

A NAME OF ONE'S OWN: GENDER AND SYMBOLIC LEGAL PERSONHOOD IN THE EUROPEAN COURT OF HUMAN RIGHTS

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"[I]t is always within representation that we recognise ourselves."

Madan Sarup¹

"'Become what you are': that is the principle behind the performative magic of all acts of institution. The essence assigned through naming and investiture is, literally, a *fatum*"

Pierre Bourdieu²

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¹ MADAN SARUP, *IDENTITY, CULTURE, AND THE POSTMODERN WORLD* 47 (1996).

² PIERRE BOURDIEU, *LANGUAGE, AND SYMBOLIC POWER* 122 (John B. Thompson ed., Gino Raymond & Matthew Adamson trans., 1991). *Fatum* is Latin for fate or destiny. See G.H. NALL, *MACMILLAN'S ELEMENTARY LATIN-ENGLISH DICTIONARY* 154 (1897).

INTRODUCTION

A paragraph from a late nineteenth-century English language usage guidebook discusses the appropriate prepositions of the verb “to marry”:

Properly speaking, a man is not married to a woman, or married with her; nor are a man and a woman married with each other. The woman is married to the man. It is her name that is lost in his, not his in hers; she becomes a member of his family, not he of hers; it is her life that is merged, or supposed to be merged, in his, not his in hers; she follows his fortunes, and takes his station, not he hers [W]e do not speak of tying a ship to a boat, but a boat to a ship. And so long, at least, as man is the larger, the stronger, the more individually important, as long as woman generally lives in her husband’s house and bears his name—still more should she not bear his name, [sic]—it is the woman who is married to the man.³

In a morally inflected didactic mode typical of its genre and era, this excerpt couches grammatical rules in the language of social propriety, providing a vivid demonstration of the agitation potential of disturbing the language status quo.

The views expressed in the picturesque account just quoted are not as anachronistic as readers might prefer to think. As this Article will show, contemporary law in some European countries still reflects a commitment to similar notions of gender relations.

Consider this paragraph from a 1998 ruling by the Turkish Constitutional Court, explaining why it was legitimate to deny married women the right to retain their premarital surname:

The rule according to which married women bear their husband’s name derives from certain social realities and is the result of the codification of certain customs that have formed over centuries in Turkish society. According to the thinking behind family law, the purpose of the rule is to protect women, who are of a more delicate nature than men, strengthen family bonds, nurture the prosperity of the marriage, and preclude bicephalous authority within the same family.⁴

³ R.G. WHITE, WORDS AND THEIR USES 139–40 (Boston, Houghton Mifflin 1886) cited in Ann Bodine, *Androcentrism in Prescriptive Grammar: Singular ‘They’, Sex-Indefinite ‘He’, and ‘He or She’*, in THE FEMINIST CRITIQUE OF LANGUAGE 124, 131–32 (Deborah Cameron ed., 2d ed. 1998).

⁴ Ünel Tekeli v. Turkey, App. No. 29865/96, Eur. Ct. H.R. (2004), <http://www.echr.coe.int/echr>. All ECHR decisions cited in this Article are available at <http://www.echr.coe.int/echr>. The European Court of Human Rights denied Turkey’s position and granted the Applicant the right to return to her pre-marital surname (a name by which she was recognized professionally), reasoning that “society may reasonably be expected to toler-

This quotation illustrates vividly how name laws participate in shaping substantive legal rights (such as personal status and gender equality within the family) and in symbolically sustaining prevailing notions about gender roles.⁵

Names are important both to the individual and to the state. Thus, it is important to understand their intertwined role in both shaping the private sense of self and identity and in reflecting and sustaining social institutions such as the state, family, and gender. The tension between the legal triviality and marginality of names on the one hand, and their legal significance on the other hand, lies at the heart of this Article, which seeks to unravel the function of names in the legal lives of their bearers and within the rule of law.

This Article studies more than three decades of surname adjudication in the European Court of Human Rights ("ECHR"). The cases analyzed here examine the legitimacy, in human rights terms, of state regulation of naming practices that pertain to gender and family status.⁶ Cases arrive at the ECHR as a last judicial resort, after applicants have exhausted their legal venues in their home countries. ECHR rulings have the power to offer remedies that individual applicants had not received in their country, thus binding domestic law.⁷

ate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the name they have chosen." *Id.*

⁵ It should be noted from the outset that the connection between surname practices and gender equality is culturally contingent. It is impossible to assess certain naming practices outside of a specific social backdrop, because the same name practice (for example, of wives taking their husbands' surnames) could carry different social meaning depending on the context. For example, until 1872, Japanese women were not allowed to adopt their husbands' surnames, "because it was considered important to preserve information regarding the mother's contribution to the 'blood' of her husband's offspring." Taimie L. Bryant, *For the Sake of the Country, for the Sake of the Family: The Oppressive Impact of Family Registration on Women in Japan*, in GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER 234, 241 (Adrien Katherine Wing ed., 2000) (citation omitted). Against this backdrop, allowing women to take their husbands' surnames was considered an improvement in women's status, because it stressed the importance of the present generation in the house, and the integration of the wife as a member of her husband's family. It is also impossible to conclude flatly that women's retention of their birth surnames in marriage attests to a more gender egalitarian society. Korean men and women do not change their names in marriage, but their society is still highly patriarchal. See Kif Augustine-Adams, *The Beginning of Wisdom is to Call Things by Their Right Names*, 7 S. CAL. REV. L. & WOMEN'S STUD. 1, 26 (1997). It is possible to say, however, that in contemporary western societies a woman's retention of her surname does carry egalitarian meanings. Social science data reviewed below suggests that the values attached to women's retention of their premarital names include autonomy, independence, equality, and professional success. See *infra* note 19 and accompanying text.

⁶ My attention was first drawn to this case law because of a study by Aeyal Gross. I am indebted to this study for its important work in delineating this body of cases as a coherent adjudication. See Aeyal M. Gross, *Rights and Normalization: A Critical Study of European Human Rights Case Law on the Choice and Change of Names*, 9 HARV. HUM. RTS. J. 269, 270 (1996).

⁷ On the relationship between ECHR rulings and domestic law of the European states, see J. G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 12–16, 102–06 (2d ed. 1993); see also CLARE OVEY & ROBIN WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 14–19 (3d ed. 2002) (explaining

Four factors make the ECHR case law particularly interesting for examination. First, all of the cases studied here originated in civil law countries. Unlike the common law, civil law has a strict and highly regulated approach to name-giving and name-changing, a fact that results in litigation of cases that would not reach courts in contemporary common law countries.⁸ Second, the countries in question have diverse naming systems (for example, in some the wife takes the husband's name, while in others, each partner takes a different surname, composed of his or her paternal grandparents' names). This diversity allows recognizing consistent principles that appear in domestic legal systems, despite the variety of naming practices. Third, in offering remedies to citizens of Europe, the ECHR operates within the framework of human rights—its authority and substantive law are based on the European Convention on Human Rights and Fundamental Freedoms (hereinafter the Convention).⁹ The universal characteristics of human rights principles allow

how the Convention's reach into state law is based on the principles of solidarity and subsidiarity).

⁸ Common law and civil law traditions differ significantly in their approach to names. Whereas in common law, names are for the most part not constitutive of legal status, in civil law, a surname is not just a matter of convention or fact, but "a matter of law and often meticulously regulated by statute." Walter Pintens & Michael R. Will, *Names*, in 4 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 45, 51 (Mary Ann Glendon ed., 1995). In civil law, a name can establish factual possession of status vis-à-vis another person, i.e., it can establish descent status. *Id.* at 50. In contrast, under common law, to establish a legal name one usually needs to establish social usage, i.e., be able to demonstrate that one is known by that name. *Id.* at 74. Under civil law, registration by the state is both the condition and the origin, the moment of constitution, of one's name. Whereas most common law countries permit a high degree of freedom in name choice and name change, civil law countries adopt very specific naming norms governing everything from what words may be used as names to name changes. *See id.* at 74–77. *See generally* Audrey Guinchard, *Is the Name Property? Comparing the English and the French Evolution*, 1 J. CIV. L. STUD. 21 (2008) (tracing the legal history of the divergence between the two systems, which leads to the French legal view of names as immutable, as having some of the same characteristics of property, and as part of a person's status); Roderick Munday, *The French Law of Surnames: A Study in Rights of Property, Personality, and Privacy*, 6 LEGAL STUD. 79 (1986) (studying the evolution of the French legal approach to surnames as pertaining to privacy and property rights, and to the protection of personality).

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter Convention]. The Convention was formulated by the Council of Europe. It became open to states' signatures in 1950 (entered into force 1953). The procedure for submitting an individual application to the Court changed significantly in 1998. Since the cases discussed in this Article were submitted both before and after the procedural reform, I will describe here both the past and the present procedural framework. Three bodies were set up by the Convention as enforcement mechanisms: the European Commission of Human Rights, the Committee of Ministers, and the European Court of Human Rights, sitting in Strasbourg. Complaints could be submitted by states or individual applicants, but individual claims had to be recognized as acceptable by the signee state before they could be exercised. Complaints were first brought to the Commission for preliminary review and determination of admissibility. If they were found admissible, the Commission transmitted its report to the Committee of Ministers. If the respondent state accepted the jurisdiction of the Court, the Commission (but also any other contracting state concerned) could bring the case before the Court for a final and binding adjudication within three months (individuals were not entitled to bring their cases before the Court).

for an analysis that goes beyond jurisdiction-specific doctrines and that relies on a more general protection of basic rights such as equality and privacy. And fourth, there are no studies published in English about gender and names in continental Europe.¹⁰

This Article discusses the ECHR surname jurisprudence in two analytical strands. The first strand of analysis examines the role of surname laws in constructing gender; it asks how the existing surname laws delineate gender roles and maintain gender distinctions. The second strand explores the modes of judicial refusal to engage in the conversation about language. This refusal is an effective strategy of denying the political nature of the legal subjects' claims about the importance of surnames. This Article attempts to recover the suppressed conversation about the power of signifiers of identity that did not occur in the courtroom, asking what the claims on both sides (the legal subjects on the one hand, and the judges as operating in the name of the law on the other) would be had such a conversation occurred. This Article then asks what it is about signifiers of identity that prevents the law from reacting more responsively to attempts to invoke them as important sites of socio-legal change.

The Article is structured both chronologically and topically. The analysis progresses from early and more basic surname claims at the ECHR to later and more complex ones. Occurring during the 1970s and 1980s, the first applications to the ECHR sought formal and symmetrical equality. Applicants argued that the rules governing women's surnames should be identical to the ones governing men's. In this stage, for example, women fought for the right to retain their premarital name after marriage. In many European countries, the laws governing surnames underwent reform during the 1990s,¹¹ and the new surname rules revoked many of the former distinctions between men and women. These more egalitarian rules raised more com-

Due to significantly growing numbers of applications to the Court since 1980, it was decided to simplify the process of application, and strengthen the judicial character of the system by making it fully compulsory. Protocol no. 11 of 1998 abolished the Committee of Ministers' adjudicative role, and replaced the part-time Court and Commission with a single full-time court. In addition, it opened direct access to individual applicants. Thus, the earlier applications reviewed in this Article went first to the Commission, and the ones submitted after 1998 went directly to the Court. The decisions of both the Court and Commission are written in one of the two official languages, French or English. In analyzing the cases that were initially written in French, I rely on their official translation into English. See INFORMATION DOCUMENT ON THE COURT (1996), http://www.echr.coe.int/NR/rdonlyres/981B9082-45A4-44C6-829A-202A51B94A85/0/ENG_Infodoc.pdf (detailing the history and development of the ECHR); see also MERRILLS, *supra* note 7, at 2–5 (explaining the division of labor between the Commission and the Court); OVEY & WHITE, *supra* note 7, at 6–10 (describing the overview of the structure and roles of the Commission and the Court).

¹⁰ Gross, *supra* note 6, has conducted the only study of which I am aware. His study does not focus on women and is not dedicated exclusively to civil law countries.

¹¹ See, for example, the legal reform in Switzerland described in *Burghartz v. Switzerland*, 280 Eur. Ct. H.R. (ser. A) 19, 29 (1994) (discussed *infra* Part III.B); the legal reform in Spain described in *De La Cierva Osorio De Moscoso v. Spain*, 7 Eur. Ct. H.R. 485, 496 (1999) (discussed *infra* Part IV); and the legal reform in The Netherlands de-

plex and subtle challenges about applying them without resorting to traditional notions of gender and family. For example, if the new law permitted a married couple to take the wife's surname as their family name, the question then arose whether the husband could hyphenate his premarital surname to his post-marriage name.¹² Another new question was whether a couple could name their male offspring with the father's surname, and the female offspring with the mother's surname.¹³

As the analysis progresses, the legal questions become more removed from the basic sex binary, and raise questions not just about sex equality, but also about names as a locus of personhood. For instance, the Court was now asked to determine whether a man who lost his mother could change his surname to her maiden name, as a gesture of commemoration, thereby moving to more complex questions of signifying personhood through surname.¹⁴

Part I provides the theoretical framework for the Article's analysis. As signs, names challenge legal thinking, because signs are (wrongly) perceived as disconnected from and as less important than the "reality" underlying them. This semiotic nature of names enables the legal denial that names have political significance, maintaining that they are unrelated to more substantial or fundamental rights. In fact, the names of legal persons shape their legal personhood, influencing access to rights that are considered more fundamental such as equality and various freedoms.

Part II presents the first generation of cases in which it was claimed that surnames fall within the jurisdiction of the European Court of Human Rights. These cases offer an initial mapping of the repertoire of judicial responses to claims about names. They demonstrate the task facing those wanting to challenge name laws within a rights-governed legal framework. Applicants were required to convince the court that the way in which rights bearers are *named* by the law shapes the scope and content of their legal rights (e.g., the right to vote or the right to private life). They argued that it was impossible to disconnect the access to the "substantive" right (for instance, the right to vote) from the way the right-holder was named in relation to this right.

Part III demonstrates how surname rules, designating men differently than women, delineate, prescribe, and reify gender norms. By entrenching traditional naming conventions, lawmakers guard against what they view as emasculation of men and de-feminization of women. It shows how judicial decisions about surnames become an arena of sanctioning men and women who express disregard for the traditional patriarchal naming system.

scribed in *Bijleveld v. The Netherlands*, App. No. 42973/98, Eur. Ct. H.R. (2000), <http://www.echr.coe.int/echr> (discussed *infra* Part IV).

¹² See *Burghartz*, 280 Eur. Ct. H.R. (ser. A) at 24.

¹³ See *Bijleveld*, App. No. 42973/98, Eur. Ct. H.R. (2000), <http://www.echr.coe.int/echr>.

¹⁴ *K.B. v. The Netherlands*, App. No. 18806/91, Eur. Ct. H.R. (1993), <http://www.echr.coe.int/echr>.

