



DATE DOWNLOADED: Wed Oct 6 03:12:08 2021
SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Bluebook 21st ed.

Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761 (2007).

ALWD 6th ed.

Emens, E. F., *Changing name changing: Framing rules and the future of marital names*, 74(3) U. Chi. L. Rev. 761 (2007).

APA 7th ed.

Emens, E. F. (2007). *Changing name changing: Framing rules and the future of marital names*. University of Chicago Law Review, 74(3), 761-864.

Chicago 17th ed.

Elizabeth F. Emens, "Changing Name Changing: Framing Rules and the Future of Marital Names," *University of Chicago Law Review* 74, no. 3 (Summer 2007): 761-864

McGill Guide 9th ed.

Elizabeth F Emens, "Changing Name Changing: Framing Rules and the Future of Marital Names" (2007) 74:3 U Chi L Rev 761.

AGLC 4th ed.

Elizabeth F Emens, 'Changing Name Changing: Framing Rules and the Future of Marital Names' (2007) 74(3) University of Chicago Law Review 761.

MLA 8th ed.

Emens, Elizabeth F. "Changing Name Changing: Framing Rules and the Future of Marital Names." *University of Chicago Law Review*, vol. 74, no. 3, Summer 2007, p. 761-864.
HeinOnline.

OSCOLA 4th ed.

Elizabeth F Emens, 'Changing Name Changing: Framing Rules and the Future of Marital Names' (2007) 74 U Chi L Rev 761

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

The University of Chicago Law Review

Volume 74

Summer 2007

Number 3

© 2007 by The University of Chicago

Changing Name Changing: Framing Rules and the Future of Marital Names

Elizabeth F. Emens†

Introduction.....	763
I. The Nature of the Problem	767
A. The Trouble with Names.....	768
B. The Trouble with Marital Naming Choices	774
II. Current Social Defaults: Practices of Family Naming	785
A. What Spouses Do with Their Names.....	785
B. What Parents Do with Their Children's Names.....	791
III. Social Alternatives: Crafting A Sustainable Egalitarian Convention	793
A. Common Alternatives to the Mrs. His Name Convention.....	794
B. A Promising Alternative: Biphenation	804
IV. Current Legal Defaults: State Procedures for Marital Names	809
A. Keeping: The Least Sticky Default (But Only for Women).....	812
B. The Process (Costs) for Various Marital Name Changes.....	816

† Associate Professor of Law, Columbia Law School. For helpful conversations and comments on earlier versions, I thank Ian Ayres, Katharine Baker, Vincent Blasi, Richard Briffault, Mary Anne Case, Caroline Mala Corbin, Michael Dorf, Ariela Dubler, Melvin Eisenberg, Robert Ferguson, Philip Genty, Suzanne Goldberg, Jack Greenberg, Philip Hamburger, Scott Hemphill, Harry Kavros, Sarah Lawsky, Jonathan Levav, Jacob Levy, Kent McKeever, Aloisia Moser, Henry Monaghan, Melissa Murray, Gerald Neuman, Alex Raskolnikov, Robert Rasmussen, Carol Sanger, Catherine Sharkey, Rachel Smith, Elizabeth Scott, Robert Scott, Richard Squire, Geoffrey Stone, Mark Stopfer, Peter Strauss, Susan Sturm, Cass Sunstein, Guy Uriel-Charles, John Witt, Mary Zulack, and participants in faculty workshops at the S.J. Quinney School of Law at the University of Utah and Columbia Law School, in the *Columbia Journal of Gender & Law* Symposium on Gender, Sexuality, and Law, in the 15th Annual Women and Society Conference at Marist College, and in the American Constitution Society and Law Women at NYU. Excellent research assistance was provided by Joya Banerjee, Andrew Brantingham, Jordan Connors, John Gildersleeve, Guy Gribov, Maeve Herbert, and Leah LaPorte, and special thanks goes to Beth Williams for her outstanding research support. This Article is © 2007 by Elizabeth F. Emens.

C. Desk-Clerk Law	823
V. New Uses of Existing Default Categories: Setting the Default	827
A. Switching the Default	829
B. Altering Rules	834
C. Forced Choosing.....	836
D. Menus	838
VI. Framing Rules: Regulating How the Question Is Asked	839
A. Interrogatory Frames: How the Question Is Worded.....	843
B. Embedded Frames: The Context of the Question	844
C. Informational Frames: What Accompanies the Question.....	848
D. Time Matters: The Timing of Frames	851
E. Whose Frame: Different Framing Entities	853
F. Beyond Names: Implications for Other Areas of Law.....	853
VII. Two Possible Reforms.....	854
A. The New York Model.....	856
B. A More Ambitious Model.....	859
Conclusion	861

Marital names shape our ideas about marriage, about our children, and about our selves. For about a hundred years, American states required married women to take their husbands' names in order to engage in basic civic activities such as voting. While the law no longer requires women to change their names, it still shapes people's decisions about marital names in both formal and informal ways.

For example, the formal legal default rule in most places is that both spouses keep their premarital names. This rule is minoritarian for women, which means it imposes a range of social costs on women who make the most conventional naming choice. But the rule is majoritarian for men, which means it does nothing to unsettle the most robust aspect of our current marital naming conventions—the fact that men almost never change their names, even to hyphenate. This fact about men's names—coupled with the fact that children almost always have their father's name, even if their mother makes an unconventional naming choice for herself—means that women are ostensibly choosing their marital names, but in fact they are choosing from a very limited decision set. That is, women effectively can have nominal continuity either with their past (their families of origin and premarital selves) or with their future (their children and possibly their spouse), but not across all three generations. The formal legal default that both spouses keep their names reinforces this bind for women.

Informally, legal institutions also shape choices through "desk-clerk law," that is, advice given by the government functionaries who answer public inquiries at state and local agencies. These legal actors frequently mislead people and discourage unconventional naming choices as a result of ignorance or their own views about proper practice.

Because states historically reinforced a regime of patrilineal descent of names, what might seem a neutral default regime is inadequate. States should set defaults and frame choices to encourage more egalitarian decisions about whether to change names and how. States could try any number of creative solutions using existing categories for thinking about choice regimes, drawn from contract-law theory: default rules (what rule the state fills in if the parties don't speak to the contrary); menus (what range of options parties are given); and altering rules (what steps parties must take to contract around the default rule into different alternatives). Most modestly, states could adopt a "forced choosing" approach, requiring both spouses to state their postmarital names. More ambitiously, states might encourage hyphenation and, at the next generation, "biphe-

tion”—defined as the passing of one name from each hyphenated parent—by making this the default option.

States could also create what might be called “framing rules,” which would dictate how the state asks the question of parties in a choice regime. Framing rules encompass what information the state gives parties, what words it uses, what context surrounds the question, as well as the timing of the question. Framing rules are particularly important in contexts, such as marital names, where social conventions exert a strong influence on choices, and where desk-clerk law is likely to be erroneous or misleading.

INTRODUCTION

What laws should govern spouses’ names at marriage? If a man and a woman marry, should the woman’s name change automatically? Or should the woman’s name remain the same unless she goes through more or less complicated steps to change it? Contrary to convention, should the man’s name change to the woman’s? Should both their names be hyphenated? Many variations could be imagined.

The law of marital names has undergone a significant transformation over the past forty years. For about a hundred years of U.S. history, states required married women to take their husbands’ names in order to engage in basic activities such as voting and driving. Now, because of a series of decisions made in the 1970s, married women may choose the names they bear. In the language of contract law, then, a *mandatory* regime has been replaced with a *default* regime.

But the law continues to matter. A growing number of studies show that default rules affect the choices that parties make across widely varying domains, from organ donations to pension plans to corporate antitakeover measures. For instance, across these varied domains, defaults are often “sticky.” That is, parties often choose whatever option is set as the default. Thus, even when private parties choose, the law shapes behavior by the way it frames those choices.

Relatively little attention has been paid, however, to areas where social conventions strongly influence decisions. Marital names therefore present an interesting case study, because the default rule here—*Keeping*—is not sticky for women. Although no longer required to do so, the majority of women take their husbands’ names at marriage. This suggests that something other than law is largely driving behavior, at least for women. So what role is law playing, and what role should it play?

One contention of this Article is that the law of marital names should try to encourage egalitarian choices—meaning choices that favor neither men nor women. Names are a highly personal matter, arguably constitutive of our selves. For this reason, names should generally be a matter of choice, and this Article does not even entertain proposals for mandatory naming regimes.

So why should the state be involved in marital names at all? In short, because it has to be. The state has to set some default for names at marriage—even that names change or do not change—and the state must decide how it asks the question and how costly it makes the relevant choices. At present, in ways that this Article elaborates, the current default regime formally and informally encourages the continuation of inegalitarian conventions that the state used to mandate.

In addition, the state's default rule should be sensitive to the fact that naming choices are constrained by the social and historical context in which they are made. Formally, names may be choices for adults, but children are born into this naming regime, with no way to opt out until they are grown. In addition, current preferences are likely to be endogenous to the state's previous mandatory regime. It would be surprising if women's (and men's) preferences did not adapt to that mandatory regime, much as Aesop's fox adapted to the unavailability of the grapes.

Under current conventions, women's choices in this area are sharply limited. This is true in the obvious sense that social costs accompany unconventional choices, thereby creating the collective action problem surrounding any attempt to change social meaning.¹ Women's choices are also limited in the sense that what men do with their names constrains the overall marital naming options: since men almost never change their names, and since children typically take their father's name even when their mother makes an unconventional naming choice for herself, women lack a naming option that creates continuity among their parents, their spouses, and their children.

The current law of marital names tends to discourage, rather than encourage, egalitarian alternatives to this bind. By setting Keeping as the legal default, the state does nothing to unsettle the most robust feature of our current marital naming conventions: the fact that men almost never change their names. More pointedly, through both formal and informal means, states make any name change other than her becoming *Mrs. His Name* more difficult.² Formally, some states place additional administrative burdens on unconventional marital name changes. And even more often, states and localities place such burdens informally, through what I call *desk-clerk law*.

¹ See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U Chi L Rev 943, 993–99 (1995) (indicating that when an “individual or part of the collective wants to transform a social meaning, that individual or part faces a collective action problem, since it must succeed in inducing a collective response from a sufficiently large portion of the total society to assure the social change of meaning”).

² The phrase “*Mrs. His Name*” has been used by others. See, for example, Jean M. Twenge, “*Mrs. His Name*”: Women's Preferences for Married Names, 21 Psych Women Q 417, 425 (1997).

Desk-clerk law is what the person at the desk tells you the law is. In the realm of marital names, the government functionaries who answer questions and direct choosing behavior around marital names seem frequently to give incorrect or normatively driven responses that discourage unconventional choices. In this informal way, desk clerks effectively make the rules for many citizens. Desk-clerk law is important to government-citizen interactions in the realm of marital names and beyond.

In light of these considerations, and especially the states' historical role in mandating an inegalitarian regime, the law of marital names should instead encourage egalitarian choices. This Article lays out a range of ways that states could design their default regimes to this end. Existing categories for thinking about default regimes—default rules, menus, and altering rules—could be used to vary the features of the naming regime that affect choice. For instance, a state could create a *facilitative default*, where the state supplies parties with a suggested version of their hyphenated names, by randomly generating the order of the names and, where necessary, which name from each. Or, following research on contrast and compromise effects, the default could be set at a *radical default*, something extreme, such as the husband becoming Mr. Her Name, to make biphenation seem more moderate. Alternatively, *menus* could be used to favor certain options, since research indicates that people tend to prefer the first option listed. Finally, *altering rules*—the rules that determine the steps the parties must take to contract around a default rule—could be varied to make egalitarian naming options easier than inegalitarian ones.

The Article also introduces a new category to the default-rules literature: *framing rules*. Though the existing categories provide some interesting avenues for reform, the fact that marital names are a domain in which choices are strongly shaped by social conventions highlights the need to think about the problem differently. States not only determine which options are easier than others and how; states also determine how to ask the questions in a default regime. Framing rules therefore encompass the words used to ask the question (*interrogatory frames*), the information provided to accompany the question (*informational frames*), and the context that surrounds the question (*embedded frames*).

The idea of framing rules applies to a range of contexts. New York law provides an example of a framing rule about marital names, through a law passed in 1985 that requires marriage license applications to inform the parties that either can change his name, that neither must change his name, and that a specific, wide range of naming options is available.³

³ NY Dom Rel Law § 15(b) (McKinney 1999).

Framing rules also have applications to many other domains, from the way parties are required to disclose contractual terms to one another (for example, unconscionability doctrine) to the words police officers must use to explain rights to a detainee (for example, *Miranda* warnings). They are likely to be particularly important in areas where social conventions strongly influence decisions and where desk-clerk law is therefore especially likely to be erroneous or misleading.

This Article comes in seven Parts. The first Part discusses why names matter, both in general and in the context of marriage and family formation in particular. The second Part lays out contemporary social trends of marital naming. The third Part then proceeds from the premise, supported by Part I, that an ideal social practice of family naming would not follow our historical practice of patrilineal naming, but would involve some workable solution that favors neither men nor women across generations. After considering various options, this Part proposes the “biphenation” convention, in which spouses hyphenate their own names (or just their children’s) and then biphenate across generations by choosing one of each parent’s names.

The rest of the Article addresses the legal regime. Part IV sets out the current array of practices by states with regard to name changes at marriage. The fifth Part evaluates the merits of possible legal default rules that would, to differing degrees, encourage more egalitarian naming choices. Building on existing categories in the default rule literature, this Part lays out several innovative types of default rules, discusses the virtues of forced choosing, and considers possible approaches to designing menus and altering rules in this context. In these ways, a state might modify its default regime to try to steer choices away from a convention shaped by the state’s past involvement in subordinating or even unconstitutional past practices. The sixth Part develops the novel category of framing rules for marital names in order to show the utility of this category for marital names and across a wider range of legal domains. Finally, the seventh Part presents two possible proposals for reform, one more modest and the other less so, both building on the idea of framing rules to help overcome misleading desk-clerk law and ignorance of law’s departure from convention.

* * *

An audience member at a talk I gave on this Article asked me this question: “Do you judge women who make some naming choices rather than others?” I was troubled by the question—troubled that someone who had heard the talk could think that was my position—but the answer came easily. I explained that I have no interest in judging individual women’s choices in this domain. On the contrary, I think

individual women are typically in a bind—with no particularly good choices, and with likely disapproval from someone for whatever choice they make. An aim of this paper is therefore to broaden the frame away from the choices that individual women make. The hope is to focus our attention on how we—as communities and lawmakers—could better frame decisions about marital names to make egalitarian choices more plausible for both men and women.

I. THE NATURE OF THE PROBLEM

I guarantee you that the first generation of women who grow up without scribbling “Mrs. Paul Newman” all over their notebooks “just to see what it looks like” is going to think we [the feminists who fought against mandatory name change for women] were mad. It is a very odd and radical idea indeed that a woman would nominally disappear just because she got married.

—Ellen Goodman⁴

Picture Rachel Smith and Sam Miller. If they choose to become Rachel and Sam Miller (or Mr. and Mrs. Sam Miller), we know the progression: Their kids are Millers, and if and when their kids grow up and marry, the boys continue to be Millers, and the girls become Mrs. Husband’s Name. Their kids’ kids follow the same practice—fairly simple. As one commentator wrote in the heyday of the lawsuits that stopped the practice of forcing women to change their names to their husband’s under law:

Sure, it smacks of discrimination to require that a woman assume her husband’s surname upon marriage and that the children she bears also go by her husband’s name. But it is tidy. In a culture that developed as a male-dominated society, it was natural that the family name follow the male line of descent. . . . [W]hy don’t we leave well enough alone . . . ?⁵

Everyone understands the practice of male surnames passing to the wife and the children. How could they not? It is very simple.

The arguments for why names matter—that is, why it should matter that men’s surnames pass from generation to generation and women’s surnames disappear—were articulated at great length by those who fought to defeat our previous mandatory regime for women taking

⁴ Ellen Goodman, *The Name of the Game*, Boston Globe 30 (Sept 24, 1974).

⁵ *What to Call What’s-His-Name*, Virginian-Pilot A10 (Jan 5, 1981).

their husband's names.⁶ This Article will not rehearse all of these arguments. Before proceeding to discuss social and legal alternatives to our current regime, though, this Part lays out several reasons why marital names matter.

A. The Trouble with Names

Suppose we had a tradition that when blacks married whites, the white name was always the name used by the family. . . . If you really think that there's equality, ask him to change his name.

—Morrison Bonpasse⁷

Volumes have been written—and many more could be written—on the history, law, and social meaning of names. This Part very briefly highlights a few noteworthy points about names in general and marital names in particular.

1. Names in general.

Names are peculiarly situated as among our most trivial, and yet our most foundational, social practices. Names are mere words—a string of letters and sounds typically chosen by someone else to identify us. Our first names and our last names are given by others before or shortly after we are born, when the choosers have no idea of our personalities or preferences, and thus are in some sense chosen blindly.⁸ When we are older, we can formally change our names, but very few men do so, and, outside the context of marriage, few women make a change.⁹ Mostly, outside marriage, we take the names we are

⁶ See, for example, Julia C. Lamber, *A Married Woman's Surname: Is Custom Law?*, 1973 Wash U L Q 779, 783–807; Shirley Raissi Bysiewicz and Gloria Jeanne Stillson MacDonnell, *Married Women's Surnames*, 5 Conn L Rev 598, 602–20 (1972).

⁷ Morrison Bonpasse, quoted in Chris Poon, *The Name Game—A Bride Has to Decide: Should She Change, Stay the Same, Hyphenate, or Invent?*, Providence Journal-Bulletin 8L (Oct 17, 1999). Bonpasse is currently the Executive Director of the Lucy Stone League, a group established in the 1920s to fight for women's right to retain their birth names after marriage, and rejuvenated in 1997 to promote egalitarian naming practices more generally. See also Amanda Bower, *It's Mrs., Not Ms.: In a Return to Tradition, More Brides Are Taking Their Husband's Name*, Time Bonus Section W4 (June 6, 2005).

⁸ Compare John Stuart Mill, *A System of Logic* 23 (Harper 1850):

The only names of objects which connote nothing are *proper* names. . . . A proper name is but an unmeaning mark which we connect in our minds with the idea of the object, in order that whenever the mark meets our eyes or occurs to our thoughts, we may think of that individual object.

⁹ People of course take nicknames and screen names, which informally alter their names. See, for example, Stephanie Rosenbloom, *Mi, A Name I Call Myself. And You Are?*, NY Times G1 (Apr 13, 2006). It may be that more people are formally changing their names outside of marriage, though still in small numbers. For instance, between July 2005 and June 2006, New

given, in spite of any embarrassment we may feel if our names seem outdated or unwieldy, or fail to reflect who we are.

Though apparently trivial, names are also constitutive. To have a name at all is thought to be a fundamental element of identity and dignity.¹⁰ From a young age, we are identified by our names.¹¹ Our names are often among the first words we are taught to say and write. They are words that we learn early to associate with our selves.¹² Moreover, for many, our names link us to our families and kin networks—whether through first, last, or middle names. And in the eyes of outsiders, our names link us to particular others. Sometimes these assumptions are right. (Elizabeth Dole and Bob Dole are in fact married; George Clooney is indeed related to Rosemary Clooney.) Sometimes such assumptions, no matter how strong the resemblance of the names, are terribly wrong. (Kenny Loggins, currently the subject of the prominent juvenile-life-without-parole case in Alabama, is apparently not the same person as, nor is he related to, the '70s singer, also named Kenny Loggins, who wrote and sang the theme song to *Footloose*.¹³) Most people have strong feelings, whether articulated or implicit, about the idea of keeping, or changing, their names.¹⁴ Existing social practices, discussed in the next Part, certainly suggest that most men would balk at the idea of changing their names. Even more uniformly than their

Jersey state courts received 4,690 case filings for name changes outside of the marital context (equivalent to approximately 0.05 percent of the state population), which was a 15 percent increase from the previous year. See New Jersey Judiciary Civil Statistics (June 2006) 87, table Civil Caseload Summary by Case Type.

¹⁰ The third principle of the United Nations Declaration on the Rights of the Child, adopted in 1959, is that “[t]he child shall be entitled from his birth to a name and a nationality.” *Resolution 1386*, UN General Assembly, 14th Sess. 841st mtg (Nov 20, 1959), UN Doc A/RES. Although legal names are generally a matter of individual choice in the U.S. (in the absence of fraudulent intent), not having a name at all—and being identified by a number instead—is probably not an option. See *In re Dengler*, 287 NW2d 637, 639 (Minn 1979) (upholding a denied application for a change of name to “1069”); Thomas M. Lockney and Karl Ames, *Is 1069 a Name?*, 29 Names 1 (1981). To some, being identified by a number, even in addition to a name, is a spiritual harm. See *Bowen v Roy*, 476 US 693, 696 (1986) (rejecting the Free Exercise claim of a Native American father who argued that being assigned a “Social Security number . . . will serve to ‘rob the spirit’ of his daughter and prevent her from attaining greater spiritual power”).

¹¹ See, for example, Gordon W. Allport, *Pattern and Growth in Personality* 115 (Holt, Rinehart and Winston 1961) (noting that children’s names are integral to “awareness of independent status in the social group”).

¹² If identification with names seems doubtful, think how offended people can be when others forget their names.

¹³ See generally *United States v Kenneth Loggins*, 777 F2d 336 (6th Cir 1985).

¹⁴ See Margaret Jean Intons-Peterson and Jill Crawford, *The Meaning of Marital Surnames*, 12 Sex Roles 1163, 1165–71 (1985) (finding, in a study of university students and other affiliates, that both males and females tended to identify strongly with their names, but that both men and women thought women identified less strongly than men). See also Deborah A. Duggan, Albert A. Cota, and Kenneth L. Dion, *Taking Thy Husband’s Name: What Might It Mean?*, 41 Names 87, 91–92 (June 1993).

last names, men's prefixes to their names don't change through marriage: unlike women, for whom the prefix "Mrs." as opposed to "Miss" signifies their marital status, men stay "Mr." whether single or married.¹⁵

The typical acceptance of women becoming Mrs. His Name is perhaps more puzzling in light of troubling historical associations with name changes. Historically, name change outside of marriage has often been an act of racial and cultural domination. Under the Nazi name decrees of the 1930s, Jews were required to add Sarah (for females) or Israel (for males) to their names.¹⁶ Immigrants to this country have been renamed due to the carelessness of clerks.¹⁷ Slaves in the U.S. were sometimes named and renamed by the whites who legally owned them.¹⁸ Among the dramatic portrayals of this renaming is the scene in *Roots* when Kunta Kinte is renamed by his master: "You To-by!" he is told by another slave. "Massa say you name Toby!"¹⁹ Such histories also affect the ethnic significance that many people attach to their names, as I discuss later.²⁰

2. Marital names in particular.

For about a hundred years in this country, until about two decades ago, women were effectively subject to a mandatory regime of name change at marriage. This regime warrants a brief explanation, as it forms a useful background to our discussion of why names matter, and how the law should frame our contemporary choice regime.

The curious history of women's marital surnames in the U.S. is a story of custom influencing law influencing custom. At common law, in the U.S. as in England, both women and men were free to change their

¹⁵ Of course, when men become doctors or professors or PhDs, few balk at adopting the new title of "Dr." or "Professor," and those who do refuse the title tend to do so in an attempt to resist hierarchy.

¹⁶ This applied to all those whose Jewish identity was not "already self-evident" from their names, and required that these new middle names be used in all official documents and communications. See Robert M. Rennick, *The Nazi Name Decrees of the Nineteen Thirties*, 18 *Names* 65, 76-77 (1970).

¹⁷ See William Petersen, *Surnames in US Population Records*, 27 *Population & Dev Rev* 315, 316 (2001).

¹⁸ See Omi [Morgenstern Leissner], *The Problem that Has No Name*, 4 *Cardozo Women's L J* 321, 330-31 (1998); Frank Nuessel, *The Study of Names: A Guide to the Principles and Topics* 4-5 (Greenwood 1992); Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* 444-50 (Pantheon 1974).

¹⁹ Alex Haley, *Roots* 181 (Doubleday 1976). This is after the word "name" has appeared thirty-four times in the book already—and prominently, as when Kunta is given his family's name. Much emphasis is placed on the importance of Kunta's name to his identity and pride, as he wants to "shout" in response to Samson who's bearing this bad news: "I am Kunta Kinte, first son of Omoro, who is the son of the holy man Kairaba Kunta Kinte!" Id.

²⁰ See Part III (discussing factors relevant to devising a sustainable egalitarian convention).

surnames through common usage, subject to certain exceptions for fraud.²¹ The law was required to recognize the surname by which a person, man or woman, was known. As one commentator wrote, “By the common law of England a man was entitled to adopt a new name for himself as one changes a coat.”²² The freedom to change one’s surname is perhaps unsurprising in light of the fact that first names were generally the only names borne until the eleventh century, when surnames were added for functional purposes, to help differentiate the many people with the same first (or Christian) names.²³ Surnames typically conveyed some kind of information about the bearer, such as his occupation, his characteristics, or his place of origin.²⁴

For married women, who were treated under coverture as legally subsumed by their husbands’ identity, bearing his surname was generally deemed the most informative moniker.²⁵ Thus, up until the mid-nineteenth century, women typically changed their names to their husbands’ as a matter of custom. There are some notable cases of women not doing so—by geographical custom, or by virtue of their own names’ distinction relative to their husbands’ (who sometimes changed their names to their wives’²⁶)—but these were apparently the exception.²⁷ Importantly, however, women plainly adopted their husbands’ names by custom but not by legal mandate.

²¹ See Una Stannard, *Mrs Man* 112, 115 (Germain 1977) (remarking that, at common law, surnames had “original mutability” and did not require court approval for change).

²² Frederick Dwight, *Proper Names*, 20 Yale L J 387, 387 (1911).

²³ See Stannard, *Mrs Man* at 112 (cited in note 21). Stannard says surnames did not become common until the time of Henry VIII (the sixteenth century), though other sources suggest their widespread use prior to that time. See also David Hey, *Family Names and Family History*, 51 Hist Today 38, 39 (July 2001) (stating that use of surnames “began to spread in southern England and East Anglia from about the middle of the thirteenth century and was largely completed across the country within the next two hundred years”); Judith M. Bennett, *Spouses, Siblings and Surnames: Reconstructing Families from Medieval Village Court Rolls*, 23 J Brit Stud 26, 37 (1983) (noting that in the late thirteenth century, “almost all court citations identified individuals by both forename and surname”); G.S. Arnold, *Personal Names*, 15 Yale L J 227, 227 (1905) (stating that surnames became “universally necessary” in the early fourteenth century).

²⁴ See Arnold, 15 Yale L J at 227 (cited in note 23).

²⁵ Lamber, 1973 Wash U L Q at 781 (cited in note 6); Bysiewicz and MacDonnell, 5 Conn L Rev at 600–01 (cited in note 6).

²⁶ Stannard, *Mrs Man* at 112–14 (cited in note 21). On this practice in some contexts in Japan, see note 144.

²⁷ Sandra L. Rierson, *Race and Gender Discrimination: A Historical Case for Equal Treatment under the Fourteenth Amendment*, 1 Duke J Gender L & Policy 89, 91 (1994) (quoting a seventeenth-century treatise on this point: “When a small brooke or little river incorporateth with Rhodanus, Humber, or the Thames, the poor rivulet looseth her name”).

²⁸ According to *The American and English Encyclopedia of Law*: “By custom, the wife is called by the husband’s name; but whether the marriage shall work any change at all is, after all, a mere matter of choice, and either may take the other’s name, or they may join their names together.” 9 *The American and English Encyclopedia of Law* 813 (Thompson 1887–1896), quoted together.

Custom became law by a series of cases in the late-nineteenth and early-twentieth century.²⁹ These cases built dicta upon dicta until many states had plainly declared in case law³⁰ or by statute³¹ that married women's ability to engage legally in certain activities—such as driving or voting—was dependent on her bearing her husband's name.

This legal regime largely continued until the 1970s, when a series of cases established the right of women to continue to bear their birthnames after marriage.³² Courts generally avoided constitutional ques-

in Una Stannard, *Manners Make Laws: Married Women's Names in the United States*, 32 Names 114, 117 (June 1984).

²⁹ The foundational dicta came from *Chapman v Phoenix National Bank*, 85 NY 437, 449 (1881), a case involving an overzealous wartime action to confiscate property. The court set aside the action to confiscate, reasoning that improper notice of forfeiture was given because the notice was in the married woman's maiden name. Though reaching an apparently just result on the facts, the court gave us the following unfortunate dicta: "For several centuries, by the common law among all English speaking people, a woman, upon her marriage, takes her husband's surname." Of course, not only was this dicta, it was also incorrect, as this was not common law, but rather simply custom. See also Omi, 4 Cardozo Women's L J at 352–54 (cited in note 18); Lamber, 1973 Wash U L Q at 783–95 (cited in note 6).

³⁰ See, for example, *Freeman v Hawkins*, 77 Tex 498, 14 SW 364, 364–65 (1890) (concluding that constructive service in a married woman's maiden name is not sufficient legal notice to give a court jurisdiction to bind the woman); *Bacon v Boston Elevated Railway Co*, 256 Mass 30, 152 NE 35, 36 (1926) (involving a tort suit for a car crash in a car registered in the female driver's maiden name); *Rago v Lipsky*, 327 Ill App 63, 63 NE2d 642, 647 (1945) (interpreting a state statute—and reversing a trial court's interpretation to the contrary—to mandate that a woman's voter registration in her maiden name is automatically cancelled upon marriage, and that she must reregister in her married name in order to vote). See also *Forbush v Wallace*, 341 F Supp 217, 220–22 (MD Ala 1971) (concluding that the state's unwritten regulation requiring married women to obtain drivers licenses in their husband's names, and the state's common law rule that a woman's name automatically changes to her husband's at marriage, both have a rational basis, particularly because she can apply for a name change through probate court (so the harm to her is de minimis), but noting that "no area of the law seems more unsettled today than the guarantees and the protection of women's rights under the Constitution"), affd without opinion, 405 US 970 (1972) (affirming the three-judge district court's decision without opinion one year before heightened scrutiny for sex-based classifications was established). For a discussion of this case, see Lamber, 1973 Wash U L Q at 795–800 (cited in note 6). Federal rulings have also built upon the erroneous dicta in *Chapman*. See *In re Kayaloff*, 9 F Supp 176 (SDNY 1934) (holding, under *Chapman*, that a female musician could not be naturalized in her maiden name, rather than her married name). For a chart of state laws as of the early 1970s, see Lois B. Gordon, *Statutory Development: Pre-Marriage Name Change, Resumption and Reregistration Statutes*, 74 Colum L Rev 1508, 1520 (1974).

³¹ Only one state passed a statute explicitly mandating that women change their names: Hawaii, apparently for reasons of westernization. See Hawaii Rev Stat § 574-1 (1968) ("Every married woman shall adopt her husband's name as a family name."). This law has since been superseded. See Hawaii Rev Stat § 574-1 (1993 & Supp 2004) (allowing for choice in marital naming). See also Stannard, 32 Names at 127 n 25 (cited in note 28) (referencing the Hawaiian exception); Bysiewicz and MacDonnell, 5 Conn L Rev at 602–03 (cited in note 6) (examining state laws of name change).

