.* at 90.

42. *Id.* at 89–91. For example, to establish a claim on the crown a conqueror would often marry the widow of the ousted king. If the conqueror died, his son and heir would marry his stepmother. *Id.* at 91.

43. *Id.* at 91–92.

44. *Id.* at 104. For example, childlessness was a common reason for taking a new partner; this rationale was first used by the ruling elite so that a line of rulers would be established but it was then taken up by the lower classes. *Id.*

45. *Id.* at 110.

vital role in maintaining the economic system in place at the time.<sup>46</sup> Village politics also influenced the marriages of peasants<sup>47</sup> and as a result, a serf peasant's lord or a free peasant's family and neighbors would often contribute to the choice of a mate.<sup>48</sup> Often, a prenuptial contract would be drawn up to cover property transactions that would occur at and after the marriage.<sup>49</sup>

Around this time, the western patrilineal surnaming system was beginning in Anglo-Saxon England.<sup>50</sup> The use of surnames in England was slowly adopted after the Norman Conquest in 1066.<sup>51</sup> Indeed, the term "surname" derives from the French word "surnom" meaning "above or over name."<sup>52</sup> Following the Norman Conquest, a limited list of Norman first names began to replace the old Saxon first names.<sup>53</sup> In time, the limited choice of names combined with the growth in population led to confusion.<sup>54</sup> This in turn led to the adoption of a second name, the surname, in order to uniquely identify individuals.<sup>55</sup>

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46. *Id.* at 110–11. Land was the basis of the economy and the married peasant household was the basic unit of production. *Id.* Thus, a lord had a vital economic interest in his serf's marriages. For free peasants, families and neighbors had a similar interest in marriage. Often, the geography of a family's land holdings was dispersed and marriage was a way to unite adjacent land parcels. Crop rotations and harvesting decisions also required community effort. *Id.*

47. *Id.* at 112.

48. *Id.* at 110–12. For example, "[i]n some regions the lord of an estate . . . could prevent his serf from marrying a woman from another manor. In other regions, lords even had the right to choose husbands for their tenants' daughters." *Id.* at 110. While a free peasant's neighbors did not have direct control over him or her akin to serf's lord, they still had their own methods of indirect control such as ostracism and ritual harassment. *Id.* at 111–12.

49. *See id.* at 106 (noting that these included the amount of the dowry, the groom's marriage gift to the bride, arrangements for the wife if she were to be widowed, plans for dispersing property to children and grandchildren, and plans for supporting the parents of the groom if the man was expected to take over the family farm).

50. Kelly, *supra* note 2, at 10. The naming system used in the United States today was primarily inherited from the Anglo-Saxon tradition as practiced in England. *Id.*

51. *Doherty v. Wizner*, 150 P.3d 456, 458 (Ore. App. 2006); Kelly, *supra* note 2, at 10. "On October 14, 1066, the Normans from northern France defeated the Anglo-Saxon army in England at the Battle of Hastings. Thereafter, Norman customs and culture dominated all phases of English life." *Doherty*, 150 P.3d at 458 (citing WILLIAM DODGSON BOWMAN, *THE STORY OF SURNAMES* (1931); H. R. LOYN, *THE NORMAN CONQUEST 171–95* (1965)).

52. *Doherty*, 150 P.3d at 458 (citing Yvonne M. Cherena Pacheco, *Latino Surnames: Formal and Informal Forces in the United States Affecting the Retention and Use of the Maternal Surname*, 18 T. MARSHALL L. REV. 1 (1992)). *See also* Dictionary.com, <http://dictionary.reference.com/browse/surname> (last visited Dec. 2, 2007).

53. The list for men was about sixteen given names, while the list for women was even shorter and six names were predominantly used. *Doherty*, 150 P.3d at 458; Kelly, *supra* note 2, at 10.

54. *Doherty*, 150 P.3d at 458; Kelly, *supra* note 2, at 10 (noting that "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.").