Part IV moves into the more intricate ways in which judicial lawmaking maintains the prevailing modes of representation. It focuses on the short lives of women's surnames and points to recursive interplay between conceptions about gender and allocation of name rights. Since one cannot have a solid grip on a surname if one is a woman, a woman's surname is incapable of doing the work that a man's surname does in establishing presence in culture and history, and if women do not have solid presence in history and public record, then it is harder to see that infringing their name rights damages them. The trope of stability is employed here, to describe how judicial decisions contrast women's interest in surname stability with the stability of the naming rules themselves and choose the latter over the former. This choice, in turn, serves to reify traditional notions of family and gender.

Whereas the cases discussed in the first four parts remain within a binary structure of *either* husband's surname *or* wife's surname, the cases examined in Part V diverge from this structure, and are thus harder for courts to analyze. The applicants here make personhood-related claims that move away from the discrimination paradigm and are more difficult to classify under a specific identity category. The applicants' difficulty in fitting their claims into the preexisting legal formulations of clear identity categories renders their claims incommunicable to the law. Here I draw on earlier work,¹⁵ in which I developed a critique of the legal impulse to categorize identity claims under preexisting categories. This previously developed theoretical framework is applied to the cases presently in question.

The conclusion outlines an alternative framework to name laws and to legal theory of signifying personhood.

I. NAMES AS SIGNS: THE CHALLENGE TO LEGAL REASONING

Legal commentators have offered rich accounts of how name laws are shaped by patriarchal ideology and reproduce gender hierarchies.¹⁶ Such cri-

¹⁵ See generally Yofi Tirosh, *Adjudicating Appearance: From Identity to Personhood*, 19 YALE J.L. & FEMINISM 49 (2007).

¹⁶ Legal scholarship on gender and the law of surnames consistently shows that this area of law serves as a site for reinforcing traditional gender roles, and that patriarchal values stagnate its development towards more egalitarian name practices. See, e.g., Augustine-Adams, *supra* note 5 (reviewing the legal surname choices available for women in various countries and assessing the feminist implications of the legal constraints on naming practices); Omi Morgenstern Leissner, *The Name of the Maiden*, 12 WIS. WOMEN'S L.J. 253 (1997) (surveying the history and the law on surnames and marital status, and examining the advantages and flaws of various imperfect alternative name-regimes); Leila Obier Schroeder, *A Rose by Any Other Name: Post-Marital Right to Use Maiden Name: 1934-1982*, 70 SOC. & SOC. RESEARCH 290 (1986) (surveying major developments in U.S. case law regarding women's rights to keep their surname after marriage); Michael Rosensaft, Comment, *The Right of Men to Change Their Names Upon Marriage*, 5 U. PA. J. CONST. L. 186, 191-95, 210-17 (2002) (showing that U.S. state laws still set limits on the freedom of husbands to take their wives' surname, and arguing that this right should be recognized as part of a more egalitarian legal regime); Esther Suarez, Note, *A Woman's Freedom to Choose Her Surname: Is It Really a Matter of Choice?*, 18 Wo-

tique of the power of names is foundational in that it reveals why conventions of representation matter. But while existing analysis conveys *what* the law of names does and *why* it does it, there is still a need to understand *how* it is done: what is it that enables the law to successfully sustain non-egalitarian ideological worldviews in the area of names, views which could not have been sustained in other legal areas? What is it in the legal formulation of names that enables legal acts of naming to seem legitimate, unremarkable, and apolitical? The theoretical framework of semiotics helps to uncover the dynamics at play in the area of name law. To study how judges produce decisions regarding names that in any other area of law would be considered publicly illegitimate and legally wrong (either discriminatory decisions, or ones that violate basic human rights such as the right to privacy), the quality of names as signs must be appreciated. While previous scholarship did a thorough job of examining surname cases through the lens of gender, focusing on how the law is informed by patriarchal norms and participates in maintaining them, such analysis is insufficient, for it overlooks a fundamental aspect of these cases. Key to understanding these cases is the fact that gender is not the only issue at stake, but rather, that the regulation of gendered identities is done through names, on the level of *representation and language*.

Names are tricky entities. Like other signs, there is much ambivalence and indeterminacy about their nature and their role. They are both private, most one's own (consider how people get offended at those who forget or distort their names), and public, a point of interface, an anchor for identification and perception by others (one's own name rolls off the tongues of others much more than off one's own).¹⁷ Their functions are multilayered, often conflicting: are names supposed to allow for faithful and certain identifiability of their bearers, or do they have a constitutive role in their bearer's personhood? Are they significant, or are they "just names," mere appearances, signs that remain on the surface level of social and legal identity, to be distinguished from substantial rights or statuses such as suffrage or marital status? And correspondingly, do surnames have a role in sustaining the gendered division of labor and the stability of the family and of the nation?

The analysis below suggests that this evasive nature of names challenges legal thinking, producing a disappointing judicial account of the role of names in the life of legal subjects. This lack of a compelling jurispruden-

MEN'S RTS. L. REP. 233 (1997) (outlining reform in the substantive and procedural law of naming); Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law* (Rutgers School of Law-Newark, Working Paper No. 036, 2009), available at <http://ssrn.com/abstract=1351133> (examining how marital surname practices shape perception on marriage, and how these practices and perceptions play out in the context of the gay marriage debate).

¹⁷ See also Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 768 (2007) (describing names as "peculiarly situated as among our most trivial, and yet our most foundational, social practices").

tial theory of names leads to decisions that unwittingly reproduce and conserve the existing gendered status quo, both legally and culturally.

A focus on the judicial approach to the characteristic of names as signs yields compelling explanatory tools for understanding legal regulation of signifiers of identity. Courts, as shown in this Article, employ inconsistent, often contradictory theories of the nature of names as signs. Most importantly, the uncertain and complex nature of names enables the production of inconsistent decisions, at times treating names as important, and at times as insignificant. Often, while purporting to dismiss the importance of names, the law utilizes identity signifiers as sites for implicit yet powerful shaping of institutions such as gender, family, and citizenship.

Names are signs, and signs have a curious versatility: it is possible to argue that they are of trivial significance or ephemeral nature (“it’s just a name”), or to argue that they are extremely significant in representing the world, that as symbols they have a constitutive role vis-à-vis reality. Both arguments can be made convincingly and reasonably. This duality of names, their changing face, frequently appears in the case law. The versatility of names enables courts to conclude that it would not be a breach of basic rights to limit individual choice of names (because names are “merely symbolic” rather than a matter of actual, material rights), while recognizing a state interest in maintaining a certain name-order (e.g. that all family members must have the same surname in the interest of family unity), thereby highlighting the constitutive power of names.

In other words, this symbolic nature of names enables courts to produce legal rulings that are often unresponsive to the applicants’ claims about the meaning of their surnames to their sense of self. Names are often declared insignificant in court rulings, because they are not perceived as actual rights, but are legally categorized as derivative of other rights (e.g. the right to equality and the right to protection of private life). The paradox in this reasoning is readily apparent: if names are insignificant, there is no reason not to give applicants permission to do what they like with their names. As this Article shows, names play a significant role in maintaining patriarchal institutions and protecting the gender status quo. A much more convincing judicial response to naming problems would openly recognize the co-constitutive dynamics between signs and reality. Such an approach would reject the view that names only present an underlying, preexisting reality, and identify the ways in which this reality is constructed through names.

Names—surnames included—play a constitutive role in one’s personhood (defining for oneself and for one’s social world a set of affiliations with past generations and with present family),¹⁸ and, as will be demonstrated below, they also shape the nature of rights and neutralize certain

¹⁸ See Janet Finch, *Naming Names: Kinship, Individuality and Personal Names*, 42 Soc. 709, 714–18 (2008) (analyzing the extent to which family names are used to map and connote family connections in contemporary U.K. society).

social institutions and divisions of labor. The applicants in the cases studied below challenge the names legally prescribed to them. Their legal challenges can be seen as refusals to accept names as mere functional symbols that remain on the surface of things. These applicants seem to know that the work of naming does not stop at the semiotic level, but has real effects.

More specifically, the applicants tell stories about the role that surnames play in women's sense of individuality and in women's ability to play an equal part in their family and in their public life.¹⁹ It seems that the applicants in the surname cases studied here suggest that there is something

¹⁹ There is ample empirical evidence that surnames are regarded, by both men and women, as a meaningful site in constructing the meaning of gender and the status of women in society. A 2001 study examined women's surname choices among two elite groups in the U.S. from 1980 to 2001. Researchers found a correlation between the women's decision to keep their names upon marriage and factors such as more years between college graduation and marriage, a higher academic degree, the prestige level of the university of graduation, and a non-religious nature of the wedding ceremony. See Claudia Goldin & Maria Shim, *Making a Name* (NBER Working Paper Series, Working Paper No. 8474, 2001), available at <http://www.nber.org/papers/w8474>.

Other empirical research confirms this correlation between women's retention of surnames and level of education or career track. See David R. Johnson & Laurie K. Scheuble, *Women's Marital Naming in Two Generations: A National Study*, 57 J. MARRIAGE & FAMILY 724, 727 (1995) (indicating that "[w]omen who married later in life, were better educated, more career oriented, and held more liberal gender role values were more likely to go by a nonconventional marital name"). A 1989 study found that college-educated women who took their husband's surname expressed primary commitment to their relationship with their husbands and children; women who hyphenated their name to their husbands' name gave equal weight to the relationship and to issues of self; and women who kept their own surname focused on personal identity and independence as primary values. See Karen A. Foss & Belle A. Edson, *What's In a Name?: Accounts of Married Women's Name Choices*, 53 W. J. SPEECH COMM. 356, 367-70 (1989). *But cf.* Margaret Jean Intons-Peterson & Jill Crawford, *The Meaning of Marital Surnames*, 12 SEX ROLES 1163, 1168 (1985) (finding that American men and women do not believe that the adoption of a traditional surname necessarily implies traditional division of labor in the marriage).

Women's choice of surname in marriage also reflects how people see their personality characteristics. Claire E. Etaugh et al., *"Names Can Never Hurt Me?": The Effect of Surname Use on Perceptions of Married Women*, 23 PSYCHOL. OF WOMEN Q. 819 (1999) (finding that American college students perceive women who take their husband's name as less agentic and more communal—i.e. kind, nurturing, etc.—than women who either kept their maiden name or hyphenated their name, who are viewed in a less gender stereotypical manner); Gordon B. Forbes et al., *Perceptions of Married Women and Married Men With Hyphenated Surnames*, 46 SEX ROLES 167 (2002) (This survey of white middle-class college students' perceptions of men and women who hyphenate their surname to their spouse's name found that men and women who hyphenated their names were viewed as more agreeable, conscientious, and open. Men but not women rated women who hyphenated their names lower on the agreeableness factor and higher on the adjective "masculine," but neither men nor women rated such women as different from the average woman on the traditional gender role factor. In addition, men but not women rated men who hyphenated their name as lower on the adjective "masculine" and higher on the adjective "feminine." Finally, the researchers found a correlation between the surveyed person's high score on a sexism scale and their negative approach towards men and women who hyphenated their surnames.); see also DONAL CARBAUGH, *SITUATING SELVES: THE COMMUNICATION OF SOCIAL IDENTITIES IN AMERICAN SCENES* 94-111 (1996) (presenting sociological data on the diverse meaning American men and women ascribe to their surname choices.)

more to the boat than the fact that it is tied to a ship. If we are in a habit of seeing the boat exclusively through its tie to the ship, we may be impoverished of other valuable aspects of the boat. If we keep talking about boats only as “that which is tied to a ship,” we would probably never find ways for unmooring the boat from the ship without rendering it invisible. Furthermore, some of the name-petitions discussed below maintain that the tie between the ship and the boat is important for the ship no less than for the boat. That is, if we do not have words to talk about the ship in terms of the boats tied to it, we may be missing something fundamental about the ship as well. Finally, the legal applications discussed here question our very understanding of what kinds of vessels qualify as ships and what vessels should be called boats. They suggest that each vessel in this tie may be in some respects or in some moments a ship, and in other respects or moments a boat.

The work of sociologist Pierre Bourdieu is central to this Article's analysis. Throughout his work, Bourdieu resolutely rejects the possibility of differentiating between “objective reality” and representation, maintaining that control of representation shapes power relations.²⁰ In *Language and Symbolic Power*,²¹ the central text upon which this Article draws, Bourdieu shows how dominant groups, who are interested in preserving existing social hierarchies, resist any change to the representational order by denying that it matters. For example, nation-states create a cohesive national identity by instilling standardized language and reifying it as neutrally objective and free from ideology. Bourdieu is fascinated with a myriad of other mundane phenomena apart from language, such as ways of carrying one's body, dress, food, humor, and gestures.²² These sets of habitual behaviors are so effectively and viscerally ingrained in us that they unwittingly reveal—and si-

The relationship between status and a woman maintaining her surname appears in other cultures too. According to Alford (who compared sixty societies' naming practices), among the Serbs, “one's surname may come from one's mother, if she is more important or stronger than one's father In a similar vein, the name of a Rif woman may be transmitted to her children if she has an important occupation (e.g., doctor, midwife, or dance leader)” RICHARD D. ALFORD, *NAMING AND IDENTITY: A CROSS-CULTURAL STUDY OF PERSONAL NAMING PRACTICES* 56 (1988). For an extensive sociological account of prevailing positions on surnames in contemporary Israel, see MICHAL ROM & ORLY BENJAMIN, *FEMINISM, FAMILY, AND IDENTITY IN ISRAEL: WOMEN'S MARITAL NAMES* (forthcoming 2010).

²⁰ BOURDIEU, *supra* note 2, at 220. His fascination with the mundane nuances of everyday usage of language (forms of address, character of voice, pronunciation, ways of pausing, hypercorrection, etc.) is part of his larger project of understanding how social order becomes so ingrained and self-evident that it is transparent to those participating in it, and is thus constantly reproduced. See Paul DiMaggio, *On Pierre Bourdieu*, 84 *AM. J. SOC.* 1460, 1461 (1979) (discussing Bourdieu's interest in the dispositions that are taken for granted by social actors).

²¹ BOURDIEU, *supra* note 2.

²² See, e.g., PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* (Richard Nice trans., Harvard University Press 1984) (1979) (documenting and quantifying “trivial” practices, from how the dinner table is set to where living room furniture is purchased, as a central site of socio-economic class distinctions).

multaneously constitute—class distinctions, gender identity, and other social divisions based on invisible power relations.

Bourdieu's work provides helpful tools not only for understanding the role of names in shaping identities and reifying social relations, but also for studying how the political effect of names becomes invisible. Bourdieu meticulously documents how challenges to the prevailing symbolic order are defused by denying that there is such an order at work and that this order matters in determining and maintaining power relations.²³ The effectiveness of the denial strategy is enabled by our ability to argue that words are just words, or that names are merely names.²⁴ It is always possible to argue that names are mere appearances, located on the surface rather than the depth of the matter. As the proverbial cover but not the book, names can be presented as disconnected from the true quality of their bearers, from their actual identities. A name can always be made "just a name." Bourdieu insists that those who resist challenges to the naming order by claiming that they are merely names are well aware of names' constitutive power.

With this backdrop it becomes possible to see why a legal challenge to a naming system is an arena in which the seemingly neutral and technical function of names is put at risk. The petitions studied here seek to destabilize the equilibrium of the naming order and to accentuate the ways in which this order is far from natural or free from ideology. And yet, the equilibrium of name law is rarely successfully disturbed; almost all of the name applications examined here fail.²⁵ The reason for this failure lies not only in the patriarchal values that inform the law, but also in the dichotomous distinction the law seeks to maintain: the distinction between appearance (name) and reality (the person behind the name).