³² See, for example, *Kruzel v Podell*, 67 Wis 2d 138, 226 NW2d 458, 463–66 (1975) (concluding that a woman's name does not—and need not—change to her husband's on marriage, if she consistently uses her maiden name, in response to a petition from an art teacher whose public school insisted she register for health insurance under her husband's name); *Dunn v Palermo*,

tions by reasoning that their decisions merely resurrected the proper interpretation of the common law.³³ A key decision in this line was *Dunn v Palermo*,³⁴ in which the Supreme Court of Tennessee struck down a state law requiring a married woman to register to vote under her husband's name.³⁵ Though the court did not reach the plaintiff's constitutional claims under the Fourteenth and Nineteenth Amendments, and relied for its decision only on the common law right to determine one's own name, the court spoke the language of equality:

We are urged to the conclusion that the custom of women adopting the surnames of their husbands has ripened into law and that, therefore, a wife is under a legal duty to adopt her husband's surname. . . . [M]arried women have labored under a form of societal compulsion and economic coercion which has not been conducive to the assertion of some rights and privileges of citizenship. The application of a rule of custom and its conversion into a rule of law[] would stifle and chill virtually all progress in the rapidly expanding field of human liberties. We live in a new day. We cannot create and continue conditions and then defend their existence by reliance upon the custom thus created. Had we applied the rules of custom during the last quarter of a century, the hopes, aspirations and dreams of millions of Americans would have been frustrated and their fruition would have been impossible.³⁶

522 SW2d 679, 688-89 (Tenn 1975) (holding that neither custom nor law requires that a woman's name change to her husband's at marriage, and thus that the plaintiff's name was wrongly purged from the voter rolls when she declined to reregister in her husband's name); *Stuart v Board of Supervisors of Elections for Howard County*, 266 Md 440, 295 A2d 223, 227 (1972) (concluding that a married female voter could continue to vote in her maiden name if she showed cause that she had used her maiden name consistently and nonfraudulently). See also Claudia Goldin and Maria Shim, *Making a Name: Women's Surnames at Marriage and Beyond*, 18 J Econ Persp 143, 144-45 (2004) (noting the legal changes regarding marital name change in the 1970s, especially the *Dunn* decision); 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 (1998) (surveying case law). An earlier precedent against mandatory name change for women is *Krupa v Green*, 114 Ohio App 497, 177 NE2d 616, 620 (1961), in which the court denied a taxpayer's petition to prevent a married woman from appearing on the ballot for municipal judge using her maiden name, Blanche Krupansky. For a federal case under Title VII, see *Allen v Lovejoy*, 553 F2d 522 (6th Cir 1977) (holding that Title VII was violated when a county employer suspended a female employee for refusing to sign a form authorizing postmarriage name change in personnel file).

³³ See, for example, *Kruzel*, 226 NW2d at 466; *Dunn*, 522 SW2d at 689; *Stuart*, 295 A2d at 228. Interestingly, these cases implicitly approve the constitutionality of differential procedural burdens on men and women in this regard; for instance, under *Stuart*, a female voter who had never used any name but her maiden name would still have to show cause to the Board of Elections to indicate that she had used only her maiden name, and nonfraudulently so, to be registered to vote in that name. 295 A2d at 228.

³⁴ 522 SW2d 679 (Tenn 1975).

³⁵ Id at 688-89.

³⁶ Id at 688.

Thus the values of liberty and equality coincided with a proper understanding of the common law to overturn mandatory name change for women.

Though U.S. courts have avoided deciding such cases on broad principles of constitutional equality, the UN Human Rights Committee addressed the fundamental question directly in 2002. In *Müller v Namibia*,³⁷ the Committee found a violation of the gender-equality provisions of the International Covenant on Civil and Political Rights in the financial and administrative burdens that Namibia imposed on a man's taking his wife's name at marriage, but not on a woman's taking her husband's name.³⁸

While the meanings of one person taking another's name vary, the act of naming is often an act of power. The ability to choose one's own name is arguably therefore an important aspect of self-possession.³⁹ Fortunately then, under U.S. law today, women choose what to do with their names at marriage. However, for a variety of reasons, the issue of choice is a complicated one. This brings us to our next subject.

B. The Trouble with Marital Naming Choices

Society dictates that the woman change her name. Now, you can decide to keep your maiden name or hyphenate your name or take his, whatever you want. But men don't normally change their names. I don't know what else to tell you.

— Clerk in Jasper County, Missouri⁴⁰

In our current discussions of marital names, the focus tends to be on choice. The important victory of the women's movement, many will say, is that women can choose for themselves—whether about their bodies, their careers, or their names. In the words of Hanna Holborn Gray, former President of The University of Chicago, "I would say to young women on campuses today, 'Remember that what the women's liberation movement ought to be about is liberating you, giving you

³⁷ UN GAOR Human Rights Committee, 74th Session, UN Doc CCPR/C/74/D/919 (2000).

³⁸ Id.

³⁹ This belief may be particularly common in the United States, with its peculiar brand of individualism. Though the footnotes mention cross-cultural reference points, the focus throughout the Article is nonetheless U.S. laws and conventions.

⁴⁰ Telephone conversation with Clerk, Jasper County, Missouri, Recorder of Deeds (June 28, 2006) (responding to the question of whether a husband could legally take his wife's name or hyphenate his name at marriage). For the protocol of these telephone conversations, see note 175.

choices to make, and don't let people seduce you into thinking that there's only one choice you can make.”⁴¹

Women surely should be permitted to make choices in any number of highly personal domains where they formerly had no choice—including marital names. This Article therefore proposes only default, not mandatory, rules, in the interests of preserving individual choice for both women and men. But the popular emphasis on choice in contemporary discussions of marital names has a number of troubling features.⁴² It is as if the mere fact that women can choose their names in the U.S.—such progress from the olden days—should erase any concerns we might have about current practices. The points that follow elaborate the trouble with the choices available to women—and to men—concerning marital names.

1. An incomplete decision set.

First, it is women’s choices—and *only* women’s choices—that are typically discussed. The standard question about names surrounding a wedding is, “is she changing her name?” or perhaps “is she keeping her name?,” not “are they changing their names?” And surely few, if any, grooms-to-be are asked if they are changing their names. (Note the *New York Times* wedding pages’ traditional practice of noting, as the marked answer to an implied question, “the bride will be keeping her name.”) Of the numerous studies on marital names, few even discuss husbands’ names.⁴³ Articles on the subject talk about how much time women spend discussing the issue of names, and how important it is for them (or how unimportant, depending on the article). While several studies report on how husbands feel about their wives’ mari-

⁴¹ Leslie Maitland Werner, *The Gray Presidency—The First Ten Years*, 81 U Chi Mag 7, 10 (Fall 1988).

⁴² See, for example, Alison Lobron, *The Same-Name Game*, Boston Globe Magazine 40 (Oct 30, 2005); Tracy E. Higgins, *Why Feminists Can’t (or Shouldn’t) Be Liberals*, 72 Fordham L Rev 1629, 1633–34 (2004).

⁴³ See Part II.A (collecting sources). Among the notable exceptions is Laurie Scheuble and David R. Johnson, *Marital Name Change: Plans and Attitudes of College Students*, 55 J Marriage & Fam 747, 750 (1993), which gathered data on college student attitudes to male, as well as female, marital name change. They found, in response to the question “[i]f a man marries, under what circumstances should he take his wife’s last name?,” the following: “If his wife wants him to take her last name”—males (12.0 percent), females (19.0 percent) (not a significant difference); “If he wants to change his last name”—males (70.0 percent), females (84.8 percent) (a significant difference); “If he marries a woman who is well-known in her field of work”—males (14.0 percent), females (19.0 percent) (not a significant difference); “A man should never change his name to the last name of his spouse”—males (33.0 percent), females (19.6 percent) (a significant difference). Id. In light of the study’s interest in those attitudes, however, it is striking that even Scheuble and Johnson asked only the female subjects if they planned to change their own names to their spouse’s if they married. See *id* at 749–50.

tal-naming choices and how included or not included the men felt in the decision, even most of these give hardly a nod to the idea that men are also free to change their names.⁴⁴

Of course the inattention to men's names at marriage could reflect mere probabilities: perhaps so few men change their names in any way at marriage that there's no reason to ask about it, any more than one would ask if the couple is getting matching garter belt tattoos or honeymooning in Antarctica. But the form of the question about marital names is more significant than that, as is plain from newspaper articles whose newsworthiness stems from the fact that men changed their names in some way at marriage.⁴⁵ As I discuss further below, the few men who alter their names at marriage are often greeted with disbelief or worse, evincing the obvious fact that the social meanings surrounding names, and marital names in particular, make any change of name at marriage a very costly decision for men.⁴⁶ The social pressures may be tremendous, but, in the language of choice, men are free to choose it, so there's no problem.

Thus, although a woman ostensibly has a wide variety of choices about her marital name, her actual options are quite limited if she's marrying a man, because there's no serious possibility of (most) men altering their names at marriage. She can Keep her name—and have a different name from her husband and typically her child as well.⁴⁷ She can Change to Mrs. His Name—and leave behind her birthname, but share a name with her immediate family. Or she, and only she, can hyphenate—and share one part of her name with her parents and her past self, and another part with her husband and her child, while her husband has the same name as his parents and his child and thus continuity across all three generations of his family. If she hyphenates her name, she alone bears the hassle of all the computer forms that apparently can't accommodate such a name, and the people who can't seem to remember it, and the people who think she's constantly trying to make a point about her independence.

⁴⁴ See notes 54–55 and accompanying text (discussing these studies).

⁴⁵ See, for example, Samanatha Sordyl, *More Men Take Plunge—With Her Name: Although Still Rare, Husbands Are Changing Their Last Names When They Get Married*, Orlando Sentinel E3 (Jan 6, 2005); Ann Doss Helms, *How N.C. Sees the Male Name Game: Should Common Law on Married Women's Names Apply to Men?*, Charlotte Observer 2E (June 19, 2001); Jessica McBride, *More Grooms Are Saying 'I Do' to Taking Bride's Last Name in the Name of Love*, Milwaukee J Sentinel sec Lifestyle at 1 (Nov 28, 1999); Paula Span, *Taking a Wife, and Her Name*, Wash Post F01 (Jan 9, 1998); Sam Howe Verhovek, *My Maiden Name*, NY Times sec 6 at 18 (May 14, 1995); Roger L. Welsch, *The Hyphenated American*, 103 Natural Hist 24, 24–25 (1994).

⁴⁶ See notes 64–65 (quoting articles and postings).

⁴⁷ See Part II.B (citing data indicating that the vast majority of women who make unconventional naming choices for themselves still give their children his name).

In an article celebrating the increasing numbers of women who become Mrs. His Name, Peggy Noonan implicitly chides the women who do otherwise as insufficiently committed to marital unity: "A bride [who] grew up in the Age of Divorce . . . may have fewer misconceptions than [her] parents about how important freedom and self-actualization are. [She] may think other things are more important, like constancy and commitment and loyalty."⁴⁸ Of course, to decline to become Mrs. His Name is to choose independence over marital unity only where there is no realistic possibility of *him* or *both* changing to create that nominal unity.

It has gone out of fashion to quibble over language, and names may be one instance of this—as if what happens to names at marriage is on a par with whether we do or do not call first-year students "freshmen." Abandoning the language wars is sometimes claimed as a sign of our recent progress towards real equality. Likewise, a woman who becomes Mrs. His Name will sometimes say that since women have enough real equality now—or at least, she may say, since "I" am independent enough of my guy not to fear losing my identity, I need not make a point about equality with something as trivial as my name. Abandoning the debate over freshmen may well be part of the path of progress, particularly now that women attain undergraduate and, in some fields, graduate degrees in roughly equal numbers as men.⁴⁹ But I think it's harder to claim a cultural embrace of Mrs. His Name as a sign of our progress. As one writer puts it,

Of my married friends who have taken their husbands' names, most say they did so for reasons of simplicity. . . . The decision was one of convenience, they assured me. It was totally neutral and nonpatriarchal. I'm glad they feel that way, but it seems to me that if we had really reached the stage of true equality, I'd know at least one couple who discovered that it was just as convenient for the man to take his wife's name.⁵⁰

She may be choosing, but so long as his name is not up for discussion, she's choosing from a very limited decision set.

⁴⁸ Peggy Noonan, *Looking Forward*, Good Housekeeping 208 (Oct 1996). She continues:

Maybe, for these brides, taking their husbands' names is a declaration not only of intention, but of faith. Maybe they are suspending disbelief. Marriage itself is a marvelously faithful act. It shows that you have faith in yourself and your spouse, and also in life, in the ability of things to stay and grow and endure.

⁴⁹ See U.S. Census Bureau, *Educational Attainment of the Population 15 Years and Over, by Age, Sex, Race, and Hispanic Origin: 2005*, online at <http://www.census.gov/population/www/socdemo/education/cps2005.html> (visited July 8, 2007).

⁵⁰ Lobron, *The Same-Name Game*, Boston Globe Magazine at 40 (cited in note 42).

2. Who cares.

Another common trope surrounding marital names—and particularly the naming of children—is that he *cares* about his name more than she does. It simply matters more to him to keep his name, and to pass his name onto the children. So a basic utility calculus may suggest to the spouses that it makes sense to give the kids his name, and even more obviously, for him to keep his name. This might seem similar to a split in household chores based on who hates which tasks more: he hates making the bed and she hates cleaning the bathroom, so each does the other's least favorite task, and everyone is happier for it.

With names, though, the preferences may not be neutral. Imagine two people. One grew up knowing from a young age that his name is his to keep, and that it won't change by virtue of his relationships. In fact, if he marries and has children, his name will spread to his family, and, if he has boys, to future generations. The second person grew up knowing from a young age that her name would disappear and be replaced by another name, if and only if she were lucky enough to be loved enough to be given a new name. Her children would bear that name as yet unknown to her, that name that would mark her success in love. With new boys she met, she scribbled out her new name and dreamily imagined herself as Mrs. Somebody Else.⁵¹

How could the first person *not* care more about his name? It is his and he has always thought it would be his. It is, in a different sense than for her, his property. From studies of loss aversion and the endowment effect, we know that people value what they own more highly than what they do not.⁵² If people can develop an attachment to indifferent mugs once they own them, causing them to value the mugs they own more highly than those they do not, then it seems reasonable to think that something similar could be true of names.⁵³

⁵¹ See note 4 and accompanying text (supplying the epigraph to this Part). The other candidate for the epigraph to this Part was "I've always wanted to be Mrs. Somebody Else." Conversation with anonymous New York City hairdresser (May 26, 2006).

⁵² See, for example, Daniel Kahneman, Jack L. Knetsch, and Richard H. Thaler, *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J Econ Persp 193, 205 (1991).

⁵³ Of course many women do become attached to their names. One study of university students and faculty and staff, mentioned earlier, found that about half of both the male and the female undergraduates—and more than half of the male and the female graduate students and faculty and staff—reported feeling identified with their (premarital) names, though both males and females thought that women identified less strongly and that it was psychologically easier for women to change their names than men. See Intons-Peterson and Crawford, 12 Sex Roles at 1165–66 (cited in note 14). Even in this sample, the females nonetheless reported a significantly greater willingness to change their names than did men. Id at 1166–67.

It makes sense, then, that most men prefer that their wives take their names.⁵⁴ Men whose wives don't take their names will sometimes say that they were surprised at how disappointed they felt, surprised that it felt like a loss.⁵⁵ But how could it not feel like a loss for men who grew up thinking that, as part of a meaningful and happy occasion, their future wives would take their names?

Moreover, women who decline to take their husbands' names face not only the potential displeasure of their husband, but negative stereotypes from the wider public. Women who keep their own names are thought by others to be more assertive, more feminist, and more oriented towards their careers than their families.⁵⁶ Women in earlier eras who wanted to keep or resume their birthnames were subjected to harsher words than "assertive."⁵⁷ A study of the psychology of names from the 1930s concluded that "the effect of a man's changing his name [for any reason] may be extreme emotional disturbances, a split personality, or other maladjustments. But women who object to

⁵⁴ See Susan J. Kupper, *Surnames for Women: A Decision-Making Guide* 65–67 (McFarland 1990) (reporting, in a study of women who made unconventional naming choices, that "it was unusual for husbands to have an immediate and unquestioning acceptance of their wives' names. Many felt an initial ambivalence or even opposition to the idea, but gradually came to accept and support it"). This is consistent with another study that found that men whose wives kept or hyphenated their names reported feeling less happy with their wives' names. Andrea Anderson, *The Relationship between Wives' Marital Last Name Style and Husbands' Self-Esteem, Locus of Control, Gender Role and Perception of Power within Their Marriage* 97–99 (unpublished PhD dissertation, Alliant International University, 2005).

⁵⁵ See Kupper, *Surnames for Women* at 65–67 (cited in note 54).

⁵⁶ See Claire E. Ettaugh, et al., "Names Can Never Hurt Me?": *The Effects of Surname Use on Perceptions of Married Women*, 23 *Psych Women Q* 819, 821 (1999) (reporting on a study of 222 male and female university students who read a description of, and rated on fifty-one traits, a woman who took her husband's name, kept her own name, or hyphenated her name, and finding that subjects viewed the women who kept their birth names or hyphenated as "more assertive and less communal"); Donna L. Atkinson, *Names and Titles: Maiden Name Retention and the Use of Ms.*, 9 *J Atlantic Provinces Linguistic Assn* 56, 69–70 (1987) (reporting on a survey of 325 Canadian respondents about women who keep their last names and who use "Ms." and finding similar stereotypes about both practices, that is, that the women were "career-oriented," "independent," and not "submissive"; "feminist" was also associated with "Ms.," though not significantly; contrary to the author's hypothesis, "unattractive" was not associated with "Ms."); Sheila M. Embleton and Ruth King, *Attitudes towards Maiden Name Retention*, 66 *Onomastica Canadiana* 11, 17 (1984) (reporting on the results of having asked forty-three Canadian respondents (thirty-one males and twelve females) in a campus pub and in a strip bar about women's names and finding that subjects associated a woman's retaining her own name with assertiveness and, for the male subjects, orientation towards job rather than towards home or family). See also Duggan, Cota, and Dion, 41 *Names at 95* (cited in note 14) (discussing such findings). Finally, one study showed substantial tolerance among male (57.0 percent) and female (91.8 percent) college students of women's keeping their names, but a preference by both males (51.0 percent) and females (54.4 percent) that, if there are children, the wife takes the husband's name. The difference between male and female views on the latter point was not statistically significant. Scheuble and Johnson, 55 *J Marriage & Fam* at 750 (cited in note 43).

⁵⁷ See Omi, 4 *Cardozo Women's L J* at 397–98 (cited in note 18).

change because of possible violation of important values are usually maladjusted anyway, and projecting their difficulties onto the norm.”⁵⁸ In a case from the 1970s, the Attorney General of Indiana described a married woman who wanted to resume her maiden name as “kind of odd ball” and “a sick and confused woman,” whose “need was not for a change of name but for a competent psychiatrist.”⁵⁹ Researchers in the 1980s studying the related topic of women’s titles found that women who were called “Ms.” were thought to be less honest than those called “Miss,” “Mrs.,” or a name with no title.⁶⁰

Moreover, women considering an unconventional naming option that involves their birthname face the retort that they are merely deciding between their husband’s name and their father’s name, so what does it matter? Of course what this argument ignores is that what was her father’s name is now her name, and has been so for her entire life.⁶¹

Returning to our two people, we would therefore expect the second person to care less about her birth name, particularly if her mother or grandmothers grew up without the legal option to do anything other than take a husband’s name. Like the fabled fox who deemed the grapes sour, one who is fated to lose her name may well learn not to value it.⁶² Adaptive preferences of this sort are troubling because they suggest that some preferences result from, and can perpetuate, inequality.⁶³

Additionally, any man who does not keep his name at marriage faces the problem of social costs. How could he not care more that his name stays the same when *everyone else* cares that his name stays the same (and gets passed on to any children he may have)? Whatever

⁵⁸ Robert R. Holt, *Studies in the Psychology of Names* 312 (unpublished BA thesis, Princeton University, 1939).

⁵⁹ *In re Hauptly*, 262 Ind 150, 312 NE2d 857, 861 (1974) (Hunter concurring) (quoting the state’s brief to the Indiana Supreme Court). The dissent from the majority decision to grant the name change expressed a similar view of the petitioner: “[T]he petitioner’s stated reasons for desiring the change indicate nothing but whimsey [sic] and an unusual psychological quirk. I know of no reason why the law should be concerned with such trivia.” Id at 862 (Prentice dissenting).

⁶⁰ See, for example, Jane Connor, et al, *Use of the Titles Ms., Miss, or Mrs.: Does it Make a Difference?*, 14 Sex Roles 545, 547–48 (1986). This is perhaps because they were thought to be concealing something important about themselves, that is, their marital status. Id at 548. Interestingly, though, the study did not find any other significant associations with “Ms.” such as with stereotypically masculine traits. For a fascinating case, with three separate opinions, rejecting a married woman’s plea to register to vote under “Ms.” rather than “Mrs.,” see *Allyn v Allison*, 34 Cal App 3d 448, 453 (1973).

⁶¹ For women who have already been married, they may no longer bear their birth name, but rather another name that they have been known by for a shorter or longer period of time. The subject of names on divorce raises many interesting issues, as noted earlier. See note 120.

⁶² See Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* 109, 125–33 (Cambridge 1983).

⁶³ See id. See generally Amartya Sen, *Commodities and Capabilities* (North-Holland 1985).

naming choice she makes—whether to keep or to change or to hyphenate, for example—some people may have views about the merits of her choice and thus impose costs for that choice. For him to do anything other than keep his own name, though, is likely to meet even harsher and more uniform criticism.⁶⁴ Some particularly colorful examples of the kind of criticism men receive can be found in internet forum postings in response to a lawsuit filed in Los Angeles County in 2006 by a man seeking to take his wife's name: the plaintiff is called, *inter alia*, "gay," a "wimp," and "the feminine spouse."⁶⁵ Put simply, the social meanings surrounding names strongly prescribe that his name should stay the same. Thus, unless more men change their names, the social costs are so great for any individual man who does so that the individual benefits of making such a choice will rarely outweigh the individual costs. This is an exemplary case of the collective action problem involved in trying to change social meanings.⁶⁶

3. Romance versus equality.

The flip side of attachment to what is ours is the romance of name change. As Ellen Goodman suggests in the epigraph to this Part, generations of girls have indulged in "scribbling 'Mrs. Paul Newman'

⁶⁴ See, for example, Greg Risling, *California Man Sues to Take Wife's Name; Bureaucratic Hurdles Violate 14th Amendment, Petition Says*, Wash Post A04 (Jan 21, 2007) (reporting that the plaintiff was told by a clerk at the DMV: "Men just don't do that type of thing"); Jodi Rudoren, *Meet Our New Name*, NY Times sec 9 at 3 (Feb 5, 2006) (reporting comments to her husband after they merged their names, including "[i]t appears that married life has literally taken the 'man' out of you"); Jeanne Phillips, *Dear Abby: Man Takes Wife's Name Despite His Mother's Threat*, Charleston Daily Mail P2D (Sept 5, 2005) (asking when and how to tell the husband's mother that he took his wife's name, in light of mother's threat to "disown" him if he did so); Verhovek, *My Maiden Name*, NY Times sec 6 at 18 (cited in note 45) (noting the "[l]emme get this straight" response of a former New York Post writer to a wedding announcement of the groom taking the bride's name, as well as the "occasional ribbing, always from other men, that real men don't take their wives' names"); Lou Gonzales, *Man Finds Resistance to Name Change*, Fla Times-Union D2 (Feb 10, 2000) (describing the reaction of the person in charge of name changes in military records as "[n]o dice.... You're the man. You're the man of the house."). See also Lessig, 62 U Chi L Rev at 998 (cited in note 1) ("Social meanings act to induce actions in accordance with social norms, and thereby impose costs on efforts to transform social norms").

⁶⁵ In more detail, here are some of the postings: "He is a wimp.", "[T]his guy is gay (not that there is anything wrong with that) and wants to be the feminine spouse.", "No. Of course I wouldn't [take my wife's name]. I am a man.", "Sure, I'd take my wife's name. Then my father would disown me, and he'd be right to do it.", and more colorfully (and curiously), "Taking your wife's last name?! [W]ow, no wonder this country is headed to hell in a handbasket. My sister is more of a man that [sic] a lot of men in this country." See Comments, *Taking Wife's Name Not So Easy*, USA Today (Jan 12, 2007), online at http://blogs.usatoday.com/ondeadline/2007/01/taking_wifes_na.html (visited July 8, 2007). On the lawsuit, see Risling, *California Man Sues to Take Wife's Name*, Wash Post at A04 (cited in note 64).

⁶⁶ See Lessig, 62 U Chi L Rev at 997–98 (cited in note 1).

all over their notebooks ‘just to see what it looks like.’”⁶⁷ Of course the ritual involves more than just seeing what it looks like. The erotics of the name-change fantasy are captured in Erica Jong’s classic novel of female sexual adventure, *Fear of Flying*.

Just after describing her intense desire for one Adrian Goodlove in no uncertain terms, Isadora Wing begins scribbling her desire into her notebook, beginning with the statement, “My name is Isadora Zelda White Stollerma Wing, . . . and I wish it were Goodlove.”⁶⁸ She then covers a page of her notebook (and the novel) with fantasy names:

Adrian Goodlove
Dr. Adrian Goodlove
Mrs. Adrian Goodlove
Isadora Wing-Goodlove
Isadora White-Goodlove
Isadora Goodlove
A. Goodlove
Mrs. A. Goodlove
Dame Isadora Goodlove
Isadora Wing-Goodlove, M.B.E.⁶⁹

And the list continues, after which she writes, “I hastily cross all that out and turn the page. I haven’t indulged in this sort of nonsense since I was a lovesick fifteen year old.”⁷⁰ In Jong’s novel, writing out the nominal union is the consummation of an erotic moment.

This romancing of name change seems surprising coming from Jong, who elsewhere writes with concern about women giving up their birth names. “Naming is the crucial activity of the poet; and naming is a form of self-creation. In theory, there’s nothing wrong with a woman’s changing names for each new husband, except that often she will come to feel that she has no name at all.”⁷¹ Women artists often keep their birthnames, Jong writes, in a “last-ditch attempt to assert an unchanging identity in the face of the constant shifts of identity which

⁶⁷ Goodman, *The Name of the Game*, Boston Globe at 30 (cited in note 4). A college-age subject in a more recent study voiced a similar history of anticipating her name change: “This is something that I have been waiting to do since I was young, always wondering what my full married name will be. I see it as giving myself to my husband and although he won’t take my name, he will have given himself in other ways.” Twenge, 21 Psych Women Q at 426 (cited in note 2).

⁶⁸ Erica Jong, *Fear of Flying* 78 (Holt 1973).

⁶⁹ Id.

⁷⁰ Id at 79.

⁷¹ Erica Jong, *The Artist as Housewife, The Housewife as Artist*, in Francine Klagsbrun, ed., *The First Ms. Reader* 111, 113 (Warner 1973).

are thought . . . to constitute femininity.”⁷² Changing names all the time is “only disturbing because it mirrors the inner uncertainty.”⁷³

Under this kind of reasoning, the erotics of marital name change seems incompatible with a feminist commitment to formal equality. Yet in *Fear of Flying* Jong seemed to appreciate the erotics of name change. Must women with romantic visions of uniting with their beloved through their names thus simply relinquish such girlish fantasies?⁷⁴

Not necessarily. A stark tension between romance and equality exists only if there is no chance that he will change his name as well. In reality, name change at marriage need not be sexed at all, as suggested, for instance, by the minority of same-sex couples who are choosing to merge their names in some way.⁷⁵

Indeed, under current conventions, men are denied the pleasures of merging through changing their own names, and both men and women are typically denied whatever pleasures could come from mutual changing. While those might not sound like pleasures to many men now, it is hard to say how that might change if conventions and social costs changed. New possibilities might inspire new fantasies.

There are various naming practices that incorporate union and equality, such as dual hyphenation or merged names, options discussed in detail in Part III. A small minority of couples has tried these options, and they are all legal, so of course no one is banned from adopting them. But as discussed, unless more couples try them and they become less socially costly, any romance to egalitarian name change is unlikely to outweigh the significant costs, especially to him.

Of course nominal union isn’t everyone’s idea of romance. For some, perhaps many, the idea of union through names produces a dysphoric reaction. Some people—men or women—might feel erotic displeasure at the idea of such merging. The reasons could be varied, but at least for some, the aim in a relationship is to maintain enough separateness to keep an erotic charge between them.⁷⁶

⁷² Id at 113–14.

⁷³ Id at 114.

⁷⁴ See Elizabeth F. Emens, *Adaptive Desires* (work in progress).

⁷⁵ See Part II.A.2. Of course the erotics may be complicated. One person’s submerging his identity by giving up his name and taking the other’s name may have a different charge than, say, both adding the other’s name to their birthnames. There’s no reason why that sort of change has to be gendered, however. And a certain romance of nominal unity could, in theory, also surround double hyphenation or merging, as discussed in Part III.

⁷⁶ See Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 NYU Rev L & Soc Change 277, 326–27 (2004) (describing the erotic aspects of privacy and separateness in a polyamorous context); Marny Hall, *Turning Down the Jezebel Decibels*, in Marcia Munson and Judith P. Stelboum, ed., *The Lesbian Polyamory Reader: Open Relationships, Non-Monogamy, and Casual Sex* 47, 53–54 (Harrington Park 1999).

I am not suggesting that people should be forced to merge or hyphenate their names; names are choices and should be so. But currently both spouses' keeping their names may be seen as the only (or only realistic) egalitarian option. Under this view, women—and men—who romanticize nominal union are therefore forced into the position of having to abandon either their romantic feelings about names or their egalitarian goal of nominal parity. This doesn't seem like a real choice.

4. Different for boys.

Perhaps the most significant problem with our current regime of choice is that, while adults can choose their names, children don't choose theirs. While they can change their names later, children enter the world with names, and within a naming regime, that has repercussions for their sense of themselves, their family, and their future. Though we would like to think otherwise, the current naming regime may well affect both how parents behave toward their children and how children understand themselves.

Patrilineal naming could affect parental behavior towards their children in at least two ways. To start, it may cause parents to prefer boys over girls. Parents who have genetic children show a preference for boys to girls, at least for the first or only child.⁷⁷ Though adoptive parents sometimes prefer girls to boys—because, for instance, adopted girls are expected to be easier to raise—those parents who prefer to adopt a boy rather than a girl cite as a reason an interest in carrying on the family name.⁷⁸ In this light, it seems reasonable to think that the birth-parent preference for boys is also to some extent related to the boys' carrying on the family name.

Relatedly, boys' carrying on the name creates at least a mild incentive for parents to invest more in boys. For a father to have only daughters means, in common parlance, that his family "dies out" because his name "dies out." Parents may intend not to treat boys and girls differently, but if parents care about the family name, they have reason to care more about what their boys do and how well they do it.⁷⁹

⁷⁷ See Kristine Freeark, et al, *Gender Difference and Dynamics Shaping the Adoption Life Cycle: Review of the Literature and Recommendations*, 75 Am J Orthopsych 86, 92 (2005); Nancy King Reame, *Gender by Design: Not Yet Ready for the Prime Time*, 1 Am J Bioethics 29, 29 (2001).

⁷⁸ Freeark, et al, 75 Am J Orthopsych at 92 (cited in note 77); Rosalind J. Dworkin, Report for Children's Bureau, Department of Health and Human Services, *Adoption of African American Children: Gender Preferences and Parental Coping* 25–26 (1996).

⁷⁹ A colleague suggested the following hypothetical: imagine that you're a father with two children, an adopted boy and a girl who's your biological child. Only one of them will have a child, your sole grandchild. Your daughter would pass along your genes, whereas your son would pass along your name. Which of your children would you prefer has your one grandchild? It

The current naming regime also tells children about their selves and their parents, as noted earlier. We may worry about the different self-understanding given to the child who expects to lose her name as opposed to the one who expects to keep and extend his name. And we might wonder what a child thinks the first time he learns that his mother's family has a different name than he does, and than his mother does, and that his mother had a different name sometime before she became his mother.⁸⁰ It would be surprising if these conventions didn't affect children's sense of their place in the world and their prospects for the future.