55. *Doherty*, 150 P.3d at 458; Kelly, *supra* note 2, at 10. "Distinctions needed to be made when two people were trying to identify a person with a common name, like John. So qualifications were added, as in imaginary bits of conversations like these: 'A horse stepped on John's foot.' 'John from the hill?' 'No. John of the dale.' 'John the son of William?' 'No. John the son of Robert.' 'John the smith?' 'No. John the tailor.' 'John the long?' 'No. John the bald.'"<sup>55</sup> *Doherty*, 150 P.3d at 458 (citing J. N. HOOK, *FAMILY NAMES: HOW OUR SURNAMES CAME TO AMERICA* 12 (1982)).

However, the practice of using a surname did not become widely adopted until the thirteenth or fourteenth century.<sup>56</sup>

Surnames were initially drawn from a number of sources; the most common sources for men were places (John Hill), personal names or patronyms (John Thomas, John Williamson), occupations (John Smith), and descriptions and moral characteristics (John Short, John Good).<sup>57</sup> At least for the lower classes, which did not tend to own property, these surnames were not hereditary.<sup>58</sup> However, for those who owned property, surnames became hereditary and were passed on from parents to children.<sup>59</sup>

The two cultural norms of marriage and surnaming interwove in powerful ways to address property concerns. They facilitated the control and transfer of property during the early development of surnaming in England, as spouses of either sex would often change their surname to that of the propertied spouse in order to align themselves with the estate.<sup>60</sup> In addition, surnames facilitated the inheritance of property because only the heir using the surname associated with the family estate could receive anything.<sup>61</sup> During the early development of this system, a child would take the surname of the propertied parent, regardless of sex.<sup>62</sup> Thus, it was property concerns and not gender which drove naming customs at this time.

Naming customs further evolved towards the patrilineal in response to several developments in England. The first was primogeniture, which involved the practice of restricting inheritance to the eldest son.<sup>63</sup> During the eleventh and twelfth centuries, aristocratic families began to use primogeniture to avoid dilution of their properties.<sup>64</sup> As a result, primogeniture decreased the number of propertied women.<sup>65</sup> Coverture further pushed naming customs towards the patrilineal.<sup>66</sup> Coverture was a legal doctrine where a wife's legal identity was subsumed in her husband's.<sup>67</sup> Under coverture, all property was controlled by

56. Kelly, *supra* note 2, at 10; G. S. Arnold, *Personal Names*, 15 YALE L.J. 227, 227 (1905).

57. *Doherty*, 150 P.3d at 458; Kelly, *supra* note 2, at 10. While some evidence exists, the development of women's names is more difficult to trace. *Id.* at 10–11. Women were frequently defined in relation to others, usually men. *Id.* However, due to the patrilineal surnaming system, these names typically did not survive. *Id.*

58. Kelly, *supra* note 2, at 11. *See also Doherty*, 150 P.3d at 458 (noting that when the use of surnames was first adopted they "were not passed down from generation to generation").

59. *Doherty*, 150 P.3d at 458; Kelly, *supra* note 2, at 11. However, during the fourteenth century, surnames also became hereditary for the landless class due in large part to government edicts. *Doherty*, 150 P.3d at 459; Kelly, *supra* note 2, at 11–12.

60. *See Kelly*, *supra* note 2, at 11 ("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.").

61. *Doherty*, 150 P.3d at 458; Kelly, *supra* note 2, at 11.

62. Kelly, *supra* note 2, at 11 (citing PERCY H. REANEY, *THE ORIGIN OF ENGLISH SURNAMES* 82–83 (1967)).

63. *Doherty*, 150 P.3d at 458; COONTZ, *supra* note 35, at 102.

64. COONTZ, *supra* note 35, at 102.

65. *Id.*

66. *Doherty*, 150 P.3d at 458; Kelly, *supra* note 2, at 19.