Beyond uncovering the unsatisfactory nature of current ECHR name jurisprudence, this Article offers a new way for law to understand names. This Article is part of a larger ongoing project that focuses on the courtroom as a site of struggle over the legal regulation of representation of identity through external signifiers such as names, dress style, accent, and so on. Every claim about the importance of signifiers of identity entails a more general semiotic claim about the performative power of language and other signs. In claiming that their names matter, the applicants in the cases re-

²³ See, e.g., PIERRE BOURDIEU, *THE MASCULINE DOMINATION* 54–80 (Richard Nice trans., Stanford University Press 2001) (1998) (describing the ways in which masculine domination is internalized by women through pre-discursive messages and practices that render the differences between the sexes natural and neutral).

²⁴ For an illuminating discussion of Bourdieu's understanding of symbolic power and its political importance, see DAVID SWARTZ, *CULTURE & POWER: THE SOCIOLOGY OF PIERRE BOURDIEU* 65–94 (1997).

²⁵ Among the cases reviewed here, only one application succeeded. *Burghartz v. Switzerland*, 280 Eur. Ct. H.R. (ser. A) 19, 19 (1994) (discussed *infra* Part III.B.). There is also an extensive body of case law concerning the name changes of transsexuals in the ECHR's jurisprudence. Although these cases address gender and identity, the questions they raise remain beyond the scope of this Article.

viewed below argue against the view that their identities exist *a priori*, “out there in the real world,”²⁶ before they are marked by names. They urge the law to acknowledge that the naming system is a powerful epistemological tool to reify ideologically-laden ways of seeing. Names are never mere “labels”; they produce and maintain social divisions, hierarchies, social institutions (such as the family and the nation), and identities. This account of the power of language and representation is consistently rejected by the legal discourse, but it is not openly rejected. Rather, judges systematically resist the attempt of legal subjects to initiate a conversation about how and why their legally regulated identity-signifiers matter.

Reading these cases reveals the methods employed by judges to avoid conversing about the role of language. The analysis shows how the legal process dismantles subversive claims about representation by resorting to the judicial authority of detached impartiality and by employing a technical and formal legal language. This language has a diluting effect, taking away the poignancy of the litigants' argument.²⁷ The rhetorical strategies employed in the judicial opinions provide a vivid demonstration of the ways in which, to quote Bourdieu, “[l]aw is the quintessential form of the symbolic power of naming that creates the things named”²⁸

In reading these cases, the methodology employed in this Article aims to make audible the suppressed voices in the conversation about names, personhood, law, and language. Since all that is available in the cases is the delivery of the competing arguments by the writers of the judicial opinion, the challenge is to retrieve the argument about the importance of names to the legal subjects, to fill the gaps in the text with the unreported narratives of

²⁶ JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM*, at ix (1990). This phrase embodies White's depiction of this approach to language. According to White, such an approach sees the function of language as that of mere labeling of preexisting objects or ideas. Language is meant to achieve only the instrumental purpose of transmitting the image in our mind and reproducing it accurately in the mind of our hearer. Bourdieu describes this view as treating language as “a *code*, in the sense of a cipher enabling equivalences to be established between sounds and meanings” See BOURDIEU, *supra* note 2, at 45. Bourdieu counters that “[i]t is rare in everyday life for language to function as a pure instrument of communication. The pursuit of maximum informative efficiency is only exceptionally the exclusive goal of linguistic production and the distinctly instrumental use of language which it implies generally clashes with the often unconscious pursuit of symbolic profit.” *Id.* at 66–67.

²⁷ Bourdieu recognizes the law as a site of social struggle that constantly denies its nature and clings to a claim of neutrality, professionalism, and impartiality. The law's naming power is persistently denied by legal actors.

The juridical field is the site of a competition for monopoly of the right to determine the law. Within this field there occurs a confrontation among actors possessing a technical competence which is inevitably social and which consists essentially in the socially recognized capacity to *interpret* a corpus of texts sanctifying a correct or legitimized vision of the social world.

Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L.J.* 805, 817 (Richard Terdiman trans., 1987).

²⁸ *Id.* at 838.

the applicants. To throw these suppressed voices into relief, this Article conducts a close reading of the opinion's text, as a way of amplifying arguments that the text delivers laconically.²⁹ This methodological choice fits with the premise of this Article that there is a missing conversation in legal theory about the relationship between signs and "reality." Since in the judicial proceedings the opportunity to conduct such conversations is repeatedly missed, this Article can be read as an attempt to conduct this important conversation.

II. LITIGATING NAMES AS HUMAN RIGHTS

In what ways is the legal regulation of surnames a matter of human rights? This Part analyzes the first two cases that raised the matter of surnames and sex equality at the ECHR adjudication, and lays out the legal framework through which these cases are understood in the context of the Convention.

In the first two surname cases submitted to the ECHR, the applicants needed to offer a convincing theory by which intervention in surnames could amount to a human rights violation. In other words, they had to show that their name was intertwined with their human rights rather than being merely symbolic, detached from some material core of the rights. The applicants' arguments focused on two articles in the Convention: Article 8, which protects private and family life, and Article 14, which mandates not to discriminate in the allocation of the rights and freedoms prescribed in the Convention.

Lucie Hüsler, a Swiss local politician, was the first applicant to introduce surnames as a human rights question in an ECHR adjudication. Hüsler registered as a candidate for parliamentary elections in her canton.³⁰ The canton authorities refused to register her under her premarital name—a name she continued using after her marriage and by which she was known to her constituency. They required her to campaign under her husband's surname—Hagmann. The canton declined her suggestion that his name would be hyphenated to hers (Hüsler-Hagmann), and would only recognize the reverse order of names (Hagmann-Hüsler). Her alternative suggestion, that she would run her campaign under the name "Lucie Hüsler, épouse Hagmann" (Lucie Hüsler, wife of Hagmann), was also rejected.³¹

²⁹ On law as narrative and the methodology of extrapolating the narrative of judicial texts, see generally GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* 201–91 (2000) (presenting and assessing the contribution of narrative criticism of the law); *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* (Peter Brooks & Paul Gewirtz eds., 1996) (containing essays by renowned legal theorists explaining the importance of stories for the legal process).

³⁰ *Hagmann-Hüsler v. Switzerland*, App. No 8042/77, 12 Eur. Comm'n H.R. Dec. & Rep. 202, 202 (1977).

³¹ *Id.* at 205.

This dispute over the order of the hyphenated surnames might seem petty on the part of Hüsler. But for public figures, names are trademarks, and their alteration is costly. Try to imagine what would happen to the public image and currency of Britney Spears had she been legally required to release albums and present herself in public appearances by the name of Britney Federline-Spears.

After exhausting her opportunities to challenge the decision in Swiss courts, Hüsler appealed to the ECHR, arguing that Switzerland's policy was in breach of the Convention. The European Commission for Human Rights (hereinafter the Commission), the body that was responsible for preliminary screening of applications under the Convention until 1998, declared her application inadmissible, for reasons that will be immediately discussed.

As described in the Commission's decision, Hüsler claimed three violations of the Convention. First, she argued, the requirement that she change her surname violated Article 8 of the Convention, which guarantees the right to respect for private and family life.

Article 8 reads:

Article 8 – Rights to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.³²

The Commission left open the question of the breadth of the sphere of private life under Article 8, and specifically whether it included “the use of a patronymic name for the purpose of standing in a parliamentary election”³³ Accepting Hüsler's broad interpretation of the meaning of “private life” would mean, according to the Commission, that Article 8 guaranteed a more “general right to protection of personality.”³⁴

The Commission found that hyphenating her name to the family name provided her with “a reasonable possibility of precise identification,”³⁵ and

³² Convention, *supra* note 9, art. VIII.

³³ *Hagmann-Hüsler*, 12 Eur. Comm'n H.R. Dec. & Rep. at 205.

³⁴ *Id.*

³⁵ *Id.* Note that the name here is conceived by the Commission as a mere label, serving the functional role of identifiability of its bearer. See *infra* Part IV for further discussion of this point.

therefore there was no need to determine the scope of the right to private life.³⁶

The argument that surnames fall under Article 8 is repeatedly raised in the cases examined in this Article, so it is worth examining closely. What areas of life should be respected under Article 8? The phrase “private and family life” is ambiguous in that it leaves open the question whether “private and family life” is one sphere or two distinct spheres. In other words, it is unclear whether the protection offered by this clause is only for privacy issues that fall within family life, or for matters that either pertain to private life or to family life. How, for example, would the legal regime created by Article 8 classify a case in which it is the *family* life that compromises respect for the *private* life of family members?³⁷ As feminist critiques repeatedly stress, families are composed of individuals.³⁸ Protection offered to families is often done at the expense of the weaker parties in the family, namely women (and sometimes children, the disabled, or the elderly). The cases discussed in this Article stress how this blurry convergence between private and family life is detrimental to women. As a woman, Lucie Hüsler was mainly thought of through her family ties. When these ties conflicted with her independent life as a politician, she could not rely on her legal right to “private life” for salvage, because as a woman, her private life was primarily associated with domesticity. Thus, it was hard for the Commission to recognize the importance of her existence outside of the home. If women are perceived through their marital status (and the surname that Hüsler was required to take after her marriage ensured that she would be so perceived), then it is not surprising that the law is unable to see why it is important to protect them as independent individuals.

Subsequent ECHR case law supports the claim that the Commission’s difficulty in including some public and professional aspects of an individual’s life in the definition of “private life” is affected by the applicant’s gen-

³⁶ For a general review of how the ECHR interprets the scope of the rights guaranteed in the Convention, see MERRILLS, *supra* note 7, at 166–69.

³⁷ A similar uncertainty between mere adjacency and conceptual overlap occurs in the remainder of this right’s formulation, with the phrase “his home and his correspondence.” How would the law treat cases in which the lack of respect for one’s correspondence occurs within the home? For a wonderful treatment of the threat to women’s private correspondence from within the home, see Dena Goodman, *Letter Writing and the Emergence of Gendered Subjectivity in Eighteenth-Century France*, 17 J. WOMEN’S HIST. 9 (2005). The same conceptual difficulty occurs with relation to privacy of one’s “home,” when the interests of one party (usually the woman) conflict with those of her partner. See, e.g., Marybeth Herald, *A Bedroom of One’s Own: Morality and Sexual Privacy after Lawrence v. Texas*, 16 YALE J.L. & FEMINISM 1, 3 (2004).

³⁸ See, e.g., JOHN STUART MILL, *THE SUBJECTION OF WOMEN* (Hesperus Press Limited 2008) (1869) (presenting one of the earliest modern formulations of the argument that women are oppressed in marriage, in the name of intimacy and family loyalty); CAROLE PATEMAN, *THE SEXUAL CONTRACT* 154–88 (1988) (offering a poignant critique of the exploitation and discrimination of women within the marriage arrangement).

der. In a case that examined whether a search in a law office violated the applicant's right to "private life,"³⁹ the Court found that this right includes:

[A]ctivities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world Thus, especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment in time.⁴⁰

If it would be artificial to exclude a lawyer's professional life from the scope of the right to private life, then surely it is similarly problematic to exclude political candidacy from the scope of private life.

In addition to invoking Article 8, Hüsler argued that Switzerland's law of names infringed one's right to marry and to establish a family, which is guaranteed in Article 12.⁴¹ The text of the Hagmann decision does not specify the details of Hüsler's Article 12 argument, but it is reasonable to assume that she claimed that a mandatory surname change (which would hinder her political career) presented her with an unnecessary and burdensome conflict between marriage and career. The compulsory surname change constrained her ability to exercise her right of marriage, because it created an unnecessary conflict between her life as an individual and her life as a spouse. The Commission rejected this claim, reasoning that Hüsler failed to show how her rights to marriage and family were infringed.⁴² In rejecting her claim, the Commission's decision expressed a view of women's lives as existing primarily in the private sphere of the family. The fact that Hüsler's marriage encumbered her political career was considered insignificant, because as a woman, Hüsler was perceived primarily through her family status, not as an individual with a public life of her own. Recognizing Hüsler's claim would first require imagining that a woman's political career might be as important to her as her family life, that she could weigh the two aspects of her life one against another, and that she could prefer public life over family life. For the Commission, these were inconceivable options.

³⁹ Niemetz v. Germany, 251 Eur. Ct. H.R. (ser. A) 23, 33 (1993).

⁴⁰ *Id.*

⁴¹ Convention, *supra* note 9, art. XII. Article 12 asserts: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

⁴² "[T]he applicant is married and has in no way shown that the Swiss authorities placed obstacles of any kind in the way of her marriage." Hagmann-Hüsler v. Switzerland, App. No 8042/77, 12 Eur. Comm'n H.R. Dec. & Rep. 202, 206 (1977).

Lastly, Hüsler argued that requiring only women to change their surnames in marriage constituted sex discrimination, which is prohibited by Article 14 of the Convention.⁴³ This Article provides:

Article 14 – Prohibition of Discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.⁴⁴

The Commission found that the different standards for men and women did not amount to discrimination because they served the reasonable aim of the Swiss government that members of the same family should be easily identifiable vis-à-vis third parties. “[T]he obligation placed on spouses to bear the same name (in this case, that of the husband) constitutes a suitable measure, proportionate to the aim it is sought to realise.”⁴⁵

It is crucial to observe the way in which the decision is formulated to project sex-blindness and affirm a commitment to sex equality. The obligation to change a name is “placed on [a] spouse[],” writes the Commission,⁴⁶ implying that the fact that the obligation is placed on the wife in this case is only contingent. However, if the gender of the spouse who changes her or his name in marriage is indeed arbitrary, then it would be possible to imagine alternative name arrangements that distribute the burden equally. But because of the transparent, self-evident nature of the existing naming conventions,⁴⁷ the alternatives go unnoticed.

⁴³ *Id.*

⁴⁴ Convention, *supra* note 9, art. XIV.

⁴⁵ *Hagmann-Hüsler*, 12 Eur. Comm’n H.R. Dec. & Rep. at 206. The surname solutions that Hüsler proposed were not discussed in the opinion, nor were naming strategies that would have achieved the goal of the Swiss government of having a unified surname for the entire family (strategies such as enabling the family to hyphenate both spouses’ names, taking the wife’s surname, or creating a new surname altogether).

⁴⁶ *Id.*

⁴⁷ One could raise an objection regarding the relationship between social practices of naming and the naming laws. One could argue that the name law merely relies on preexisting social norms of naming, and therefore the critique offered in this Article points in the wrong direction. After all, if a state needs a law of names, why not make this law responsive and harmonious with prevailing naming conventions?