II. CURRENT SOCIAL DEFAULTS: PRACTICES OF FAMILY NAMING

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

—Henry James⁸¹

The vast majority of women who marry men change their names to Mrs. His Name, while very few men change their names at all when they marry. The alternatives adopted by the few who make different naming choices include both spouses' keeping their names, hyphenation (usually just her), and merged or entirely new names. Of those who adopt alternatives to Mrs. His Name, the vast majority give any children his surname. Though no studies have been conducted of same-sex couples' naming choices, preliminary data suggest that a small minority of same-sex couples who form legal unions create nominal unity. This Part sketches the current landscape of the choices people are making about their names.

A. What Spouses Do with Their Names

1. Different-sex marriages.

Overall, only 10 percent of married women in the U.S. have as their last name their own birthname or any name other than their husband's birthname.⁸² That number is greater among more educated

makes sense that this could be a hard question for some men in light of our idea that a family "dies out" when the name stops being passed down, even if daughters have continued to reproduce and thus continue the family line genetically.

⁸⁰ Relatedly, see the text accompanying note 127 (describing a conversation between a mother and daughter about the reasons women take their husbands' surnames at marriage).

⁸¹ Henry James, Letter to William Dean Howells (Feb 21, 1884), in Philip Horne, ed, *Henry James: A Life in Letters* 152, 154 (Allen Lane 1999) (emphasis omitted).

⁸² See Joan Brightman, *Why Hillary Chooses Rodham Clinton*, 16 *Am Demographics* 9, 9 (Mar 1994) (citing a poll conducted by NFO Research Inc for *American Demographics* in 1993). It is hard to say how reliable these numbers are. Attempts to find out the sample size or any other features of this study have been fruitless. Scheuble and Johnson report that fewer than 5 percent of women over two generations did anything other than take their husband's name at

women, and for those who have married more recently, but the historical trend is apparently not linear. Note that reliable and consistent data are hard to come by in this area, so the findings should be taken with some caution.

The study using the most varied types of data was done by Claudia Goldin and Maria Shim who compared Harvard alumnae records, *New York Times* weddings announcements, and Massachusetts birth records.⁸³ According to Goldin and Shim, the percentage of U.S. women college graduates keeping their surnames upon marriage rose from 2 to 4 percent in 1975 to just below 20 percent in 2001.⁸⁴ Interestingly, though, the peak in surname retention appears to have been the 1980s, when as many as 25 to 30 percent of women with elite educations were keeping their surnames.⁸⁵

In another study, of the 10 percent of married women who used something other than their husband's last name, half of those (5 percent of the sample) used a hyphenated name, 2 percent used their maiden name, and 3 percent used some other name (presumably often a prior marital name, a not uncommon choice among divorced women with children from a previous marriage).⁸⁶ Although the methodology is not clear, this study may have involved women of all ages, including women who would have married before Mrs. His Name ceased to be a mandatory legal rule.⁸⁷ In some regions, particularly the South, women

marriage, though the older sample excluded women who had divorced during a relevant twelve-year window, making it likely that the 5 percent figure is lower than the general rate in the population. Laurie K. Scheuble and David R. Johnson, *Women's Marital Naming in Two Generations: A National Study*, 57 J Marriage & Fam 724, 727 (1995).

⁸³ Goldin and Shim, 18 J Econ Persp at 143–44 (cited in note 32). Though Goldin and Shim worked to identify trends using multiple sources in order to verify their findings across populations, their data are hard to interpret, because the results vary so widely between datasets and over time.

⁸⁴ Id at 144. Note that Goldin and Shim's study separates women's naming choices simply into "keepers" and "changers," including among changers those who have hyphenated, apparently without regard to whether the husband might have hyphenated or otherwise changed his name as well. Anecdotal information suggests that exceedingly few men change their surnames in any way at marriage, so the husband's name dimension is unlikely to skew their data in any significant way, but since women who hyphenate are generally considered to be making nontraditional choices, their conflation with the Mrs. His Name changers is surprising. Id at 147–48.

⁸⁵ Id at 149–54. By contrast, a more recent study using *New York Times* announcements found no significant time trends—though this study looked only at data since 1987. See Michele Hoffnung, *What's in a Name?: Marital Name Choice Revisited*, 55 Sex Roles 817, 819–20 (2006) (reporting that 71 percent of brides took their husband's name, versus 29 percent who kept their own names or hyphenated). This study included in the nontraditional category the wife's keeping or hyphenation, but even rerunning its data using Goldin and Shim's categories, found no significant time trends. Id at 820.

⁸⁶ Brightman, 16 Am Demographics at 9 (cited in note 82).

⁸⁷ See Hoffnung, 55 Sex Roles at 818 (cited in note 85) (noting this methodological problem in other work in this area). Hoffnung's own study, part of which was based on a small sample of more recent college graduates (126 women) and therefore does not purport to be representative, found the following: 37.3 percent reported taking their husband's name; 16.7 percent used

commonly make their maiden name a middle name and their husband's name their last name.⁸⁸ In addition, some women use their husband's name socially and their maiden name professionally.⁸⁹ News and anecdotal sources suggest, however, that this may be increasingly difficult under post-9/11 security measures, unless all of a woman's legal documents are in the same name.⁹⁰

A woman is more likely to keep her own name if she has an advanced degree, marries later in life, and has her first child later in life.⁹¹ More specifically, graduating from an Ivy League school, a top-twenty-five liberal arts college, or a Seven Sisters school is correlated with surname retention.⁹² A woman with an advanced degree is more likely (14 percent more likely in 1991) to keep her name, though, interest-

their husband's name as their last name and their own name as a middle name; 11.9 percent used their husband's name socially and their own name professionally; 28.6 percent kept their own name for all purposes; 4 percent hyphenated their own name with their spouse's; and 1.6 percent did something else. *Id.* at 820–22. This article also involved the *New York Times*–based study mentioned above. See note 85. Like most studies, the questions asked of the subjects did not even acknowledge the possibility of male name change. See Hoffnung, 55 Sex Roles at 820 (cited in note 85).

⁸⁸ See Scheuble and Johnson, 57 J Marriage & Fam at 729–31 (cited in note 82). Interestingly, this same study described this choice as “nonconventional.” *Id.* at 726.

⁸⁹ Twenge, 21 Psych Women Q at 422 table 1 (cited in note 2) (reporting in a study of college-age women at the University of Michigan in 1994 that 73.2 percent predicted they would use their husband's name socially, and 59.5 percent predicted changing their names to their husband's altogether). See also Laurie K. Scheuble and David R. Johnson, *Married Women's Situational Use of Last Names: An Empirical Study*, 53 Sex Roles 143, 147–49 (2005).

⁹⁰ See Real ID Act of 2005, Pub L No 109-13, 119 Stat 231, 302 (2005), to be codified at 8 USC § 1101 et seq. (forbidding federal agencies from accepting, after the Act's effective date, state-issued identification cards that fail to comply with the Act's requirements); Nicole Gaouette, *National ID Requirements Postponed under Criticism*, LA Times A16 (Mar 2, 2007) (explaining that states may be able to postpone compliance with the Real ID Act until the end of 2009). See also Martin Frost, *Driven Crazy at the DMV*, Fox News, online at <http://www.foxnews.com/story/0,2933,182548,00.html> (visited July 8, 2007) (explaining that Virginia has passed legislation implementing the Real ID Act, and describing a woman's difficulties under the state legislation getting a driver's license after she failed to notify the Social Security Administration of her name change). Further anecdotal reports suggest that states are following up with women who have documentation in different names and requiring them to reconcile their documents. I thank Nancy Sharples for taking the time to describe her experiences with this.

⁹¹ Goldin and Shim, 18 J Econ Persp at 158–59 (cited in note 32):

A Ph.D. or an M.D. is associated with a reduction of about 25 percentage points in the probability of changing one's name. Each year of marriage delay is related to a 1 percentage point decline, and each year of delay in having children is related to a 1.3 percentage point decline.

⁹² *Id.* at 156:

Graduation from an Ivy League or a top-25 liberal arts college is associated with an 11 percentage point increase in 1991 and 14 percentage point increase in 2001 relative to any college or university ranked below number 25 in its class. Graduation from a ‘seven sisters’ college is associated with an 8 percentage point increase in 1991 and a 16 percentage point increase in 2001. Graduation from other top universities has no effect relative to the base group.

ingly, Goldin and Shim found that those women with MBAs were no more likely to keep their names than the base group of women with no advanced degree.⁹³ The typical link between more education and Keeping may reflect, for instance, the potential loss in changing names if one has “made a name for oneself” professionally.⁹⁴

Race significantly affects married naming choices. In the late 1990s, married, college-educated, African-American women retained their own name at the time of their first child’s birth at twice the rate (34 percent) of comparable white women.⁹⁵ Perhaps more surprisingly, married African-American new mothers who had not gone to college retained their names at approximately the same rate as African-American women who had gone to college; by contrast, the number of non-college-educated white women who keep their birth names is extremely low.⁹⁶ Race aside, marrying in a religious ceremony correlates with lower rates of surname retention.⁹⁷

A woman’s husband having a PhD correlates with higher rates of surname retention (independent of her having a PhD), whereas marrying a husband with a suffix such as “Jr.” or “III” tends to have the opposite effect.⁹⁸ (The authors puzzle over the effect of husbands’ PhDs, without considering the possibility that such husbands might value their wives’ attachment to their own names for affective or egalitarian reasons.⁹⁹) Having a prominent father-in-law correlates

⁹³ Id. The data on graduate degrees are consistent with other research showing high rates of surname retention among women physicians. See Penelope Wasson Dralle, *Women Physicians’ Name Choices at Marriage*, 42 J Am Med Women’s Assn 173, 173 (Nov–Dec 1987) (reporting on a sample of female physicians, among whom 64 percent had taken their husbands’ last names, approximately half of the remainder had kept their names, and the other half of the remainder used their birth names professionally and another name for legal or social purposes). Other research has found that women who retain their names or hyphenate report higher individual incomes than those who take their husband’s name. See Christopher George Parigoris, *Marital Surnames and Gender Roles of Contemporary Women* 108 (unpublished PsyD dissertation, The Chicago School of Professional Psychology, 2002). Interestingly, this study did not find significant differences in educational level. Id.

⁹⁴ Compare Dralle, 42 J Am Med Women’s Assn at 174 (cited in note 93) (finding a significant relationship between a female physician’s marital name choice—whether traditional or nontraditional—and whether she had married before or after obtaining her MD).

⁹⁵ Goldin and Shim, 18 J Econ Persp at 152 (cited in note 32). Hoffnung also found that women of color generally were more likely (61 percent) to use nontraditional names than were white women (39 percent). See Hoffnung, 55 Sex Roles at 823 (cited in note 85). Some of the women of color explained their naming choice in terms of race or ethnicity. Id.

⁹⁶ Goldin and Shim, 18 J Econ Persp at 152 (cited in note 32).

⁹⁷ Id at 156.

⁹⁸ Id at 157, 159. Hoffnung similarly found in the *New York Times* portion of her study that women who made nontraditional naming choices had husbands with more education. See Hoffnung, 55 Sex Roles at 820 (cited in note 85). In contrast, however, Dralle found that for female physicians, higher educational attainment by the husband correlated with a traditional naming choice for her. See Dralle, 42 J Am Med Women’s Assn at 174 (cited in note 93).

⁹⁹ Goldin and Shim, 18 J Econ Persp at 159 (cited in note 32).

with women giving up their names, whereas having an academic father-in-law correlates with women keeping their names.¹⁰⁰ As the authors note, “[t]he effects just mentioned suggest that the bride’s in-laws—the importance they place on names, their wealth and their nontraditional views—exert an independent impact.”¹⁰¹ Of course they may be exerting their influence indirectly, through shaping the values and preferences of their sons.

2. Same-sex marriages.

The Mrs. His Name convention that prevails in straight culture obviously has no equivalent for same-sex couples. There is an interesting question, then, about what same-sex couples do with their names when they create formal unions. There are no available studies of the subject, but I have acquired some data on the couples who formed civil unions in the first year the status was available in Vermont.¹⁰² Of the 2,305 couples whose names are both known, 6 percent share some or all of their last names, suggesting that one or both partners changed his or her name.¹⁰³ Their sample is approximately two-thirds women, and the women disproportionately share names in some way (approximately 7 percent of female couples versus 4 percent of male couples). The most common way of sharing names was to have the same last name (4 percent overall), but this is not terribly telling, as there is no way to know from this dataset whether those couples with identical last names created a new name for themselves or asymmetrically assumed one partner’s name for both partners (or had the same name to begin with). The next most common alternative was to hyphenate both partners’ last names (Mark and John Smith-Jones; 1 percent overall), though this choice was more common among men than women. A few couples hyphenated only one last name (Mark Jones and John Smith-Jones; less than 1 percent overall).

In sum, it appears that vastly fewer same-sex couples create name commonality when creating civil unions than do straight couples when marrying, and fewer male couples than female couples do so. The fact

¹⁰⁰ Id at 157.

¹⁰¹ Id. One study specifically focused on husbands found that men whose wives kept or combined their names, among other things, endorsed more egalitarian beliefs and reported a smaller income difference with their wives, as compared to men whose wives changed their names to their husband’s name. Anderson, *The Relationship Between Wives’ Marital Last Name Style and Husbands’ Self-Esteem* at 100, 104 (cited in note 54).

¹⁰² Esther Rothblum and Glen Elder, researchers conducting the Civil Union Project, a significant study of same-sex couples forming civil unions under Vermont law, sent me their data on the civil unions formed between July 1, 2000, and June 30, 2001, for which I thank them.

¹⁰³ All results are statistically significant at the $p < .05$ level or better. I thank Geraldine Wright for lending her statistical expertise to these questions (data on file with author).

that fewer male than female couples change their names is interesting, but perhaps unsurprising, given that the most robust feature of U.S. marital naming conventions is that men's names do not change.¹⁰⁴ There is of course no sex-based default for same-sex partners' changing, as noted, and I have found no suggestion of any gender-based trend, such as the more-butch partner's name being adopted asymmetrically by the less-butch partner.

The gap between straight and gay couples could be attributable to the lack of "marriage" per se for gay couples in the Vermont sample, as well as to demographic or other individual factors.¹⁰⁵ Regardless, a not insignificant number of same-sex couples are creating some kind of name commonality. Moreover, a quotation from one member of the Vermont dataset—who spontaneously, and apparently proudly, raised the issue—suggests that name change may be very meaningful to some individuals who choose it:

Thought you would be interested to know that since we had our civil union, I changed my name at work ... by showing my civil union certificate. Then we recently bought a new home here in _____, applied for a VA loan, and have loan papers saying "married," based on our civil union certificate.¹⁰⁶

Case law also provides examples of gay couples' changing their names to create commonality. There is a line of cases specifically focused on same-sex partners' efforts to change their names, though not in conjunction with any legal change in their relationship status. Generally, in these cases, a lower court refuses the request for a name change on grounds of public policy—typically these days citing the state's mini-Defense of Marriage Act (mini-DOMA)—and then an appeals court reverses the decision on the grounds that no fraud is involved.¹⁰⁷ In such cases, some of the couples are trying to create a

¹⁰⁴ See Part I.B. It might also be that couples are more likely to create some nominal commonality if they have children, and that more female than male couples in the sample have children.

¹⁰⁵ For instance, Rothblum and Elder's data also compare straight married couples who are family members of the gay civil union subjects, and indicate that the gay couples are generally better educated—a variable that tends to correlate with women keeping their names in straight marriage. See Sondra E. Solomon, Esther D. Rothblum, and Kimberly F. Balsam, *Pioneers in Partnership: Lesbian and Gay Male Couples in Civil Unions Compared with Those Not in Civil Unions and Married Heterosexual Siblings*, 18 J Fam Psych 275, 285 (2004). Moreover, though the researchers on the Civil Union Project have worked hard to obtain up-to-date records on the subjects, not all subjects have responded, so some names may have changed after the latest information was received. Email from Esther Rothblum (July 26, 2006).

¹⁰⁶ Solomon, Rothblum, and Balsam, 18 J Fam Psych (cited in note 105).

¹⁰⁷ See, for example, *In re Miller*, 2003 Pa Super 197, 824 A2d 1207, 1214–15 (holding that the trial court abused its discretion by refusing a nonfraudulent name-change petition nominally unifying a same-sex couple on the grounds that it offended public policy); *In re Bicknell*, 96 Ohio St 3d 76, 771 NE2d 846, 849 (2002) (reversing the decision of the trial and appellate courts that a

hyphenated name,¹⁰⁸ and others have devised a one-word name that combines their names in some way.¹⁰⁹ There are also case-law examples of one partner changing to the other partner's surname.¹¹⁰ The same-sex couple name cases sometimes arise in the context of the couples trying to create a shared name among themselves and their children.¹¹¹ Perhaps the best known case involving a same-sex couple who adopted a married name is *Shahar v Bowers*,¹¹² in which the Eleventh Circuit sitting en banc upheld the decision by Georgia Attorney General Michael J. Bowers to fire attorney Robin Shahar for marrying her female partner in a religious ceremony.¹¹³ The name Shahar, which both spouses adopted, means "the dawn" in Hebrew.¹¹⁴

B. What Parents Do with Their Children's Names

Women married to men make even fewer unconventional naming choices for their children than for themselves. Of those women who make unconventional choices about their own names—that is, keeping their maiden names or hyphenating—the vast majority (59 to 77 percent) still give their children their husband's last name.¹¹⁵ And data on

couple's request to change both their names to a word combining letters from each of their prior names violates public policy, that is, Ohio's mini-DOMA, on the grounds that the partners have no criminal or fraudulent purpose and wish only to show their commitment to each other and to share a name with the child they are expecting); *In re Bacharach*, 344 NJ Super 126, 780 A2d 579, 585 (2001) (reversing the decision of a trial court denying a woman the right to change her name to that of her same-sex partner because there was no fraud involved and the concern that some members of the public might be mislead about the status of same-sex marriage in the state was "farfetched and inherently discriminatory" (in a state with a law prohibiting discrimination on the basis of sexual orientation, a law that the court mentioned but essentially found to be irrelevant to this name-change issue) and because the trial court had no authority to decide public policy of the state and thus to decide this name was against it). See also *Decision of Interest*, 231 NY L J 18, 18 (Jan 23, 2004) (recounting the granting of a name-change petition to nominally unify a same-sex couple because it was untainted by fraud and did not interfere with the rights of others).

¹⁰⁸ See *Bacharach*, 780 A2d at 580.

¹⁰⁹ See *Bicknell*, 771 NE2d at 847 (explaining that appellants Jennifer Lane Bicknell and Belinda Lou Priddy wished to change their last names to "Rylen"). See note 107 (explaining the change).

¹¹⁰ See, for example, Mary Anne Case, *Marriage Licenses*, 89 Minn L Rev 1758, 1761–64, 1769–71, 1792–93 (2005) (discussing the 1970s efforts by Jack Baker and Michael McConnell to marry in one way or another, including a successful adoption and name change—Baker, who was adopted, became Pat McConnell—followed by an initially successful but ultimately failed attempt to marry under the name McConnell).

¹¹¹ See, for example, *Bicknell*, 771 NE2d at 849 (recounting Ms. Bicknell's claim that "we just want to share a name so that when we do have kids, when this child is born seven or eight months from now, the three of us will share the same name and we'll be a family").

¹¹² 114 F3d 1097 (11th Cir 1997) (en banc).

¹¹³ Id at 1100–01.

¹¹⁴ Id at 1100 n 4. See also Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* 93 (Random House 2006) (discussing the linguistic significance of the couple's name choice).

¹¹⁵ David R. Johnson and Laurie K. Scheuble, *What Should We Call Our Kids?: Choosing Children's Surnames When Parents' Last Names Differ*, 39 Soc Sci J 419, 419 (2002). The abstract

Harvard alumnae from the class of 1980 indicate that among those graduates who kept their names at marriage (52.3 percent), some of those who had children later changed their own surname to their husband's (12 percent).¹¹⁶

Eighty percent of female college students surveyed in 1994 predicted that they would give their children their husband's surname. (This is in a study in which 60 percent said they planned to take their husband's name for themselves, 14 percent predicted they would use their own name professionally and their husband's name socially, and 24 percent anticipated a nontraditional choice.¹¹⁷) The second most popular prediction was for a hyphenated name for the kids (12 percent), whereas an equally small number predicted giving them her name, giving them a new name, or giving her name to daughters and his name to sons (0.7 percent on all three).¹¹⁸ The main reason cited by the subjects for giving children his name was tradition. Other common responses were family unity and simplicity or avoiding confusion.¹¹⁹ These numbers project a higher percentage of unconventional naming choices than contemporary practices reflect; whether this gap is related to the education level or other features of the women in this study, or whether women during college unrealistically predict that they will make less conventional naming choices than they eventually

reports that approximately 90 percent of women making unconventional marital naming choices still give their children their husband's last name, but that means giving the children the husband's last name in any way, even in hyphenation. However, a narrower reading of their data (which they were generous enough to send me) still indicates that mothers who made unconventional marital name choices (hyphenation or keeping their maiden names) gave their children their husband's name as the kids' only last name 72.6 percent of the time. More specifically, the percentage of children given their mother's husband's last name when the mother kept her maiden name is 73.4 percent ($n = 177$), and the percentage of children given their mother's husband's last name when their mother hyphenated her name is 69.6 percent ($n = 46$). (This excludes the data on women who kept their previous husband's surname, since there are different issues involved there, with about half the kids keeping their father's last name.) (Data on file with author.)

¹¹⁶ Goldin and Shim, 18 J Econ Persp at 153–54 (cited in note 32).

¹¹⁷ The remaining 3.3 percent formed an "other" category. The specific numbers for all categories are as follows: "take husband's name" (59.5 percent); "keep own name for all purposes" (9.8 percent); "use my name for professional purposes, husband's for social" (13.7 percent); "hyphenate my name, but not expect him to hyphenate his" (9.2 percent); "hyphenate my name and he will hyphenate his" (3.9 percent); and "husband and I will choose new name and both use" (0.7 percent). Twenge, 21 Psych Women Q at 422 table 1 (cited in note 2).

¹¹⁸ Id.

¹¹⁹ Id at 422 table 2, 424–25 (reporting that, in response to open-ended questions for reasons behind name choices (which can add up to more than 100 percent because some gave more than one answer), 45 percent of subjects cited tradition, 17 percent cited practical reasons of confusion/simplicity, and 14 percent cited bonding/union in marriage and family).

make, is not clear.¹²⁰ Nonetheless, even there, the vast majority said they would give their children their husband's name.

There are apparently no available data on the names of the children of same-sex couples. Case law indicates, though, that some same-sex couples attempt to change their own names to share a name with each other and their children.¹²¹

III. SOCIAL ALTERNATIVES: CRAFTING A SUSTAINABLE EGALITARIAN CONVENTION

Everyone in the family should have the same surname [sic].

—Female undergraduate at the University of Michigan¹²²

Although fathers' surnames are passed from generation to generation in most families today, there may be an alternative family naming convention that could be sustainable across generations without favoring men's names over women's.¹²³ At present, there is little reason to think that an alternative naming convention will take hold. As noted, any one individual or couple that makes an unconventional choice cannot change the convention, and their individual naming choices therefore take on meanings that exceed what they intend; change in this area therefore requires a feat of collective action. Law may be able to help with this, without inhibiting individual choice, in ways discussed in the next Parts. First, though, it is reasonable to ask whether there even is a promising alternative to the patrilineal Mrs. His Name convention.

This Part therefore lays out and evaluates a range of possibilities for a sustainable egalitarian convention, to lay the groundwork for subsequent discussion of how law does, and how law should, treat marital names. After considering common alternative naming practices in Part III.A, I describe in Part III.B one variation—biphenation—that I think

¹²⁰ Parents sometimes dispute their children's last names after divorce, a fascinating subject which I do not address in this article. For a thorough and thoughtful treatment, see Merle H. Weiner, "*We Are Family*": Valuing Associationism in Disputes over Children's Surnames, 75 NC L Rev 1625, 1761–62 (1997). Relatedly, the laws surrounding women's (and men's) names at divorce also present a rich subject, to which this Article does not purport to do justice. The proposed convention of biphenation is well suited to divorce and remarriage, however, as explained in Part III.

¹²¹ See, for example, *Bicknell*, 771 NE2d at 847.

¹²² Female undergraduate at the University of Michigan on why children should have their father's last name, quoted in Twenge, 21 Psych Women Q at 425 (cited in note 2).

¹²³ See Johnson and Scheuble, 39 Soc Sci J at 425 table 2 (cited in note 115) (demonstrating the significant preference for giving children their mother's husband's last name). See also note 115 and accompanying text (observing that, even among women who make unconventional naming options for themselves, between 59 and 77 percent give their children their husband's surname).

better satisfies the range of interests at stake. Of course, reasonable minds could disagree on the relative merits of these conventions. The aim is to discuss the range of options and to present a relatively novel alternative that may not have been considered by many readers. Note that the focus here, as elsewhere in the Article, is on U.S. laws and practices, though the notes highlight comparative analogues. Finally, keep in mind that the topic here is alternative naming *conventions*—that is, social defaults—not legal or mandatory rules.

A. Common Alternatives to the Mrs. His Name Convention

Despite the social costs that attend unconventional naming choices, some partners and parents have departed from the Mrs. His Name convention, as noted earlier. The range of alternative approaches includes the following: Keeping; matrilineal naming; bilineal naming; hyphenating; Mr. Her Name; new names; and merged names.¹²⁴

1. Keeping: Mr. His Name and Ms. (or Mrs.) Her Name.

There are some benefits to spouses both keeping their names. The solution is egalitarian, and while the spouses' names may create information costs because they don't signify the new family relationship,¹²⁵ neither does this solution require anyone to inform others, including government entities, about a new name—nor does it require those others to learn the new name. Moreover, both spouses have the continuity of their names throughout their lives, which may be a benefit if they have a constitutive or professional attachment to their original names, or if they divorce or remarry, as many people do. They also maintain a connection with the past, with their families of origin, and thus with any ethnic or historical identity that name may represent.

We generally accept the continuity of each spouse's name, unblinking, from the famous men and women who marry. Query why famous women are considered exempt from—or even just separate from—the social conventions of marital naming. Are their independ-

¹²⁴ There are of course an unlimited number of possibilities. One common approach is for women to make their maiden name their middle name, as noted in Part II. Sometimes the mother's maiden name is also given to children as a middle (or even first) name, dropping out at the next generation. There are also some (presumably very small) number of men who take their wives' birthnames as middle names. Other, more creative, variations include the decision by a woman I know who, when taking her husband's surname, made her birth surname her first name. These approaches, among many others, may provide satisfying possibilities for individual couples, and would always be available as alternatives to any default convention. The aim in this Part is to search for an alternative convention that could be egalitarian across generations.

¹²⁵ Compare Richard A. Posner, *Sex and Reason* 311–13 (Harvard 1994) (arguing that same-sex marriage has signaling costs).

ent lives so much more significant than those of women who aren't famous? Do they have more to lose in changing their names? Possibly the latter is true,¹²⁶ though an anecdote published in *Glamour* in 1991 offers an interesting take on the link between fame and names:

I remember being ten years old, looking at my mother's mail and asking why she was addressed by a man's name with a *Mrs.* stuck in front of it.

"It's what's done when you get married."

"Then why is Marilyn Monroe still Marilyn Monroe?" I knew she'd been married at least twice.

"She's a movie star. It's her professional name."

The only women I knew who had professions were my teachers, each of whom changed her name—in a gleeful frenzy, mind you—the minute she got married.

"That's different," my mother explained, "They're not famous."

"Only famous women keep their maiden names?"

"Something like that."

"But men keep their maiden names whether they're famous or not? Or is it that all men are famous?"¹²⁷

To some then, like the author of this exchange, Keeping is the way forward for women as well as men.

Though Keeping is our current legal default, it is not our current social convention: women typically become *Mrs. His Name* anyway. A key reason for this discrepancy is, I suspect, children's names.¹²⁸ As discussed above, children usually bear the husband's name, even if the

¹²⁶ For a judge who firmly held a contrary view, see *In re Kayaloff*, 9 F Supp 176, 176 (SDNY 1934):

Furthermore, as all are well aware, many professional women of note and standing, and who are married, are known in private life by the surname of their respective husbands. In the artistic circles in which such women move, they are known by their stage or professional names. It is my judgment that none of them has 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.

¹²⁷ Jean Gonick, *Save Me from the Woman Who Takes Her Husband's Name*, *Glamour* 260 (Nov 1991).

¹²⁸ See Hoffnung, 55 *Sex Roles* at 822 (cited in note 85) (reporting that 45 percent of the women (in their small study of college graduates) who became *Mrs. His Name* said they had done so for reasons of "family unity," saying things like "I wanted our family to be one," "[w]anted our whole family to have the same name," and "I wished to be associated with my new family and to have the same surname as my child").

wife has chosen an alternative naming practice for herself.¹²⁹ Of course, children have to have some name, and there is no obvious choice, other than the current social default. But there are alternatives, as discussed in the next two Parts. If the children are going to have his name, though, then for the wife to choose to keep the name of her family of origin (and her life to date) is to choose not to have a nominal connection with her current nuclear family and any generations that follow her.

Some women may also forgo Keeping because they romanticize nominal union.¹³⁰ Indeed, it has been suggested that Keeping is more popular in Western European countries than in the U.S. because the U.S. has a more romantic idea of marriage.¹³¹ Some would say that the language of romance is just a cover for gender subordination. But the choices by substantial numbers of same-sex couples to create commonality of names suggest that nominal unity is not necessarily tethered to sex-based subordination (though it still might be).¹³² And for straight couples, as discussed earlier, if she's not the only one whose name could change, then the romance of nominal unity is not inconsistent with equality of naming choices.¹³³

2. Matrilineal naming.

One alternative convention—often accompanying Keeping for the parents—is to give the children her name.¹³⁴ Some favor this ap-

¹²⁹ See note 115 and accompanying text.

¹³⁰ See Part I.B.3.

¹³¹ Patricia Wen, *Tradition, in Name Only: Most Brides Keep Convention of Taking Husband's Surname*, Boston Globe A1 (Mar 17, 2001):

Annemette Sorenson, director of the Henry A. Murray Research Center at Radcliffe, said . . . that in Denmark, where she is from, women went from taking their husbands' names to retaining their names within one generation in the 1970s. But Sorenson said the United States may have a more romantic notion of marriage, which keeps the name issue associated with emotional love, rather than a reminder of an old system in which a woman was the property of her husband.

¹³² Of course gender subordination can occur in same-sex relationships. The point here is only that (1) naming conventions do not have to follow sex-based lines, and (2) there is no evidence to suggest that naming practices by same-sex couples follow gendered lines, as noted. See Part II.B.2.

¹³³ See Part I.B.3.

¹³⁴ This practice is associated with explicitly matrilineal indigenous cultures, such as the Minangkabau in Indonesia, see Tsuyoshi Kato, *Change and Continuity in the Minangkabau Matrilineal System*, 25 *Indonesia* 1, 3 (1978), and the Haida communities of North America, see Lisa Kelly, *Divining the Deep and Inscrutable: Toward a Gender-Neutral, Child-Centered Approach to Child Name Change Proceedings*, 99 *W Va L Rev* 1, 8 (1996). Matrilineal naming is also the default legal practice in some countries. See, for example, *Family Law Legislation of the Netherlands* 4 (Intersentia 2003) (Ian Sumner and Hans Warendorf, trans) (citing Dutch Civil Code Title 2, Art 5, § 1, which establishes that, even if paternity is determined, children take the mother's surname unless both parents consent); Walter Pintens and Michael R. Will, *Names*, in

proach on the principle that the mother does more work to bring the child into the world, or typically does more work to raise the children, or typically stays with the children even across divorce and remarriage. Although various plausible theories support this—for example, the biological fact of labor or empirical reality of average relative time spent child rearing, or the importance of subverting the historical practice of legal disappearance of women in the family (that is, *cov-
er-ture*)—this approach may be troubling to some because it reinscribes traditional gender roles by associating women with children. In addition, it may also overvalue the biological contribution: why should that particular nine months define the name, as against care or education or financial support of the growing child? (Relatedly, if biology is paramount, one might even ask whether a surrogate should give the surname to a child that she bears.) Much more could be said on this, but in short, while one can see why matrilineal naming would appeal to some at this moment in history, and why it might raise awareness, we might prefer a longtime solution that favors neither men nor women. (As with all claims on this subject, this one is contestable; it fits, however, with my definition of egalitarian as favoring neither men nor women.)