67. *Doherty*, 150 P.3d at 458; Kelly, *supra* note 2, at 19.

the husband.<sup>68</sup> Toward the eighth century, the Church began to have more influence over marriage and further contributed to patrilineal naming customs.<sup>69</sup> Polygamy was prohibited as early as the twelfth century<sup>70</sup> and by 1215, the Church required that a wife have a dowry for a marriage to be valid, which undercut the independence of women from their parents.<sup>71</sup>

In the twenty-first century, marriage in western culture has evolved and largely shifted away from a public decision made by relatives, neighbors, and the Church, to a private decision made between two persons.<sup>72</sup> Naming customs are also evolving. Upon marriage, women used to be forced to take their husband's names; now in all fifty states a woman can keep her maiden name or take her husband's surname.<sup>73</sup> In addition, the law has begun to recognize the rights of women in naming children.<sup>74</sup>

#### IV. LAWS ON MEN CHANGING THEIR SURNAMES UPON A CHANGE IN MARITAL STATUS

Despite this naming evolution, only seven states explicitly give a man the statutory right to change his name upon marriage.<sup>75</sup> Other states allow a man to change his surname upon marriage regardless of statute.<sup>76</sup> For example, I was married in Colorado but lived in Ohio at the time, so all my documentation changes were done in Ohio. Neither state's statutes explicitly allowed for me to change my name. Despite that, when I received my marriage certificate from Colorado, which only had my wife's and my old names, I simply took it to the Social Security office and to the Bureau of Motor Vehicles and received identification reflecting the name change. Following that, I sent off my new documents to the Passport Agency and my passport now reflects the new surname.

However, many states do not allow a man to change his name without statutory authorization and require a man to go through the statutory name

68. *Doherty*, 150 P.3d at 458; Kelly, *supra* note 2, at 19.

69. COONTZ, *supra* note 35, at 105.

70. *Id.* at 124.

71. *Id.* at 106.

72. *Id.*

73. See Kif Augustine-Adams, *The Beginning of Wisdom is to Call Things by Their Right Names*, 7 S. CAL. REV. L. & WOMEN'S STUD. 1, 4-9 (1997) (describing the legal developments that led the United States from historically requiring women to take their husband's surname to recognizing women's naming rights).

74. See Doll, *supra* note 6, at 236-44 (1992) (describing the progress in some courts from giving the father the primary naming rights to recognizing the mother's and child's interests).

75. The seven states are Georgia, Hawaii, Iowa, Louisiana, Massachusetts, New York, and North Dakota. GA. CODE ANN. § 19-3-33.1 (1999); HAW. REV. STAT. ANN. § 574-1 (Michie 1993); IOWA CODE ANN. § 595.5 (West Supp. 2001); LA. CIV. CODE ANN. art. 100 (2002); MASS. ANN. LAWS ch. 46, § 1D (Law. Co-op. 1991); N.Y. DOM. REL. LAW § 15 (McKinney 1999); N.D. CENT. CODE § 14-03-20.1 (1996).

76. Wisconsin's statutes do not mention a right to do so, yet clerks there have allowed men to just modify the marriage certificate to allow for the name change. Jessica McBride, *More Grooms Are Saying 'I Do' to Taking Bride's Last Name in the Name of Love*, MILWAUKEE J. SENTINEL, Nov. 28, 1999, Lifestyle, at 1.

change process.<sup>77</sup> This may sound simple and easy, but that is not necessarily the case. The statutory name change process varies by state, and a person seeking to change his name is typically subject to the discretion of the courts. Seventeen states give the judiciary nearly complete discretion with respect to male name changes.<sup>78</sup> Others among the remaining thirty-three states have also rejected male name changes based on judicial discretion.<sup>79</sup> Although appellate courts have at times reversed them, trial judges have utilized this discretion to reject name changes for gay couples attempting to change to the same surname.<sup>80</sup> At least one judge has criticized a man's petition to change his surname to that of his wife, but ultimately allowed the name change.<sup>81</sup>

Even if a man can legally change his surname to his wife's, the statutory process can be onerous.<sup>82</sup> These factors led Michael Buday to bring a constitutional challenge under the Equal Protection Clause to California's laws which did not allow for him to change his surname to his wife's surname.<sup>83</sup> California required Mr. Buday to file a petition with the court, publish a copy of an Order to Show Cause in a newspaper of general circulation for four weeks, and pay all costs. Finally, if the court received no objection, his name change request could be granted.<sup>84</sup> However, the California legislature has recently mooted this case by passing legislation which would allow men such as Mr.