In the area of names, the legal and the social are closely entwined. It is impossible to argue both that the law only reflects independently existing social naming norms, and that names are primarily dictated by the law. Indeed, the Swiss law of surname is probably linked to patriarchal naming norms, but we cannot comfortably say that these norms exist independently of the law. Legal and social norms are in a co-constitutive relationship; one relies on the other and enables the other to move forward successfully. *See* Intons-Peterson & Crawford, *supra* note 19, at 1167–68 (finding that American students wrongly assumed that it was legally easier under U.S. law for women to take their husbands’ surnames in marriage). The law serves to root name conventions so that they are rendered invisible. Thus, it participates in instilling specific ways of seeing, in reifying the distinctions and identities reflected by the naming order. While I am not positing a

The second surname case arriving at the ECHR approached the issue of election-related rights from a different perspective. In the 1983 case of *X v. the Netherlands*, the Applicant argued that she should be listed as a voter not under her husband's name, but under her own name, and without reference to her husband.⁴⁸ The Dutch Electoral Act stipulated that a married woman would be registered in the electoral list either under her husband's name followed by "born . . . (maiden name)," or under her premarital name followed by "wife of . . . (husband's name)."⁴⁹ The marital status of men was not reflected in the list.⁵⁰

The Applicant argued that this registration policy discriminated against women in relation to the right of individual suffrage. In more technical terms, she argued that Article 3 of the Convention's First Protocol, guaranteeing freedom and secrecy in elections, should be read in conjunction with Article 14, the antidiscrimination provision.⁵¹ The Commission denied the admissibility of the application, reasoning that when a sex-based distinction served a legitimate aim and did it with proportional means, there was no violation of Article 14.⁵² The commission did not articulate the specific aim that the law served.

causal claim that points to the law as the origin of the name order, I still stress that we cannot say that extra-legal norms are the sole origin of naming convention.

The co-constitutive dynamics between law and society are also manifest when considering the historical process through which names became prevalent identity signifiers. In the Roman world, informal law played a pivotal role in establishing names as stable markers of identity. Pintens & Will, *supra* note 8, at 46–47. Similarly, in early modern Europe, the law was indeed but one of the prompting factors in instilling the conventions that surnames are family names (i.e. common to all family members). State registration procedures and the church also took part in shaping this phenomenon. *Id.* at 47.

International human rights norms demonstrate a similar interplay between a name as a social convention and a name as a legally prescribed act. For example, Article 24(1) of The International Covenant on Civil and Political Rights asserts: "Every child shall be registered immediately after birth and shall have a name." International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171. Thus, the state becomes involved in the act of naming, making sure that every legal subject is named, even if such naming does not occur as a matter of social convention.

⁴⁸ *X v. The Netherlands*, App. No. 9250/81, 32 Eur. Comm'n H.R. Dec. & Rep. 175, 175 (1983). Under Dutch law, women are not required to take their husband's surname upon marriage, but the law notes that customarily the wife will take the surname of the husband. Marriage has no influence on the spouses' names. Pintens & Will, *supra* note 8, at 65–66. The case does not inform us whether X took her husband's surname, but we can reasonably assume that she did not, given her concern with being recorded in relation to her husband's name. *See X*, 32 Eur. Comm'n H.R. Dec. & Rep. at 175.

⁴⁹ *Id.* at 176 (citing Article D 4, paragraph 2 of the Elections Act of 6 November, 1979).

⁵⁰ As late as 1972, similar cases could be found in the U.S., where women were denied the vote unless they used their husbands' surname. *See SUSAN J. KUPPER, SURNAMES FOR WOMEN: A DECISION-MAKING GUIDE* 11, 17, 20–21 (1990).

⁵¹ Article 3 to the Convention's First Protocol declares: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." Convention, *supra* note 9, Protocol 1, art. 3.

⁵² *X*, 32 Eur. Comm'n H.R. Dec. & Rep. at 177.

The Commission rejected her argument that the seemingly administrative voter record had power to bring about that which it declares.⁵³ In rejecting this application, the Commission denied any role to the representational. Appearance in the voters' register was merely that—appearance. Bourdieu expresses suspicion of such statements that deny the importance of representation. Any attempt to differentiate between actual social reality and the level of representation, says Bourdieu, is not only impossible, but far from innocent.⁵⁴ Claims to possess the ability to discuss representation as distinct from its referent are disingenuous since they try to impose “a vision of the social world through principles of di-vision”: i.e. a vision denying its role in constituting social reality, denying that it is a vision that establishes a particular way of perception out of many possible ones.⁵⁵

Hüsler and X, two women seeking the possibility to operate in the political sphere, one as a politician and one as a voter, were denied access to it as independent individuals, as actors present there in their own right, in a manner unrelated to their marital affiliation. Men's political existence remains, however, uninterrupted by any changes in their “private” affiliations, which are thereby constructed as secondary to their primary identity as citizens participating in public life. In a sense, these two women's struggles should be understood as directly linked to the women's suffrage struggle. The fact that the locus of this late twentieth-century phase of the struggle is the semi-otic realm should not yield the conclusion that it is less significant.⁵⁶

Given the already well-established feminist critique of the gendered nature of the public/private divide,⁵⁷ this last observation borders on cliché. Yet it remains worthwhile to invoke this oft-made point because the exclusion from the public sphere occurs here not on the literal level of access to a right (by, for example, denying women's right to vote or to get elected) but on the representational level. The Applicants failed to convince the Commission that the way in which the identity of the right bearer is constructed by the state shapes the nature of the right itself. In other words, the question of *as whom* she is allowed to vote is inseparable from the question *whether* she is allowed to vote. As bearers of political rights, as legal subjects, the Applicants are marked by the law. They can practice their right only if they

⁵³ “Even the most strictly constative scientific description,” Bourdieu observes, “is always open to the possibility of functioning in a prescriptive way, capable of contributing to its own verification” BOURDIEU, *supra* note 2, at 134.

⁵⁴ *Id.* at 226.

⁵⁵ *Id.* at 221.

⁵⁶ Female European politicians are not alone in experiencing pressure to change their surname in marriage. Connie Shultz, a journalist who accompanied her husband when he ran for the U.S. senate, recalls how she was described as “one of those women who won't change her name” CONNIE SCHULTZ, . . . AND HIS LOVELY WIFE 153 (2008).

⁵⁷ See, e.g., CAROLE PATEMAN, *Feminist Critique of the Public/Private Dichotomy*, in THE DISORDER OF WOMEN 118, 118 (1989) (recognizing the public/private dichotomy as “ultimately what the feminist movement is about,” and mapping the various feminist challenges to this dichotomy vis-à-vis the liberal theory of separation of the spheres).

agree to be summoned to the political realm through the men with whom they are affiliated. They are denied autonomous political presence, and full, free citizenship.

X and Hüsler were named by the state, and they were acutely aware of the effects of this naming: they realized that by pronouncing them as wives, the law prescribed the ways they could participate in the public sphere as citizens. Bourdieu compares the invisible suggestive power of legitimizing language to that of a person who, "instead of telling the child what he must do, tells him what he is" ⁵⁸ Bourdieu continues:

The institution of an identity . . . is the imposition of a name, i.e. of a social essence. To institute, to assign an essence, a competence, is to impose a right to be that is an obligation of being so (or to be so). It is to *signify* to someone what he is and how he should conduct himself as a consequence . . . the indicative is an imperative.⁵⁹

In order to practice her voting rights, said X, she was required to recognize herself as "wife of" when the voting clerk called her name. She was required to reply "yes, this is me"; thus, to be responsive to a way of seeing her that she rejected; she had to subject herself to a system that saw, and thus constituted her, as "wife of" rather than as a citizen in her own right.⁶⁰

This connection between the right and the naming of its bearer was denied by the law. The fact that the dispute was over representation, over names, seems to have enabled the Commission to conclude that no fundamental violation of a right occurred. The matter was not one of principle, but of mere appearance. The Applicants claimed, in contrast, that their existence within alternating names was not merely technical. It defined and constituted who women are, both for themselves and for others.⁶¹

⁵⁸ BOURDIEU, *supra* note 2, at 52.

⁵⁹ *Id.* at 120; *see also id.* at 121 ("The act of institution is thus an act of communication, but of a particular kind: it *signifies* to someone what his identity is, but in a way that both expresses it to him and imposes it on him by expressing it in front of everyone . . . and thus informing him in an authoritative manner of what he is and what he must be.").

⁶⁰ James Donald observes: "This citizen-subject has no identity other than that produced by the Law. That is not to say that subjectivity is merely a facsimile of the Law. On the contrary, assigned identities are transformed and recreated as individuals negotiate the Law's play of power." James Donald, *The Citizen and the Man About Town*, in *QUESTIONS OF CULTURAL IDENTITY* 170, 175 (Stuart Hall & Paul du Gay eds., 1996).

⁶¹ In the words of Deborah Cameron, explaining the theory of Dale Spender: "[N]ames are not just reflections of pre-existing realities, nor arbitrary labels with no relation to reality, but a culture's way of fixing what will *count* as reality in a universe pregnant with a multitude of possible realities." Deborah Cameron, *Introduction: Why is Language a Feminist Issue?*, in *THE FEMINIST CRITIQUE OF LANGUAGE* 1, 9 (Deborah Cameron ed., 2d ed. 1998).

III. NAME LAW AS MAINTAINING GENDER BOUNDARIES

While Part II examined the surname cases through the doctrinal lens of the Convention, this Part moves away from the conceptual legal framework of the right to private life, to explore how the Court applied the legal doctrine to sustain traditional understandings of femininity and masculinity. Section A reexamines the two cases discussed in Part II through a human rights analysis, this time examining them from the perspective of semiotic theory. This theoretical shift enables appreciation of the judicial decisions' reification of notions of normal womanhood. Section B studies three additional surname cases. Together, these three cases produce a consistent account of judicial reproduction of entrenched notions of masculinity.

A. *Femininity*

Signifying women's familial affiliation through their surnames marks women as domestic. Their domesticity, in turn, marks them as women. Moreover, this naming practice designates what womanhood is; it takes part in the construction of gender. The judicial claim⁶² in *X* and *Hüsler* is that representations of women through surnames and in registries do not play a constitutive role in social or legal reality, that they are objective and neutral and, because they are only symbols and not "real" rights, that they have merely technical importance. The Commission dismissed the significance of names *and* implicitly argued for their reliability as representations of the women that are made to bear them.

In both decisions, names are framed as insubstantial and marginal in constituting access to what are seen as actual rights (political rights, such as voting, and personal rights, such as the right to marry or right to private life). In *X*, the Commission declared that "the electoral register has mainly an administrative function and does not, as such, directly affect the population."⁶³ In *Hüsler*, the Commission maintained that the order of surnames should make no difference to the Applicant, implying that her identity as a politician would remain uninfluenced by the surname she bore.⁶⁴ Names are claimed to be intangible, unsubstantial, and insignificant.

⁶² I use the term "judicial" as an umbrella term both for the decisions of the European Court of Human Rights and for decisions of the European Commission of Human Rights. Such usage may be technically inaccurate, but referring to the Commission's decisions as judicial texts captures their nature. They are structured and articulated as judicial opinions, and the process that leads to their production is judicial in nature. See OVEY & WHITE, *supra* note 7, at 6–10 (reviewing the structure and roles of the Commission and the Court); see also MERRILLS, *supra* note 7, at 2–5 (describing the division of labor between the Commission and the Court).

⁶³ *X v. The Netherlands*, App. No. 9250/81, 32 Eur. Comm'n H.R. Dec. & Rep. 175, 177 (1983).

⁶⁴ *Hagmann-Hüsler v. Switzerland*, App. No 8042/77, 12 Eur. Comm'n H.R. Dec. & Rep. 202, 205–06 (1977). The "name-story" with which the applicants approach the court is suppressed in the judicial opinions. We do not know what it meant for Hüsler to

More importantly, the implicit message in both decisions is that the names the law prescribes to women are the names that accurately and reliably represent who they are. Lucy Hagmann is precisely what her name conveys—Mrs. Hagmann, a boat tied to a ship. If it weren't so, then there would have been no particular stake in allowing her to place her husband's name after her name rather than before it. This is a nomenclaturist approach: words are mere labels to identify objects. Like labels on jam jars, names are mere tags on preexisting identities.

There is hardly any acknowledgement in these cases of how names shape the way their bearers are perceived. The name collapses into its bearer, and the bearer is reduced to his or her name, in a one-to-one relationship of identity.⁶⁵

The name of the voter (X) or of the electoral candidate (Hüsler) shaped the scope and nature of their political rights—the right to vote and the right to be elected. But this aspect of names was ignored in the decisions reviewed above. When the judges confirmed the surnames imposed on X and on Hüsler, they also confirmed the worldview conveyed by the existing discriminatory naming norms. However, they do not make this point overtly, because such a view would be a clear and blunt violation of the legal principle of sex equality. Rather, they incoherently maintained that women are equal to men, whatever their name is, and that their current name accurately portrays their identity.

The cases of *Hüsler* and *X* highlight how the legally prescribed naming conventions compel women to constantly carry a reminder of the tension between where they belong according to conservative views—the home—and where they wish to extend themselves—the public sphere. Unfailingly attaching familial status to a woman's name is a way to keep her and her social environment conscious of the hybridity of her operation outside of the private sphere. Her competing loyalties, duties, and roles are echoed in her husband's surname. Short of confining women to the domestic realm, these naming norms bring the domesticity of women to the public realm. Like a turtle carrying its home everywhere, women carrying their husbands' surnames constantly bear a gender identity.⁶⁶ Women are molded into a tem-

keep her premarital surname, except for the narrow report the opinion provides. This calls for turning to external sources that would fill in the gaps about the repertoire of meanings that women and men ascribe to surnames in the context of marriage.

⁶⁵ Bourdieu talks about the need to develop a theory of the theory effect, the process which, "by helping to impose a more or less authorized way of seeing the social world, helps to construct the reality of that world." BOURDIEU, *supra* note 2, at 106.

⁶⁶ Women are often permitted presence in the public sphere only if their domestic roles are maintained and constantly signaled. Consider, for example, Kathleen Canning's historical account of the shift in conceptions of women's labor in early twentieth-century Germany. Kathleen Canning, *Feminist History After the Linguistic Turn: Historicizing Discourse and Experience*, 19 *SIGNS* 368 (1994). Canning describes how it was no longer considered appropriate and natural for women to work outside the home. *Id.* at 380. She observes the social anxieties that men would be feminized and that women's abduction from the family would result in moral degeneration. *Id.* at 380–81. "As they

plate through which, and only through which, they can exist in the public realm.

B. Masculinity

Gendered boundaries define masculinity no less than femininity.⁶⁷ The surname cases studied here produce an account by which masculinity entails keeping one's surname as the name of the father. As this section demonstrates, men who fail to sustain the socio-legal naming order are emasculated in various ways. For example, the courts are less willing to protect their professional or public identity, or their parental rights. Men who, conversely, insist on maintaining the patriarchal naming system gain the sympathy of the law and receive its protection.

A decade after *X*, the question of surnames and marital status came up again, but this time the applicant was a man who willingly deviated from the traditional naming conventions.