Interestingly, Miss Manners seems to endorse matrilineal naming, albeit obliquely, in the interests of avoiding so many name changes, which are inconvenient for self and (especially) others.¹³⁵ After recommending that adults choose one permanent name at the moment of marriage or first serious career, she explains:

It is wise not to associate these names with philosophies or spouses who are likely to prove fleeting, because this is the surname they must keep. Miss Manners suggests sticking to the original family surname—but in the female line. The basic family unit has now become the mother and children of whom she has been awarded custody, and it is simpler if they all have the same name and keep it, no matter who happens to join them later. The system of the matriarchal line worked fairly well in ancient socie-

Mary Ann Glendon, et al, eds, 4 *Intl Encyclopedia Comp Law* Ch 2 at 53–54 (Mohr 1995) (noting that in the Scandinavian countries, children take their mother's name if nominal consensus can't be reached within a legal time limit). If the parents are unmarried, matrilineal naming is the statutory default in some U.S. states. See, for example, SD Cod L § 34-25-13.3 (Michie 1994 & Supp 2003) (codifying matrilineal naming for unmarried mothers unless the parents sign an affidavit confirming paternity).

¹³⁵ See Judith Martin, *Miss Manners' Guide to Excruciatingly Correct Behavior* 53–54 (Norton 2005). Miss Manners doesn't directly suggest naming one's children in this way (presumably because Miss Manners does not like to make waves), but in suggesting that adults choose one surname for all of adulthood, she urges they choose the matrilineal name, as the next quotation indicates.

ties, before women made the mistake of telling men that they had any connection with the production of children.¹³⁶

Miss Manners's explanation for her endorsement of this approach captures some of why we might worry that it reinscribes, rather than reforms, traditional gender roles.

3. Bilineal naming: different for boys and girls.

Another possible convention—also alongside Keeping for the parents—is to give the male children His surname and the female children Her surname.¹³⁷ Of course this would not work for same-sex couples, and there are potential problems for different-sex couples here as well. Most notably, sex-aligned surnaming not only creates an additional layer of distinguishing children by their sex from the start (for example, pink and blue clothes, boy and girl first names), it also creates family alignments and disalignments along sex lines. We already heavily embed identity in sex/gender from birth: as Judith Butler has noted, the moment of assigning a child a gender is the moment of recognizing the child as human—“It’s a boy!” or “It’s a girl!”¹³⁸ The moment of assigning a first name is almost invariably a gendering moment as well. To the extent gender roles confine individuals, then, there is something troubling about more gender differentiation within the family.

Moreover, giving the boys the father’s name risks nothing for the father if the kids don’t follow their parents’ nontraditional naming route in their own marriages: the sons, whose surname matters traditionally, have the father’s name to pass along. If a couple really means

¹³⁶ Id.

¹³⁷ See Sharon Lebell, *Naming Ourselves, Naming Our Children: The Last Name Dilemma* 64–69 (Crossing 1988). There are some related precedents from cultural and historical contexts outside the U.S. For instance, according to traditional Icelandic naming practices, a child’s surname is formed by attaching either the prefix of “son” or “dóttir” to either the father or mother’s first name. See Ministry of Justice and Ecclesiastical Affairs, *Information on Icelandic Surnames*, online at <http://eng.domsmalaraduneyti.is/information/nr/125> (visited July 8, 2007). There is, however, some disagreement in the academic literature about the extent to which daughters actually take their mother’s name and sons take their father’s name. Compare Judith Rosenhouse, *Personal Names in Hebrew and Arabic: Modern Trends Compared to the Past*, 47 J Semitic Stud 97, 100 (2002) (“In Icelandic [culture,] . . . girls get the mother’s name as surname, whereas boys take the father’s name for surname.”), with Richard F. Tomasson, *Iceland: The First New Society* 172 (Minnesota 1980) (“Rarely, at any time, have daughters been named after their mothers.”). A related use of prefixes is found in Classical Hebrew and Arabic naming practices, according to which a child’s surname was created using the father’s name and “son of”; on occasion, the mother’s name was used instead of the father’s. See Rosenhouse, 47 J Sem Stud at 100 (noting that the practice occurs only when “the father has died at an early age or the mother is the dominant figure in the family”).

¹³⁸ See Judith Butler, *Bodies That Matter* 232 (Routledge 1993).

to adopt a new tradition that resists patrilineal privilege, however, they might switch the groups: Father gives his name to any daughters, Mother gives her name to any sons. This would move away from patrilineal descent, and it would flip the sex-based identification. But this approach nonetheless introduces yet another way that boys and girls are distinguished based on their sex from a young age.

A related option would be to alternate the last names of the children: for instance, giving the first the mother's, and the second the father's, and so on.¹³⁹ This approach isn't gendered, and, assuming more than one child, both names get passed on, regardless of the sex of the child. However, as with bilineal naming, the children wouldn't share a surname with each other, or with both parents, though they could be given middle names that reflect the other parent's name (and thus their siblings'). With alternating surnames, there is also the question of whose name comes first, since, unless there are twins, the parents don't know for certain if there will be another child.

4. Endlessly proliferating hyphenation.

Hyphenation initially seems to be an appealing (although still uncommon) alternative.¹⁴⁰ Typically, she hyphenates and he leaves his name the same, but in the egalitarian version, both spouses hyphenate, or the children hyphenate while the parents keep their names. Hyphenation has obvious benefits: it can be egalitarian, it involves the continuity of both names, and it can signify a connection among some or all members of the nuclear family.

As commentators are always quick to point out, however, hyphenation presents new problems at the second generation of family formation.¹⁴¹ If the child of Rachel Smith and Sam Miller is Lara Smith-Miller, and if she marries Kevin Lee-Brown, then what name will their children bear? Will they really be Boy and Girl Smith-Miller-Lee-Brown?¹⁴² And what of the next generation? Hyphenation, at least

¹³⁹ See Richard D. Alford, *Naming and Identity: A Cross-Cultural Study of Personal Naming Practices* 56 (Hraf 1988) (noting a variation of this practice among the Hokkien, an agricultural Taiwanese community in which parents sometimes alternate giving their surnames).

¹⁴⁰ See Part II (reporting that one study found that 5 percent of women hyphenate, and reporting no data on how many men hyphenate).

¹⁴¹ See, for example, Span, *Taking a Wife*, Wash Post at F01 (cited in note 45); Neil A.F. Popovic, *The Game of the Name*, Ms. 96 (Nov-Dec 1994); Gerri Hirshey, *Little Kids, Big Names*, Redbook 40 (Oct 1993); Lance Morrow, *The Strange Burden of a Name*, Time 76 (Mar 8, 1993); Lebell, *Naming Ourselves, Naming Our Children* at 32, 51-52 (cited in note 137).

¹⁴² Compare Pintens and Will, *Names* at 54 n 499 (cited in note 134) ("Portugal admits up to four surnames (Law 51 on the civil register art 128 no 1), while most other countries expressly allow only two, amongst them Greece (CC art 1505) and Quebec (CC art 56.1).").

standard hyphenation, thus does not seem sustainable across generations. I return to the topic of hyphenation at the end of this Part.¹⁴³

5. Mr. Her Name.

Another option is for him to take her name.¹⁴⁴ As mentioned earlier, this option has received some attention in light of a suit brought by the ACLU to challenge the difficulty a couple faced in trying to change his name to hers in Los Angeles County.¹⁴⁵ Mr. Her Name is simple and elegant, and it clearly doesn't favor men's names over women's names. And it may have some salutary effects these days, such as demonstrating the odd asymmetry of our predominant convention of Mrs. His Name, and showing that men are also capable of changing their names. But of course, like matrilineal naming for children, it favors women's names over men's.

6. New names.

Another option is to create a new name for the newly formed family. The couple could choose a word or place name that has special significance to them. If Rachel Smith and Sam Miller met in Brooklyn,

¹⁴³ Part III.B proposes an alternative model for intergenerational hyphenation, which does not lead to endless proliferation of names, and which should therefore have more appeal.

¹⁴⁴ As noted in Part I, men in the Anglo-American tradition have sometimes done this in special circumstances, such as when the wife's family was more prominent. See note 27. In addition, according to one Japanese custom, it is not uncommon for a husband to take his wife's surname in certain circumstances, that is, when her family has no sons or no sons remain in the household. See Kitteredge Cherry, *Womansword: What Japanese Words Say about Women* 11 (Kodansha 2002) (stating that "[o]ne custom enables a family to adopt a son-in-law who assumes his wife's surname and enters her family just as a bride would normally do"). See also Ekaterina Korobtseva, *Late Marriages in Contemporary Japan* 14 (unpublished MSc dissertation, Oxford University, 2003) (explaining that "another very Japan-specific norm which seems to affect marriage is the traditional requirement for the eldest daughter from a family with no sons to find a groom who will agree to be symbolically adopted into his wife's family and take her surname"); Keith Brown, *Dōzoku and the Ideology of Descent in Rural Japan*, 68 Am Anthro 1129, 1131–32 (1966) (observing that among those families belonging to *dōzoku*—that is, a hierarchically organized corporation of families patrilineally related—it is common for a husband to take the wife's surname when the wife's family either doesn't have a son or none of the sons remains in the household). While this traditional naming custom is apparently waning, anecdotal evidence suggests its persistence in some rural communities. See Misa Izuhara, *Changing Family Tradition: Housing Choices and Constraints for Older People in Japan*, 15 Housing Studies 89, 94–95 (2000) (discussing the importance of family continuity in Japan and the naming custom's role in perpetuating the family name). Currently, however, 98 percent of Japanese women take their husband's surname. See Masumi Arichi, *Is it Radical? Women's Right to Keep Their Own Surnames after Marriage*, 22 Women's Stud Intl Forum 411, 411–15 (1999).

¹⁴⁵ See, for example, Risling, *California Man Sues to Take Wife's Name*, Wash Post at A04 (cited in note 64); Jennifer Steinhauer, *He Does Take This Woman. Now, About Her Last Name*, NY Times A1 (Dec 16, 2006). See also generally Complaint, *Buday v California Department of Health and Services*, Civil Action No CV06-08008 (CD Cal filed Dec 15, 2006) ("Buday Complaint").

they could become Rachel and Sam Brooklyn. (This type of location choice would recall the historical practice in some regions of the world of using names to indicate geographical origin—think Leonardo da Vinci.) Or if they shared a fondness for a particular type of tree, they could adopt its name as their own. One couple in Susan Kupper's study of naming choices adopted the family name of Ailanthus, commonly known as the tree of heaven, though they gave the name only to their children.¹⁴⁶ As noted earlier, Robin Shahar and her partner took the new name of Shahar because it means "the dawn" in Hebrew.¹⁴⁷

7. Merged names.

With some greater nod to continuity of identity, spouses could instead merge their separate surnames into one surname. Thus Sam and Rachel become the Smillers or the Millsmis (or similar). Last year, Jodi Rudoren, who writes for the *New York Times*, combined her last name (Wilgoren) with her husband's (Ruderman), and they both became the Rudorens.¹⁴⁸ Rudoren's article seems to have prompted a flurry of articles in British newspapers claiming that merging is the new American suburban trend, but all indications suggest that merging is still rare.¹⁴⁹ Web posts responding to Rudoren's article about her name change nonetheless reveal a few further examples; for instance, a couple with the names Newstrom and Kotok became the Newstoks; and, more unusually, Brian Culkowski and Julia Lester blended the latter parts of their names into Sterkovsky.¹⁵⁰ Moreover, the mayor of Los Angeles, Antonio Villaraigosa, bore the name Villar until he married Connie Raigosa.¹⁵¹

¹⁴⁶ Kupper, *Surnames for Women* at 87 (cited in note 54) (describing the choice of Kass Sheedy and Douglas Morea).

¹⁴⁷ See notes 113–14 and accompanying text.

¹⁴⁸ See Rudoren, *Meet Our New Name*, NY Times sec 9 at 3 (cited in note 64). Writing in 1990 on couples who had made decisions prior to that time, Kupper mentions one merged name, which was applied only to the children: Marc Greenwood and Susan Ransom gave their kids the name "Ranwood," which Susan called the "family name" although the parents didn't assume it. Kupper, *Surnames for Women* at 86 (cited in note 54) (describing, however, Greenwood's eventual regret).

¹⁴⁹ See Benjamin Zimmer, *Keeping Up with the Smoneses: Are American Newlyweds Blending Their Names?*, Slate (Aug 16, 2006), online at <http://www.slate.com/id/2147875> (visited July 8, 2007). See also Denise Winterman, *What a Mesh*, BBC News Magazine, (Aug 3, 2006), online at http://news.bbc.co.uk/2/hi/uk_news/magazine/5239464.stm (visited July 8, 2007); Carol Sarler, *Frankly, I Blame Brad and Angelina*, Observer (July 30, 2006), online at <http://observer.guardian.co.uk/comment/story/0,,1833370,00.html> (visited July 8, 2007); Chloe Rhodes, *Why I Didn't Want to "Mesh" with My Husband*, Telegraph (July 28, 2006), online at <http://www.telegraph.co.uk/health/main.jhtml?xml=/health/2006/07/28/hname28.xml> (visited July 8, 2007).

¹⁵⁰ Scott Newstok, *Design Your Surname, Design Your Life* (Nov 13, 2005), online at <http://www.design-your-life.org/blog.php?id=350> (visited July 8, 2007).

¹⁵¹ See Rudoren, *Meet Our New Name*, NY Times sec 9 at 3 (cited in note 64).

Although it might seem difficult to determine how names would be merged, we know from linguistics that certain letter and sound combinations sound better (or worse) in certain languages, and some combinations are simply unacceptable. These kinds of considerations, among others, would likely drive naming choices.¹⁵²

Like hyphenation, this option brings together the two names into a new name, but without the length or questions about the next generation that hyphenation raises. Everyone in the immediate family—the parents and all their children—would have the same last name, and neither spouse's name would be privileged. The solution is thus egalitarian and, in some ways, parsimonious.

This solution has one great disadvantage, though: because neither partner's name is preserved intact, within one or two generations, family names would bear little trace of the names of earlier generations. The history and intergenerational continuity of current surnames would cease. Specific ethnic or racial heritage would be lost through the blending of parts of names (though at least some names could be merged in a way to preserve identifiable parts).

Embracing a social practice that would end the passing of names across generations may seem disconcerting, even sad. After all, both men and (perhaps to a lesser extent) women have reasons to be attached to their names of origin.¹⁵³ If everyone gave up his or her name, however, we might all develop less of an attachment to our birth names.¹⁵⁴ Everyone would potentially anticipate this life transition, in much the way many women have for generations. In other words, the preference for birth names may itself be endogenous to norms and practices in a way that means that much less would be lost than we think, were the practice to change.

And there might be gains from the loss of intergenerational name affinity. First, in addition to breaking any preference for sons that might result from patrilineal naming, ceasing the intergenerational transmission of names might reduce the pressure on children to pur-

¹⁵² See Alan Cruttenden, ed, *Gimson's Pronunciation of English* 216–22 (Edward Arnold 5th ed 1994) (discussing English phonotactics).

¹⁵³ See Part I.B.2.

¹⁵⁴ Some first-name practices suggest that the preference for names that bear marks of tradition and familiarity, rather than blending and creativity, is culturally specific. For instance, the creation of new first names through varying prefixes or suffixes or merging existing first names is not uncommon among African-Americans. See, for example, Sonia Weiss, *The Complete Idiot's Guide to Baby Names* 133 (Alpha 1999) (stating that “[c]ombined names, often taking elements from the names of both parents, and creative spellings are also very much a part of this [African-American] naming fashion”); Pauline C. Pharr, *Onomastic Divergence: A Study of Given-Name Trends among African Americans*, 68 Am Speech 400, 401–02 (1993) (describing patterns of coined African-American first names, including adding prefixes or suffixes or creating “blends or compounds, such as *Marschelle* (*Marsha/Michelle*) and *Maxille* (*Maxine/Lucille*)”).

sue unsatisfying life and career paths to do credit to the Family Name. That said, it could also undermine whatever *useful* social pressure is created by such expectations. But, under this model, children do have the same name as their parents unless or until they marry—just not their grandparents.

Second, new pleasures might even be found in the relinquishment of one name for the other. Much as many young girls have eroticized becoming Mrs. His Name, as discussed earlier, a naming practice that involves conjoining or blending names might thus invite new pleasures for men who've never had such pleasures, and novel forms of pleasure for women who haven't experienced or likely even imagined this variety of nominal union shared equally with a spouse.¹⁵⁵

Moreover, this approach applies to same-sex couples as well as different-sex couples.¹⁵⁶ The fact that a social practice is potentially inclusive of historically excluded groups may be positive in its own right. In addition, the practice's availability to partners who defy gender norms may signify the new practice's break from marriage's historical role in subordinating women.

In addition, the merged or new name option is not incompatible with preserving names across generations in some way. For instance, one supplement to the new-name (or merged-name) option would be to preserve family names across generations by accumulating middle names, as many women have done with their maiden names.¹⁵⁷ These middle names would have odd echoes of the merged surnames, however.

On the negative side, perhaps a social convention of nominal union smacks of coverture for all. Rather than just women losing themselves, now both spouses lose themselves in marriage, at least as signified by their surnames. One might worry that this is the opposite of progress. Another, more trivial, complaint about merged names is that their novelty may prompt mispronunciation or require their bearers always to spell them out. This cost isn't unique to novel names, however; many people's names are mispronounced. Nonetheless, while merged names have some appeal, they also have some notable costs—perhaps most particularly, the loss of the integrity and history of existing names.

¹⁵⁵ See Part I.B.3.

¹⁵⁶ It also works for groups of more than two, which, if they do not follow a patriarchal model of polygyny, also lack a naming default. Since limited survey data on people in polyamorous relationships suggests little interest in formal marriage, however, common surnames may be a matter of relative indifference. See Emens, 29 NYU Rev L & Soc Change at 303, 353–54, 354 n 14 (cited in note 76).

¹⁵⁷ See note 88 and accompanying text (noting that women, particularly in the South, commonly take their given surnames as middle names at marriage).

B. A Promising Alternative: Biphenation

Hyphenation by both spouses has numerous virtues, as noted above, including continuity of each person's name, symmetry between spouses, and shared names between parents and children. But the difficulty comes with marriage at the next generation: surely the kids of Lara Smith-Miller and Kevin Lee-Brown won't become Smith-Miller-Lee-Brown. Superficially, then, hyphenation seems a one-generation solution.

But there is no reason all the names have to be retained.¹⁵⁸ What if only two names were hyphenated at every generation?

This may sound complicated, but it's not. The idea—which we might call clipped hyphenation or *biphenation*—is that when two hyphenators marry, each chooses one of his or her current names to merge into the new family name. So Lara Smith-Miller picks, say, Smith, and Kevin Lee-Brown picks, say, Brown, and their new family name is Smith-Brown. They might both adopt this new name, at the time of marriage or if and when they have kids, or they might just give the name to the kids (if any) that they have. With biphenation, then, everyone has a hyphenated name, but its component parts may change over time.

Biphenation is thus similar to the common practice in many Spanish-speaking countries, in which children bear two names, one from their father and one from their mother, though typically without a hyphen.¹⁵⁹ Under the Spanish convention, however, mothers' names are dropped at the next generation.¹⁶⁰ Thus, patrilineal descent is the operative principle across multiple generations. Under the biphenation approach, by contrast, no patrilineal principle would dictate which name gets passed along.

This approach has the virtues of merging, in that names do not become endlessly long, but they bear properties of each partner's name. And it retains the key additional virtue of hyphenation: that existing family names—with their heritage, history, and individual recognition value—retain their integrity.

¹⁵⁸ I thank Kathy Baker for this point.

¹⁵⁹ See Civil Code of Spain Book I, Title V, Chap I, Art 108–10 (allowing, among other things, the parents to decide on the order of the child's double name); Barbara R. Hauser, *Born a Eunuch? Harmful Inheritance Practices and Human Rights?*, 21 L & Inequality 1, 29–30 (2003) (describing the mechanics and motivations of the Spanish system); Pintens and Will, *Names* at 54 (cited in note 134). Note that Portugal and Brazil follow a similar practice, though the mother's name typically precedes the father's. Pintens and Will, *Names* at 54 (cited in note 134).

¹⁶⁰ See Pintens and Will, *Names* at 54 (cited in note 134). Another difference is that the biphenation approach proposed here would invite the parents to adopt the biphenated name, not just the children. See note 148.

Biphenated names help create genealogies, even though they will not travel neatly or predictably. Given that women's names have (almost) never traveled, this is not a loss of information, but instead a spreading out of the information gaps. And because each child bears a coherent part of each parent's name, tracing family lines and connections should presumably be easier rather than harder. In addition, biphenation preserves the connection between past and present and the ethnic significance of existing names.

Moreover, both men and women could be more easily found by old friends, or traced through a publication record or website, under biphenation than under merging (or under Mrs. His Name or Mr. Her Name). A Google search for Lara Smith-Miller has a decent chance of turning up Lara Smith-Brown, particularly if paired with some relevant information about her, and the chances would be much increased where the component parts of the names are more unusual than Smith and Brown.

The choosing of which half of each name to keep could be a matter of family ties, aesthetics, or the flip of a coin. Requiring couples to choose—both which names to include in their name, and the order of those names—might seem a burden to place on them and their families of origin, creating guilt or hurt feelings. This concern may be overblown, though. Parents sometimes name children after family members, giving them first or middle names of relatives with whom they feel, or want to forge, a particular connection. Principles other than elective affinity might appeal to some—such as choosing the shorter names or choosing which ones sound best together. The former might favor names from some national or ethnic traditions over others, though, and the latter may be subject to much disagreement, notwithstanding the principles of phonotactics.¹⁶¹ Alternatively, some people might want to use a principle similar to the bilineal principle described above, though with a twist to disrupt patrilineal descent for reasons discussed in Part II: that is, men would keep the part of their names they got from their mothers, and women the part they got from their fathers.¹⁶² This creates another gendered principle for dividing people, however, and doesn't work for the children of same-sex couples.

To avoid these decisions, couples could choose biphenated names randomly, by, for example, three coin flips: first, to determine which of the first spouse's names is included; second, to determine which of the

¹⁶¹ See note 152.

¹⁶² So Lara Smith-Miller (the daughter of Rachel Smith and Sam Miller) passes Miller to her children, and Kevin Lee-Brown (the son of Patricia Lee and Jennifer Brown) passes Lee to his children. Their children therefore bear the last name of Lee-Miller. (Or it could be Miller-Lee; for the order, I think aesthetics would often dictate, though randomness or alphabetical order could supply the default.).

second spouse's names is included; and third, to determine the order of the two names selected.¹⁶³ As I discuss later, the state could help make this choice easier and even more neutral by supplying a randomly generated *facilitative default*.¹⁶⁴

I have spoken as if both parents and children would have the new biphenated family name, but part of the beauty of biphenation is that the parents can choose whether they wish to biphenate their own names or not—and the convention works equally well either way.¹⁶⁵ (Under the Spanish convention, by contrast, only the children receive the combination name; the parents' names generally do not change.¹⁶⁶) Couples will likely vary in whether they wish to change their own names to the new biphenated family name, or to reserve the new biphenation for any children they may have. Factors may include how much they wish to share a name with each other or how much they wish to have the exact same name as their children, versus how much they wish for career or personal continuity reasons to retain their exact birth names. Note, though, that even if couples change their own names, they retain a coherent portion of their birth names before and after marriage.

Biphenation also permits partial continuity of a person's name across marriage and remarriage, for those who wish to change their names with each marriage, because they can keep the same part of their birth name with each marriage. And even if a person changes his name with each new marriage, he can still share part of his name with his children from previous marriages, so long as he keeps the half of his name that they have. (This would be a good reason for a person at

¹⁶³ Several readers proposed coin flipping as a way to deal with any number of naming decisions—including as a way to choose one family name for all (for example, Smith or Miller)—perhaps even through public ritual, like the bouquet toss. This might appeal to some, but my suspicion is that most (though not all) people would not take well to using randomness to decide whether they will keep or lose their name. That said, if they can be certain that they'll keep some part of their name, randomness might be relatively more appealing as a way to decide which part.

¹⁶⁴ See Parts V and VII.

¹⁶⁵ In this way, biphenation is not a simple “ratcheting up” or “ratcheting down” solution. In antidiscrimination theory, solutions ratchet up if they focus on giving rights of the dominant group to the subordinate group; solutions ratchet down if they attempt to transform the norms or practices of the dominant group to look more like those of the subordinate group. Biphenation is a hybrid. It ratchets up in that it extends to women the historically male practice of keeping and passing on one's name, but only partially. And it ratchets down in that it invites men to engage in the historically female practice of changing one's name and passing on a spouse's name to the children, but only partially. To the extent that it invites couples to decide whether they prefer to partially change their own names (to entirely match each other and any children) or to keep their own names precisely as is, biphenation gives them the option of ratcheting up or down to a greater or lesser extent.

¹⁶⁶ See Hauser, 21 L & Inequality at 29 (cited in note 159). Some women, however, do add “de” or “y” and then their husband's name at the end of their own.

remarriage to choose actively which name to keep, instead of leaving the choice to chance, or to a default.) Because no gendered principle determines the names, biphenation also works for both same-sex and different-sex couples.¹⁶⁷

In a sense, biphenation is very much like merging, except that it preserves the integrity and historical resonance of existing surnames. It brings together existing names rather than coining neologisms. And the basic underlying logic is simple: when families had one formal head of household, perhaps it made sense to have one family surname; now that in families of two parents both are heads of the household, two names seems sensible.

Hyphenated names are generally longer than single names, and some find them unwieldy or unappealing. This is a meaningful concern, but not an insurmountable one, in my view. Surely there is nothing essentially unappealing or costly about two surnames connected by a hyphen.¹⁶⁸ And as more people biphenated, we, and our filing and forms and computer systems, would adjust. In addition, with regular and genuine choosing built into our naming convention—in contrast to such a strong majority convention of Mrs. His Name—people might well make more choices on the basis of aesthetics, leading to an overall improvement in the appeal of the surnames we bear, without sacrificing the integrity of the names that are passed on. Moreover, friends can (and sometimes do) create nicknames for the last names of their hyphenated friends, much as they create nicknames for friends with long first names.¹⁶⁹

Nothing complicated needs to happen to pursue biphenation as a solution to the naming problem. At present, for those prospective spouses with single surnames (for example, Smith and Miller), biphenation simply means hyphenation. The prospect of biphenation merely solves the dilemma of what their kids can do, and their kids'

¹⁶⁷ The term biphenation suggests that this approach couldn't apply to polyamorous relationships, but twoness isn't actually key here; the key is that each partner's name contributes without names proliferating across generations. So a family of three could adopt the principle of biphenation to create a three-part name, such as Smith-Miller-Jones. As this could become cumbersome, though, particularly for larger families, poly families who wanted to share names or give shared names to children might choose simple merging over hyphenation. Nonetheless, biphenation offers approaches—merging and coin flipping—that could help poly families devise individualized solutions.

¹⁶⁸ But see Howard G. Chua-Eoan, *It Hyphenated One Night*, *Time* 78 (Apr 17, 1989) (describing hassles associated with hyphenated names, as well as a child who is proud of his hyphen). Note that biphenation may also be uniquely unappealing (or, I suppose, appealing) to some who come from cultural contexts in which double-barreled names signify posh upbringing or aspirations, as, for instance, in England.

¹⁶⁹ I know of no work on this, so I can speak only anecdotally, for instance, of a family with kids that are the equivalent of Smith-Miller, and their friends call the family the "Smillers."

kids, with the legacy of hyphenation. And if parents wish to help embrace the biphenation idea, they may wish to hyphenate their own names as well as their children's, to help to inch along the acceptability of hyphenated names, and thus, ultimately, of biphenated names. Moreover, it might help ease any burden that children with hyphenated names might feel—from whatever administrative hassles and social costs accompany the two-part name until hyphenation is more widespread—to know that their parents have assumed those same hassles, and can advise them on how best to deal with them.¹⁷⁰

No solution is ideal from all perspectives. But biphenation may best satisfy the various values at stake, for the following reasons:

- An individual's name continues, either partially or completely, throughout that individual's life.¹⁷¹
- Existing family names continue across generations, thus preserving their ethnic and historical significance and signaling connections within extended kin networks.
- Names can pass equally through the male and female line.
- Couples can unite nominally if they choose, but still retain some continuity with their past identity and with their family of origin; or, just as easily, each spouse can choose to retain his or her entire birth name and yet share partial continuity of surname with any children.
- Thus, parents always share some or all of their current names with their children.¹⁷²
- Family names will be a manageable length.
- On average, names will convey more, not less, information for genealogists, particularly of an amateur sort, trying to track connections between families.
- Couples can make choices about their names, and their children's names, against a background convention that could (though need not) be based on randomness, which could mitigate parents' and grandparents' hurt feelings.

¹⁷⁰ Moreover, there might be reason to think that boys with hyphenated names would particularly appreciate a father's having a hyphenated name if he has one himself, since males less frequently have hyphenated names.

¹⁷¹ That is, names continue partially or completely depending on whether couples adopt the new biphenation themselves or just give it to their children.

¹⁷² If there is any reason to think that parents (or fathers) might invest more in children who bear their name (an interesting question, on which I've found no data either way), then the fact of at least some nominal continuity across generations may be useful. See Part I.B.4.

- People can change names (or not) across marriage and remarriage; either way, they retain at least some nominal continuity.

In short, biphenation offers the virtues of merging names—of gender equality, relative parsimony, and (potentially) shared names among nuclear families—while preserving certain values of our current system—such as the passing of names across generations, the preservation of heritage and ethnic meaning, and the affective connections associated with nominal unity and continuity.

* * *

Thus, biphenation may, on balance, present the most appealing naming option across generations. Of course, a new social convention wouldn't mandate that approach for everyone. Conventions are, in a sense, defaults. And the choices that couples make might mean more if they were truly choices, if spouses had greater social flexibility about their naming options. Indeed, taking his name could even have greater social and erotic charge if biphenation were the social default, because becoming Mrs. His Name would no longer be expected of her. But these are all social concerns. The next step is to consider how the law treats individual choice of marital names.

IV. CURRENT LEGAL DEFAULTS: STATE PROCEDURES FOR MARITAL NAMES

Congratulations! You've just made married life easier.

—Official New Bride Name Change Kit¹⁷³

Name changes at marriage are no longer mandatory for women. Marital names are thus a default regime, a choice regime. But in light of the recent history of mandatory name change, how is that choice regime structured?

The basic legal default seems to be keeping one's name. That option involves the fewest active choices and associated costs. By contrast, the most common choice made by women—to take their husband's name—involves numerous interactions with public and private entities: if done properly, according to the *Official New Bride Name Change Kit*, the process consists of contacting four separate public entities and nearly thirty different types of private entities. This seems a heavy toll, suggesting that we are placing substantial costs on those making the most conventional naming choice.

¹⁷³ KitBiz, *Official New Bride Name Change Kit*. For more information, see <http://www.kitbiz.com> (visited July 8, 2007).