77. For example, a customer service representative for a Wyoming county marriage license department refers men who want to change their name upon marriage to the local district court clerk. Karen Jansen, *Play the Name-Change Game*, WYOMING TRIBUNE-EAGLE, June 4, 2000, High Plains Living.

78. Idaho, Montana, South Carolina, Washington, Connecticut, and Georgia give judges total discretion in this area. IDAHO CODE ANN. § 7-804 (Michie 2001); MONT. CODE ANN. § 27-31-204 (2001); S.C. CODE ANN. § 15-49-20 (Law. Co-op. 2000); WASH. REV. CODE ANN. § 4.24.130 (West 1997); *Don v. Don*, 114 A.2d 203, 205 (Conn. 1955) (permitting a child's name to be changed to that of the adopted parent despite objections from the biological parent). *See also* *In re Mullinix*, 262 S.E.2d 540, 541 (Ga. Ct. App. 1979) (overturning the trial court's denial of a name change). Alaska, Massachusetts, Oregon, and Texas simply require the name change to be rejected if against the public interest. ALASKA STAT. § 25.24.165 (Michie 2000); MASS. ANN. LAWS ch. 210, § 12 (Law. Co-op. 1991); OR. REV. STAT. § 33.410 (1983); TEX. FAM. CODE ANN. § 45.103 (Vernon 1998). Arkansas, Nebraska, Nevada, North Carolina, North Dakota, Ohio, and South Dakota require a "good reason" for a name change. ARK. CODE ANN. § 9-2-101 (Michie 2000); NEB. REV. STAT. § 25.21,271 (1996); NEV. REV. STAT. § 41.290 (1996); N.C. GEN. STAT. § 101-2 (1999); N.D. CENT. CODE § 32-28-02 (1996); OHIO REV. CODE ANN. § 2717.01 (Anderson 2000); S.D. CODIFIED LAWS § 21-37-5 (Michie 1999).

79. Rosensaft, *supra* note 15, at 194 (citing *In re Dengler*, 287 N.W.2d 637, 639 (Minn. 1979); *In re Ritchie*, 159 Cal. App. 3d 1070, 1072 (1984); Jane M. Draper, Annotation, *Circumstances Justifying Grant or Denial of Petition to Change Adult's Name*, 79 A.L.R.3d 562, Section 3(a) (1977)).

80. *See* *In re Bicknell*, 96 Ohio St.3d 76, 771 N.E.2d 846 (2002) (reversing trial judges denial of a gay woman's name change request and rejecting the trial judges rationale that adopting her partner's surname would sanction their lifestyle and was against public policy). *See also* *In re Bacharach*, 780 A.2d 579, 581 (N.J. Super. Ct. App. Div. 2001) (denying as against public policy a same-sex couple's surname change).

81. *See* Lou Gonzales, *Man Finds Resistance to Name Change*, FLA. TIMES-UNION, Feb. 10, 2000, Lifestyle, at D-2.

82. *See id.* (noting that the man had to deal with an ornery judge and pay \$71 in fees to change his surname to his wife's).

83. *Buday v. State of California*, Complaint, Case No. CV06-08008, U.S. District Court for the Central District of California (C.D.Cal. 2006).

84. *Id.* at 2.

Buday to change their names.<sup>85</sup>

It is time for the other forty-two states to take this same step in the evolution of surnaming and recognize a man's right to take his wife's surname at marriage. In addition, the related right of a man to revert back to his surname following divorce should also be recognized.<sup>86</sup> These changes in marital status already allow for a woman to change her name, and it is a violation of the Equal Protection Clause to deny men the same opportunity.