The applicants, Susanna Burghartz and Albert Schnyder, a Swiss couple, married in Germany in 1984 and chose to take the wife's name as their family name.⁶⁸ The husband availed himself of the possibility under German law to put his surname in front of the family name (Schnyder Burghartz). When they returned to Switzerland that same year, they realized that the Swiss registry office recorded both of them under the husband's premarital surname, Schnyder. The cantonal government declined their petition to change this registry so that the wife's name would be the family name and that the husband's premarital name would be put before the family name. According to the Swiss Civil Code at the time, a couple received the husband's surname upon marriage.⁶⁹

In 1988, the Swiss Civil Code was changed so that, prior to their marriage, couples could request to have the wife's surname as the family name, provided they presented "a good cause" to their canton's government.⁷⁰ In

came to realize that married women could not be banned from factories, social reformers sought to *import the home into the workplace*, to instill female factory workers with domestic skills, and to supplant the imagery of disorder, the specter of feminization and disintegration of gender roles, with new order founded on the division between the male breadwinner and the female 'secondary' earner." *Id.* at 383 (emphasis added).

⁶⁷ This point is well established in contemporary feminist theory. See generally, *FEMINISM AND MASCULINITIES* (Peter F. Murphy ed., 2004) (a collection of works studying masculinity from a feminist perspective); *MASCULINITY STUDIES AND FEMINIST THEORY* (Judith Kegan Gardiner ed., 2002) (presenting essays that examine the relationship between feminist theory and masculinity studies); Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 *UCLA L. REV.* 1037 (1996) (calling for feminist theorists to re-evaluate the role they assign to men and to turn attention to stereotyping of men as well as of women).

⁶⁸ *Burghartz v. Switzerland*, 280 Eur. Ct. H.R. (ser. A) 19, 24 (1994).

⁶⁹ *Id.* at 25.

⁷⁰ This is the translation of the Swiss Civil Code provided in the Court's ruling. In the Commission's Report (part of the preliminary proceedings in this case), the Code is described as stipulating that the couple will be granted permission "if there are reasons

addition, the new law enabled a wife who takes her husband's surname to put her premarital surname before the family name.⁷¹

Once this law changed, Burghartz and Schnyder applied again.⁷² Their canton's ministry of justice refused their application again, this time on the grounds that they had not demonstrated any inconvenience in having the husband's name as the surname. In addition, the canton reasoned that the legislative amendment was not retroactive and had no transitional provisions; thus it did not apply to their marriage.⁷³

Their appeal to the Federal Court was only partially successful.⁷⁴ The Court recognized their right to have the wife's surname as the family name, finding important factors that justified applying the new law to them: their age, their profession (both were historians), and the nature of Basle, their city, as a frontier city. However, the husband's request to bear the name "Schnyder Burghartz" was again denied. He argued that he was known by the name of Schnyder in his professional life, thus not allowing him to keep this name would impair his professional identity. He further maintained that Swiss institutions refused to put his premarital surname on the record. His university, for example, refused to put "Schnyder" on his dissertation, as it was not a name recognized by the law.⁷⁵

The Swiss Court refused to allow him to add his premarital name to his family name, reasoning that the underlying rationale of the name law was to preserve *family unity* and to avoid a break with tradition. "[T]he Swiss Parliament . . . had never agreed to introduce absolute equality between spouses in the choice of name and had thus deliberately restricted to wives the right to add their own surname to the husband's."⁷⁶

Invoking the principle of family unity to legitimize state regulation of surnames is problematic in at least three ways. First, it is problematic on semiotic grounds. That a name would reflect family unity is not a natural fact or a neutral observation about the way names work. It is a normative statement, which suppresses the fact that the work of names is culturally contingent. In contemporary Spain, Iceland, and Latin America, for instance, the spouses usually have different surnames, each composed of the surnames of their maternal and paternal grandfathers. The children take a name that combines their mother's and father's paternal grandfather's sur-

commanding respect." *Burghartz v. Switzerland*, Decision of Admissibility by the Eur. Comm'n H.R. (1992), <http://www.echr.coe.int/echr>. In a later case citing the same law, this requirement is translated as "commendable grounds." *See G.M.B. v. Switzerland*, App. No. 36797/97, Eur. Ct. H.R. (2001), <http://www.echr.coe.int/echr>; *see also* Pintens & Will, *supra* note 8, at 68 (referring to this legal requirement as showing a "reasonable ground"). The Swiss Government declared during the proceedings that such permissions would be given liberally.

⁷¹ *Burghartz*, 280 Eur. Ct. H.R. (ser. A) at 24.

⁷² *Id.* at 24.

⁷³ *Id.*

⁷⁴ *Id.* at 30.

⁷⁵ *Id.* at 25.

⁷⁶ *Id.* at 24.

name. Other cultures present not just tolerance to name variety among family members, but rejection of the idea that family members should bear the same name. For example:

In some cultures, the fact that the husband and wife bear the same surname does not communicate family unity, but discord. In the *barriada* (squatter) settlements of Lima, Peru, a single surname for married persons intimates incest. "When people are together as a couple and use the same last name, it sounds as though they are brother and sister."⁷⁷

Second, in a liberal state, and in particular in the area of human rights, preferring a family interest over the rights of individual is highly problematic in that it prioritizes a social construct (family) that is useful only to the extent that it serves as a means for promoting the rights of its individual members. In a liberal legal framework, families (just like other constructs such as "the state" or "society") cannot function as ends in of themselves. As this Article claims throughout, such preference passes unnoticed because it is mostly women who pay the price of family unity, and it is harder to notice the importance of women's individuality in a system that views them primarily as belonging to the sphere of family.⁷⁸ In addition, such granting of primary importance to the family over the individual is possible because it is done in the realm of names rather than in areas that are thought of as less symbolic and therefore more fundamental and "actual."

And third, invoking the principle of family unity of names ignores the complexity of contemporary families. With a rising number of families that are composed of stepparents and half-siblings, what family among a person's multiple familial connections should be marked as united by the surname?⁷⁹

Before turning to the proceedings of Burghartz and Schnyder at the ECHR, it is worth examining the domestic proceedings in Switzerland. The analysis conducted here demonstrates that although the couple lost in the domestic courts and won in the European courts, the reasoning in both cases is based on a problematic understanding of the connection between names and gender.

Consider the Swiss Government's explanation for its finding that there was no discrimination in the rule that allowed women, but not men, to add their premarital name to the family name:

⁷⁷ Augustine-Adams, *supra* note 5, at 24.

⁷⁸ For a classic formulation of this argument, see CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 215-39 (1989) (claiming that women's right to equality can be recognized in modern liberal states only once they claim rights that have already been recognized and granted to men).

⁷⁹ For data on the changing patterns of family in Europe, see Bernadette Bawin-Legros, *From Marriage to Remarriage: Ruptures and Continuities in Parenting*, in EUROPEAN PARENTS IN THE 1990S: CONTRADICTIONS AND COMPARISONS 229 (Ulla Björnberg ed., 1992).

[T]he wife's right to put her name before the family name aims at alleviating the results of having a name imposed on her. This need does not exist if, as in the applicant's case, there is a voluntary change of name. The change of name is not imposed, and it appears logical to treat the two situations differently.⁸⁰

The reality of women taking their husband's surname upon marriage is treated here as given and natural. Thus, it is legitimate not to accommodate men who take their wives' surnames.

What is puzzling about this reasoning is the way in which the Government recognizes the personal price women pay for parting with their surname upon marriage. At the same time, there is no place to provide similar "alleviation" for a man who parts with his surname upon marriage. This, arguably, is not because the Swiss Government does not recognize the importance of surnames for men, but precisely the opposite: the State understands the importance of men's surnames all too well. This understanding is why no room is given for attempting to understand what could possibly make a man part with his own surname in marriage. Such an act is so incomprehensible, and carries such grave results, that it amounts to a man giving up on his name altogether.

Two additional points demonstrate that for the Swiss state, maintaining one's surname should matter to men because it is a way of asserting and sustaining autonomy and public personhood. First, one of the Government's preliminary arguments was that the wife had no standing as an applicant, because no interest of hers was violated: "No one but Mr Burghartz had been aggrieved by the refusal of his request"⁸¹ In contrast to women, who are marked by their familial ties, men here are constructed as independent individuals, whose ties to their family are irrelevant to their name interests: what they do with their names is their own business and should not concern anyone else in their family. Furthermore, men's surnames simply do not (and should not) have the function of marking their affiliation to their nuclear family. Men here are not defined by commitment, affiliation, co-dependence, or intimacy; they are standalone entities.⁸²

Second, the language used by the Swiss Government and courts towards the husband was a language of personal responsibility to a fault: a

⁸⁰ *Burghartz v. Switzerland*, App. No. 16213/90, Opinion of the Eur. Comm'n. H.R. (Annex), 280 Eur. Ct. H.R. (ser. A) 35, 38 (1994).

⁸¹ *Burghartz*, 280 Eur. Ct. H.R. (ser. A) at 24.

⁸² The Court rejected this claim and affirmed the familial context, by maintaining that Mrs. Burghartz had a personal interest in the success of her husband's action, since she had chosen their family name together with him, and "she considered herself directly responsible for her husband's loss of his surname 'Schnyder', and their married life might suffer from this." *Id.*

language of penalty. The husband "deliberately and in full knowledge of the consequences . . . change[d] his surname to that of his wife."⁸³

It is thus impossible not to read the legal arrangement that prevented the husband from keeping his name as a penalty for a man who violated the naming order. Just as women's bearing of their husbands' surnames defines femininity, so does men's maintaining their names throughout life define masculinity.⁸⁴ A man that takes his wife's name emasculates himself.⁸⁵

At the ECHR, the couple's argument was twofold. They maintained that the name constraint violated their right to respect for private and family life under Article 8 and that they suffered discrimination in their enjoyment of this right (i.e. that Article 14, read in conjunction with Article 8, was breached).⁸⁶

Both the Commission and the Court accepted that this case fell under Article 8's protected sphere of private and family life.⁸⁷ Their reasoning sets the normative framework for the cases to come, as it became the most often cited precedent on this issue.⁸⁸ The judges had to determine what aspects of names are protected under Article 8, or, more accurately, what elements of the right to respect for private and family life in Article 8 might be affected by whether one is allowed to bear a particular surname.

⁸³ *Id.* at 29; see also *Burghartz*, Opinion of the Eur. Comm'n. H.R. (Annex), 280 Eur. Ct. H.R. (ser. A) at 44 (J.C. Geus, dissenting) (recommending that the application should be found inadmissible). "The disadvantage mentioned . . . is merely the outcome of the change of the applicant's name which he himself requested." Similarly, the partial dissenting opinion in the Commission maintained that the Applicant's difficulties, "which result in the first place from the applicants' decision . . . may cause inconveniences, but they do not appear insurmountable . . . [The husband] is not prevented in future [sic] from further developing his academic reputation, and showing the connection with his previous publications, for instance by referring in his new publications to his previous name before marriage." *Id.* at 43.

⁸⁴ Social science data suggests that the expectation to maintain one's surname is deeply engrained in men's contemporary socialization. A 1985 survey of college students found that "none of the . . . males strongly agreed that they would change their surnames on marriage, whereas 61% of the . . . women strongly agreed. Moreover, 92% of these males disagreed or strongly disagreed that they would change" their surnames. See Intons-Peterson & Crawford, *supra* note 19, at 1166. Statistical data suggests that the rate of American men changing their surname in marriage is miniscule. See Emens, *supra* note 17, at 785. Kupper's survey of American men's approach to their wives' surname decision found that men connect their sense of masculinity to whether their wives change their name; for example, one man "admitted that his masculinity, his sense of power and authority, was somewhat damaged" by his wife's retention of her surname. See KUPPER, *supra* note 50, at 66. A woman who kept her surname reported that although her husband was encouraging, "he has had some comments about why he didn't have more control over [her], etc. (questioning his 'masculinity') . . ." *Id.* at 64.

⁸⁵ Not permitting men to take their wives' surname does not, of course, only punish men, for this arrangement functions as a negative incentive for couples to take the woman's surname, and thus reduces the chances that women will be able to make their surname the family name.

⁸⁶ *Burghartz*, 280 Eur. Ct. H.R. (ser. A) at 27.

⁸⁷ *Id.* at 30.

⁸⁸ See *infra* note 93.

The European Commission and Court rejected Switzerland's arguments and ruled for the Applicants,⁸⁹ but still, the Commission's logic is not markedly different than that of the Swiss authorities. The Commission's recognition that a man has a right to keep his premarital surname after marriage may either reflect the judges' willingness to acknowledge alternative naming practices or may merely be motivated by the need to help a man retrieve his masculinity after losing his name, which is culturally understood as one of masculinity's central attributes. The following discussion examines these options.

In delineating the rationale of the decision, the Commission wrote:

The Commission considers that the right to respect for private life as enshrined in Article 8 § 1 of the Convention ensures a sphere within which everyone can freely pursue the development and fulfillment of the personality. The right to develop and fulfill one's personality necessarily comprises the right to identity and, therefore, to a name.⁹⁰

The Commission did not elaborate on the meaning of "personality," so its view on the connection between personality and name is unclear. Is it that legal subjects are simply entitled to a name, i.e. their "true" name (in the spirit of the nomenclature approach by which names are simple labels on preexisting identities), or is the connection between names and identity or personality meant here in a wider sense, which may reflect *legal subjects' understanding* of their identity or personality? In other words, recognizing the Applicant's right to carry his premarital name may either reflect the view that this is the name that is the most appropriate "label" and refusing it would deny him the basic right to a name (i.e. seeing the main function of names as promoting precise *identifiability*),⁹¹ or it may reflect the view that respect for his personality and privacy means enabling him to choose his name (i.e., viewing names as constitutive to *personhood*).⁹²

⁸⁹ *Burghartz*, 280 Eur. Ct. H.R. (ser. A) at 20.

⁹⁰ *Burghartz*, Opinion of the Eur. Comm'n. H.R. (Annex), 280 Eur. Ct. H.R. (ser. A) at 37.

⁹¹ As noted earlier, the right to a name is recognized in international human rights conventions. *See, e.g.*, The International Covenant on Civil and Political Rights art. 24(2), Mar. 23, 1976, 999 U.N.T.S. 172 (stating that "[e]very child shall be registered immediately after birth and shall have a name"); The Convention on the Rights of the Child art. 7(1), Nov. 20, 1989, 1577 U.N.T.S. 3 (declaring that "[t]he child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire nationality and, as far as possible, the right to know and be cared for by his or her parents"); The American Convention on Human Rights art. 18, Nov. 22, 1969, 1144 U.N.T.S. 144 (stating that "[e]very person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.").

⁹² A 1988 case from Japan offers some additional insights to the present context, despite being grounded in different cultural and legal naming norms. As described by Bryant, *supra* note 5, at 236–37, the facts of the case are as follows: Reiko Sekiguchi, a university professor, took her husband's surname upon marriage (the Japanese law re-

Subsequent surname cases that rely on *Burghartz* interpret it as guaranteeing a narrow right to a name, a right to one's "objective" name, rather than a right to reflect one's sense of identity through one's name.⁹³

The rulings in favor of Albert Schnyder Burghartz, both by the Commission and by the Court, do not seem to be guided by a wish to allow the Applicant to maintain his sense of identity and personality. Rather, these rulings were guided by his male gender, and reflect a conviction that men ought to keep their surname throughout life. In other words, the decisions were informed by reverence for the prevailing gendered naming conventions.