By a traditional contract-law account of default rules, this is problematic, because the default is minoritarian and thus creates more costs than a majoritarian default.¹⁷⁴ Alternatively, by an account that favors egalitarian naming options, the Keeping default might seem progressive, nudging the social practice in unconventional directions. This seems not to be so, however, because Keeping is apparently not sticky for women—and it is sticky for men. Arguably the most important feature of our default regime is that it does nothing to challenge the most entrenched aspect of our naming conventions: the fact that men almost never change their names at marriage.

In addition, although this legal regime places significant costs on women who become Mrs. His Name, it typically places greater costs on women (and men) choosing other naming options. In short, the current regime tends to make any other naming choice beyond Keeping or Mrs. His Name even more challenging than a change to Mrs. His Name. Through an often unobtrusive set of decisions and interactions at the federal and state or local levels, any unconventional naming choice that unites the couples by name—such as merging names and often even double hyphenation—typically requires an even more challenging process. The bottom line is that the existing rules and procedures—though all technically default rules—differentially burden choices that spouses might make about their names upon marriage. In this way, this regime may be steering unconventional choosers away from options that might lead to more sustainable egalitarian options across generations.

Some of the obstacles to unconventional name change options occur at a level of government action that might be viewed as the most informal sort of rulemaking: *desk-clerk law*. By desk-clerk law, I mean the steering of choices by a government functionary, not through any official grant of discretion, but through her own ignorance, impatience, or normative views.

This Part provides information about the current law of marital names across the country. What follows is based principally on statutes, regulations, and many calls and emails to federal agencies, county clerks, Departments of Motor Vehicles (DMVs), and other government entities. The inquiries were generally framed as questions about the options for a couple deciding what to do with their names and

¹⁷⁴ See Richard A. Posner, *Economic Analysis of Law* 96 (Aspen 6th ed 2003); Ian Ayres and Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L J 87, 87–92 (1989); Douglas G. Baird and Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 Vand L Rev 829, 835–36 (1985); Charles J. Goetz and Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 Va L Rev 967, 971 (1983).

considering the option of him changing his name.¹⁷⁵ This Part also dis-

¹⁷⁵ The information presented here stems largely from the determined efforts of my outstanding summer research assistant, Leah LaPorte. Her inquiries were never designed as an empirical study of desk-clerk law or of state law as shaped by desk-clerk law; rather, her initial task was simply to try to figure out what the marital-naming laws were in different states. Given that there are so few statutes on the books, she set about trying to find out the relevant information from the officials who were administering the name changes. Once she began reporting back on what she was finding, and on the striking comments the clerks were making, I asked her to start recording the range of responses, including quotations. LaPorte describes her process as follows:

In order to collect marriage license application forms from each state, I began with a general internet search for keywords “marriage application” and the state. I downloaded or bookmarked any forms that I found. If, from that initial search, the forms appeared to be consistent statewide, I searched on the state Department of Health website or called the department for confirmation. If the forms appeared to be local, county-wide forms, o[r] if my initial search did not yield any marriage license applications, I began searching by county within the state. I found a list of counties for every state on the National Association of Counties’ [NACO] website. . . . If the county had a website, I linked to that site and searched for either an application form, or an email address to contact the county clerk. If the county clerk’s email address was available, I sent the following message:

To whom it may concern:

I’m hoping you may be able to help me—I’m a student at Columbia Law School and I’m working on a project that concerns marriage application forms. I’m gathering applications from around [State X] and the rest of the country in order to compare the specific kinds of information requested before couples can receive a marriage license. Is there any way I could get a blank copy of the application a couple would fill out in [your county]? It would not be reproduced in any way, or made available to others.

My goal was to collect forms from at least 10% of the counties in states where the application forms were issued by the local county clerk; in a state such as Georgia with 159 counties, I sent emails to the 23 counties with email addresses available. The counties ranged in population size from over 600,000 to under 9,000, and their geographic location was random. In total, I sent 294 request emails to county clerks.

To speak with county clerks about the name change options available to marrying couples, I again began from the list of counties on the NACO website. I generally called a large county (one with large population) first, and then contacted a smaller county. My initial question was generally the same: “My fiancé and I are talking about what we want to do with our names after we’re married, and we’re wondering if it is possible for him to take my name, or to hyphenate with my name?” and then [I] asked follow-up questions about other options. I called at least two counties in every state; if those two gave conflicting information, I moved on to another state. If they were consistent, I called more counties until I found an inconsistency in the information, or had a conversation I found particularly notable. If I called four or more counties, I tried to ensure some variety in geographical location as well as population size. Hawaii is the only state where I was unable to communicate with any county clerks regarding name change.

[For c]ommunicating with DMVs about name change options[, b]ecause DMVs’ call centers often have very long wait times and occasionally refus[e] to answer questions if the caller does not have an in-state driver’s license, my first form of contact was email. I searched for contact information on each state DMV’s website, and sent the following message:

I am interested in finding out more information about how to go about changing my name on my driver’s license after I get married. The website says that I should bring my marriage license with me, but my fiancé and I have not decided what to do with our names, and I am wondering if it is possible for us to:

plays some ways that desk-clerk law may shape people's experience of the law in the realm of marital names and beyond. Note that the nature of desk-clerk law means that someone else making similar inquiries would likely get different information. The information that is presented here is therefore impressionistic and anecdotal rather than statistical, and it may not be representative.

A. Keeping: The Least Sticky Default (But Only for Women)

The simplest thing is just to take his name. Because that's what you're going to do anyway. What are you going to do if you have kids?

—Clerk in Cuyahoga County, Ohio¹⁷⁶

The basic legal default in all or nearly all states is that both spouses' names stay the same at marriage.¹⁷⁷ This is therefore the easiest option in a strict legal sense; it is the option with the least costs

-
- 1) Both hyphenate our last names.
 - 2) Both take a combination name—he's Jones and I'm Smith, can we become Smones?
 - 3) If he can take my last name instead of me taking his.

If the DMV did not provide an email address for questions or did not respond to my request, I called the department and asked, "After my fiancé and I get married, if we come in with the marriage license, can he change his last name to mine, or can we both hyphenate our names?" and then asked further follow-up questions. In some cases where the DMV did respond via email, I also called the department; for most states, I just used one of the two forms of communication.

There were three states where I was unable to communicate with the DMV: North Dakota, Illinois, Massachusetts. These three states never responded to emails, and had phone systems that denied access to representatives without a state driver's license number.

Email from Leah LaPorte (Oct 13, 2006). Except where noted otherwise, all calls and email inquiries referenced in the Article were made by LaPorte.

¹⁷⁶ Conversation with Clerk, Cuyahoga County, Ohio, Probate Court (June 30, 2006) (responding to a question about the legal process for a husband to hyphenate his name).

¹⁷⁷ The reason I say nearly all is that six states invite parties to state their postmarital names on their marriage license application form, and thus involve a kind of forced choosing. See Ga Code Ann § 19-3-33.1 (1999); Iowa Code Ann § 595.5 (West Supp 2001); Mass Ann Laws ch 46, § 1D (Law Co-op 1991); Minn Stat § 517.08 (2005); NY Dom Rel Law § 15 (McKinney 1999); ND Cent Code § 14-03-20.1 (1996). As I later discuss, the choosing is more invited than forced. See note 339 and accompanying text. Moreover, given that the parties still would need to record their new names with all the relevant public and private entities, this forced choosing doesn't change the fact that Keeping is by far the easiest option legally. In addition, anecdotal evidence suggests that costs are occasionally still imposed on Keeping as opposed to her becoming Mrs. His Name—such as a woman recently married in Kentucky who reported to me that she had to go before a judge to justify her choice not to change her name. Since the most authoritative source in Kentucky indicates that Keeping is the default, this woman's experience was most likely an example of desk-clerk law rather than formal policy. See Part IV.C. Similarly, as explained below, a few clerks, particularly in Alabama, claimed that becoming Mrs. His Name is automatic, but that is unlikely to be the actual legal practice, as discussed. See text accompanying note 199.

imposed by the state at the time of marriage. The prospective spouses who wish to keep their names avoid the many steps required of those making a change, the subject of Part IV.B.

Nonetheless, as discussed earlier, very few women keep their names at marriage. Unlike so many default rules, Keeping is not “sticky” for women. This is interesting in its own right, since recent work indicates that default rules affect choices in a range of areas, including some highly personal domains, such as organ donation, and some presumptively market-rational domains, such as corporate behavior.¹⁷⁸ Ian Ayres has called this the “iron law of default inertia.”¹⁷⁹

Contrary to findings in other areas, though, in the realm of marital names the default rule seems to have little or no inertia effect on women’s choices. The iron law turns out not to be a law after all. It is an interesting empirical question as to why the default’s not sticky for women, and there is no work directly on point. Some theories can be generated by extrapolating from the research on default rules in other areas, with the caveat that substantial differences separate existing research and these hypothetical applications.

1. Why Keeping doesn’t stick (for women).

Research in decision science has identified three potential causes for the stickiness of defaults: (1) people may experience loss aversion, making them reluctant to depart from the status quo; (2) people may want to avoid the effort of making a decision, either through laziness or through some desire not to be actively responsible for their decisions; and (3) people may interpret a default as a suggestion or recommendation from some better informed or authoritative entity.¹⁸⁰ It

¹⁷⁸ See, for example, Eric J. Johnson, Mary Steffel, and Daniel G. Goldstein, *Making Better Decisions: From Measuring to Constructing Preferences*, 24 Health Psych S17, S18 (2005) (describing both laboratory studies and cross-national studies of actual behavior involving organ donation); Eric J. Johnson and Daniel Goldstein, *Do Defaults Save Lives?*, 302 Science 1338 (2003) (same); Yair Listokin, *What Do Corporate Default Rules and Menus Do? An Empirical Examination* 6 (Yale Law School Working Paper, May 2005) (showing that whether a state’s default antitakeover statute uses an opt-in or opt-out rule affects the likelihood that a corporation in the state will adopt the statute’s protections). See also note 277. See generally Ian Ayres, *Menus Matter*, 73 U Chi L Rev 3 (2006); Cass R. Sunstein and Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U Chi L Rev 1159 (2004); Colin Camerer, et al, *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U Pa L Rev 1211 (2003).

¹⁷⁹ Ayres, 73 U Chi L Rev at 5 (cited in note 178).

¹⁸⁰ See Johnson, Steffel, and Goldstein, 24 Health Psych at S18 (cited in note 178) (discussing default options in the context of health care and suggesting the careful use of default options), citing Amos Tversky and Daniel Kahneman, *Loss-Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Quarterly J Econ 1039, 1039 (1991); Jonathan Baron and Ivan Ritov, *Reference Points and Omission Bias*, 59 Org Behav & Hum Dec Proc 475, 477 (1994); Eric J.

makes sense that none of these would operate to make Keeping into a sticky default for women in light of the strong social conventions in this area. We can see this with each of the rationales above.

First, any loss aversion women experience is likely to be shaped more by the social conventions and expectations surrounding the legal decision than by the legal decision itself. That is, although some women may experience changing their names as a loss, more women may feel a loss at the idea of not becoming Mrs. His Name, to the extent that they grew up expecting to change their names at marriage, and even romanticizing it, as discussed in Part I.B.3. To depart from the convention might feel like the loss of something expected.

Second, women might wish for a way to avoid the effort of making a choice about their names, but they don't really have that option because of the strong social forces surrounding the naming decision. Sticking with the legal default of Keeping may save them a few administrative costs. But in the social world, Keeping is likely to be greeted as at least as much, if not more, of an active choice. Given that his name is rarely up for discussion, and the children almost always get his name, she may feel that the choice involving the least overall effort is the social, rather than the legal, default.

Third, women are unlikely to understand the default of Keeping as an authoritative suggestion of what they should do with their names. The Keeping default endorses the social convention for him, and merely treats her the same as him. The effect is that the "default" is just what-their-names-were-before-marriage. Marriage often involves a lot of administrative costs—whether for a wedding (especially if large) or for changing life details (such as addresses and names on leases and bills, where applicable).¹⁸¹ Her having to endure costs to change her name is likely to seem like just another of those marriage-related hassles—not a statement by the government that it is best for her to keep her name.

2. Why Keeping isn't a progressive penalty-default rule.

One might interpret Keeping as a kind of penalty-default rule, that is, a minoritarian rule that is information-forcing.¹⁸² If women don't speak about their choices, they end up with a result that most don't want. This may effectively force them to think about and to articulate

Johnson, et al, *Framing, Probability Distortions, and Insurance Decisions*, 7 J Risk & Uncertainty 35, 50 (1993).

¹⁸¹ There are fewer administrative costs of the latter sort for couples who live together before marriage (or who never live together or share property). For a brief discussion, see note 196.

¹⁸² See Ian Ayres and Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 Stan L Rev 1591, 1591–94 (1999). See also note 251 and accompanying text.

their naming preference—typically, of Mrs. His Name—and may therefore discourage complacent acceptance of the patrilineal convention.

Understood in this way, Keeping might seem to be a legal rule that is more progressive than the social convention, and in some way encourages a more progressive naming result. Perhaps even more women would choose Mrs. His Name if Keeping weren't the default and if departing from the default weren't costly. Indeed, at least one study of marital names offers anecdotal evidence of a few women saying that they didn't change their names because they couldn't be bothered with the administrative hassle.¹⁸³

There are several problems with the view that this is a progressive rule, however. First, Keeping is having little, if any, inertia effect on women keeping their names. Even the study that reports on some women who cite convenience acknowledges that “[t]hese sorts of statements [about convenience], however, were generally cited only as secondary factors in women's decisions. Usually, the primary factors involved more positive convictions.”¹⁸⁴ And the data show that such a small percentage of women keep their names that the inertia effect on women, if any, must be small.¹⁸⁵

Second, the legal default of Keeping for both men and women is leading to differential costs imposed on the two groups. The rule is majoritarian for men, so few men bear the costs of contacting the thirty or so different types of entities mentioned earlier as part of the process of name change.¹⁸⁶ The sheer number of steps outlined by the *Official New Bride Name Change Kit* (with its slogan “You've just made married life easier”) might lead one to believe that few men would put up with so much administrative hassle; if most men changed their names at marriage, then perhaps the law would change to make that the easiest choice.¹⁸⁷

¹⁸³ See Kupper, *Surnames for Women* at 47 (cited in note 54):

Most women who kept their own names explained this for reasons that involved their feelings: They wanted to maintain their identities or professional reputations, keep their family names, make feminist statements, and so on. Others, however, cited purely pragmatic reasons such as convenience, credit, simplicity, or even laziness. In some cases, they found it was just easier and more convenient for them to keep the names they were currently using than to make a change.

¹⁸⁴ Kupper, *Surnames for Women* at 48 (cited in note 54).

¹⁸⁵ See Part II.

¹⁸⁶ See Part IV.B.

¹⁸⁷ Indeed, it calls to mind Gloria Steinem's famous essay which imagines major and minor ways the world and its laws would be different if the positions of men and women were switched. Gloria Steinem, *If Men Could Menstruate*, reprinted in Gloria Steinem, *Outrageous Acts and Everyday Rebellions* 367 (Owl 1995):

So what would happen if suddenly, magically, men could menstruate and women could not? Clearly, menstruation would become an enviable, worthy, masculine event: Men would brag

Finally, as I discuss next, Keeping is probably still steering choices, though in conventional directions.

3. Why Keeping matters.

All this might lead one to think that the Keeping default doesn't matter. Indeed, social conventions are probably the most important determinant of marital naming choices. Nonetheless, in light of the robust literature on the behavioral effects of defaults, it would be surprising if the legal default mattered not at all.¹⁸⁸ And in fact, the legal default is likely shaping behavior in important ways, at least around the margins.

The default rule of Keeping likely steers women—and perhaps men—away from unconventional naming choices *other than Keeping*. For those couples who might consider doing something other than the most conventional Mr. and Mrs. His Name, the state does nothing to facilitate their choice unless they both choose to Keep their names. And in fact, most states effectively may make any other unconventional option hardest, as discussed in the next Parts.

More broadly, a default that involves both spouses Keeping does nothing to invite men to choose to alter their names in any way, nor does it acknowledge or facilitate any alternative to children bearing their father's name. If neither the man's name nor the child's name is up for discussion, women may feel that the costs of an unconventional naming choice far outweigh its benefits—especially when they are the only ones who will bear them.

B. The Process (Costs) for Various Marital Name Changes

It's the lady who changes her name after she gets married.

—Clerk in Harrison County, Mississippi¹⁸⁹

Any choice other than Keeping is costly. And to different degrees in different states, those costs are unevenly distributed across different naming options. The biggest cost divide is between those name changes that require a court order and those that can be made, at least in the

about how long and how much. Young boys would talk about it as the envied beginning of manhood. Gifts, religious ceremonies, family dinners, and stag parties would mark the day. To prevent monthly work loss among the powerful, Congress would fund a National Institute of Dysmenorrhea. Doctors would research little about heart attacks, from which men would be hormonally protected, but everything about cramps. Sanitary supplies would be federally funded and free. Of course, some men would still pay for the prestige of such commercial brands as Paul Newman Tampons.

¹⁸⁸ See note 178.

¹⁸⁹ Circuit Clerk, Harrison County, Mississippi (June 30, 2006).

first instance, through marriage alone. (A person can, theoretically, change his or her name simply by using that new name consistently; however, the administrative state now effectively obligates people to engage in formal name change.¹⁹⁰) Thus, in looking at the marital name change options, there are two questions: How many and which entities need to be contacted and persuaded to change the name, and is a court-ordered name change necessary or is marriage alone sufficient evidence of the change?

This discussion will begin with Mrs. His Name, the choice that has as few, or fewer, costs than any other option, a striking fact in light of just how many steps even that process seems to involve.

1. Mrs. His Name.

A woman who wants to change her name to her husband's at marriage has to go through a multitude of steps. She has to complete forms and send a copy of her marriage license to as many as four separate public entities:

- the Social Security Administration (SSA) (for a new Social Security card; the SSA supplies this information to the federal and state tax agencies);¹⁹¹
- the state Department of Motor Vehicles (for a new driver's license);¹⁹²
- the state Voter Registration Bureau (to change her voter's registration record);¹⁹³ and
- the United States Passport Agency (to change her passport record).

¹⁹⁰ See, for example, sources cited in note 90.

¹⁹¹ See *Official New Bride Name Change Kit* (cited in note 173) (reporting no changes that need to be made with the state or federal tax entities). The IRS website tells taxpayers that they need only change their names with the Social Security Administration. See *Tips for Recently Married or Divorced Taxpayers*, online at <http://www.irs.gov/newsroom/article/0,,id=105969,00.html> (visited July 8, 2007) (reflecting common assumptions, the IRS refers only to women changing their names upon marriage).

¹⁹² Even with increasing synchronization of state DMV databases with the SSA in response to the Real ID Act, an individual still needs to contact the DMV to obtain a new driver's license. See Real ID Act, 119 Stat at 311–16 (providing in part instructions to states and localities for identification card requirements). See also notes 90 & 259; Karen Keller, *What's in a Name?: Blending In, Kin Cited for Change*, Herald News (Passaic County, NJ) B1 (Dec 17, 2006).

¹⁹³ This step apparently doesn't usually require a copy of her marriage license, see *Official New Bride Name Change Kit* (cited in note 173), but voting is likely to require some form of identification, and one might expect states to begin to require more documentation for voter registration in the future. This step may also be eliminated by Motor Voter, which allows name and address changes, as well as voter registration, with license renewal. National Voter Registration Act of 1993, 42 USC § 1973 (2000).

The kits available on the internet to help newlyweds with these tasks—the *Official New Bride Name Change Kit* and the (less gendered) *Findlegalforms.com Just Married Name Change Kit*—also set out checklists of all the types of private entities to which notification should be sent. According to the *New Bride* kit, these include the following:

- *Banking and financial records* (seven types of records, some of which require personal appearances, such as entities maintaining one's checking and savings accounts, investment accounts, retirement accounts, mutual funds, and credit cards);
- *Household records* (eleven types of items, including landlords/mortgages, property tax or title records,¹⁹⁴ vehicle insurance, homeowners' insurance, health insurance, and life insurance);
- *Personal records* (four types, including employer records, medical records of all sorts, and records with professional service providers such as lawyers);
- *Memberships/organizations* (seven types of items, including health clubs, alumni organizations, and frequent flier programs).¹⁹⁵

Thus, to be thorough, a new bride (or groom) should tell thirty-three different types of entities about her new name (and that number assumes she has only one healthcare professional in her life).¹⁹⁶

Nonetheless, there is one important shortcut available to women seeking to become Mrs. His Name, relative to citizens who want to change their name for reasons unrelated to marriage.¹⁹⁷ Interestingly, to change a bride's name, both public and private entities require only a marriage license stating her and her husband's *premarital names*. Thus the apparent hassle imposed upon the prospective Mrs. His Name is not as great as it appears at first, relatively speaking. Al-

¹⁹⁴ For property records, the standard practice is apparently to add an "AKA" to one's property record. The new married name will also appear on the property record. The *Official New Bride Name Change Kit* (cited in note 173) comments that "[t]his method is the easiest way to record your new name on your property record. If you require a complete deletion of your maiden name, call your County Assessor and have them provide you with an alternate method."

¹⁹⁵ *Id.*

¹⁹⁶ If couples move in together or otherwise pool resources at the moment of marriage, then some of these contacts would be necessary in order to include both names on bills, etc. If couples already live together, own property, or otherwise pool resources before marriage, or do no such pooling before or after marriage, then any such contacts to change a name are more likely to be due to the name change alone. To the extent that more couples live together before marriage, the name change imposes more unique costs.

¹⁹⁷ Whether men can avail themselves of this shortcut at marriage is discussed shortly, as are women who want to become something other than Mrs. His Name at marriage. See note 198.

though the woman who wants to become Mrs. His Name has to endure many steps to make the change both publicly and privately—as enumerated above—she does not have to get a court-ordered name change before proceeding with those steps (as she would have to do if she just wanted to change her name to something else for personal, not marriage, reasons). A regular court-ordered name-change procedure may cost hundreds of dollars in fees, plus the cost of publishing notice of the name change in a local newspaper, in addition to a possible court appearance to explain the name change.¹⁹⁸ Even without all that work, every entity—public and private—can be expected to be receptive to her name change through her marriage license, stating premarital names, alone.

In inquiries made in 2006, a few local clerks—in Alabama, Georgia, Pennsylvania, and South Carolina—claimed that a woman’s name “automatically” changes to her husband’s at marriage.¹⁹⁹ Further inquiries with the state DMVs suggest, however, that these clerks are mistaken as to the law. (One way to understand the clerks’ comments is that the clerk is giving her view that the wife becomes Mrs. His Name in almost a magical legal way—as if the words “I now pronounce you man and wife” automatically make her Mrs. His Name ever after—even without any specific action by the state.) But the mere fact that clerks in disparate states could think this was an automatic change highlights the fact that this type of name change will confront no obstacles other than several uncomplicated bureaucratic contacts.

2. Mrs. Hyphenated.

In most places, becoming Mrs. Hyphenated appears to involve the same process as her becoming Mrs. His Name, with a few potential hassles. First, in a handful of jurisdictions—Alabama, Ohio, and Wyoming—at least one clerk claimed that a court order would be required to become Mrs. Hyphenated.²⁰⁰ The statement from Wyoming was

¹⁹⁸ See, for example, *Party Talk*, 67 Tex Bar J 948, 953 (2004) (noting that to legally change one’s name in Texas requires the filing of a formal petition for name change and a hearing in front of the judge).

¹⁹⁹ For explanation of the context of the queries, see note 175. This answer was given more than once in Alabama. Telephone conversation with Clerk, Calhoun County, Alabama, Probate Court (June 22, 2006); Telephone conversation with Clerk, Cullman County, Alabama, Probate Court (June 22, 2006). But a similar suggestion was made by individual clerks in Georgia, Pennsylvania, and South Carolina. Telephone conversation with Clerk, Augusta County, Georgia, Probate Court (June 9, 2006); Telephone conversation with Clerk, Allegheny County Court House, Pennsylvania (June 29, 2006); Telephone conversation with Clerk, Horry County, South Carolina, Probate Court (June 28, 2006) (saying “as soon as you’re married, you have his name”).

²⁰⁰ Telephone conversation with Clerk, Calhoun County, Alabama, Probate Court (June 22, 2006); Telephone conversation with Clerk, Cuyahoga County, Ohio, Probate Court (June 30,

from a clerk at the DMV, which as a state agency tends to have more control over these matters, and therefore may be considered more authoritative. Contacts in most states, however, said that they permitted the change, often agreeing to whatever is in the SSA's database, including her name becoming hyphenated.

Second, the Social Security Administration's database will record a hyphenated name, and SSA is formally willing to hyphenate her name (or his) based just on a marriage license with the premarital names.²⁰¹ (As discussed in the Parts on desk-clerk law, however, an applicant's ability to do this may depend on the desk clerk.²⁰²) Apparently, though, the hyphen will not appear on the social security card itself.²⁰³ From a formal legal perspective, the hyphen is part of the name, as the official database apparently contains the hyphen. This helps, for instance, with those state DMVs that synchronize their computers with the SSA. But informally, the lack of hyphen on the social security card could present a hassle for anyone who wanted to use the social security card as evidence of her official name to other entities.

Third, some entities—public as well as private—reported that their computers do not permit hyphenated names. For instance, clerks at the New Hampshire DMV reported that their computer cannot handle hyphens.²⁰⁴ So the DMV clerk can put the second name in the database after the individual's birth name as an additional last name, but no hyphen will appear. This can cause hassles similar to those noted above.

Finally, and relatedly, some states will hyphenate the names only in a particular sequence.²⁰⁵ This not only limits the *order* in which an individual hyphenator could structure her hyphenated name (an in-

2006); Telephone conversation with Clerk, Wyoming Department of Motor Vehicles, Wyoming (June 27, 2006).

²⁰¹ See author's notes on repeated calls to the Social Security Administration (callers include Jordan Connors).

²⁰² See notes 232–35.

²⁰³ Telephone conversation with Clerk, Social Security Administration (June 7, 2006).

²⁰⁴ Telephone conversation with Clerk, New Hampshire Department of Motor Vehicles, New Hampshire (June 26, 2006); Telephone conversation with Clerk, New Hampshire Secretary of State, Bureau of Vital Records, New Hampshire (June 26, 2006).

²⁰⁵ See, for example, Idaho, Department of Motor Vehicles regulation IDAPA 39.02.75.200 (2005) (requiring women to hyphenate names as "maiden-married" name and men to hyphenate as "surname-maiden" name), email from Idaho Department of Motor Vehicles (June 13, 2006) (requiring Her Name–His Name for the bride, and Surname–Maiden Name for the groom); Michigan, phone conversation with Clerk, Michigan Department of State (June 29, 2006) (same); Oklahoma, OAC § 595:10-1-35 (2005) (same); South Carolina, email from South Carolina Department of Motor Vehicles (June 26, 2006) (requiring Married Name–Maiden Name; this only applies to females since males would need a court order to hyphenate); Virginia, email from Virginia Department of Motor Vehicles (June 7, 2006) (requiring Birthname–Other Name).

teresting question in its own right²⁰⁶), but it may mean that a couple couldn't create the same hyphenated name.²⁰⁷ For instance, a clerk at the Michigan Department of State (which handles driver's license inquiries) reported that hyphenated names are ordered as Birthname-Spouse Name.²⁰⁸ For some spouses, then, this would mean a court order would be necessary to obtain their chosen name.²⁰⁹

Though some additional costs present themselves, typically her becoming Mrs. Hyphenated is unlikely to be much harder than her becoming Mrs. His Name. Beyond these two types of name changes, the hassles multiply, as the next Parts discuss.

3. Changing his name: Mr. Hyphenated or Mr. Her Name.

The gap between formal and informal rulemaking becomes more pronounced with any attempt to change his name. As a formal matter of law—if a prospective spouse persists across agencies and, ideally, hires a lawyer—changing his name seems harder than changing her name in only seven states;²¹⁰ it should be equally difficult to change his name as to change hers in thirty-nine states;²¹¹ and in four states it is unclear if there is a difference in difficulty.²¹²

²⁰⁶ Some uncertainty surrounds the question of which position in the hyphenated name, if any, is the dominant position. Anecdotally, opinions on this vary, with some saying that the first part could readily become a middle name, and others arguing that it is easier to drop the latter part of a hyphenated name, since the first part alphabetizes and otherwise more readily identifies you. See, for example, Karen Heller, *Playing the Name Game in Modern America*, Chattanooga Times Free Press F2 (Dec 14, 2003) (acknowledging the equity of hyphenated names, but also discussing the attendant difficulties such as hyphenation over generations and ordering). Note that in the Spanish tradition of providing both parents' names to children, the father's name comes first, whereas in Brazil and Portugal, the order is reversed; in both traditions, however, it is the mother's name that drops out across generations. See Pintens and Will, *Names* at 54 (cited in note 134). Until amendments to the Civil Code in 1999, the order in Spain was mandatory. Johan Verlinden, *European Court of Justice, Judgment of October 2, 2003 Case C-148/02, Carlos Garcia Avello v. État Belge*, 11 Colum J Eur L 705, 706 (2005).

²⁰⁷ If both are hyphenating, then creating commonality of surname is presumably important to them.

²⁰⁸ Telephone conversation with Clerk, Michigan Department of State (June 29, 2006).

²⁰⁹ Telephone conversation with Clerk, New Hampshire Department of Motor Vehicles (June 26, 2006); telephone conversation with Clerk, Michigan Department of State (June 29, 2006).

²¹⁰ Alabama, Kentucky, Mississippi, South Carolina, Tennessee, Washington, and Wyoming. Note that this conclusion is a matter of interpretation, however, since the forms are sometimes ambiguous. See, for example, note 296 and accompanying text (discussing forms that ask for the bride's maiden name "if different").

²¹¹ Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, West Virginia, and Wisconsin.

²¹² Florida, Illinois, Vermont, and Virginia.

Informally, however, the picture looks somewhat different. From contacts in eleven states it appeared practically more difficult to change his name than to change hers;²¹³ in thirty it looked practically no less so;²¹⁴ and in nine it was unclear.²¹⁵ More starkly, in a limited number of calls to county clerks and DMVs in all states, at least one clerk in each of thirty-eight states indicated that it would be harder to change his name than hers,²¹⁶ and in ten states at least one clerk suggested contacting an attorney to attempt a change in his name.²¹⁷ In only five states did no clerks contacted suggest that changing his name was harder.²¹⁸

Thus a couple fiercely determined to hyphenate their names, could probably do so without a court order (for him) in at least thirty-nine states. But anyone merely considering that possibility might well encounter obstacles in the vast majority of states. Rather than helping couples overcome the collective action problem associated with changing social meaning to favor egalitarian naming practices, then, state and local governments are apparently exacerbating, not reducing, the costs of change.

4. Merging or new names.

Merged or new names would require a court order in nearly all jurisdictions. This is the result of a combination of federal and state policies. Federal agencies do not automatically accept merged or altogether new names through marriage. A new bride or groom who wanted to make either of these choices would therefore have to produce either (1) a state marriage license that stated their new names on it as part of their regular marriage application process, or (2) a court order of their new names. Very few states invite parties to list new names on their marriage license, and of those that do, even fewer permit

²¹³ Alabama, Arkansas, California, Hawaii, Kentucky, Mississippi, South Carolina, Tennessee, Virginia, Washington, and Wyoming.

²¹⁴ Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Texas, and Wisconsin.

²¹⁵ Illinois, Nebraska, New Jersey, Ohio, Oregon, Pennsylvania, Utah, Vermont, and West Virginia.

²¹⁶ Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming.

²¹⁷ Alabama, Arkansas, Louisiana, Mississippi, Nevada, New Mexico, Oklahoma, Oregon, Texas, and Utah.