## V. PRIVACY AND ONE'S OWN PERSONAL LABEL

The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone.<sup>87</sup>

Analyzing one's name as a privacy issue may seem counterintuitive; after all, a name only becomes relevant during social interaction. Analyzed under a common understanding of privacy as a condition of being secluded or concealed from the view of others,<sup>88</sup> a name and privacy seem unrelated. However, privacy in this paper is not meant to refer to the dictionary definition; instead, it

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85. Press Release, HT Media, *supra* note 13 (Governor Schwarzenegger has yet to sign the bill).

86. State's divorce statutes vary more than their marriage counterparts in this area. See Rosensaft, *supra* note 15, at 192-93 (describing state's divorce laws). Thirteen states explicitly allow women, but not men, the right to change back to their pre-marriage surname including Arkansas, California, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Montana, Nevada, Oklahoma, Rhode Island, South Dakota, and Vermont. ARK. CODE ANN. § 9-12-318 (Michie 2000); CAL. FAM. CODE § 2080 (West 2000); IND. CODE ANN. § 31-15-2-18 (West 1999); KY. REV. STAT. ANN. § 403.230 (Michie 1999); LA. CODE CIV. PROC. ANN. art. 3947 (West 2002); MASS. ANN. LAWS ch. 208, § 23 (Law. Co-op. 1991); MICH. COMP. LAWS ANN. § 552.391 (Michie 1988); MONT. CODE ANN. § 40-4-108(4) (2001); NEV. REV. STAT. ANN. § 125.130(4) (Michie 1996); OKLA. STAT. ANN. tit. 43, § 121 (West 2001); R.I. GEN. LAWS § 15-5-17 (2000); S.D. CODIFIED LAWS § 25-4-47 (Michie 1999); VT. STAT. ANN. tit. 15, § 558 (2001). Curiously, included in those thirteen states is Louisiana and Massachusetts, which are two of the seven states which allow men to change their surname upon marriage. Twenty-three other states employ gender neutral language to allow men or women to change back to their pre-marriage surname, including Alaska, Arizona, Connecticut, Delaware, Hawaii, Iowa, Kansas, Maine, Maryland, Minnesota, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Virginia, Washington, West Virginia, and Wisconsin. ALASKA STAT. § 25.24.165 (Michie 2000); ARIZ. REV. STAT. ANN. § 25-325 (2000); CONN. GEN. STAT. ANN. § 46b-63 (West 2000); DEL. CODE ANN. tit. 13, § 1514 (2000); GA. CODE ANN. § 19-3-33.1 (1999); HAW. REV. STAT. ANN. § 574-5(B) (Michie 1993); IOWA CODE ANN. § 674.13 (West 1996); KAN. STAT. ANN. § 60-1610(c) (1994); ME. REV. STAT. ANN. tit. 19-A, § 1051 (West 1998); MD. CODE ANN., FAM. LAW § 7-105 (West 1999); MINN. STAT. ANN. § 518.27 (West 2001); NEB. REV. STAT. § 42-380 (1996); N.H. REV. STAT. ANN. § 458:24 (2001); N.J. STAT. ANN. § 2A:34-21 (West 2000); N.Y. DOM. REL. LAW § 240-a (McKinney 1999); N.C. GEN. STAT. § 50-12 (1999); OHIO REV. CODE ANN. § 3105.16 (Anderson 2000); OR. REV. STAT. § 107.105 (1983); 54 PA. CONS. STAT. ANN. § 704 (West 1996); S.C. CODE ANN. § 20-3-180 (2000); TEX. FAM. CODE ANN. § 6.706 (Vernon 1998); VA. CODE ANN. § 20-121.4 (Michie 2000); WASH. REV. CODE ANN. § 26.09.150 (West 1997); W. VA. CODE ANN. § 48-5-613 (LexisNexis 2001); WIS. STAT. ANN. § 767.20 (West 2001).