The 1993 case of *K.B. v. The Netherlands* is an example of how the reasoning in *Burghartz* served to affirm the role of names in making

quires that married people take either the husband or the wife's surname). She continued using her premarital surname in her professional life, since this was the name by which she was known before her marriage. "Sixteen years later, when Sekiguchi changed universities, her new employer required her to use her formally registered surname rather than her professionally established [one]" *Id.* at 247. Sekiguchi sought legal recognition of her right to maintain her premarital surname in professional settings. During the proceedings, the university argued that "if she valued her surname so much, she should have protected it herself through the couple's choice of her surname upon marriage rather than expecting the university to use an unregistered surname." *Id.* at 237. Only when we place the seemingly symmetrical name law within the patriarchal context in which it operates can we observe the way in which it serves to maintain gender power relations. When the law allows only an either/or choice for both partners, that is, that both of them should take either the husband or the wife's surname, clearly very few women will be able to maintain their surname after marriage. We still live in a world in which men have more sound professional identities, where they are compensated more for the same work, and outnumber women in politics and public life. The naming conventions correlate to the social division of power. In this case, both partners were professionals. "As Sekiguchi pointed out Japanese law disproportionately burdens marriages in which both spouses are professionals because one spouse is required to give up his or her surname at marriage." *Id.* at 237; see also Foss & Edson, *supra* note 19, at 367 (reporting survey results in which women express the concern of keeping their professional identity as informing their decision to keep their premarital surname or hyphenating it to their husbands' name).

⁹³ ECHR case law that is unrelated to names (for example, in areas such as forced psychiatric hospitalization, paternal responsibilities, discrimination based on sexual orientation, or euthanasia) cites *Burghartz* for establishing a broader interpretation of the right to personality and identity. I suggest that this discrepancy in interpreting the scope of the protected right to identity under the Convention has to do with the special nature of names as signs: in the mind of the judges, names need to stably and reliably mark one's "actual" identity, and not serve as a locus for self-making or self-searching. See, e.g., *Van Kück v. Germany*, 2003-VII Eur. Ct. H.R. 1, 22 ("[T]he concept of 'private life' . . . can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. Likewise . . . although no previous case has established as such any right to self-determination as being contained in Article 8, the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.") (citations omitted); *Pretty v. The United Kingdom*, 2002-III Eur. Ct. H.R. 155, 193 (citing *Burghartz* as establishing that "Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world").

gendered reality seem natural. In this case, a man whose mother was dying sought to add her maiden name to his surname, wishing "to express the special bond between him and his mother, who had stimulated him in many respects."⁹⁴ The Dutch official refused his request because he "did not find that the Applicant's personal interest in having his name changed was of such a nature that his request should nevertheless be granted."⁹⁵ The Commission similarly failed to see the denial of the surname as related to the son's right for respect for his private and family life.

Burghartz stands out not only as the only surname case in which a claim based on Article 8 was accepted, but also as the only surname case in which a discrimination claim was accepted. This is ironic, for it is safe to assume that, like most antidiscrimination clauses, Article 14's reference to sex discrimination was primarily meant to protect women, as the less privileged sex, against discrimination, but in the context of name adjudication, its first and main beneficiary was a man, and women's claims under Article 14 were repeatedly denied.⁹⁶ The Commission and the Court recognized that the Applicants' right to protection from discrimination, guaranteed in Article 14, was violated when read in conjunction with Article 8, i.e. that the Swiss name law discriminated between men and women regarding their right to respect for their private and family life. Thus, they rejected Switzerland's argument that the interests in keeping tradition and maintaining family unity justified denying men the possibility to keep their surnames if they take their wives' names upon marriage. The Court and Commission did not dismiss the legitimacy of considerations such as family unity and tradition, but found that these considerations were irrelevant in this case. According to the Court, Switzerland had already compromised the interest in having a common surname for all family members by allowing women to add their premarital name to their family name.⁹⁷ Switzerland also put aside tradition by allowing high flexibility of name arrangements in the reform of its name law.

The antidiscrimination principle did not, on its own, grant the Court the power to find for the Applicant without considering the specific genders of the applicants. Were it not a man who was prevented from keeping his surname, it is doubtful that the Court would have accepted the discrimination claim. This argument is important not merely or mainly in order to reveal the law's bias in favor of men. Rather, it is important because this gendered-bias application of the legal norms is done in the representational realm of

⁹⁴ K.B. v. The Netherlands, App. No. 18806/91, Eur. Ct. H.R. (1993), <http://www.echr.coe.int/echr>; see discussion *infra* Part V.B.; see also Gross, *supra* note 6, at 277.

⁹⁵ K.B. v. The Netherlands, App. No. 18806/91, Eur. Ct. H.R. (1993), <http://www.echr.coe.int/echr>.

⁹⁶ The court rejected the sex discrimination claim in all cases discussed in this Article, except *Burghartz*.

⁹⁷ *Burghartz v. Switzerland*, Opinion of the Eur. Comm'n. H.R. (Annex), 280 Eur. Ct. H.R. (ser. A) 19, 39 (1994).

names. The legal reasoning in this case produces an implicit claim about the nature of language and the function of signs, denying that representation is (and should be, or could be) anything but a reflection of the pre-existing reality, an instrumentally reliable medium for transmission and reproduction of reality. This point is crucial in understanding the dynamics that enable this gendered bias in name adjudication. Legal reasoning here “endeavor[s] to impose universally, through a discourse permeated by the simplicity and transparency of common sense, the feeling of obviousness and necessity which this world imposes”⁹⁸ Bourdieu’s observations on political struggles over language are applicable to the present context: the legal discourse, “having an interest in leaving things as they are,” aspires “to undermine politics in a depoliticized political discourse, produced through a process of neutralization or, even better, of negation, which seeks to restore the . . . original state of innocence”⁹⁹ The decisions at various levels in the Burghartz case reify existing gender relations by denying that legal regulation of surnames participates in shaping the realities and possibilities of men and women. To comprehend how the legal discourse manages to “bring about that which it declares,”¹⁰⁰ one needs to observe how the prevailing surname conventions, shaped by a particular understanding of gender roles, underlie the seemingly objective and technical application of the antidiscrimination principle.

As the following case demonstrates, gender determines the ability of judges to recognize discrimination. More specifically, the case illustrates the ECHR’s investment in giving a child its father’s (rather than its mother’s) surname. In the 2001 case of *Petersen v. Germany*,¹⁰¹ an unmarried couple separated shortly after the birth of their son. The father, Petersen, kept regular contact with his son for the first eight years of the child’s life (subsequently, the mother did not fully comply with the accessibility arrangements).

Under German law, in the absence of marriage, the child receives the mother’s surname unless the parents declare otherwise to the names registrar.¹⁰² The son thus received his mother’s surname. When the mother married another man, she took her husband’s surname. A daughter born to the couple also received the husband’s surname. The mother then initiated proceedings to change her son’s surname to his stepfather’s surname. The German authorities refused to grant standing to the biological father in the name

⁹⁸ BOURDIEU, *supra* note 2, at 131.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 134.

¹⁰¹ *Petersen v. Germany*, App. No. 31178/96, Eur. Ct. H.R. (2001), <http://www.echr.coe.int/echr>.

¹⁰² *See id.*

change proceeding. “[T]here was no breach of the [father’s] rights as the natural parent as his child had never borne the father’s surname.”¹⁰³

When the ECHR recapitulated the case, it substantially reframed the factual depiction that was provided by the German courts. Most significantly, whereas the German courts referred to the son’s surname as “the mother’s surname,” the ECHR referred to it as “the parents’ common choice of a child’s surname,”¹⁰⁴ or the “joint surname.”¹⁰⁵ This rhetorical shift in terminology indicates that the ECHR recognized that a parent can relate to his or her child’s surname even if this is not the parent’s own surname. The Court also stressed the fact that “the notion of family under [Article 8] is not confined to marriage-based relationships,” and that “the protection afforded by Article 8 continues even if the relationship between the parents has broken down.”¹⁰⁶

Given this reframing of the case, the holding of the ECHR, rejecting the Application, is surprising. In accepting Germany’s position that the father should have no standing in his son’s name-change proceedings, the ECHR explained:

The applicant did not have resort to the possibility under German law that his child should be given his surname in order to demonstrate the natural link between them. Consequently, the child’s surname did, at no stage, constitute an outer sign of a bond between the applicant and his child.

In these circumstances, the connections between the applicant’s involvement in the choice of his child’s surname at the time of his birth and the later change of this surname are too remote as to be constitute [sic] any legitimate interest in the protection of the applicant’s family life with his son.¹⁰⁷

This reasoning is puzzling. The rule emerging from it is that a parent who does not give his or her surname to a child does not have a sufficient link to this name to be heard when the other parent wants to change the child’s name.

Note that if the logic of the opinion is followed, it would be necessary to conclude that a mother who does not give her surname to her child—that is, the vast majority of mothers in the West—has no interest, claim, or standing in her child’s surname change. Consider a hypothetical that would mirror this case by presenting analogous facts with the sexes reversed. In this

¹⁰³ *Id.* According to German law, a child that was born out of wedlock can receive the surname of the parent that does not have custody, upon the request of the custodial parent and the agreement of the other parent. If the child indeed received the surname of the non-custodial parent, the latter has to agree to a change of the child’s surname.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

imaginary scenario, a child born “out of wedlock” receives his father’s surname. The father has custody over the child, and when he remarries, he wants to change his child’s surname to the surname of the stepmother, a surname that the father also took upon marrying her. Ignoring for a moment the extent to which this is indeed an unlikely hypothesis (for men rarely take their wife’s surnames), one should ask whether any court would deny the mother standing regarding her child’s name change because her connection to the child’s surname is too remote to constitute a legitimate interest. We would see such a policy as unreasonable, because it would mean that if a mother doesn’t give her child her own surname, she loses any claim to her child’s name.

It would seem unlikely that this is the rule that the Court intended to create. Therefore it seems that the only way to understand the Court’s argument would be to point to the fact that it only works when the genders of the parents are exactly as they are in the case. In other words, the logic stands because it is the *father* who did not give his surname to his offspring, not because it is a *parent* who did not give his or her surname to that offspring. The Court points out, as if accusingly, that the Applicant did not resort to the legal possibility he had to give his name to his child, with the implication that his voluntary self-emasculatation deserves no sympathy.¹⁰⁸ Fathers who do not insist on passing their name to their child have some contributory fault in losing control over their child’s surname, due to their digressing from proper manhood.

“[P]olitically unmarked . . . language,” observes Bourdieu, “is characterized by a rhetoric of impartiality, marked by the effects of symmetry, balance, the golden mean, and sustained by an ethos of propriety and decency, exemplified by the avoidance of the most violent polemical forms, by discretion, an avowed respect for adversaries, in short, everything which expresses the negation of political struggle as struggle.”¹⁰⁹ The *Petersen* case demonstrates how the semiotic norm by which women and children are “swallowed” into fathers’ surnames is upheld by the law in a seemingly oblivious manner. The prevailing naming order is reinforced by employing an ostensibly gender-neutral logic (signified by gender-neutral terms such as “parent”), by sanctioning men who do not practice their male privilege to name their offspring, and by denying the political nature of naming norms.

In *Rogl v. Germany*, the Commission examined a similar question—whether a father’s right under Article 8 was violated because his ex-wife initiated a change of surname for their daughter.¹¹⁰ The Applicant separated

¹⁰⁸ Recall that the default legal rule dictated that a child born out of wedlock gets his mother’s surname. This renders the Court’s disapproval of the father’s “failure” to name his child even stronger, for he was expected to diverge from the legal default in order to retrieve the naming order.

¹⁰⁹ BOURDIEU, *supra* note 2, at 132.

¹¹⁰ See *Rogl v. Germany*, App. No. 28319/95, 85-A Eur. Comm’n H.R. Dec. & Rep. 153, 158 (1996).

from the mother of his daughter a few weeks after their daughter was born. Custody was given to the mother, and he received visitation rights. When the mother remarried and gave birth to a son with her new husband, she successfully petitioned the German authorities to change the daughter's surname to her own new surname, reasoning that this way her daughter (six years old at the time) could have the same name as her mother, stepfather, and half brother.¹¹¹

Unlike in *Petersen*, the father here did not give up his naming right, and the Commission granted much more weight to his interest, finding that the change in his daughter's surname amounted to interference with the father's right to respect for his family life under article 8(1) of the Convention.¹¹² This finding is particularly noteworthy, since among all the cases reviewed in this Article, it is the only case in which the Commission or the Court found such a breach of article 8(1). The father still lost the case, however, because the Commission found the interference with the right to family life was justified under the conditions of article 8(2)—the daughter's surname change served her well-being in adjusting to the new family that her mother had built.

The Commission's exceptional finding in the context of surname adjudication of interference with the right to family life under article 8(1) requires explanation. This is true particularly when compared to the decision in *Petersen*, in which the Court did not find an interference with the right to family life when the surname of the Applicant's son was changed. The possibility should be considered that the difference between the two cases is the varying extent to which the applicants, both fathers, practiced their naming privilege, one (*Rogl*) obeying and the other (*Petersen*) subverting the patriarchal naming order. The Applicant's claim in *Rogl* conforms to the patriarchal naming order because it seeks to protect the name of the father. Therefore, the more serious judicial approach to the father's interest in his child's surname in *Rogl* can only be explained by the fact that he gave his daughter *his* surname when she was born, and not her mother's name. Unlike in *Petersen*, the father in *Rogl* maintained his masculinity by asserting his holding of his child's surname from the start.

These decisions reflect a notion that naming one's offspring is an integral part of manhood. To be a man is not just to be *involved in* naming your child, but to give your child *your* name.¹¹³ A father's failure to give his name

¹¹¹ The welfare authorities reviewing the request established that the daughter "would suffer from keeping her previous surname." *Id.*

¹¹² See *id.* at 160 (maintaining that a change in the daughter's surname was a possible violation of Article 8(1) of the Convention).

¹¹³ See, e.g., UNA STANNARD, *MRS MAN* 289–305 (1977) (arguing that the patronymic naming system serves to sustain the myth that men are essential to the family, despite their inability to give birth); Gail Rubin, *The Trafficking in Women: Notes on the "Political Economy" of Sex*, in *TOWARD AN ANTHROPOLOGY OF WOMEN* 157, 173–74 (Rayna Reiter ed., 1975) (patronymic practices are part of the objectification of women and serve to sustain male oppression).

to his child is interpreted as a complete withdrawal from the surname battlefield, and thus from masculinity, for the only way a man can maintain influence regarding his child's surname is to occupy the surname stronghold.