²¹⁸ Alabama, Kentucky, Mississippi, South Carolina, and Virginia. One commentator believes that men would have difficulty changing their names in most states. See Michael Rosensaft, Comment, *The Right of Men to Change Their Names upon Marriage*, 5 U Pa J Const L 186, 192 (2002).

merging or new names as an option. Specifically, Iowa, Massachusetts, Minnesota, New York, and North Dakota permit merged names through marriage, and only the first three of those permit wholly new names through marriage.²¹⁹ Even if a state does recognize name change through marriage, not every federal and private entity will necessarily recognize the new or merged name without a court order.²²⁰

Particularly as to wholly new names, the resistance to facilitating such name changes may be unsurprising. States may worry about making the invention of an entirely new name too easy, because of concerns about fraud, identity theft, and criminals avoiding detection.²²¹ Merged names at least bear traces of the previous names, but new names create a completely new nominal identity.

Thus, couples who wanted to adopt merged or new names would typically need to obtain a court-ordered name change, in addition to all the steps Mrs. His Name or the hyphenators have to go through.

C. Desk-Clerk Law: The Most Informal Form of Rulemaking

Q: My fiancé and I are wondering if, after we're married, he can take my name, or if he can use a hyphenated name?

A: Hon, we had one other person come in here and take the woman's name, and it was the biggest mess you've ever seen. It turns out he was in trouble in other states, and that's why he wanted to take her name.

Q: So do you think it would be a big hassle for us?

A: I truly do. I do not think you want to do that.

²¹⁹ See Iowa Department of Public Health, Bureau of Vital Records, Application to Marry in Iowa, online at http://www.dubuquecounty.org/offices/recorder/Marriage_Application.doc (visited July 8, 2007); Massachusetts Department of Public Health Registry of Vital Records and Statistics, Notice of Intention to Marry, Form R-202m ("Massachusetts Notice of Intention to Marry"); Cass County, Minnesota, Application for Marriage License, online at http://www.co.cass.mn.us/auditor/pdfs/marriage_lic_app.pdf (visited July 8, 2007); New York Department of Health, Affidavit, License and Certificate of Marriage; North Dakota, Application for Marriage License.

²²⁰ Social Security Administration clerks gave inconsistent and unclear answers as to whether a merged name would always require a court order, but it seems likely that if it were printed on the marriage license, the SSA would approve it. See telephone conversations with SSA clerks (June 7, 13, 20, and 30, 2006). The Passport Agency used to have particularly strict policies on name change, but seems to be relenting; a representative there thought that a merged name on a marriage license might be sufficient for the Agency to recognize the new name, but recommended getting a court order just to be safe. See telephone conversations with Passport Agency clerks (June 7 and 13, 2006).

²²¹ See note 243 (noting the range of state interests in naming).

—Conversation with Clerk in Henderson County,
North Carolina²²²

One of the most striking results of this inquiry into marital names was the degree to which federal, state, and local government clerks gave inaccurate, incomplete, contradictory, or normative responses to specific questions about legal options. These officials, without any specifically delegated discretion, effectively make the rules for many individuals through *desk-clerk law*.²²³

Clerks in nine states gave information that directly conflicted with a state statute,²²⁴ and clerks in twenty-six states gave information that conflicted with a stated DMV policy.²²⁵ Numerous clerks referred the questioner to a lawyer (in eleven states) or to another agency without facilitating the communication (seven states).²²⁶ (Note that advising callers to contact a lawyer, while ostensibly neutral advice, is effectively telling them that making that choice will be very costly.) In twenty-

²²² Telephone conversation with Clerk, Henderson County, North Carolina Register of Deeds (June 28, 2006).

²²³ Their lack of any official grant of discretion contrasts desk clerks with what Michael Lipsky has called “street-level bureaucrats,” which are the cadre of police officers, welfare workers, and teachers who administer with “considerable discretion” the public services of the state to those who need them. See Michael Lipsky, *Street-Level Bureaucracy* 13 (Russell Sage 1980). Lipsky contrasts his group with the type of functionaries I am discussing when talking about the greater harm street-level bureaucrats can do because of their knowledge and discretion:

It is one thing to be treated neglectfully and routinely by the telephone company, the motor vehicle bureau, or other government agencies whose agents know nothing of the personal circumstances surrounding a claim or request. It is quite another thing to be shuffled, categorized, and treated “bureaucratically,” (in the pejorative sense), by someone to whom one is directly talking and from whom one expects at least an open and sympathetic hearing.

Id at 9. This may be true, but Lipsky may also underestimate the kind of personal knowledge and policymaking power in the hands even of those with no official discretion—largely because no one typically prevents them from administering the law in their own image. And in contexts such as marital names, desk clerks often do have personal information—if only incidentally—about the citizens with whom they interact. In this sense, what Lipsky says about street-level bureaucrats may be true in a more disconcerting way of desk clerks because their influence is deemed nonexistent or innocuous rather than a matter of discretion to be monitored and subjected to public scrutiny:

I argue that the decisions of street-level bureaucrats . . . effectively *become* the public policies they carry out. I argue that public policy is not best understood as made in legislatures or top-floor suites of high-ranking administrators, because in important ways it is actually made in the crowded offices and daily encounters of street-level workers.

Id at xii.

²²⁴ Georgia, Hawaii, Idaho, Iowa, Minnesota, New York, North Dakota, Pennsylvania, and West Virginia.

²²⁵ Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Maine, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming.

²²⁶ Alabama, Arkansas, Louisiana, Mississippi, Montana, Nevada, New Mexico, Oklahoma, Oregon, Texas, and Utah; California, Georgia, Maine, Nebraska, Oregon, Texas, and Utah.

eight states clerks from different agencies gave conflicting information (typically, a county clerk contradicted a clerk from the DMV).²²⁷ Even in New York, which requires the marriage license application form to state the marital naming options, some clerks at the county level and even the DMV gave misinformation.²²⁸

Clerks often provided their own views spontaneously. Some supported unconventional choices, and some discouraged them. Specifically, clerks in thirty-nine states suggested some opinion on the issue of marital name change;²²⁹ at least one clerk in each of twenty-four states endorsed a conventional view of marital names,²³⁰ and at least one in twenty-nine states endorsed an unconventional view of marital names.²³¹ But keep in mind that these responses were in the context of questions posed to the officials about *the legal possibilities for making unconventional choices*. It seems unlikely that clerks spout off unconventional views to people who call up to inquire about the process for conventional name changes.

Clerks at the Social Security Administration also provided both inconsistent and normatively inflected responses to queries about unconventional name changes.²³² When asked whether a husband can adopt his wife's name, three out of ten clerks contacted in 2007 said that a marriage license with their premarital names would suffice; four said a court order would be required; and three said to contact the local SSA office.²³³ Some offered their opinions in response to queries about this unconventional choice, such as "[i]n a typical marriage, the

²²⁷ Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Maine, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming.

²²⁸ NY Dom Rel Law § 15(b). See Part VI. See also notes 343–44 and accompanying text (discussing the erroneous information in more detail).

²²⁹ Alaska, Arkansas, Connecticut, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

²³⁰ Arkansas, Idaho, Indiana, Iowa, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, and Washington.

²³¹ Alaska, Connecticut, Georgia, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Wisconsin, and Wyoming.

²³² See telephone conversations with SSA clerks (Feb 16 and 22, 2007) (Jordan Connors). Connors's queries were similar to LaPorte's, see note 175.

²³³ Id.

wife takes the husband's name.”²³⁴ One clerk candidly captured the essence of desk-clerk law: “You have a 50-50 chance when you go to the SSA to have your name changed. Although states have different laws on this, most of the agents don't know the law and are not expected to know the law, so it just depends on them.”²³⁵

Some past work on the naming issue has noted the problem of normative interventions by clerks. A qualitative study of women's unconventional marital naming choices offers the following anecdote:

While filling out all the forms [to have my name changed back to my maiden name while still married], an older male bureaucrat told me I had to get my husband's signature on the form before he would file it. There was not space on the form for this, but he insisted, and wouldn't give me a reason. Fuming, I went back home, got Peter's signature, took more time off from work, and brought the forms back to the office. I brought all the papers to another office worker—a woman this time—and asked her why I had to get my husband's signature. She said, “[o]h, you don't need it—some of the men around here like to give you a hard time.”²³⁶

The plaintiff in the recently filed ACLU lawsuit challenging a man's relative difficulty changing his name to his wife's also encountered desk-clerk difficulties. At the Department of Motor Vehicles, “Buday said he was told by a woman behind the counter: ‘Men just don't do that type of thing.’”²³⁷

Intentionally or not, clerks surely influence decisions in a wide range of government interactions with citizens. Of course officials exercise discretion, more or less warranted, all the time, from police officers walking the beat to local judges deciding whether to grant minors permission to obtain abortions without parental consent.²³⁸ But unlike

²³⁴ Telephone conversation with Clerk, Social Security Administration (June 22, 2006) (Jordan Connors).

²³⁵ Telephone conversation with Clerk, Social Security Administration (June 22, 2006) (Jordan Connors). The agent began this remark by saying, “I spoke with my technical advisor and she said that she would allow the man to change his name using only a marriage certificate, but it depends on the agent.” Id.

²³⁶ Kupper, *Surnames for Women* at 121 (cited in note 54). Kupper reports that this is not a direct quote, but is the “gist” of the anecdote. Id.

²³⁷ See Risling, *California Man Sues to Take Wife's Name* (cited in note 64). See also Buday Complaint at 4–5 (cited in note 145):

Michael went to the Santa Monica Department of Motor Vehicles where he presented his marriage license and asked to change his name. The representatives laughed and ridiculed him for wanting to take his wife's name. They were rude, disrespectful and unprofessional. Michael asked to speak to the manager of the Santa Monica Department of Motor Vehicles who also ridiculed him and acted discourteously and unprofessionally.

²³⁸ See Helena Silverstein and Leanne Speitel, “*Honey, I Have No Idea*: Court Readiness to Handle Petitions to Waive Parental Consent for Abortion, 88 Iowa L Rev 75, 77 (2002).

judges or police officers, desk clerks have been granted no discretionary authority. Nonetheless, they become the face of the government, the source of information as well as the immediate authority encountered by most citizens, and thus can exert tremendous influence.

V. NEW USES OF EXISTING DEFAULT CATEGORIES: SETTING THE DEFAULT

You can also hyphenate your names. But that is sort of frowned upon in our office, because it creates problems. Because now you have two last names, and what order do you want them in, how should they be entered in the computer? But it's entirely up to you.

— Clerk in Boxford County, Massachusetts²³⁹

Imagine a state legislature that wanted to leave marital names to individual decisions, but also sought to use the legal default rule to encourage egalitarian choices. Legislators might have various reasons for wanting to set the default in this way. They might be concerned about their state's history of forcing women to become Mrs. His Name in order to vote or to drive. They might think that the state has helped create current preferences for patrilineal descent of names through a history of mandatory rules, and thus that their default should at least put a thumb on the scale toward more egalitarian choices. They might worry that the social costs imposed on more egalitarian choices ensure that individuals aren't choosing as freely as they might. They might fear that unless legislators take affirmative steps to the contrary, desk clerks will urge inegalitarian choices. They might think that egalitarian names could encourage more equal treatment of girls and boys. They might simply think that, since the state has to set the default somehow, an egalitarian default is best.

So how could a state use default rules to shape marital naming choices? Majoritarian default rules (for example, Keeping for men) generally reduce transaction costs for private parties by supplying a default that tracks what most people would want. Minoritarian, and particularly penalty, default rules (for example, Keeping for women) force parties to convey information—to reveal their preferences—to

Silverstein demonstrates that not only are some clerks uninformed but some judges exceed their allotted discretion and simply defy the law in the realm of judicial waivers for minors seeking abortions. See *id.* See also note 223 (discussing work by Michael Lipsky on the exercise of discretion by police officers, teachers, and welfare workers).

²³⁹ Telephone conversation with Clerk, Boxford, Massachusetts, Town Clerk's Office (June 22, 2006).

each other and to third parties such as courts.²⁴⁰ But what kinds of default rules are most likely to alter preferences or, at least, choices?

In light of “sticky norms” in the realm of marital names,²⁴¹ it would be surprising if changing the choice regime caused tectonic shifts in social practices, but as discussed earlier, it would also be surprising if the structure of the choice regime mattered not at all.²⁴² And given that the state must set some default rule, it is worth considering what default rule stands the best chance of helping to overcome the collective action problem in changing social meanings that encourage patrilineal descent of names.

Note that our hypothetical state legislature may have any number of interests in legal names, beyond their egalitarian quality. State interests in legal names include administering an effective tax system; reducing costs; avoiding and detecting fraud against the state and among citizens; identifying and apprehending those in violation of the law; and policing borders.²⁴³ One might also understand the state to have an interest in protecting citizen self-expression through control of one’s own name. The aim in this Article is not to provide a comprehensive account of how states should define and balance these interests, but to identify ways that states might help to encourage—rather than discourage—egalitarian naming choices.²⁴⁴ That said, biphenation seems to fit better with these state interests than naming regimes that

²⁴⁰ Ayres and Gertner’s second article on default rules clarifies that there are many potential functions of minoritarian defaults, with information forcing as only one such function. Ayres and Gertner, 51 Stan L Rev at 1596 (cited in note 182).

²⁴¹ See Part IV. For the term “sticky norms,” see generally Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U Chi L Rev 607 (2000) (discussing “sticky norms” in the context of law enforcement).

²⁴² See Part IV.A. See also note 277; Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S Cal Interdiscipl L J 389, 413–14 (1993) (expressing skepticism that defaults could alter preferences).

²⁴³ Many of these functions may be served, and are increasingly served, with social security numbers. See, for example, *Bowen v Roy*, 476 US 693, 709–12 (1986) (discussing how social security numbers help promote the state interests in avoiding fraud and promoting efficiency in administering welfare benefits). Technological advances in tracking people—such as retinal scanning—may also render names redundant for these state purposes. From this perspective, one might think that the state might as well get out of the business of legal names. In addition to whatever self-expression interest the state may respect through legal names, though, names may serve state interests in avoiding fraud and assisting detection even alongside such technological advances. For instance, recording the names by which people are known in formal and informal transactions (and through those names knowing to whom they are related) may nonetheless help to track those individuals who find comparably sophisticated ways to elide such systems (not to mention being useful in the meantime). Among other things, recording names can help the state to publicize investigations and warnings and to seek information from others who would know suspects only by name.

²⁴⁴ A more thoroughgoing account would discuss, for instance, the ways that shared family names might assist nepotism in hiring and other forms of advantage, a point for which I thank Mary Anne Case.

involve one or both parties changing their names entirely, to the extent that biphenators retain at least part of their last names throughout their lives and share names with multiple kin networks past, present, and future.

The next two Parts of the Article identify a range of possible ways that a state might structure its choice regime to try to encourage egalitarian (and typically socially costly) preferences. This Part develops new uses for existing categories: switching the default to a normative, facilitative, queer, or radical default; altering the altering rules; forcing choices; and carefully designing menus of options. The next Part introduces a new category—framing rules—to the default-rule literature. These two Parts together identify in some detail a wide range of options under each of these categories, using the topic of marital names as a site for exploring some ways that existing and new categories of default-rule theory might be used to try to shape choices in a realm with a strong background social convention. The final Part of the Article, Part VII, then narrows the focus to two simple proposals—one modest and one more ambitious—for how a subset of these ideas might be implemented, were there the political will to do so. This discussion is highly speculative, extrapolating from studies in very different contexts, but the hope is to identify avenues for future research as well as, in the meantime, to formulate some promising proposals based on the current literature.

A. Switching the Default: Normative, Facilitative, Queer, and Radical Defaults

A state could build upon the classic contract-law idea of default rules to try to shape choices. This Part first discusses the general category of normative defaults, then introduces three new types of default rules: facilitative, queer, and radical defaults.

1. Normative defaults.

The state could switch the default to a preferred, or normative, default.²⁴⁵ Based on the discussion in Part III, a preferred default might be hyphenation or (for those already hyphenated) biphenation. As discussed, defaults are often sticky, so a state might hope that this

²⁴⁵ See Schwartz, 3 S Cal Interdiscipl L J at 391 (cited in note 242) (defining normative default as “direct[ing] a result that the decision maker prefers on fairness grounds but is unwilling to require”). These might also be considered transformative defaults, to the extent that they may aim to transform preferences in the preferred direction, even when parties don’t choose to accept the default. Id. See also David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 Mich L Rev 1815, 1867–68 (1991).

one would be too. Given, though, the extent to which Keeping doesn't appear to be sticking for women, it is possible that the new default alone would not be enough. Subsequent Parts discuss some other ways to approach the issue—such as menus, altering rules, and framing rules—but first let's consider some more creative angles on the basic tactic of switching the default.

The simplest change would be to supply parties with the preferred default. This could have some of the default effects discussed earlier, most notably, the effect of making people think that others are making this choice and an authoritative source supports it.²⁴⁶ Unlike the Keeping default, a new default of hyphenation would seem an endorsement of the approach.

Switching the default to hyphenation or biphenation could involve the state eliciting from the parties their preferred hyphenated name (that is, what order for the names) or biphenated name (that is, which name from the spouse named A-B, which name from the spouse named C-D, and what order). The form could have two blanks for the postmarital name, separated by a hyphen, and ask the parties to fill in their postmarital name in the blank. The form could require them to check a box, or take whatever alternative steps, to choose a different approach to their name. In a sense, this is a default, because it assumes the parties will have a hyphenated name, unless they say otherwise. A purer default, however, would involve the state actually supplying the default name. To supply a default of hyphenation or biphenation, though, the state has to make various choices for the parties, which brings us to the next type of default.

2. Facilitative defaults.

The state could set the legal default in a way that helps to solve practical problems involved in adopting certain alternative naming practices. We might call this a *facilitative default*, because it aims to enable certain choices by helping the decisionmakers overcome obstacles to making those choices.²⁴⁷

Facilitative defaults might usefully facilitate hyphenation or biphenation for those who would consider this option if it were less complicated or burdensome. As discussed, hyphenation and biphenation involve choices about the order and selection of the names. So

²⁴⁶ See Part IV.A. Of course, this is a highly theoretical discussion, as this legal default would be created only if there were more popular or legislative support for it than presumably exists at present.

²⁴⁷ Another apt term for what I'm calling facilitative defaults would be problem-solving defaults, but that term has already been used to characterize defaults that aim to supply the terms the parties would have wanted. See Schwartz, 3 S Cal Interdiscipl L J at 390–92 (cited in note 242).

when Rachel Smith marries Sam Miller, if they hyphenate, they have to decide whose name comes first. There is no obvious principle for choosing, and, according to some, there is no obvious power position of the hyphenated names.²⁴⁸ For biphenation, there are three decisions: which name of spouse Smith-Miller, which name of spouse Lee-Brown, and the sequence.

The state could ease people's decision costs in hyphenation by supplying them with a randomly generated version of their name—by effectively flipping a coin once (for hyphenation) or three times (for biphenation) for them. Or the state could supply a default based on another principle, such as mellifluousness—based on the judgments of, say, trained linguists.

The clerk's office would provide this facilitative default, which the parties could, as with all defaults, either accept or reject. The state's generated version of the new name might reduce the complexity or hurt feelings (of parents) that could arise if the couple chooses the biphenated name themselves.

The state's supplying prospective spouses with this facilitative default could make the process of choosing that option easier. Such an approach would contrast sharply with the reaction of at least some present-day clerks, who respond to questions about hyphenation by highlighting the onerous set of choices it presents to the couple. For instance, as noted in the epigraph to this Part, a clerk in Massachusetts stated, "You can also hyphenate your names. But that is sort of frowned upon in our office, because it creates problems. Because now you have two last names, and what order do you want them in, how should they be entered in the computer? But it's entirely up to you."²⁴⁹ This example of desk-clerk law looks particularly imposing in light of research indicating that decisionmakers, when presented with too many choices, often revert to simpler decisionmaking strategies;²⁵⁰ in the realm of marital names, the simplest choice may well be the conventional one, that is, the social default. A clerk who, rather than complaining about the burdens hyphenation imposes on the parties and

²⁴⁸ See note 206. On name order and other issues in biphenation, see Part IV.B.

²⁴⁹ Telephone conversation with Clerk, Boxford, Massachusetts, Town Clerk's Office (June 22, 2006).

²⁵⁰ See, for example, Ayres, 73 U Chi L Rev at 13–14 (cited in note 178); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U Chi L Rev 1203, 1226–27 (2003) (arguing that as choices increase, so does cognitive effort, and thus decision-makers "adopt simpler choice strategies to cope with that complexity"); Sheena S. Iyengar and Mark R. Lepper, *When Choice Is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J Personality & Soc Psych 995, 996 (2000) (finding the same in a study where subjects were asked to choose from a selection of jams).

her office, readily supplied parties with a suggested hyphenation could diminish, rather than compound, the costs of making this choice.

In addition, the state-generated defaults might help facilitate the egalitarian development of this tradition. One might imagine if the order of the names in hyphenation was always gendered (for example, man's name first), the convention itself might turn into a gendered tradition (for example, the mother's name being dropped at the bi-hyphenation point). If the order were randomly generated by the state and supplied as a default, though, a gendered convention would be less likely to develop.

3. Queer defaults.

Alternatively, the parties could be provided with a default that *no one* wants. Penalty default rules are minoritarian rules that aim to be information forcing by requiring a majority of parties to express their preferences to contract around the unwanted default.²⁵¹ What I call *queer defaults* take this to an extreme by supplying a default that not even a minority wants.

For instance, the spouses' last names could be switched: Rachel Smith and Sam Miller could become Rachel Miller and Sam Smith. This is egalitarian and involves a name change for him as well, but it is a bit silly, such that it is hard to see anyone wanting that solution. Or the bride and groom could be randomly assigned a default name from the phone book. Or queerer still, the couple could be presented with a default postmarital name with a completely unappealing sound. Appealingness might seem subjective, but as mentioned earlier, we know from linguistics that certain languages have sounds that go together, and sounds that do not.²⁵² For example, in English we never have the letters "bn" in sequence at the beginning of a word. What if Rachel and Sam were given a form assigning them both a postmarital name—unless they say otherwise—of "Bnaxt"?

This could have several possible effects. In theory the Bnaxts could accept the new name—though this would be most surprising. Names are such a personal matter—as well as a matter of quotidian significance—that it seems unlikely that most anyone would accept a decidedly unappealing name to which they have no prior connection. More likely, the prospective Bnaxts would go ahead and choose a different name or names. Perhaps imagining themselves for a moment with a meaningless and unappealing (and unpronounceable) name could jar them to think more creatively and deliberate more fully on

²⁵¹ See Ayres and Gertner, 99 Yale L J at 91 (cited in note 174).

²⁵² See note 152 and accompanying text.

alternatives to her taking his name. In this view, a queer default might be understood to be information forcing, or even deliberation forcing, with a vengeance. Deliberation has costs of course, which must be taken into account.²⁵³

4. Radical defaults.

Rather than randomly assigning a default name, the state could pick a more normatively driven default. A *radical default* is radical in a preferred direction, overshooting the mark of the preferred default to propose something more extreme. Unlike a queer default, which we assume no one would want, a few people might want to stick with the radical default; but unlike a normative default, the aim is not to make the default stick. Radical defaults might be thought of as a type of transformative default, in that transformative defaults aim to alter preferences, even among those who do not adopt the default.²⁵⁴

For instance, the default naming option for the spouses could be that only his name changes—to hers. So our couple would become Rachel and Sam Smith. As discussed in Part III, this alternative convention shares with the current convention of Mrs. His Name the virtues of simplicity and family unity for each new family, and in the short term, this reversal may usefully highlight the asymmetry of current conventions. As this option prefers one sex over the other (now women over men), though, a more egalitarian convention over the long term would incorporate both family names.

Most couples probably would not accept this new default. But forcing him to think about what it means to have his name change to hers, *and hers remain the same*, and setting this undesirable solution as the default, might shift the terms of their discussion—and the larger social discussion—of desirable naming options at marriage. After being presented with the possibility of becoming Mr. and Mrs. Her Name, the couple might view hyphenation or a merged name as less radical or disruptive.

Research on context dependence in decisionmaking supports this supposition.²⁵⁵ In short, our appraisal of an option may shift because of

²⁵³ For another concern about queer as well as radical defaults, see note 280 and accompanying text (discussing Lessig's "Orwell effect"). Ultimately, I do not think queer defaults would be the best proposal for change in this area. The most promising solutions in my view are in Part VII.

²⁵⁴ I think that transformative defaults are generally imagined to be normatively desirable defaults in their own right as well, so radical defaults might best be thought of as a distinct variation on the same theme rather than a subset. See Charny, 89 Mich L Rev at 1867–68 (cited in note 245); Schwartz, 3 S Cal Interdiscipl L J at 391 (cited in note 242).

²⁵⁵ See, for example, Mark Kelman, Yuval Rottenstreich, and Amos Tversky, *Context-Dependence in Legal Decision Making*, 25 J Legal Stud 287, 289 (1996) (conducting experiments to test for "compromise and contrast in legal judgments" and "legalized products"). See also

the alternatives that accompany it. Specifically, we are likely to rate an option more favorably in two situations: when we consider it in relation to a more extreme alternative (that is, compromise), and when we consider it in relation to a less appealing alternative (that is, contrast).²⁵⁶ Mr. Her Name seems more extreme than hyphenation, both in terms of prevalence of current practices, and in terms of its political distance from the existing convention. Thus, radical defaults might help to steer choices towards alternatives such as hyphenation. Much more could be said on this subject, and even if radical defaults may not be the best solution to the problem of names, they may be useful in other areas.

B. Altering Rules: Making Some Options Easier than Others

A state could also redesign its altering rules for marital names to encourage certain choices. Altering rules “tell private parties the necessary and sufficient conditions for contracting around a default.”²⁵⁷ They define the steps parties have to take to opt into each alternative to the default.

Current altering rules—both formal and informal—create a hierarchy among different marital naming options. As discussed in Part IV, Keeping is the default, so that is legally the easiest option for both men and women. After that, though, in most jurisdictions, her becoming Mrs. His Name is the next easiest—that is, it is easier for her to “contract into” that option than any other. She just has to send her marriage license with their premarital names stated on it to the various public and private entities relevant to her name change, and all will accept it without question. For every other option (in the vast majority of states), the ease or difficulty depends on whether each relevant public and private entity, such as the DMV or a bank, wants to recognize the proposed change—such as Mr. Her Name or hyphenation—as a reasonable name change at marriage. Some entities formally require different evidence for other name change options, such

Itamar Simonson, *Choice Based on Reasons: The Case of Attraction and Compromise Effects*, 16 J Consumer Res 158, 159 (1989) (discussing how consumers preferences move towards the middle of a given set); Seymour Sudman, Norman M. Bradburn, and Norbert Schwarz, *Thinking about Answers* ch 6 at 130 (Jossey-Bass 1996) (noting that the “order in which alternatives are presented has also been shown to influence decisions with potentially important consequences”); Itamar Simonson and Amos Tversky, *Choice in Context: Tradeoff Contrast and Extremeness Aversion*, 29 J Marketing Res 281, 281 (1992) (studying how “preferences are influenced by the set of alternatives under consideration” in market research).

²⁵⁶ See Kelman, Rottenstreich, and Tversky, 25 J Legal Stud at 288 (cited in note 255).

²⁵⁷ Ayres, 73 U Chi L Rev at 6 (cited in note 178).

as hyphenation or merged names, and even where official rules permit the option, desk-clerk law often imposes additional costs.²⁵⁸

At the very least, states should make the altering rules for egalitarian naming options such as biphenation no more burdensome than they are for conventional marital name-change options. This intervention is discussed further in relation to forced choosing below and in Part VII. More creatively, altering rules could instead be used to make egalitarian, but unconventional, marital naming choices easier than sex-based, conventional choices. Consider a few examples.

A state could make unconventional choices even easier than conventional choices are now by notifying other public entities of name changes on behalf of the changer—for the types of name changes the state wanted to encourage. So, for instance, a state could offer to notify the DMV, the SSA, and the Passport Agency of any choices by couples to hyphenate both their names. To save (or make) money, the state, or a private entity, could even charge a small fee to perform this service, which would probably be more appealing to many people than the hassle; of course those who preferred the hassle could still do it themselves.²⁵⁹

A hierarchy could be created by not providing this service to those making the most conventional choices. Or, more aggressively, additional steps could be added to the name-change process for conventional options. Couples making a conventional naming choice could be asked to appear before a judge to explain their choice or, more simply, write (or record orally) an explanation of their choice. No evaluation of the merits of their claims need be introduced; this is not a substantive obstacle, but a procedural one. The aim would be to force couples to deliberate and to explain the choices that are conventional, and that are thus generally subject to less social pressure for explanation.

Legal rules that distinguish conventional from unconventional naming options might run afoul of state or federal constitutional requirements, given that the most conventional option involves different behavior by men and women. In particular, making the altering rules different for men and women arguably raises constitutional problems. So we would need a facially neutral law creating the different altering

²⁵⁸ See Part IV.

²⁵⁹ Note that this streamlining might not be as difficult for the government as it sounds, though. At present the SSA apparently makes its database available to the IRS for updating of naming records, which the IRS reports doing every four weeks. See note 191. Some DMV clerks also reported that their database is regularly synchronized with the SSA's in an effort to comply with the Real ID Act. Other entities could perhaps access that database as well, though privacy concerns might dictate that these be only (certain) public entities. If a private service did this for a fee, the service could also potentially contact all of the private entities in a changer's life, such as doctors, clubs, employers, and other types of entities listed in Part IV.

rules. One option would be to distinguish those naming choices in which *both* spouses change from those in which *only one* spouse changes. Where only one spouse changes, it is almost invariably the woman, so this would sort the Mrs. His Name couples from most everyone else. (This would bring the Mr. Her Name couples into the burdened camp as well, along with the single hyphenators (Mrs. Her-His Name), but it might be worth it if this is the best available option.) For instance, perhaps the state could print new names on the marriage license—thereby eliminating the need for a court-ordered name change—only if both spouses are changing their names. If the state wanted to put its imprimatur on double hyphenation more directly, say, it could make especially easy altering rules for that option alone.²⁶⁰ There are many good reasons for a state not to take steps to create these differential costs—not least that women will likely bear the bulk of them under current conditions. But, as noted earlier, states should at least make egalitarian marital naming options as easy as more conventional, ine-galitarian options. One way to facilitate this would be through forced choosing, our next topic.

C. Forced Choosing: Leveling the Playing Field (a Bit)

Another option would be forced choosing: that is, the state could force couples to choose their postmarital names as a condition of civil marriage.²⁶¹ This solution respects choice in that it invites parties to make their own choices about their names. It also does away with some portion of the unequal administrative burdens currently placed on the majority of women as opposed to men under the typical Keeping default. And it could address other problems with the dominant

²⁶⁰ Altering rules can also direct choices if the rules themselves are made more or less explicit. See Ayres, 73 U Chi L Rev at 6 (cited in note 178). That is, an official state website could give very clear instructions on what all the alternatives to the default are, and what steps one has to take to achieve them. Or it could make the steps clearer for some options than for others, such that people have to buy things like the *Official New Bride Name Change Kit* to figure out how a woman changes her name to match a man's. At present, people have reason to use such kits for any name changes, mainly because there are multiple steps requiring multiple entities. But such private facilitation would be even more helpful for options other than Mrs. His Name, since personnel at the relevant entities know what Mrs. His Name requires, but often give conflicting and even incorrect information about whether and how one can make any other name changes. See Part IV. In a twist on this, the steps to hyphenation could instead be spelled out plainly by the state, and conventional options could be left opaque. This example, with its emphasis on what information surrounds the choice, ties into the discussion of framing rules in Part VI.

²⁶¹ “Forced choosing” is also known as “required active choosing,” see Sunstein and Thaler, 70 U Chi L Rev at 1189, 1173 (cited in note 178); or, relatedly, as “affirmative choice rule[s],” which Ian Ayres describes as “a type of penalty default that forces contractors to make an affirmative choice in order to create a contract,” see Ian Ayres, *Valuing Modern Contract Scholarship*, 112 Yale L J 881, 899 n 79 (2003).

regime at present, such as its imposing the most costs on those who want to make unconventional choices other than Keeping. Forcing choice could make it equally easy to make other minority choices—such as merging names or hyphenation—as to make the majority choice of Mrs. His Name.