87. *Roberson v. Rochester*, 64 N.E. 442 (N.Y. Ct. App. 1902) (Gray, J., dissenting).

88. See Dictionary.com, <http://dictionary.reference.com/browse/privacy> (last visited Dec. 8, 2007).

refers to the broader notion that a person's privacy involves the right to be let alone from government interference, the ability to be autonomous so that he or she can make important life decisions.

The examples also in this note show fascinating intersections between names and privacy. At Ellis Island, the immigrants lost their ability to make a decision free from the oppressive intrusion of government: the clerk decided for them what their name would be. The desire to retain that autonomy by my wife's grandfather is a large part of the reason I decided to take her name in marriage. Similarly, Sojourner Truth shows another example of the loss of privacy in naming. For the first part of her life as a slave, she had little control over her name. Without slavery, she probably would not have been named Isabella. She first took back some control over her name when she changed it to the name of the white family who took her in upon her escape and later exercised near complete autonomy in changing her name again.

The Rhinelander name is another example of a family losing control over its name based on the private decisions of Kip and Alice. After the court battle following the marriage, the Rhinelander family wished to keep Alice from using the family name because she was not white. Alice had the autonomy to decide to continue to use the name, but instead she made the decision to abandon it in the settlement. Hillary Clinton's naming example does not look like a privacy issue because her name change was part of a political strategy rather than a private decision. However, she did make a private, largely autonomous decision to enter into that political world. Thus to a certain extent, she still controls her name but has decided to subdue her desire to retain her maiden name in return for political influence.

## VI. EQUAL PROTECTION ARGUMENT

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>89</sup>

The Equal Protection Clause is contained in the Fourteenth Amendment of the U.S. Constitution and provides a legal strategy to rectify the problem of naming by providing men with the ability to make a private, autonomous choice as to their surname. The Equal Protection Clause was initially applied to correct race-based discrimination, and it now also protects against gender-based discrimination.<sup>90</sup> The Court has made it clear that unconstitutional gender-based discrimination can occur against either males or females.<sup>91</sup> The Court has established an intermediate scrutiny test for gender-based discrimination: "[C]lassifications by gender must serve important governmental objectives and

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89. U.S. CONST. amend. XIV.

90. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

91. *See id.* (discussing a male who challenged the Oklahoma drinking age).

must be substantially related to achievement of those objectives."<sup>92</sup>

*Caban v. Mohammed* illustrates how a statute can serve important governmental objectives but fail to substantially relate to the achievement of those goals.<sup>93</sup> New York's statute allowed for the mother of a child born out of wedlock to stop the adoption of her child by withholding her consent; the father was given no such right.<sup>94</sup> New York's proffered objective of providing for children born out of wedlock by attempting to foster their adoption was deemed important. However, the Court found the distinction in the law between unmarried mothers and fathers was not substantially related to this objective.<sup>95</sup> It noted the statute instead could have drawn the distinction between a parent who is involved in rearing the child and one who is not involved.<sup>96</sup>

The Equal Protection Clause has also been applied to cases involving naming statutes. In *O'Brien v. Tilson*, three married couples challenged the constitutionality of a North Carolina statute which required a father's surname to be given to a child born to married parents.<sup>97</sup> One of the three couples was prevented from giving their child a surname composed of their hyphenated surnames.<sup>98</sup> The court identified two equal protection issues. First, by permitting the child to bear only the father's name, the statute created a classification based on gender. Second, the statutory scheme distinguished between legitimate children, who could only bear the father's surname, and illegitimate children, who could bear either parent's surname. In holding the statute unconstitutional, the court said it did not have to decide the standard of review "because even under the most relaxed of standards, requiring only a showing that the statute can reasonably be viewed as promoting some legitimate state interest, the statute proves to be patently defective."<sup>99</sup>

In *Rio v. Rio*, the New York Superior Court was faced with a father's petition seeking to change his child's surname to his own.<sup>100</sup> The child's current surname was given by the mother and was a hyphenated combination of both parents' surnames.<sup>101</sup> The father argued "that it is a time honored right that a newborn child born in wedlock bear the surname of the father."<sup>102</sup> The court denied the petition and held that the idea of a vested paternal surname

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92. *Id.* at 197.