Drawing on Bourdieu's terminology, male naming of children functions here as an initiation rite to masculinity. More important than their work in marking the boundary between childhood and adulthood, says Bourdieu, is what passes unnoticed about initiation rites: the division they create between all those who are subjected to them and those who are not.¹¹⁴ In this case, masculinity is initiated by naming one's offspring, but no such rite exists for femininity. "To institute, in this case, is to consecrate, that is, to sanction and sanctify a particular state of things, an established order . . ." ¹¹⁵ This rite affirms that "this man is a man," making "the smallest, weakest, in short, the most effeminate man into a truly manly man, separated [from] . . . the tallest, strongest women."¹¹⁶

IV. WHOSE STABILITY? THE RECURSIVE RELATIONSHIP BETWEEN NAMES AND THEIR BEARERS

This Part moves to a new stage in the analysis. The preceding parts of this Article demonstrated how modes of judicial analysis suppress and neutralize the relationship between names, rights, and personhood. The applicants unsuccessfully attempted to argue that surnames are not labels that merely represent reality, but rather that they constructively constitute it; that is to say, they provide lenses through which identities are perceived socially and through which legal rights receive their content. Like any lens, names shape how we see ourselves and each other, and in that they affect who we are.

This Part considers the basic assumption that surnames can play a central role in constituting reality, particularly the manner in which they fulfill this role. It highlights the existence of a vicious circle between women's social and legal status and their surname rights. Prevailing surname practices loosen women's attachment to their surnames, as they are required to change them with every change in their marital status. Furthermore, in most naming systems their premarital surname is also a man's name—the name of their father. So women are also absent from the second order of the naming terrain. This fragile attachment between women and names, as the cases below reveal, renders it difficult for courts to identify the interests that women have in surnames. Courts find it hard to recognize and articulate what exactly the harm for a woman is, if, for example, she cannot give her child her own surname, or if she wishes to change her own surname. Women are supposed to be able to move easily between names, to be able and willing to

¹¹⁴ BOURDIEU, *supra* note 2, at 117.

¹¹⁵ *Id.* at 119.

¹¹⁶ *Id.*

constantly change and adapt to new “surname environments” dictated by their changing marital status. This perception of women’s relations to names leads courts to protect the stability of the patriarchal naming system over the stability of a woman’s sense of self and autonomy as expressed by her surname.

Before embarking on the case analysis, two illustrations from extra-legal sources will serve to illuminate the discussion—one historical and one sociological. These examples will assist in appreciating the function of women’s names in history, cultural memory, and gender norms.

Consider the following quote, taken from the editor’s introduction to a volume of Virginia Woolf’s early diaries:

The task of identifying [the people mentioned in Woolf’s diary] required much search and patience. Virginia came from a very large family who knew many other very large families from all walks of life. The prominent figures in the world of art, literature, politics, law and education who daily crossed her path were reasonably easy to trace, but those not so well known—women especially—presented problems. Standard directories at the turn of the century were weighted towards the man’s world; and, though it is regrettable, it is also true that a good many husbands, fathers and brothers often blandly wrote their memoirs or autobiographies without ever mentioning the wives, the daughters or the sisters who played so central a role in their lives. Post Office Directories, moreover, listed a woman as ‘Miss’ or ‘Mrs’, with no Christian name to identify her. So that when Virginia referred to someone simply as ‘Mrs Jones’ or ‘Miss Malone’ and gave nothing further, with no electoral or similar register to turn to, it was necessary to abandon Miss Malone and Mrs Jones to the spoils of oblivion.¹¹⁷

¹¹⁷ Mitchell A. Leaska, *Editors Preface* to VIRGINIA WOOLF, *A PASSIONATE APPRENTICE: THE EARLY JOURNALS, 1897–1909*, at viii (Mitchell A. Leaska ed., Harcourt Brace Jonavich 1990). Virginia Woolf herself was deeply concerned with the way women disappear from history. Women’s lives are not documented, because history books contain only men’s affairs. “She pervades poetry from cover to cover; she is all but absent from history.” VIRGINIA WOOLF, *A ROOM OF ONE’S OWN* 43 (Harvest Books 1989) (1929). This Article’s title draws on Woolf’s claim in *A Room of One’s Own* that women need various kinds of space in order to create, think, and live a full life. Such spaces include, according to Woolf, a room for writing, sufficient income, *id.* at 113, and a right to enter shrines of knowledge such as the libraries of Oxford and Cambridge universities, *id.* at 8. But beyond such physical and material means, Woolf was also concerned with representation of women in literature and language—representation as subjects with agency, capable of intimacy and of creativity outside of the domestic context or of their affiliation to fathers, husbands, brothers, or sons, *id.* at 87–88. For a beautiful analysis of Woolf’s own ambivalence towards her marital surname, see Eyal Amiran, *Signing Woolf: The Textual Body of the Name*, 29 *GENDERS* (1999), http://www.genders.org/g29/g29_amiran.html. On women’s appearance in public record under their husbands’ names see STANNARD, *supra* note 113, at 1, 19.

Bureaucratic forms of record-keeping are never only technical. They reflect, and in turn serve to reify, certain modes of perception. They are powerful epistemological instruments; they construct reality by teaching how to see, who is worth being seen, and who can be present. As this excerpt demonstrates, for women, naming conventions are not only a matter of their identity during their lifetime: these conventions shape their existence in genealogy, history, and cultural memory. When an observer in the future (here Woolf's diary editor) looks to the past, he is unable to find women, for the naming conventions render them impossible to trace.

This was the message of X's application against The Netherlands' practice of recording women in the voter register through their husbands.¹¹⁸ The judicial reply that the voters' record was merely administrative and had no effect on the citizens' lives was, given the analysis suggested here, unconvincing.

Women's disappearance occurs fast—often within their lifetimes. Difficulties in clearly delineating a woman's life are not limited to history; they occur even when she is alive. Readers may be familiar with trying to find an old friend from school on Google or Facebook, but finding it nearly impossible because that friend has changed her last name.¹¹⁹

An example from my own family history demonstrates the inability of women's surnames to do the work of preserving or carrying family lineage. My grandmother, like many other Holocaust survivors, spent a lifetime longing to find relics from her family and community in Warsaw—someone who may have remained, someone who may know something about the destiny of her dear ones, a neighbor, an acquaintance. Starting a life in Israel in the years immediately following the war, she nurtured a hope that someone on the street may see her daughter, my mother, and say, as indeed happened in those days, “Hey, girl, your features resemble a family I knew back in Warsaw.” My mother would then be asked her name, but as a child, she would at best be able to give her present surname—that of my grandfather. My

¹¹⁸ X v. The Netherlands, App. No. 9250/81, 32 Eur. Comm'n H.R. Dec. & Rep. 175, 175 (1983); see discussion of the case *supra* in Parts II & III.A.

¹¹⁹ Women can have a loose grip even on their husbands' surnames (that is, on the name they received in marriage). This was the case of a Hungarian female Applicant to the ECHR, who took her husband's first name and surname when she married him, becoming “Mrs. his name” and completely erasing her previous first and surname. When her husband died, Hungary discovered that the woman's name was inaccurate (because it did not fully reflect the husband's name) and demanded that she change it. The Court ruled in her favor. See *DarÓczy v. Hungary*, App. No. 44378/05, Eur. Ct. H.R. (2008), <http://www.echr.coe.int/echr>.

Another example: A woman interviewed in a sociological study of marital names in America tells of a friend who was addressed, after her marriage, as “Mrs. Jim Parsons.” When her husband died, some of the cards she received were addressed to “Jane Parsons.” This angered her so much that she “drew a line through the Jane and above it wrote Mrs. Jim Parsons and returned it to the senders, explaining that her husband's name had been ‘given, not loaned, to her.’” CARBAUGH, *supra* note 19, at 96.

mother spent her entire childhood with a note that was pinned to her shirt every morning, noting the premarital surname of my grandmother.

A circular dynamic unfolds here: a surname is weakened by its attachment to a woman and, in turn, women are unable to maintain a solid presence and keep a solid grip on their names. To further appreciate the mutual effects between women and names, the discussion turns momentarily from surnames to first names.

In a study conducted in 2000, a group of Harvard University sociologists found similarities between processes of racial segregation in accommodation and the process of what may be called name segregation.¹²⁰ The Schelling model of racial segregation in accommodation shows how easily racially mixed areas become highly segregated black areas.¹²¹ Since the tolerance of whites for a racially mixed area is less than that of blacks, the entrance of blacks to a white area is magnified by whites and perceived as much larger than its actual portion. This inflated interpretation leads to rapid exodus from such neighborhoods, which accelerates their becoming more homogeneously black.

The same dynamic exists, as the research found, with androgynous names. Using a residential model for mapping names, the researchers classified first names by how many males and how many females "occupy" them. A name occupied by an overwhelming majority of one sex would be a segregated name. A name occupied by both sexes would be a mixed, or an androgynous name.¹²²

Researchers found that when parents perceive that a name is increasingly occupied by girls, the parents perceive the portion of girls occupying the name as much larger than it actually is (as in the case of blacks in white neighborhoods), and they stop giving it to their sons.¹²³ For example, when parents started naming girls "Lesley," parents of boys stopped giving that name to their newborns. Thus, androgynous names that tip slightly toward the girls can very quickly become gender-specific names. As in the case of racial segregation, the opposite is not true: it takes many more boys occupying an androgynous name to deter girls' parents from giving it to their daughters.¹²⁴

¹²⁰ Stanley Lieberman, Susan Dumais & Shyon Baumann, *The Instability of Androgynous Names: The Symbolic Maintenance of Gender Boundaries*, 105 AM. J. SOC. 1249 (2000).

¹²¹ See THOMAS SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 137-66 (1978).

¹²² See Lieberman, Dumais & Baumann, *supra* note 120, at 1259-60. The researchers reviewed birth records of whites in Illinois for eighty years until 1995. The researchers did not include African American birth records in the study due to the "enormous increase in newly invented names among blacks." *Id.* at 1258. The portion of androgynous names in the entire name pool remained small throughout the period: "97% of the average child's name is given to children of the same gender." *Id.* at 1261.

¹²³ *Id.* at 1273-75.

¹²⁴ *Id.*

When the same name is spelled differently for boys and girls (e.g. Allen and Ellen, or Daniel and Danielle), parents of girls tend to be less attracted to it: they prefer truly androgynous names, both in sound and in spelling. The researchers concluded that parents value the chance that their daughter's name would be taken to be a man's name.¹²⁵

The researchers interpreted the results in terms of gender "contamination."¹²⁶ Feminine markers have lower cultural value and status than masculine ones.¹²⁷ As such, they have the power to emasculate and stigmatize males who carry them. On the other hand, male markers of self are perceived as valuable in their potential for women's status.¹²⁸

The advantaged group has more to lose in symbolic terms when their distinctive features are merged with the less advantaged population. The aversion towards gender neutrality for males, revealed by these naming practices, is substantial and can be understood in terms of the imagery associated with such names.¹²⁹

And tying back to the question of stability of names, the researchers concluded:

Among nonandrogynous names in our matching sample, boys' names have a much longer average life than do those given to girls This is consistent with the general observation that names popular for boys have a slower turnover than do girls' names—presumably reflecting the greater emphasis on fashion in selecting girls' names and the disposition of parents to prefer the names of grandfathers and fathers and other more traditional names for their sons. The results are radically different for androgynous names: their average years of life jumps to 54 for girls, compared with 30 for nonandrogynous girls' names. By contrast, if anything, androgynous boys' names live shorter lives than do

¹²⁵ Androgynous names "with only one dominant spelling reach a higher level of usage for daughters than do names where the spelling forms serve to differentiate gender of the child By contrast, androgynous names with different spelling forms reach a higher level of popularity for boys than do names where there is no differentiation by spelling" *Id.* at 1281.

¹²⁶ *Id.* at 1285.

¹²⁷ *Id.* at 1281 (parents prefer to give masculine names to their daughters, but not to give feminine names to their sons, and parents of boys prefer the androgynous names that have spelling differentiation—Francis/Frances—whereas parents of girls prefer androgynous names where the dominant spelling is identical to both sexes—Kim, Dana).

¹²⁸ Another part of this study surveyed undergraduates' approaches to androgynous names. The students were asked to associate the characteristics of over 1000 names. People with both male and female androgynous names were considered more attractive, more liked, and more active. But on the masculine-feminine scale, "masculinity for the majority of the male androgynous names scores below the average for all males; and likewise the majority of female androgynous names are below the median femininity level." *Id.* at 1280. Furthermore, the level of masculinity attributed to a name correlates with parents' inclination to name their son this name. *Id.* at 1281.

¹²⁹ *Id.* at 1285.

their non-androgynous counterparts, declining from 47 to 37 years of life¹³⁰

Women's hold on first names and surnames, then, is unstable.

Bijleveld v. The Netherlands illustrates this point. It pertains to women's limited ability to project their name into future generations and gain "surname longevity," even at the turn of the twenty-first century.¹³¹ In this case, a married couple decided that they would give their male offspring the father's surname and their female offspring the mother's surname. Accordingly, they gave their first two sons the father's surname, and when their daughter was born, they applied to give her the mother's surname.¹³² The Netherlands refused to allow them to register their daughter with the mother's surname.¹³³ During litigation over that daughter's surname, the couple had another daughter, to whom they also sought to give the mother's surname.¹³⁴

Under Dutch law at that time, married women were unable to give their surnames to their children. Only mothers who were raising their children on their own for at least three years could have their surname given to their child.¹³⁵

Two judicial tribunals in the Netherlands rejected the mother's claim that not allowing her to pass her own surname to her daughter amounted to sex discrimination.¹³⁶ The higher tribunal explained that it could not see any discrimination: "The refusal at issue was not found to be discriminatory as it achieved that all children having the same parents bear the same surname and that therefore no difference between boys and girls was made."¹³⁷ Employing a formal, symmetrical, and gender-blind model of equality, the Dutch court reproached the parents by saying that it was *their* naming sys-

¹³⁰ *Id.* at 1283 (citations omitted).

¹³¹ *Bijleveld v. The Netherlands*, App. No. 42973/98, Eur. Ct. H.R. (2000), <http://www.echr.coe.int/echr>.

¹³² *Id.* For examples of the ways contemporary American couples view the dilemma of child naming, and the solutions they choose, see CARBAUGH, *supra* note 19, at 97–99; see also Johnson & Scheuble, *supra* note 19, at 731 (finding that contemporary American "[d]aughters whose mothers had nonconventional marital names were 5 1/2 times more times likely to use a nonconventional name themselves. Among sons, their mother's naming choice had no significant effect on the name taken by the woman the son married.").

¹³³ *Bijleveld*, App. No. 42973/98, Eur. Ct. H.R. (2000), <http://www.echr.coe.int/echr>.

¹³⁴ *Id.*

¹³⁵ "[A] minor child's surname could be changed into the mother's surname upon a request to this effect, when the mother—after the dissolution of the marriage or termination of the non-marital cohabitation with the father—has raised the child as an unmarried parent for at least three years immediately prior to the request." A mother's surname could also be given if "a refusal to do so would entail serious damage to the child's physical or mental health." *Id.*

¹³⁶ Catharina Bijleveld appealed the decision of the State Secretary of Justice to refuse her name request to the Regional Court. From there, she appealed to the Administrative Law Division of the Council of State. *Id.*

¹³⁷ *Id.*

tem that was discriminatory.¹³⁸ This reasoning is a remarkable example of how the law dissolves the discrimination argument and empties it of any power by detaching the question at hand from the overall structure of surname allocation. At first sight this reasoning seems regular and conventional, but in second reading, it borders on unintelligibility. The mother argued, of course, that the discrimination is between mothers and fathers, or men and women. And the Dutch court replied that there was no discrimination, because boys and girls are treated equally.