A few states already impose minimal forced choosing by asking marrying couples to write their postmarital names on the marriage license.²⁶² For instance, New York allows either or both spouses to take either spouse's current or former name, or either or both to take a hyphenated or merged name. Because many women (especially in the South²⁶³), and also some men (anecdotally) change their middle names at marriage,²⁶⁴ though, a better forced choosing regime would presumably improve on New York's regime by allowing a change of middle name as well.²⁶⁵

This forced choosing is minimal, though, because choosers still have to go through the relevant steps involved in changing their names;²⁶⁶ the process is just facilitated by having a marriage license that states their chosen postmarital names. A more robust forced choosing regime would further the parties' new choices, by forwarding their names to the additional entities, for instance, as discussed in relation to altering rules.²⁶⁷ Current forced choosing regimes nonetheless eliminate some transaction costs, particularly informal ones from disagreeable or ignorant clerks at subsequent entities, by providing spouses making unconventional name changes with documentation of their new names.

Forced choosing imposes its own costs, though. People may not want to choose (because of the time or tension involved in doing so), and under forced choosing, everyone faces the at-least-trivial cost of checking a box or filling in a blank, even if their preferences match the

²⁶² Georgia, Iowa, Massachusetts, Minnesota, New York, and North Dakota. See note 177.

²⁶³ See note 88 and accompanying text (reporting on the frequency, particularly in the South, with which women who become Mrs. His Name take their birth name as a middle name).

²⁶⁴ See note 124 (noting this among possible variations on naming options).

²⁶⁵ Note that New York doesn't allow the adoption of an entirely new name, such as Mr. and Mrs. Place-Where-We-Met, through the marriage license process. While there might be reasons to want to facilitate this choice, as noted earlier, this choice presumably also presents the greatest chance of facilitating fraud, as it allows complete self-reinvention. A state might well want people making up wholly new names to go through the formality of the regular court-ordered name change process, perhaps with a strong presumption in favor of marriage as a reason given for such changes. See Part IV.

²⁶⁶ It is also minimal in that such choices are not actually *forced* in that no penalty likely follows the failure to make an active choice in response to the state's invitation. See, for example, note 339.

²⁶⁷ See Part V.B. This could involve greater implementation costs, though perhaps not as much as expected. See note 259 (discussing the sharing of information between some government agencies).

majority or preferred practice.²⁶⁸ But all things considered, forced choosing may be a modest way for states to level the playing field between various unconventional options, as discussed in Part VII.

D. Menus: Designing Options

Decisions in a choice regime can also be solicited through lists of available options, or *menus*.²⁶⁹ Various features of menus can affect the choices people make. A state hoping to steer choices could vary the following features of a menu of marital naming options to try to steer choices: the order of the options listed, the number of options listed, whether the menu is exhaustive or nonexhaustive, which options are listed explicitly rather than merely permitted to be written in on a blank (in a nonexhaustive menu), and whether the menu forces choice or offers a default option if parties choose not to choose.²⁷⁰

For instance, if a state wanted to steer choices towards hyphenation, it might list hyphenation first on an explicit menu on the marriage license application form. Research on order effects reveals a primacy effect, a preference for the first item on the list.²⁷¹ For example, data on randomized ballots in California elections indicate that people are more likely to vote for the first candidate in a list of choices.²⁷²

In addition, which options are included in the list could matter. For example, a menu that expressly listed only unconventional naming options—then included a write-in blank, on which people seeking a conventional name had to write their choice (that is, Mr. and Mrs. His

²⁶⁸ See Sunstein and Thaler, 70 U Chi L Rev at 1189, 1198–99 (cited in note 178).

²⁶⁹ See Ayres, 73 U Chi L Rev at 3 (cited in note 178) (defining a menu as “a contractual offer that empowers the offeree to accept more than one type of contract”).

²⁷⁰ See id at 9–10; Listokin, *What Do Corporate Default Rules and Menus Do?* at 37 (cited in note 178).

²⁷¹ See Sudman, Bradburn, and Schwarz, *Order Effects within a Question* at 130 (cited in note 255) (using the example of a political candidate receiving more votes if his or her name is placed earlier on the ballot sheet). Alternatively, though, the order of items can lead to a recency effect, to favoring items heard most recently; this may be more likely when items are aurally, rather than visually, perceived. See id at 143. The issue is further complicated by the fact that, when visually presented, implausible items presented early on (in an opinion survey) may not lead to this effect, because they are not subject to a confirmatory process, which would accompany plausible items. Id at 142–43.

²⁷² Daniel E. Ho and Kosuke Imai, *The Impact of Partisan Electoral Regulation: Ballot Effects from the California Alphabet Lottery, 1978–2002* 1 (Princeton L and Pub Affairs Paper No 04-001; Harvard Pub L Working Paper No 89, Oct 2004), online at <http://ssrn.com/abstract=496863> (visited July 8, 2007). See also generally Jon A. Krosnik, Joanne M. Miller, and Michael P. Tichy, *An Unrecognized Need for Ballot Reform: The Effects of Candidate Name Order on Election Outcomes*, in A.N. Crigler, M.R. Just, and E.J. McCaffery, eds, *Rethinking the Vote: The Politics and Prospects of American Election Reform* 51 (Oxford 2004). Interestingly, this effect holds for primaries but not for general elections. See id. Moreover, the first item might not be most favored in all contexts. See Ayres, 73 U Chi L Rev at 14–15 (cited in note 178) (speculating on other ordering preferences in different contexts).

Name)—might plausibly make hyphenation seem more appealing, as it might seem a relatively moderate choice.²⁷³ This is an extreme example but it might also be that a menu that simply listed a wide range of alternatives, possibly ordered from least conventional to most conventional, could make some unconventional options look like compromises.

Too many options on the menu could lead people to invoke a simple heuristic to guide their decisionmaking.²⁷⁴ As noted earlier, this might lead them to revert to the social default: the convention of Mr. and Mrs. His Name. But note that menus can involve strictly forced choosing—that is, you have to choose an item on the menu—or menus can be accompanied by a default—that is, if you don't choose an item on the menu, a default is supplied. If hyphenation were then supplied as a default—and that default was facilitative in the sense that it supplied them with a randomly generated version of their hyphenated or biphenated names—then decision overload might lead them down that route instead.

To the extent that decisions about menus are decisions about the way that the question is asked, the subject of menus leads to our next subject: framing rules.

VI. FRAMING RULES: REGULATING HOW THE QUESTION IS ASKED

Thus the law . . . command[s] us to do certain things and forbid[s] us to do others; and it does so rightly if it is rightly framed, but less well if hastily framed.

—Aristotle²⁷⁵

The problem of marital names has a notable feature that invites us to recognize a new category relevant to choice regimes. Marital names are a context in which social conventions, rather than legal rules, seem largely to drive behavior. The fact that women contract around the legal default of Keeping to such a large extent—in other words, the fact that Keeping is not sticky for women—exemplifies the force of norms rather than law here.

One might ask whether, in light of the role of social conventions here, law is simply irrelevant. But, as discussed earlier, the current regime reinscribes the most unquestioned feature of our marital names regime—men keeping their names—and it makes some unconventional choices

²⁷³ See note 256 and accompanying text (discussing compromise and contrast effects).

²⁷⁴ See note 250 and accompanying text.

²⁷⁵ Aristotle, *Nichomachean Ethics*, Book E, 1129b, 79–80 (D. Reidel 1975) (H.G. Apostle, trans.).

(such as double hyphenation or merging) harder than others (both keeping). The law is therefore pushing in a conventional direction.

Could law instead push in a more egalitarian direction? The previous Part identified various ways that the basic categories of a default-rule regime—default rules themselves, altering rules, forced choice, menus—could be used to try to alter choices in this domain. These are creative proposals under existing rubrics. But the convention-dominated realm of marital names, and others like it, also suggest a need for a new category of interventions.

In any regime, but particularly in a regime heavily dominated by social conventions, an important tool of a default-rule regime is what I call *framing rules*. Framing rules are the rules that govern how the question is asked. Default rules tell us what rule the state fills in when the parties don't say otherwise; altering rules tell us what steps the parties have to take to contract around the default; menus dictate what options are provided to choosers. Framing rules, by contrast, focus on how the question is asked. They include the words that are used to ask the question (*interrogatory frames*), the context that surrounds the question (*embedded frames*), and the information that accompanies the question (*informational frames*).²⁷⁶

How questions are asked—and what questions are asked—affects choices and behavior across a range of domains.²⁷⁷ For instance, if a patient considering an operation is told that, of 100 people who undergo this operation, “90 live through the postoperative period . . . and 34 are alive at the end of 5 years,” he is more likely to agree to the procedure than if he is told, “10 die during the postoperative period . . . and 66 die by the end of 5 years.”²⁷⁸ Nothing is different but for the way the information framing his decision is presented. Moreover, merely asking a question—for example, asking a registered voter if he

²⁷⁶ In their work on asymmetric paternalism, Colin Camerer and his coauthors provide useful discussion and examples of the subspecies of framing rules that I call informational frames. See Camerer, et al., 151 U Pa L Rev at 1230–38 (cited in note 178).

²⁷⁷ See Jonathan Levav and Gavan J. Fitzsimons, *When Questions Change Behavior: The Role of Ease of Representation*, 17 Psychological Sci 207, 208 (2006); Johnson, Steffel, and Goldstein, 24 Health Psych at S22 (cited in note 178); Gavan J. Fitzsimons and Baba Shiv, *Nonconscious and Contaminative Effects of Hypothetical Questions on Subsequent Decision Making*, 28 J Consumer Res 224, 225 (2001); Richard H. Thaler, *Mental Accounting Matters*, 12 J Behav Dec Making 183, 185–88 (1999); Anthony G. Greenwald, et al, *Increasing Voting Behavior by Asking People if They Expect To Vote*, 72 J Applied Psych 315, 318 (1987); Amos Tversky and Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 Science 453, 456 (1981). See also Christine Jolls and Cass R. Sunstein, *Debiasing through Law*, 35 J Leg Stud 199, 202 (2006); Ayres, 73 U Chi L Rev at 4 (cited in note 178); Sunstein and Thaler, 70 U Chi L Rev at 1160 (cited in note 178); Camerer, et al, 151 U Pa L Rev (cited in note 178).

²⁷⁸ See Donald A. Redelmeier, Paul Rozin, and Daniel Kahneman, *Understanding Patients' Decisions: Cognitive and Emotional Perspectives*, 270 JAMA 72, 73 (1993) (reporting that this “framing effect was just as large with physicians as with lay people”).

"expects that [he] will vote or not" the next day—leads to a greater likelihood of voting among those asked, as compared to controls.²⁷⁹

Framing rules could thus be important to any default regime. But there are reasons to think that framing rules will be particularly important where social conventions depart from the law and exert a strong influence on choices. First, where strong social conventions surround choices, choosers are more likely to be ignorant of the law if it departs from those conventions. Information given to choosers may therefore be particularly important to correcting misconceptions.

Second, desk clerks may be more likely to misrepresent the law where it departs from strong social conventions. Desk clerks may themselves be ignorant of the law, or they may be more inclined to share their normative views or to allow their views to shape how they represent the law. Simply put, desk-clerk law may be more of a problem.

Finally, in areas where strong social conventions tend to drive behavior, laws that depart from those conventions—even default rather than mandatory rules—may provoke what Lawrence Lessig has called the Orwell effect,²⁸⁰ causing people to dig in their heels against progressive suggestions. Lessig has noted the way that people tend to object to government efforts to shape social meaning when government is trying to change existing social meanings. That is, if people feel the state is trying to steer their choices away from conventions, they may view an intervention as mind control and resist it. (As Lessig notes, people rarely feel the state is unfairly steering their choices when the state reinforces existing traditions or current conventions.²⁸¹) In such contexts, default rules that obviously defy convention may have little effect because people feel the state is trying to change them. For related reasons, Dan Kahan has proposed gentle nudges rather than hard shoves in legal responses to "sticky norms."²⁸² Framing rules may be experienced as milder interventions, and thus be more effective, especially where they merely involve supplying information or asking questions in an apparently neutral way.

²⁷⁹ Greenwald, et al, 72 J Applied Psych at 316 (cited in note 277). In this study, subjects were also then asked to state the most important reason to vote, but subsequent studies have replicated this "mere measurement" effect without including the additional question about significance or reasons. See, for example, Levav and Fitzsimons, 17 Psychological Sci at 207 (cited in note 277).

²⁸⁰ See Lessig, 62 U Chi L Rev at 1016–18 (cited in note 1). Lessig's Orwell effect is akin to what psychologists call "reactance." See, for example, Sharon S. Brehm and Jack W. Brehm, *Psychological Reactance* 3–4 (Academic 1981) (explaining the "theory of psychological reactance [as] hold[ing] that a threat to or loss of freedom motivates the individual to restore that freedom").

²⁸¹ See Lessig, 62 U Chi L Rev at 1018 (cited in note 1).

²⁸² See Kahan, 67 U Chi L Rev at 607 (cited in note 241).

One state has explicit framing rules for choosing marital names. New York requires by statute that marriage license application forms supply information about the law of marital names, and about the options for name change available to spouses.²⁸³ By contrast, outside New York (and even in New York sometimes²⁸⁴), much of the framing of marital-names questions seems inadvertent, merely reflecting prevailing assumptions or current practices. In light of growing knowledge of the extent to which the context, wording, or mere presence of a question can affect choices and answers, indifference to these matters seems, at best, naïve.²⁸⁵ Given the extent to which desk-clerk law tends to reinforce, rather than helping to unsettle, prevailing conventions, an inattention to framing may be cause for serious concern.

In an area strongly driven by social conventions, the law may be playing, at best, a marginal role. But the impact on the margins may nonetheless be significant. The tipping point for changing social meaning is never clear, and so change may indeed result from whatever small push the law gives to help individuals overcome the collective action problem involved in changing social meaning.

For the reasons discussed earlier, notably the state's history of preventing choice and mandating an inequalitarian naming scheme, here I introduce the idea of framing rules through examples that aim to promote active choices and egalitarian values in the realm of marital names. As in the previous Part, the values I endorse here are of course controversial. The key point, though, is that framing rules are an impor-

²⁸³ NY Dom Rel Law § 15. The statute reads, in relevant portion:

Every application for a marriage license shall contain a statement to the following effect:

NOTICE TO APPLICANTS

...

(2) A person's last name (surname) does not automatically change upon marriage, and neither party to the marriage must change his or her last name. Parties to a marriage need not have the same last name.

(3) One or both parties to a marriage may elect to change the surname by which he or she wishes to be known after the solemnization of the marriage by entering the new name in the space below. Such entry shall consist of one of the following surnames:

(i) the surname of the other spouse; or

(ii) any former surname of either spouse; or

(iii) a name combining into a single surname all or a segment of the premarriage surname or any former surname of each spouse; or

(iv) a combination name separated by a hyphen, provided that each part of such combination surname is the pre-marriage surname, or any former surname, of each of the spouses.

²⁸⁴ See notes 343–44 and accompanying text (discussing instances of erroneous desk-clerk law despite New York's framing rules).

²⁸⁵ See note 277 (citing the behavioral effects of simple queries).

tant way to shape choices, and we should think seriously about how we are already shaping choices through our existing frames and how we want to do so in the future.

A. Interrogatory Frames: How the Question Is Worded

The most basic framing issue concerns how the state actually asks the question that invites the relevant decision. On its face, the question “will the bride be changing her name?” is, for example, quite different from “will the spouses be hyphenating their names?”

We know that the way a question is asked can matter. Studies have found that people are more likely to vote or to floss their teeth if they have been asked whether they will do those activities, but only if they are asked in a way that makes imagining themselves doing the relevant activity easy rather than difficult.²⁸⁶ For example, if people are asked whether they will floss their teeth seven times in the coming week, they are more likely to floss their teeth in that period; but if they are asked whether they will floss their teeth *eight* times in the coming week, they are no more likely to do so.²⁸⁷ The difference lies in whether the manner of asking the question makes it easy for people to visualize themselves engaging in the activity.²⁸⁸ Note that these results depend on whether the activity is a desirable one; the effect reverses when it is undesirable.²⁸⁹

With this in mind, then, a state should think carefully about *how* exactly it asks the question, formally and informally, about marital naming choices. Most marriage license application forms now pose the question of marital names—where they do so at all—in a gender-neutral fashion, asking, for instance, for both spouses’ “Surname after marriage”²⁹⁰ or “Legal Name After Marriage.”²⁹¹ At least informally, then, these states seem to have gender-neutral framing rules for the marital names question. But in practice many desk clerks apparently

²⁸⁶ See Levav and Fitzsimons, 17 Psychological Sci at 208–10 (cited in note 277); Greenwald, et al., 72 J Applied Psych at 315 (cited in note 277).

²⁸⁷ See Levav and Fitzsimons, 17 Psychological Sci at 208 (cited in note 277).

²⁸⁸ See *id.*

²⁸⁹ See Fitzsimons and Shiv, 28 J Consumer Res at 226–28 (cited in note 277); Vicki G. Morwitz, Eric J. Johnson, and David Schmittlein, *Does Measuring Intent Change Behavior?*, 20 J Consumer Res 46, 53–54 (1993). But see Lauren G. Block, Gavan J. Fitzsimons, and Patti Williams, *When Consumers Do Not Recognize “Benign” Intention Questions as Persuasion Attempts*, 31 J Consumer Res 540, 550 (2004) (demonstrating that the valence question is a complicated one).

²⁹⁰ Town of New Castle, New York, Marriage License Application, online at <http://www.town.new-castle.ny.us/Marriage%20License%20App.pdf> (visited July 8, 2007).

²⁹¹ Iowa Department of Health, Bureau of Vital Records, Application to Marry in Iowa, online at http://www.dubuquecounty.org/offices/recorder/Marriage_Application.doc (visited July 8, 2007).

frame these questions in anything but a gender-neutral fashion.²⁹² Moreover, the marriage license application forms still implicitly convey conventional assumptions about marital names in various ways, through what we might call embedded frames, our next topic.

B. Embedded Frames: The Context of the Question

Marriage license application forms provide a good example of embedded frames, by which I mean the subtle suggestions about how the world is or should be, conveyed through the layout and context of the forms' question about marital names.²⁹³

For example, twenty-five of forty-two states with state-wide consistent forms ask for the bride's and groom's information in nonidentical ways.²⁹⁴ The most common differences involve the questions about her name.²⁹⁵ Some jurisdictions seem to imply that her name will change through the ways that they ask her to record her name. For instance, a number of states' forms request something like "Bride's Maiden Last Name (if different)."²⁹⁶ This "if different" is ambiguous; it

²⁹² See Part IV.C.

²⁹³ In very different contexts from marital names, cues from context have been shown to affect both perceptions of reality and decisionmaking. See Fitzsimmons and Shiv, 28 J Consumer Res at 225 (cited in note 277) (discussing how hypothetical questions can change reference points and thus contaminate the stated preference). For instance, studies of mental contamination have shown that inaccurate factual assertions embedded in questions can lead subjects to come to believe the truth of those assertions against their independent perceptual abilities. In a striking example, Elizabeth Loftus found that asking the question, after subjects have watched a video of a car accident, "[h]ow fast was the white sports car going [when it passed the barn] while traveling along the country road?" (with the bracketed portion left out for control subjects), made those to whom the barn was mentioned six times more likely to report seeing a barn than controls. *Id.*, citing generally Elizabeth Loftus, *Eyewitness Testimony* (Harvard 1979). Effects of inaccurate information included in questions, even as hypothetical, is a common theme in the literature on survey effects, referred to push polling. Fitzsimmons and Shiv, 28 J Consumer Res at 225 (cited in note 277).

²⁹⁴ Alabama, Arkansas, Colorado, Idaho, Illinois, Iowa, Maine, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. See, for example, Wisconsin Department of Health and Family Services, Division of Health Care Financing HCT 506, online at <http://www.co.green-lake.wi.us/forms/ml.pdf> (visited July 8, 2007).

²⁹⁵ There are other types of differences as well. Perhaps the most entertaining difference between His and Hers forms is the form from Chesterfield County, Virginia, which asks for details about the wedding—date, place, officiant—only on the bride's form. Compare <http://www.co.chesterfield.va.us/JusticeAdministration/CircuitCourtClerk/PDFs/MarriageLicenseFormBride.pdf> (visited July 8, 2007) (bride's form), with <http://www.co.chesterfield.va.us/JusticeAdministration/CircuitCourtClerk/PDFs/MarriageLicenseFormGroom.pdf> (visited July 8, 2007) (groom's form).

²⁹⁶ Thirteen of forty-one states with consistent forms. See, for example, Mobile County, Alabama, Marriage License Application, online at <http://www.mobilecounty.org/probatecourt/frame-mariagelicense.htm> (visited July 8, 2007) (requesting "Bride's Maiden Last Name (if different)"). See also, for example, Los Angeles County, California, Marriage License Applica-

might seem to mean “if different from the man she’s about to marry,” and it could be interpreted that way by a desk clerk.²⁹⁷ But as an official matter it seems more likely to mean “if different from her current name (because she’s been married before).” The former more strongly implies a state expectation of changing her name with this marriage, though either way, the suggestion is that the bride’s name changes at the time of marriage. On some forms, the otherwise symmetrical formatting for bride and groom’s information tries to accommodate the extra space for her maiden name, such as by asking him for a suffix, such as “Jr., Sr., III”²⁹⁸ (an aspect of his identity, as noted earlier, that the Goldin and Shim study told us correlates with her changing her name²⁹⁹). Only six states’ forms expressly ask the spouses for their names after marriage, and all six ask for both spouses’ names.³⁰⁰ Iowa forms nonetheless vary her section of the form by also asking, in the

tion, online at <http://www.lavote.net/RECODER/PDFS/confMarriageApp.pdf> (visited July 8, 2007) (requesting “Birth Last Name (if different)”).

²⁹⁷ For an example of this, see the amended complaint in the current ACLU suit in Los Angeles County, which alleges the following interaction in response to a query about how the husband could take his wife’s name:

Michael and Diana asked a clerk how they could effect the desired change of Michael’s surname to “Bijon.” The clerk responded that “there’s not a box [on the application] for you [Michael]” and said, “you can’t use this form for a man to change his name.” She stated to Michael, “if she wants to change her name, fill out this line,” pointing to a box on the application under the column “Bride’s Personal Data” marked “Current Last Name (If Different).” No similar box appears under the column “Groom’s Personal Data.” The clerk then said, “He will not be able to change his name at this courthouse or on the marriage application. He will have to go downtown to the L.A. Superior Court.”

First Amended Complaint, *Buday v California Department of Health and Services*, Civil Action No CV06-08008 at *5 (CD Cal filed Jan 22, 2007).

²⁹⁸ See, for example, Town of Cape Elizabeth, Maine, online at <http://www.capecelizabeth.com/wedapp05.pdf> (visited July 8, 2007) (asking for bride’s “maiden surname”); Manatee County, Florida, online at https://www.clerkofcircuitcourt.com/Marriage/mrg_lic_frm.asp (visited July 8, 2007) (displaying the request for the groom’s “suffix” across from the request for the bride’s “maiden name (if different)”). Some rearrange the size of her boxes or blanks on the top lines, such as for her birthdate, or insert a blank box for him, to realign the formatting immediately. See for example, Marin County, California, online at http://www.co.marin.ca.us/depts/CC/Main/clerk/Forms/Regular_Marriage_License_Application.pdf (visited July 8, 2007) (readjust for hers); El Dorado County, California, online at http://www.co.el-dorado.ca.us/countyclerk/pdf/APP_LICENSE_MARRY_MAY02.pdf (visited July 8, 2007) (shaded box for his). But others let the extra line make the entire set of blanks off one step for bride and groom all the way down the page. See, for example, Kern County, California, online at http://www.co.kern.ca.us/ctyclerk/marriage/PDF/APPLICATION_PUBLIC.pdf (visited July 8, 2007) (asking for “maiden last name (if different than current)”).

²⁹⁹ See Goldin and Shim, 18 J Econ Persp at 157 (cited in note 32) (finding that grooms with such suffixes were somewhat less likely “to marry a woman who retained her surname”); text accompanying note 98 (same).

³⁰⁰ See note 262 and accompanying text (identifying those states as Georgia, Iowa, Massachusetts, Minnesota, New York, and North Dakota).

line for her current (premarriage) name, for her “Maiden last name as on birth certificate.”³⁰¹

Note also that even identical forms imply that women’s names change and men’s do not. For example, all but one of the state forms that ask for the spouses’ parents’ names ask for the mother’s “maiden name,” but ask only for the father’s “name,” thus assuming that the mother’s name changed and that the father has only ever had one name.³⁰² Additionally, on the vast majority of the states’ forms that include both bride and groom’s information on one form, the groom’s information comes first—either in the top half or the left column—although no one ever says “the groom and bride.”³⁰³ Particularly given that some of the forms don’t ask her to duplicate all the information, this implies that her information—and quite possibly her name—will be derivative of his. While it’s true that women disproportionately change their names, and that this is therefore a statistically accurate generalization, the frame conveys a message about naming practices that bears the traces of the state’s prior mandatory regime.

Forms also convey messages about what information the state considers relevant. Consider another example, this time involving race rather than sex. Forms from more than half the states ask for the race of the prospective spouses.³⁰⁴ Some forms just include race among a number of other personal characteristics, sometimes even saying (almost apologetically) that such details are “required statistical information.”³⁰⁵ By contrast, others, such as Mobile County, Alabama, un-

³⁰¹ Iowa Marriage Application (cited in note 291) (asking for maiden last name after asking for bride’s current last name).

³⁰² Thirty of thirty-one states with consistent forms. The outlier state is Massachusetts, which asks for the maiden or birth name of both father and mother. See Massachusetts, Notice of Intention to Marry (cited in note 219) (requesting for both spouses the “surname at birth or adoption”).

³⁰³ Thirty-one out of thirty-eight jurisdictions with consistency in this regard. Arkansas, Arizona, Connecticut, DC, Hawaii, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. I thank Jordan Connor for the point about the order of the phrase “the bride and groom.” Relatedly, it is interesting to note that men’s first names are generally said first—when couples are named by the first names alone—and that work in linguistics indicates that this reflects phonological properties of men’s versus women’s names, their frequency in the language, as well as an independent effect of the gender of names. See generally Saundra Wright, Jennifer Hay, and Tessa Bent, *Ladies First? Phonology, Frequency, and the Naming Conspiracy*, 44 *Linguistics* 531 (2005).

³⁰⁴ Twenty-seven of the forty-eight states with consistent forms. Alabama, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

³⁰⁵ See, for example, Oregon, Marriage License Worksheet, online at <http://www.clackamas.us/docs/recording/marriage.pdf> (visited July 8, 2007) (also indicating race as “optional” under the

apologetically ask for race on the very first line of blanks, next to the name and date of birth.³⁰⁶ By asking for this information, the state suggests that race is relevant to marriage. Particularly given this country's history of antimiscegenation laws, to suggest that race is relevant to a marriage seems troubling.

Embedded frames may be more or less coercive. Even requesting information is coercive,³⁰⁷ a fact that some states seem to recognize with regard to the race of the parties, for instance, when they flag such questions as optional or explain that the information will not appear on the marriage license.³⁰⁸ In some instances, the questions themselves are asked in a way that forces or prevents certain answers. So for a prospective spouse whose parents hyphenated their names, what name does he fill in for his father's "name" alongside his mother's "maiden name"? Does the state want his father's current, married name, or his birth name? If a form asks the spouses for their (one) postmarital address, what address do they put if they are making the (atypical) decision not to live together? Embedded frames suggest the right answers to the questions they pose, as well as suggesting what information and hierarchies are relevant to the choices being made.

New York is the only state that prescribes by statute an aspect of the appearance of the marriage license application form. As noted earlier, a law passed in 1985 in New York requires that "[e]very application for a marriage license shall contain a statement" informing parties of the law of marital names.³⁰⁹ The New York statute is discussed further in the next Part as requiring a certain informational frame, but note here also that printing that information *on the form* may provide a contextual frame that competes with misleading or normative desk-clerk law. States would do well not only to copy this example, but to create framing rules that dictate the subtler features of the forms—to

required statistical information); Madison County, Illinois, Marriage Brochure, online at <http://app1.co.madison.il.us/countyclerk/marriagebrochure.pdf> (visited July 8, 2007) (listed under "Information For Statistical Purposes Only").

³⁰⁶ Mobile, Alabama, Marriage License Application (cited in note 296). See also Indiana statewide form (in top right corner); Horry County, South Carolina, Application for Marriage License, online at http://www.horrycounty.org/probatecourt/mrg_lic_app.pdf (visited July 8, 2007) (on the second line); Cass County, Minnesota, Application for Marriage License, online at http://www.co.cass.mn.us/auditor/pdfs/marriage_lic_app.pdf (visited July 8, 2007) (on third line). Note, as another example of different forms for bride and groom, that on the bride's portion of the form for Mobile County, Alabama (the bottom half of the form), race is actually requested on her second line of information, since her "maiden last name (if different)" bumps the race blank off the first line.

³⁰⁷ See text accompanying note 268 (discussing the coercion involved in forced choosing).

³⁰⁸ See, for example, North Carolina, Work Sheet for Preparation of Marriage License Form, online at <http://www.wataugacounty.org/deeds/marlicense.pdf> (visited July 8, 2007) (asking for "race-groom (optional)" and "race-bride (optional)").

³⁰⁹ NY Dom Rel Law § 15(b).

promote symmetry and egalitarian values, rather than implying that couples should continue unequal practices previously required by law.

C. Informational Frames: What Accompanies the Question

Informational framing rules could take a variety of forms, from modest to quite creative. Examples of four types follow.

1. Informing choosers about the law.

First, a state could provide information about the law. New York already requires this. By statute, marriage license application forms must inform prospective spouses that neither of them is required to change her name, that both have the option of changing their names, and which specific naming options are available.³¹⁰ Though no data document popular misperceptions about the law of marital naming, we know that people are mistaken about the law in other domains of personal significance, such as whether the default legal regime of their state is employment at will or for cause.³¹¹ And the legislative history of the 1985 New York law indicates that its proponents thought there was widespread ignorance about the law of marital names at that time.³¹² From conversations and research in this area, I would expect that many people continue to think the law is other than it is. Particularly given the history of mandatory name change for women for various state purposes, it seems likely that a significant number of women think they have to change their names at marriage, or at least think that will be the easiest choice under law. Moreover, it seems likely that many people would not know that a man can change his name through marriage—

³¹⁰ Id. See also note 283 (quoting the statute).

³¹¹ See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 Cornell L Rev 105, 106–10 (1997) (arguing that employees are “likely mistaken about the law and misled by their employers at the time of hiring”).

³¹² See, for example, Senator John J. Marchi, *Memorandum in Support of Amendment to Dom Rel L § 15(1)*, Sen Bill 110, in NYLS’s Governor’s Bill Jacket (“Most people are unaware of their rights regarding name changes and, more specifically, of their right to change or *not* change their name upon marriage.”); letter from Madeline Kochen, Legislative Counsel, New York Civil Liberties Union, to Gerald C. Crotty, Counsel to the Governor (June 27, 1985), in NYLS’s Governor’s Bill Jacket:

Age-old customs regarding name changes, particularly the custom by which women assume their husband[s’] surnames upon marriage, have obfuscated this issue so as to render their choice of name, a virtual nullity. The tradition of a woman assuming her husband’s name has been so embedded in our society that many, if not most, people are under the mistaken impression that what [is] custom is law.

not least because that option is not even widely known among those individuals who work at the Social Security Administration.³¹³

2. Informing choosers about conventional and unconventional practices.

Second, a state could supply information about naming options, explaining in more or less detail both conventional and unconventional options. Because most people probably know the conventions well and the alternatives less well, this might inform people of unfamiliar options. It might also create some of the context-dependence effects discussed above in relation to menus. That is, mutual options that retain the integrity of individual names, such as both spouses' hyphenating, might come to seem relatively more acceptable once people learned of couples choosing merged names, entirely new names, or Mr. Her Name.³¹⁴ Moreover, through information about alternative practices, the state could dispel misconceptions about the workability of certain options by illuminating their mechanics. As discussed earlier, people almost invariably respond to the idea of hyphenation by asking what happens at the second generation, when Mr. A-B marries Ms. C-D. By explaining simply how biphenation could work—and where applicable, how the state supports it through facilitative defaults—a state might expand spouses' decision sets.