93. 441 U.S. 380, 382 (1979). *See also* *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (striking down Missouri law which required widowers, but not widows, to show incapacitation or dependence in order to collect death benefits).

94. *Caban v. Mohammed*, 441 U.S. 380, 385-86 (1979).

95. *Id.* at 391.

96. *Id.* at 392.

97. 523 F. Supp. 494, 495 (E.D.N.C. 1981).

98. *Id.* The second couple wished to name their son "in accordance with the Swedish custom, by combining the father's given name, Arne, with the suffix 'son', to make Arneson. [The third couple] sought to name their daughter . . . in the Spanish custom, by giving the child the hyphenated combination of both parent's surnames." *Id.*

99. *Id.* at 496.

100. 504 N.Y.S.2d 959, 960 (N.Y. Sup. Ct. 1986).

101. *Id.*

102. *Id.*

presumption violates the Equal Protection Clause.<sup>103</sup>

The statutes at issue here are those marriage and divorce statutes which specify that a woman can alter her surname upon a change in marital status while not specifying that a man can do so.<sup>104</sup> These statutes are facially discriminatory and the Equal Protection Clause applies because they classify citizens based on gender. To survive an equal protection challenge, the state must identify the important governmental interests served by the statute and show that the statute substantially relates to the achievement of those objectives.

Several justifications have been provided in response to equal protection challenges to naming statutes. These justifications can essentially be organized into five categories: custom, preservation of the family unit, administrative convenience, fraud, and de minimus injury.<sup>105</sup> The first three justifications are easily dismissed.<sup>106</sup> In gender-based discrimination, custom is likely based on an "overbroad generalization," which is precisely what the Equal Protection Clause is attempting to eradicate.<sup>107</sup> Preservation of the family unit has been rejected as an outdated concept which does not accurately reflect contemporary societal norms.<sup>108</sup> Administrative convenience has been frequently dismissed as failing to amount to an important governmental interest in light of the discriminatory behavior.<sup>109</sup>

103. *Id.* at 963. *See also* *In re Schiffman*, 620 P.2d 579, 582 (Cal. 1980) (citing *Donald J. v. Evna M.*, 81 Cal.App.3d 929, 937 (Cal. Ct. App. 1978) (noting that equal rights for both parents means that neither has a primary right to give the child their surname)).

104. For the marriage statutes not at issue, *see supra* note 75. For the divorce statutes at issue, *see supra* note 86.

105. *Rosensaft*, *supra* note 15, at 200 (citing Omi Morgenstern Leissner, *The Name of the Maiden*, 12 *Wis. WOMEN'S L.J.* 253, 262 (1997)).

106. *See Rosensaft*, *supra* note 15, at 200–03.

107. *See Rio v. Rio*, 504 N.Y.S.2d 959, 963 (N.Y. Sup. Ct. 1986); *In re Steinbach*, 177 Wis.2d 178, 188 (Wis. Ct. App. 1993) (noting with approval other courts who have struck down laws giving the father preference in deciding a child's surname and upholding statute which gave parent with actual custody of the child naming rights); *Doherty v. Wizner*, 210 Ore. App. 315, 321 (Ore. App. 2006) ("Beginning in the latter half of the twentieth century, traditional naming practices, writes one commentator, were recognized as 'com[ing] into conflict with current sensitivities about children's and women's rights.' Those changes accelerated a shift away from the interests of the parents to a focus on the best interests of the child." (citing Richard H. Thornton, *The Controversy Over Children's Surnames: Familial Autonomy, Equal Protection and the Child's Best Interests*, 1979 *UTAH L. REV.* 303 (1979)). *See also* *United States v. Virginia*, 518 U.S. 515, 541–45 (1996); *Caban v. Mohammed*, 441 U.S. 380, 388–89 (1979) ("We reject, therefore, the claim that the broad, gender-based distinction of (the statute) is required by any universal difference between maternal and paternal relations at every phase of a child's development.").