Relatedly, the state could supply data about the prospects for certain naming choices so people knew how many women who change their names eventually change them back, either because they change their minds or because they get divorced. Relevant information could also include the number of women who keep their names and then eventually change them, and how many children get their father's surname, even if their mother keeps her name. Of course, the latter sort of information—about conventional rather than unconventional practices—could backfire, as it could help create or reinforce the cascades that support existing social conventions.³¹⁵

³¹³ See notes 232–35 and accompanying text (describing telephone conversations with various states' SSA office clerks).

³¹⁴ See Kelman, Rottenstreich, and Tversky, 25 J Legal Stud at 310 (cited in note 255); note 255 and accompanying text (discussing work on comparison and contrast effects).

³¹⁵ Any data would also need to be chosen carefully—and carefully described—since the valence of the information might affect its reception. See note 289 and accompanying text (noting that the mere measurement effect may be reversed in the face of negative attitudes to the activity in question). For instance, one might worry about negative effects of presenting data about men tending to have negative feelings about their wives' decisions not to become Mrs. His Name. See note 54 and accompanying text.

3. Providing choosers with concrete examples.

Third, the state could provide examples of people who have made unconventional choices. The principle of *social proof* suggests that people are strongly influenced by what they perceive other people to be doing.³¹⁶ If people don't know of others who have made less conventional naming choices, then simply providing information that such people exist might shift behavior. Which examples, and how many, could affect the potential for effects. For instance, the examples of unconventional namers could be of famous people—such as the mayor of Los Angeles mentioned earlier for having created a merged name of Villaraigosa—or Angelina Jolie and Brad Pitt's children, who bear the surname Jolie-Pitt. But people are more influenced by the behavior of those they deem similar to themselves,³¹⁷ so stories of Everymen and Everywomen might be more effective. Data also suggest that more examples are likely to have a greater effect than one or two.³¹⁸ So a significant number of examples from diverse populations might have the most potential to affect choices.

As with the information about options, the state could try to shape choices by presenting *only* information about unconventional practices. One might expect, though, greater resistance (of the Orwell-effect type) because this approach might seem too obviously trying to steer choices away from existing conventions.³¹⁹ Thus, providing examples of both conventional and unconventional options might be more effective. Since the conventional choices are already well known, though, presenting the unconventional options even alongside the conventional ones could plausibly have the social proof effect.

4. Providing choosers with individually tailored information.

Finally, the state could supply information about what the marrying couple's names would look like in various combinations. Research suggests that people are sometimes more likely to do things that they picture themselves doing, as discussed earlier. As we know, young girls often picture themselves with their husband's name; boys and men may picture a woman bearing their name. The state could possibly level the imaginative playing field a bit by, for example, generating for couples what their name would look like hyphenated, and how biphenation could work in their family. (The success of this effort would likely depend, though, on whether the couple had a positive or nega-

³¹⁶ See Robert B. Cialdini, *Influence* 116 (Morrow 1993).

³¹⁷ See id at 142.

³¹⁸ See id at 118.

³¹⁹ See note 280 and accompanying text.

tive attitude to that imagined activity.³²⁰) This idea overlaps with the suggestions of switching the default to something normative or facilitative, discussed earlier. But this intervention is less intrusive in a sense, as it involves only providing information, rather than supplying a rule that kicks in unless parties say otherwise.

A cautionary note is in order here: framing efforts have the potential to backfire. As noted earlier, mere measurement effects—that is, increases in behavior merely from being asked a question about intentions—have been shown to reverse in response to questions about undesirable behaviors.³²¹ Thus, the decisionmakers' attitudes to the activity presented—such as hyphenation—may affect whether being asked whether they would do the thing makes them more, or possibly less, likely to do it.

The tone in which any such information is presented may well be important.³²² In light of the tendency of many desk clerks to spontaneously express negative views about unconventional naming choices—when speaking to people considering unconventional naming choices—it is possible that providing informational frames about unconventional choices in a more positive tone could be a useful corrective.

D. Time Matters: The Timing of Frames

Framing rules also include timing rules: when does the state ask the question, and when does it provide the information that frames the question?

For instance, informational frames could be provided through the marriage license application process, or at some other time in a couple's, or a person's, life. A state could have framing rules that require information about different marital options to be supplied a certain number of days prior to the issuance of the license; in states that have waiting periods or counseling requirements for marriage, such a rule would fit easily within the existing scheme.³²³ The information could also be separated from the marriage process altogether. For instance, a state's framing rules could require high school home economics classes to supply information on the marital naming laws, alternatives, and processes.

³²⁰ See note 289 and accompanying text.

³²¹ See *id.*

³²² See note 315. Whether the tone of the questioner affects the perceived valence of the activity and thus the mere measurement effect is an interesting empirical question.

³²³ Twenty-six states require a waiting period, ranging from one to ten days, between the application and reception of a marriage license. National Conference of State Legislators, Marriage Waiting Periods, online at <http://www.ncsl.org/programs/cyt/waitperiod.htm> (visited July 8, 2007).

In addition, the actual question of what couples want to do with their names could be divorced from the time of applying for the marriage license. Much public attention, and much feeling, surrounds the moment of marrying. Between social pressure and bounded rationality, this might be less than an ideal time to choose one's name.³²⁴

Perhaps people could be asked to make a marital naming choice (or even merely to predict one) well before the time of marriage. Individuals could be asked to precommit to an individual default—that is, a person could be asked when young, say in college, what default rule she would like to apply to her marital naming decision.³²⁵ (We might call these self-made defaults.) She wouldn't be precommitting herself to a rule she couldn't alter; she could always change her mind. But unless she did change her mind, the default rule she set earlier would apply.³²⁶ Moreover, any informational frames supplied during preadulthood, such as in school, could also help inform the naming choices of those who never formalize their relationships with the state—such as the same-sex couples who currently do not have the option of state marriage,³²⁷ as well as the many different-sex couples who choose not to marry.

Alternatively, the marital naming question could be asked later, after the drama and emotional intensity of the marriage moment is over. The state could invite people to choose their marital names at some later point, say, one year after marriage.³²⁸ The postmarriage name time could operate as a mandatory waiting period, a default naming-decision time, or a decision-reversal period (akin to those imposed on purchases from door-to-door salesmen).³²⁹ The idea would be,

³²⁴ See Brian H. Bix, *Choice of Law and Marriage: A Proposal*, 36 Fam L Q 255, 270 (2002) (recognizing that "the problem of bounded rationality might be particularly important for parties' bargaining about marriage"). See also George Loewenstein, *Emotions in Economic Theory and Economic Behavior*, 90 Am Econ Rev 426, 430 (2000) (discussing the effects of hot states on decisionmaking).

³²⁵ As noted earlier, college students surveyed about their marital-name expectations seem to predict more egalitarian choices than the average population's actual marital-naming choices, suggesting that self-made defaults set at college age might be more egalitarian. See Part II.B.

³²⁶ This might have an effect through the general stickiness of defaults, but also through a kind of self-generated validity whereby the earlier thinking on the subject influenced the later decision. See Jack M. Feldman and John G. Lynch, *Self-Generated Validity and Other Effects of Measurement on Belief, Attitude, Intention, and Behavior*, 73 J Applied Psych 421, 421 (1988). The timing of the earlier question could affect the likelihood of any influence on the later decision. See *id.*

³²⁷ See Part II.A.2 (discussing name changes by same-sex couples).

³²⁸ For the majority of states, which do not invite a naming decision as part of the marriage license application process, a waiting period of sorts is already imposed, though it does nothing active to encourage waiting until a "cooler" period.

³²⁹ See Camerer, et al, 151 U Pa L Rev at 1238–47 (cited in note 178) (discussing mandatory cooling-off periods and decision-reversal periods).

however gently or aggressively, to push naming choices to a time of less emotion and less public scrutiny.³³⁰

E. Whose Frame: Different Framing Entities

This discussion has focused on a state's framing rules for marital names, but various private as well as public entities can frame the choices we make. Unlike legal default rules, menus, or altering rules, frames are not the exclusive purview of the state. Private advertisements, education, and media could all contribute to framing decisions in a choice regime. Compared to any governmental effort, we might plausibly expect more effects on practices if Angelina Jolie and Brad Pitt made a short film—or a major romantic picture—about their love, which either explained or romanticized (or both) their decision to hyphenate their children's names.

F. Beyond Names: Implications for Other Areas of Law

The idea of framing rules applies to many areas of law. For instance, *Miranda* warnings are legally mandated decisional frames: the government must provide you with certain information before you choose whether to speak.³³¹ Rules about what you must be told before making a knowing and voluntary waiver of rights, or rules about what jurors must be told before deciding on a verdict, or rules in some states about what information can or cannot be put on a ballot and in what order, are all examples of framing rules.³³²

Framing rules may also comprise governmental rules about what private parties must tell one another before making legally salient decisions: for instance, consumer protection laws that require certain disclosures by sellers, or landlord-tenant laws that require landlords to disclose the presence of lead or other aspects of the property. These disclosures sometimes involve the private parties' speaking in their own words, but sometimes the government requires specific words to be spoken, or even issues documents or labels that must be presented in the designated form—such as the surgeon general's warnings on cigarettes. Similarly, the unconscionability doctrine in contract law might be thought of as a kind of interrogative framing rule, requiring parties making certain kinds of deals (especially if the deal is substan-

³³⁰ Of course it's an empirical question what effect this would have. It might lead to more Keeping for women, for instance, but less openness to biphenation by men as well as women.

³³¹ See generally *Miranda v Arizona*, 384 US 436 (1966).

³³² The existing framing rules that come most readily to mind are informational frames, some useful examples of which can be found in Camerer, et al, 151 U Pa L Rev at 1230–38 (cited in note 178).

tively less fair to one party) to be sure the contract is procedurally generous—for example, that the contestable provisions are underlined or in bold or at least not in small or incomprehensible writing.

Bringing framing rules into focus should help us to see at least three things. First, frames are important, as indicated implicitly by the fact that we already have framing rules in a range of areas—some of them a matter of constitutional significance—as well as by the growing literature documenting the effect of decisional frames in a range of areas. Be they informational frames (such as jury instructions as to points of law), interrogative frames (such as rules about how census takers can ask questions), or embedded frames (such as rules about the size of typeface in which certain contractual provisions are written), framing rules can address ignorance of law, as well as individual choosers' susceptibility to the descriptive and normative suggestions implicit in the way questions are asked of them.

Second, framing rules need to be enforced, even though they're merely words and are thus sometimes neglected by those charged with following them. The penalties for government's neglect of frames are apparent in some contexts, such as the *Miranda* warnings, but not so in others, such as some New York clerks' failure to tell marriage license applicants their complete naming options despite the statute that requires the naming options to be printed on the marriage license application form.³³³

Finally, this discussion should help us to see places where we need framing rules but do not have them yet. Framing rules are a tool for affecting behavior, and one that may seem less interventionist than mandating behavior or even than changing the underlying substantive options or switching the default rule. For instance, organ donation rates would presumably rise, even if the default were left as an opt-in system, if citizens' choices whether to opt in were framed by certain information or if the question were asked in one way rather than another.³³⁴ Many other examples may be imagined.

VII. TWO POSSIBLE REFORMS

This Article concludes with a very brief discussion of two alternative constructive steps a state could take. To include this is not to evince any conviction that a state legislature would take action on this

³³³ See notes 343–44 and accompanying text.

³³⁴ See Johnson, Steffel, and Goldstein, 24 *Health Psych* at S19 (cited in note 178). See generally Eric J. Johnson, Steven Bellman, and Gerald L. Lohse, *Defaults, Framing and Privacy: Why Opting In–Opting Out*, 13 *Marketing Letters* 5 (2002) (demonstrating that both frames and defaults produce independent effects on revealed preferences for further contact from a website).

issue. Among other things, data indicating that the number of women making unconventional naming choices has decreased since the 1980s suggest that this is not a moment when change is likely to occur.³³⁵

That said, the recent lawsuit filed by the ACLU to challenge a man's difficulty changing his name in Los Angeles County has drawn attention to the issue of marital names—and to the aspect of the issue that I have highlighted as particularly naturalized and thus problematic: the assumption that it is women's, not men's, names that change. Such public attention to the issue, even if met by some derision, may suggest the potential going forward for a new recognition of the ways the Mrs. His Name convention hinders *men*—in their own naming choices and in their nominal lineage if they have only daughters.³³⁶ As discussed here, there is an alternative practice—biphenation—that could preserve many of the benefits of the current regime, with few new costs, while removing some of the losses for both women and men of the intergenerational discontinuities of the Mrs. His Name convention. If people better understood that there is a possible convention with these features, perhaps change is not impossible.

As discussed above, it is not clear that law can do much in this area. The status quo has effectively been a kind of experiment—with the minoritarian default for women of Keeping—and we've seen that most women nonetheless go through the trouble of becoming Mrs. His Name. This suggests the convention is strong and the law is relatively weak. However, the Keeping default does nothing to target the convention for men's names; if anything, by extending the Keeping default, the current approach further naturalizes the convention with regard to men. Perhaps a law that focuses on men's names or both names could do more. We do not know what the tipping point would be for overcoming the collective action problem associated with this convention, so perhaps a little movement in a new direction could go further than expected. Regardless, even if the impact may be small, the state has to set the default in some way, and particularly in light of the state's role in a past mandatory regime of convention and law, the state should choose to set the default in the way that encourages—rather than discourages—awareness and consideration of egalitarian alternatives to the formerly mandatory regime.

³³⁵ See note 85 and accompanying text.

³³⁶ See, for example, Jo Johnson, *Mum Is Finally the Word in France*, Financial Times 11 (Jan 8, 2005) (noting that the lawsuit that led to France's new law permitting a mother to pass her name to her children "was instigated, ironically, by a male député with three daughters, who feared seeing his family name die out"). See also note 64 and accompanying text (citing articles about men who were frustrated in trying to change their names).

The first proposal is simply that states adopt a statute modeled on New York's current law, which combines framing rules with a kind of forced choosing. This would inform deciders and desk clerks that the convention is not law, and help to put egalitarian alternatives on a more equal footing, in terms of transaction costs, with Mrs. His Name.

The second, less modest, proposal is that states adopt a default rule of biphenation coupled with framing rules that provide information about the law and the way biphenation works. As in the first proposal, the framing rules would help to make sure that deciders and desk clerks know the law and legal options. It would go further, though, in calling attention to biphenation and creating the possibility that biphenation might, in some cases, stick.

A. The New York Model: Framing Rules and Forced Choosing

New York provides a useful model for a regime that goes some way towards using framing rules to overcome misleading desk-clerk law and using forced choosing to level the playing field between Mrs. His Name and other options. New York's law would be a useful reform in other states, with a few modifications.

Inspired by concerns about widespread misunderstanding of the law of marital names, New York Domestic Relations Law § 15, discussed earlier, requires marriage license application forms to inform prospective spouses that neither of them must change their names, that either can, and that there are a range of naming options available to them.³³⁷ The options are Keeping for both, each spouse taking the other's (current or former) name, hyphenating for one or both, or merging of all or part of their names.³³⁸

The law creates a form of forced choosing by inviting each spouse to state how his or her postmarital name will be printed on the marriage license.³³⁹ By providing the spouses with the option of a new legal name through this process, and providing documentation of that name through the marriage license, the law helps to equalize the costs im-

³³⁷ See note 283 (quoting the language of the statute).

³³⁸ See id.

³³⁹ New York's regime in practice is not technically forced choosing. Some localities go so far as to say "optional" on the line inviting postmarital names (for example, Mendon County), and clerks contacted in several jurisdictions said that parties aren't forced to fill in that line. Clerks in Lake George, Seneca Falls, and Mendon County all reported that if parties leave that line blank, their names remain as their premarital names on the marriage license. Telephone conversations (Feb 1, 2007) (Andrew Brantingham). In that sense, the default is, as in other places, Keeping. Nonetheless, the line inviting people to state their postmarital names forces choice in the sense of provoking a choice, rather than never asking the question at all.

Note that we might also understand New York's regime as a menu regime, in that there is a specified range of options available to people by statute.

posed on changes to unconventional naming options.³⁴⁰ By posing the question about postmarital names to both spouses, the law also invites recognition and deliberation of that option for the groom as well as the bride.

New York's law also serves as an informational and contextual framing rule by requiring that the choosers' decision be framed with certain facts about the law. This may help to shape choices by providing accurate information and indicating that the legal options are wider than the social conventions. It may also help to overcome or avoid misleading desk-clerk law by providing the information to choosers and to desk clerks in clear written form.

The New York statute provides a useful model of a very modest change to existing law. The model could be improved in several minor ways, however. First, the law should require that forms provide egalitarian contextual frames.³⁴¹ That is, information about the bride and groom, and their parents, should be asked in ways that do not subtly assert inegalitarian social conventions. For instance, rather than asking for the "father's name" and the "mother's maiden name," the form should ask for each parent's "name" and "birth name (if different)."³⁴²

Second, the form of the frames should be altered to increase the chances of overcoming problematic desk-clerk law. Despite New York's framing rules, calls to New York clerks showed that even New York desk clerks do not always report the law accurately. Despite the fact that merged names are a statutory option, a town clerk in Seneca Falls stated, in response to a query about merged names, that the caller should call Albany to check if that's an option.³⁴³ Even more surprisingly, a DMV clerk indicated in an email that a court order would be required for a merged name or for Mr. Her Name.³⁴⁴ So the law printed on the form itself is apparently insufficient to eliminate all flawed desk-clerk law at the level of local and state agencies.

³⁴⁰ See Part IV (discussing the greater costs that appear to be imposed, both formally and informally, on unconventional name-change options, relative to Mrs. His Name).

³⁴¹ See Part VI.

³⁴² The form for the town of Southampton, New York, for instance, asks for parents' name information in the former way. See Application for Marriage License, Town of Southampton, New York, online at <http://www.town.southampton.ny.us/deptdirectorygallery/clerk/marriage.pdf> (visited July 8, 2007).

³⁴³ Telephone conversation with Clerk, Seneca Falls, New York, Town Clerk's Office (June 21, 2006).

³⁴⁴ An email from the New York DMV on June 22, 2006, stated: "With a marriage certificate, you can have your last names hyphenated or you can change your last name to your husband's last name. If you want any other kind of change, you will need to get court ordered forms for a name change." This was in response to a direct question about merged names and Mr. Her Name, as well as hyphenation.

That said, New York was one of only two states in which a clerk read the applicable statute over the phone in response to questions, suggesting that some desk clerks were influenced by the framing rule.³⁴⁵ One possible improvement would be to present the information in a prominent way. For instance, the form and placement of the relevant information on the marriage license application form could take a lesson from unconscionability doctrine—by favoring information presented in large rather than small print, or otherwise highlighted through prominent placement or bold or underlining. More aggressively, the statute could require desk clerks to read the statute aloud in all cases or, for a possibly less tedious and less costly alternative, to point all applicants to the relevant language about their name-change options. This would involve the desk clerk in the affirmative task of informing the public about this aspect of the law, while also repeatedly calling it to the attention of the clerk.

A further step might be to require applicants to check a box indicating that they had read the relevant information about names. This does not ensure compliance—people often check boxes saying they have read things when they have not—but it does call attention to that information. The desk clerks who read out the statute here did so in response to queries about unconventional naming options. Requiring clerks to direct all applicants to the rules on names, and requiring applicants to check a box saying they had read the material, would help to ensure that all applicants—not just those already seeking unconventional naming possibilities and thus more likely to be informed about them already—were alerted to the information.

Finally, the law might require that the frame indicate its status as law. Most simply, the marriage license application could cite the statutory authority below the statement of the naming options. This slight change would have three aims. First, it could reassure the hesitant or skeptical desk clerk that an option that might sound odd or unlikely (such as merging) is not just mentioned on the form as a local possibility but is actually required by statute. (This might have helped with the clerk who advised the caller to call Albany to confirm if merging is possible.) Second, it could enhance the authority of the applicant

³⁴⁵ Telephone conversation with Clerk, Mendon County, New York (June 21, 2006) (Responding to a query about alternative naming options, the clerk said, "I think that is written up on the form. If you'll hold, I'll get it and read it to you," and then, after reading the form, saying, "[b]asically, whatever name you have ever gone by in the past is an option in any combination. Or you can just leave your name the way it is."); telephone conversation with Clerk, Lake George, New York (June 21, 2006) (responding to the alternative naming options query by saying "I'll tell you what the form says," reading the language on the form, and then saying, "[s]o those are your options").

seeking to adopt an unconventional option, if she meets a recalcitrant or disbelieving desk clerk. (Showing the marriage license application form—with the statutory citation—to the DMV clerk might have helped persuade him or her that merging was an option.) That said, it is hard to know what could help to overcome the influence of the type of clerk who makes up rules in defiance of the form just to “give you a hard time.”³⁴⁶ Though it would raise implementation costs, perhaps forms could tell applicants whom to contact with questions or concerns about the procedure or their options. Lastly, citing the law on the form would suggest that the weight of the law is behind that choice, which might reassure prospective applicants (or their skeptical partners) that others have made this choice and that some people in authority approve of it. This might prompt choosers to take the options more seriously or to feel less burdened by the social pressure favoring conventional choices.

B. A More Ambitious Model: Framing Rules and the Biphenation Default

Because of the robustness of the Mrs. His Name convention, stronger steps than forced choosing might be in order. Specifically, perhaps the “iron law of default inertia,” though weak for women when the default is Keeping, could have some impact here.³⁴⁷ A more aggressive proposal, then, would combine a default rule of hyphenation (and biphenation, where prospective spouses already have hyphenated names) with framing rules not only setting out the naming options but also explaining the practice and uses of biphenation. Before proceeding, I should note that a truly aggressive proposal would involve mandatory rules, which are not uncommon for names outside the U.S. But given the personal and constitutive nature of names, at least to individuals in this country, I bracket this possibility entirely here.

Under this proposal, a default of hyphenation (and biphenation) would be both a normative default (a default that aims to encourage a certain solution) and a facilitative default (a default that aims to solve practical problems involved in adopting that solution).³⁴⁸ It would be normative in that it would aim to encourage people to see that that

³⁴⁶ See text accompanying note 236.

³⁴⁷ See Ayres, 73 U Chi L Rev at 5 (cited in note 178). See Part IV for a discussion of possible reasons why Keeping is apparently a nonsticky default for women (though very sticky for men).

³⁴⁸ See Part V. If more people have hyphenated names, then the default would more frequently require the principles of biphenation, discussed earlier as an approach to merging the names of individuals who each have hyphenated names already.

solution is feasible, to realize that others do it, and to adopt it.³⁴⁹ It would be facilitative in that it would supply a default selection and ordering of the names.

As a practical matter, since relatively few individuals currently have hyphenated names before they marry, the principal effect of this approach would be to supply a simple default of hyphenated names.³⁵⁰ The process for supplying the hyphenation default would be easiest in a computerized process. But since most if not all localities still use paper forms, the process at present would be this. After filling in their names and other details, the form would explain to them that, unless they say otherwise, their family name upon marriage will become their two names hyphenated. (In a computerized system, the order could be randomly generated; with a paper form, the clerk could flip a coin.) If either or both of them already have hyphenated names, the form could direct them to a separate section. This biphenation section of the form would explain that, if their names are already hyphenated, their default family name will comprise one of each of their surnames, randomly selected.³⁵¹

After explaining how their default name will be generated from their premarital names, the form can then provide a separate box to check if they reject the default name. If they check that box, then they

³⁴⁹ See text accompanying note 180 (discussing, as reasons that defaults sometimes stick, loss aversion, laziness, and social influence of others' judgments or practices).

³⁵⁰ Note here that a default of hyphenation (and biphenation) goes further even than the imagined biphenation convention requires. Remember that one of the advantages of the biphenation scheme is that the scheme is indifferent as between parents' choosing to adopt the new biphenated family name and parents' choosing to keep their premarital names and only share partial name continuity with any children through the children's biphenated names. To encourage awareness and uptake of the alternative convention, however, the legal default would opt for the spouses to hyphenate (or biphenate) their own names, in order to demonstrate what the hyphenated (or biphenated version) would look like. Moreover, as noted earlier, until or unless there is more uptake of hyphenated names more generally, children may appreciate that their parents are also willing to share the burden of additional transaction costs imposed on those with hyphenated names in which hyphens are uncommon. In addition, similar defaults could be imagined in the context of naming children, an area more commonly regulated explicitly by statute. Similar principles could be applied there.

³⁵¹ This would be simplest if the marriage license application process were computerized; in the absence of such a system, a clerk could simply flip a coin three times (or use a number generator to simulate a coin flip) or draw the names out of a hat (or similar). See text accompanying note 163 (describing the coin flipping process). While tedious, this might also have salutary effects on desk-clerk law by involving the clerk in the default-generating process, such that he or she would have to learn what the law actually was and take an active part in its implementation. Compare Kahan, 67 U Chi L Rev at 630, 641–42 (cited in note 241) (suggesting that legal efforts to shift sticky norms may be more successful if key decisionmakers have a neutral investment in others' compliance with the new norm). On the other hand, clerks might resent having to go to the trouble, inspiring new reasons for negative desk-clerk law making. All things considered, a computerized scheme would seem best—and, it seems safe to assume, is likely to precede in time any possible adoption of a biphenation default.

need to write out the name each of them will bear post marriage. A line on the form can direct them to an instruction sheet stating what naming options are available to them.

The instruction sheet will be dictated by the *framing rules* portion of the proposal. As with the New York model, the instruction sheet will explain to them that neither of them has to change their name, that either can, and what their naming options are. In addition, for the biphenation proposal, the instruction sheet would state the reasons that hyphenation is the default,³⁵² and explain clearly how hyphenation works, as well as what happens to names at the next generation under the biphenation principle. Given that everyone's question about hyphenation is "What happens when two hyphenators marry?," this might best be represented in the form of "Frequently Asked Questions."

Ideally, a biphenation default proposal at the clerks' office would be accompanied by state rules or policies dictating that government entities facilitate the use of hyphenated names more generally. That means forms that include enough blanks to accommodate hyphenated names, and the ability to enter a hyphen on computer-generated systems. A first step of this kind at the national level would be reforming the Social Security Administration's system for printing social security cards so that hyphens can appear on them.³⁵³ Under the framing rules of the system, the forms or clerks would be required to tell the deciders that state law mandates that all public entities ease the use of hyphenated names in these ways.³⁵⁴

One concern about a hyphenation (and biphenation) default would be that it could generate resistance in the form of Lessig's Orwell effect. This is certainly an advantage of the forced choosing alternative in the New York proposal, but perhaps this could be overcome by framing words making clear that deciders do get to choose—and that the hyphenation (and biphenation) defaults simply facilitate making those particular choices, if choosers wish to adopt them.

CONCLUSION

Naming is a peculiar topic, because names are both trivial and foundational. They are typically chosen by others and are thus distinct from the self, and yet they are a crucial point of connection between

³⁵² See the end of Part III.B for a list.

³⁵³ Of course, private entities also create administrative problems of this sort, but it is a more difficult question whether private entities should be required to remedy these problems.

³⁵⁴ One might worry that even mentioning the difficulties with forms could make such difficulties salient at the decisionmaking moment; one would have to weigh this consideration in deciding whether to have the framing rules require mention of this.

our identity and the outside world. The government has historically been involved in forcing women to participate in an inegalitarian practice of naming on marriage. Now women have a choice, as do men, but for a variety of reasons the existing choice regime seems inadequate and cannot be described as one of unconstrained choice.

First, discussions of marital names always emphasize women's choices and the women's right to choose their names, but women aren't given real choices so long as there's typically no chance that men will change their names in any way. If names were truly a matter of indifference, one imagines we would all know at least one man who had taken his wife's name. Instead, women, and only women, effectively have no naming option involving continuity of names across their past, present, and future. The fact that men will almost always keep their name thus imposes a significant limitation on women's freedom of choice.

Second, our current choice regime produces a widespread practice of women taking their husbands' names at marriage and, even more commonly, children being given their fathers' surnames. For those concerned about creating an equal playing field between boys and girls, there would seem something troubling about this. Among other reasons, the world must look very different to the child who grows up thinking his name will be his no matter what, as opposed to the child who grows up thinking she'll lose her name if she's lucky enough to be loved. And so while adults should be able to make whatever choices they want about their names, we perhaps should worry about what we're teaching our children about themselves through our naming practices, about which children have no say.

Third, there exists an appealing alternative convention that few people know about, much less adopt: biphenation. If everyone hyphenated, and then the next generation simply kept one of each person's prior names and hyphenated those, then both mothers and fathers could share full or partial names with their own parents, their premarital selves, their spouses, and their children. We'd have more information about genealogy and family connections, because we'd have information about the male line and the female line. (The system works equally well if the parents don't change their own names at marriage, but just use this biphenation approach with their children's names.)

Fourth, under our current convention, whether men pass on their name depends on whether they have sons, and whether their sons have sons. Fathers might prefer to have a chance of passing on their name through either sons or daughters. This would make things fairer between those men who have sons and those who have daughters, and might well lead to more equal treatment, on some level, of daughters.

Having previously participated in a mandatory regime of inegalitarian naming practices, states should design the default regimes for marital names to try to promote a sustainable egalitarian social practice, such as hyphenated and biphenated names. For instance, the default could be set to facilitate those options by supplying a randomly generated version of the spouses' names hyphenated (or biphenated, where either or both already have hyphenated names). Menus and altering rules might also be used to encourage active choices and egalitarian values. Presenting some options and not others in a menu, with a careful attention to the order of the options, might encourage preferred options. Or the hierarchy created by our current altering rules—which makes Mrs. His Name easier than other name-change options including hyphenation—could be reversed, to try to ease the path of those who make the unconventional, egalitarian option.

Most importantly, states should pay closer attention to the frames they create. The way a question is asked matters. States should thus be careful about what words are used by forms and clerks to ask questions about marital names; about the layout and surrounding questions on marriage license application forms and administrative interactions; and about the information provided to marrying couples. New York has taken a modest step in the right direction by requiring that marriage license applications forms tell marrying parties that neither of them must change his or her name, that either can change his or her name, and that various name-change options are available and facilitated by the state. Bolder and more creative steps—such as the biphenation default described here—can be imagined and should be tried. Going forward, states should design framing rules, along with other aspects of our choice regime for marital names, to help rather than hinder parties in overcoming the weight of history and social norms in order to choose greater equality in the highly personal realm of names.

More broadly, this analysis invites us to think about the ways that states set defaults and frame choices in a wide range of arenas that permit individual choice. In particular, when states have historically forced certain decisions through mandatory regimes that are inegalitarian or even unconstitutional, it is not enough that states putatively extricate themselves from those domains and leave those decisions to individual choice. Further empirical work remains to be done in this area, but given what we already know about the effects of defaults and frames, it is clear that states cannot get out of the business of shaping choices. Even where individuals are the ultimate decisionmakers, the state has to set defaults in some way; it has to frame choices somehow. And so states should set defaults and frame individual decisions—particularly in realms like marital names where there is a history of inegalitarian state practices—in ways that promote egalitarian choices.