108. *In re Erickson*, 547 S.W.2d 357, 359 (Tex. App. 1977) ("We cannot say from the evidence as presented that to grant appellant's request will result in 'the appearance of an illicit co-habitation against the morals of society,' and be 'detrimental to the institution of the home and family life,' or that it will be against the best interest of the children."). *See also Rosensaft*, *supra* note 15, at 201–02 (noting that the preservation of the family unit argument was based on the needs of illegitimate children and does not apply to contemporary society).

109. *O'Brien v. Tilson*, 523 F. Supp. 494, 497 (E.D.N.C. 1981) ("In this age of electronic data processing, the Court cannot conclude that permitting plaintiffs to do as they wish would render it impossible or even minimally more costly or difficult for the State of North Carolina to keep track of its new citizens. The fairness of this inference is substantiated by the fact that the 48 states which permit more freedom of choice than does North Carolina somehow manage to record births without undue difficulty."); *Jech v. Burch*, 466 F.Supp. 714, 740 (D. Haw. 1979). *See also Wengler v. Druggists*

The final two justifications deserve slightly more discussion, but they also fail to substantially relate to important governmental objectives. Fraud is a legitimate state interest; however, the marriage and divorce statutes at issue do not substantially relate to the prevention of fraud.<sup>110</sup> In all fifty states, women already have the right to change their surname upon a change in marital status. If women changing their surname upon marriage does not implicate fraud, then under equal protection fraud cannot be used as a rationale to prevent men from doing the same.

The last argument typically advanced to support these statutes is that the injury is *de minimus*. However, as this paper has argued in Section II, names are important. Many courts have also shown that they consider names to be important.<sup>111</sup> If the state already allows a woman to change her name upon marriage, the Equal Protection Clause requires that a man should be afforded that same right.

## VII. CONCLUSION

Names are important because they construct one's identity in several ways. For Sojourner Truth and many others, names implicate a sense of self. For my wife's grandfather and many others, names connect a person with their familial and ethnic past. The western patrilineal tradition used today in the United States is that a wife will take her husband's surname and that their children will bear that name as well. This tradition does not reflect the fact that marriage today is largely a private decision between two people. In the Middle Ages, when the western patrilineal naming tradition developed, marriage was far more concerned with property and was largely a public decision. It was rare for a couple to privately decide to wed out of love. Today, naming is largely an issue of privacy; it affects profound issues of personal autonomy and the ability to write one's own story. The Equal Protection Clause affords a legal strategy to achieve equality in naming by giving men the right to take their wife's name, just as women have the right to take their husband's name.

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Mut. Ins. Co., 446 U.S. 142, 152 (1980) ("Yet neither the court below nor appellees in this Court essay any persuasive demonstration as to what the economic consequences to the State or to the beneficiaries might be if, in one way or another, men and women, whether as wage earners or survivors, were treated equally under the workers' compensation law, thus eliminating the double-edged discrimination described in Part II of this opinion. We think, then, that the claimed justification of administrative convenience fails, just as it has in our prior cases."); *Frontiero v. Richardson*, 411 U.S. 677, 689–90, (1973) (dismissing as insufficient the Government's claim that, as an empirical matter, wives are so frequently dependent upon their husbands and husbands so rarely dependent upon their wives that it was cheaper to presume wives to be dependent upon their husbands while requiring proof of dependency in the case of the male); *Reed v. Reed*, 404 U.S. 71, 76 (1971) ("To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . .").

110. Rosensaft, *supra* note 15, at 203–05 (arguing that most persons would not enter into a sham marriage simply to change their name and hide their identity).

111. See, e.g., *O'Brien*, *supra* note 109.