The mother set forth *her* right for protection from discrimination, and the court replied with the naming system's interest of marking children as part of the same family, dressing this argument in the garb of protecting the children's equality interest. If the interest of the children is the focus of the case, then the Court should ask what happens to those children's surnames as they move along life's paths. While the boys will be able to retain their surnames throughout their lives, the girls' surnames will probably be changed at least once, if not more, throughout their lives, and their connection to their siblings and core family will no longer be manifest through their surname.

During the proceedings in Holland, a 1998 change to the Dutch law of names subsequently allowed parents to choose whether to give their children either the father or the mother's surname.¹³⁹ All the children had to have the same family name, and in case of no joint parental declaration about the chosen name, the child would automatically be registered under the father's name. The transitory rules of this new legislation made the new law applicable to the children of the couple. However, since they wanted to give the mother's surname only to the daughters, the new law provided them no support, because it required one surname for all siblings.¹⁴⁰

Exhausting domestic law to no avail, the mother petitioned to the ECHR, arguing that the new law violated her right to family life under Article 8 by denying parents the choice of how to name their children. She also argued that the new law discriminated on the basis of sex.

The Court held that the new rules did not violate the Applicant's right to respect for her family life under Article 8, accepting The Netherlands' claim that in balancing "the competing interests of the individual and of the community as a whole" the consideration of "stability required in the legal rules governing names" prevailed.¹⁴¹

In the context of human rights, stability of rules is a questionable rationale,¹⁴² especially when the competing interest is the stability of the right-

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Stability appears in several contexts in these decisions. *See, e.g.,* Sijka v. Poland, App. No. 26272/95, Eur. Ct. H.R. (1997), <http://www.echr.coe.int/echr>; Burghartz v. Switzerland, 280 Eur. Ct. H.R. (ser. A) 19, 44 (1994) (Geus, dissenting) (noting that

bearer's personhood. In the context of *Bijleveld*, the competition is between the stability of the legal rule that grants siblings the same surname (meaning, in effect, the stability of *paternal* surnames) versus the stability of the *maternal* surname over time: its opportunity to exist uninterrupted throughout generations (as well as the ability of the mother to project her surname into the future, thus ascertaining some lineage stability of her own).

The Netherlands and the ECHR saw the interest of the mother as weaker than the interest of maintaining stability of the naming order. This view, it is argued here, exists because women's surnames are inherently unstable, with a short life span, doomed to oblivion at the end of a woman's life and even earlier if she marries.

This conclusion is supported by the way the Court dealt with the Applicant's discrimination claim. The Applicant argued against the new rule, which gives the child its father's surname in case of parental disagreement. This rule, she maintained, discriminates against women, because it effectively grants the father veto power and serves as a negative incentive to reach agreement with the mother.¹⁴³

The Court acknowledged that fathers have an advantage in naming their children.¹⁴⁴ However, it found that this different treatment did not amount to discrimination, since the Government presented a reasonable justification for the difference in treatment: having all the siblings bear the same surname.¹⁴⁵ This interest in a unified sibling name, in addition to the undesirability of *indeterminacy* of a child's surname in case of lack of parental consensus, rendered the default rule justifiable.¹⁴⁶ The Court's conclusion that different treatment is legitimate is unproblematic only if one accepts the axioms lying at its basis: adherence to patriarchal naming conventions as the neutral and natural order of things. Other conceivable legal arrangements, such as giving the child both parents' surnames,¹⁴⁷ could have achieved the same stated purposes of unity of surnames between siblings and lack of indeterminacy.¹⁴⁸

while the Convention guarantees the right to a name, it does not guarantee "the right to freely choose a surname and to change it on a whim"); *K.B. v. The Netherlands*, App. No. 18806/91, Eur. Ct. H.R. (1993), <http://www.echr.coe.int/echr> (discussed in Part V, *infra*).

¹⁴³ This principle could be maintained by other methods of resolving a conflict situation, as other legal systems teach us. Former Czechoslovakian law and Hungarian law have a similar arrangement, which allows the parents to decide whose surname all the siblings will receive. However, in case of disagreement between the parents, the conflict is taken to court and decided there. Other countries delegate the decision to an administrative body. See *Pintens & Will*, *supra* note 8, at 53.

¹⁴⁴ *Bijleveld*, App. No. 42973/98, Eur. Ct. H.R. (2000), <http://www.echr.coe.int/echr>.

¹⁴⁵ *Id.*

¹⁴⁶ On the problems with the rationale of family unity, see discussion of *Burghartz*, *supra* III.B.

¹⁴⁷ Legal systems that have similar naming laws adopt this solution. In Quebec, Romania, and the republics of former Yugoslavia, children receive both parents' surnames in case of parental disagreement. *Pintens & Will*, *supra* note 8, at 54 n.495.

¹⁴⁸ See also *G.M.B. v. Switzerland*, App. No. 36797/97, Eur. Ct. H.R. (2001), <http://www.echr.coe.int/echr>, in which the parents sought the right to name their sons after the father, and their daughters after the mother. The ECHR found that there was no violation

It should also be noted that the system that the Court found reasonable and non-discriminatory does not achieve the purpose of having all siblings bear the same name in the case of half-siblings. According to the existing system, half siblings would bear the same surname only if they are related through their father, not if they are related through their mother. It is the nature of men's surnames as stable and long-lasting that informed this case's outcome.

The fact that a surname is carried by a woman "infects" it and dooms it to instability. Fathers inject their surnames with their masculinity and thus destine their name to longevity. Mothers, by the very fact that they are women, condemn their surnames to short existence in their "maiden" years or, at best, during their own lifetime, but rarely on to the next generation. Accordingly, naming one's child is not, in the eyes of the law, nearly as central or as important for women as it is for men.

It is indeed a curious interplay between the name and the name holder, for it would be impossible to draw a unidirectional causal line here: it is not just that the femininity of the name-holder saps a name of its viability. Rather, the dynamic is circular: the current "behavior" of women's surnames is *defined by* prevailing notions of gender and at the same time it *shapes* those notions by excluding women from the possibility of having a stable surname.¹⁴⁹

The 1997 case of *Sijka v. Poland*¹⁵⁰ provides another angle for appreciating the different longevity of men and women's surnames. The Applicant, a widow who had not taken her husband's surname in marriage, wanted to change her surname after he died. She wanted to create a name that was composed of her maternal surname and the surname of her late husband.¹⁵¹ That is, she wanted to abandon her paternal surname. As to her mother's surname, the Polish authorities refused the request, reasoning that "[s]he had not had anything in common . . . with [her mother's surname] as it had only been her mother's maiden name."¹⁵² A higher administrative authority

of Article 8, since it could "see no particular inconvenience" in making the daughter carry her father's surname (against her parents' wishes). *Id.* As to the couple's discrimination claim, the Court accepted Switzerland's argument and found that "[t]he unity of the family name reflects towards the outside world the unity of the family, which is in itself a perfectly legitimate justification" for the different treatment of men and women. *Id.*

¹⁴⁹ The European Court of Justice decided a similar case in 2003, and arrived at the opposite outcome, recognizing in its ruling that names have a dimension of personal dignity and self expression, and rejecting the responding state's family unity argument. *See* Case C-148/02, *Carlos Garcia Avello v. Belgium*, E.C.R. I-11613 (2003).

¹⁵⁰ *Sijka v. Poland*, App. No. 26272/95, Eur. Ct. H.R. (1997), <http://www.echr.co.int/echr>.

¹⁵¹ It seems that the wish to change her name was largely motivated by her sense that she was harassed due to her political convictions. *See id.* This motivation, I would argue, should not have weakened her claim on her desired name. The fact that she pursued the name change on the record, requiring the attention of the state's bureaucratic and legal apparatus, indicates that she did not pursue this change in order to mislead anyone.

¹⁵² *Id.*

similarly found that “the mere fact that it was her maternal family’s name did not suffice to comply with her request.”¹⁵³

Note the tone in which those claims about her relationship to her mother’s surname are made: these are findings, stated in a factual manner of self-evident observation, rather than arguments that need to be established through further legitimating reasoning. What is it that enables the law to find that a daughter could not demonstrate any connection, had nothing in common, with her own parent’s surname, other than that parent’s gender? The inherently ephemeral nature of a woman’s name denies it weight when balanced again the all-important consideration of stability in the legal naming framework.

The Commission recognized that “it can be argued that the applicant could have legitimately wished to manifest . . . a link to her family as this had been her mother’s maiden name.”¹⁵⁴ However, the Commission declared the case inadmissible, reasoning that Poland’s weighing of conflicting considerations such as the stability of naming rules against the Applicant’s request renders Poland’s refusal of the request reasonable. The application expressed the Applicant’s will to commemorate her husband and to extend the use of her mother’s pre-marital surname. It is plausible, too, that this Applicant felt that the names she wanted to take better represented who she was. Again, however, stability of rules is conceived as heftier in importance than stability of personhood.

The fragile control that women have on identity signifiers is not limited to names: it extends to other signs that define and shape personal identity. This is illustrated by a case from Spain that dealt with the gender-based allocation of nobility titles. Compared to first names and surnames, nobility titles are often more stable and do more work tying one into a reputable family and providing social visibility. The case generated elaborate public debates in Europe, a fact that might indicate that the place of women in systems that allocate signs of power and prestige is still fragile and contested.

In *De La Cierva Osorio De Moscoso v. Spain*,¹⁵⁵ the Court discussed jointly the applications of four Spanish women. All four were the oldest daughters in their family whose parent or relative passed away and left a nobility title for which they would have been next in the order of succession had they not been women. According to the Spanish law of title succession,

¹⁵³ *Id.*

¹⁵⁴ *Id.* A 1985 study of the meaning attached to marital surnames among Americans of all ages found that both sexes underestimated the extent to which women identified with their premarital surnames. In addition, women reported an equal sense of identification with their premarital surname to that found among men. See Intons-Peterson & Crawford, *supra* note 19, at 1170–71.

¹⁵⁵ *De La Cierva Osorio De Moscoso v. Spain*, 7 Eur. Ct. H.R. 485 (1999).

these women were skipped over in the succession line because their younger brothers, being male, had priority over them.¹⁵⁶

Prior to reaching the ECHR, the issue was extensively litigated within Spanish law.¹⁵⁷ Spain's Supreme Court ruled several times during the 1980s and 1990s that the priority granted to male heirs was indeed unconstitutionally discriminatory.¹⁵⁸ However, domestic law changed in 1997 when a lower court questioned the correctness of these rulings and referred the question to Spain's Constitutional Court, which found that there was no constitutional violation in the succession rules.¹⁵⁹ Following this decision, Spain's Supreme Court abandoned its case law and adopted this new ruling, thus no longer offering remedy to women who argued for the right to be recognized as legal heirs.¹⁶⁰

At the ECHR, the Applicants claimed that the ruling interfered with their family life in violation of Article 8 and constituted discrimination by denying them enjoyment of this right. In establishing their claim that Spain violated their right to respect for private and family life, the Applicants argued that "nobiliary titles constituted the heritage of their lineage's honour and a blood tie with their ascendants, and that they had been deprived of those attributes solely because they were females, not males."¹⁶¹ The ECHR rejected this claim, accepting Spain's argument that "[i]dentity with a family was expressed through the surname and not through a nobiliary title."¹⁶² Nobility titles, then, do not fall within the scope of Article 8's protection. Not finding any violation of Article 8, the Court did not examine the discrimination question, since Article 14 protects only the equal enjoyment of rights guaranteed in the Convention. The discussion in Spain's Constitutional Court illuminates the examination of women's access to "name longevity." The Constitutional Court described peerage as a historical relic, which may have played a role in the legal, social, and financial status of people in the past, but today had a "purely symbolic value,"¹⁶³ merely honorary nature, lacking "any substantive content within our legal order."¹⁶⁴ The Applicants, on the other hand, described the titles as not merely honorary in function, but of "pecuniary value, in the form of, for example, social advantages and increased prestige. Furthermore, assets, especially immova-

¹⁵⁶ *Id.* at 489–93.

¹⁵⁷ *Id.* at 493.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 495.

¹⁶³ *Id.* at 490.

¹⁶⁴ *Id.* at 491; *see also* Succession to Spanish Titles: The Rights of Males Over Females Determined by Constitutional Tribunal, *Almanache de la Cour*, 9 July 1997, <http://www.chivalricorders.org/nobility/spcntrib.htm> (last visited Nov. 9, 2009).

ble property, from the family estate, frequently reverted in accordance with custom to the holder of the peerage.”¹⁶⁵

The Court's reasoning for why prioritizing males is not discriminatory revolves around the impossibility of imposing current principles of equality on a cultural phenomenon that originated in unequal times and reflects unequal hierarchies and value systems. “[T]he social and legal values enshrined in our Constitution . . . would necessarily come into play if the legal distinction [between men and women] had a substantive content, which it certainly does not here.”¹⁶⁶ Had those titles carried more than symbolic value, or had they any actual legal or material implications, promises the Court, they would have been deemed unconstitutional.¹⁶⁷

[I]t would be paradoxical if a peerage could be acquired by succession not, as historical practice dictates, on the basis of the criteria which governed previous transmissions, but of other criteria, since that would amount to ascribing the values and principles enshrined in the Constitution, and which today have a substantive content within our legal order, to something which, because of its symbolic nature, does not have such content.¹⁶⁸

At the ECHR proceedings, the Applicants argued that the discriminatory succession rule violated their dignity.¹⁶⁹ The Government's reply expressed the same idea in more analytical terms:

[I]t would be unacceptable for one group of people to be considered more dignified than others as a result of pure biological accident. Peerages could not be accepted within society unless they were seen purely as “*nomina honoris*” belonging to a “residual institution” of the Old Regime whose recognition by some States was due solely to the fact that they were an historic institution. It would be contrary to the principle of the universality and equality of human rights to regard enjoyment of a nobiliary title as a right to respect for private and family life.¹⁷⁰

This is, then, an argument defending a notion of coherence in cultural practice. Its main concern seems to be the hybridity that would result from imposing contemporary standards on a social phenomenon from the past. To infuse it with contemporary values would amount to distortion that would empty this practice of its actual spirit and nature, and render it incoherent and inauthentic.

¹⁶⁵ *De La Cierva Osorio De Moscoso*, 7 Eur. Ct. H.R. at 494.

¹⁶⁶ *Id.* at 490.

¹⁶⁷ *Id.* at 490–91.

¹⁶⁸ This translation is quoted from the ECHR decision: the Spanish Court's decision was translated from Spanish by the European Court in its official publication. *Id.* at 491.

¹⁶⁹ *Id.* at 494.

¹⁷⁰ *Id.* at 495–96.

Moreover, continued the Constitutional Court, to point to equality as a value that should be injected into this practice would be paradoxical, because this practice is inherently unequal.¹⁷¹ The titles originated in hierarchical societies, in which people were unequal citizens by virtue of such titles, which were earned and passed on by rules that contradict contemporary merit-based standards that devalue such status-based social divisions.¹⁷² Thus the female Applicants could not solely argue against sex based discrimination while ignoring other forms of discrimination embedded in these titles.¹⁷³

If the nobiliary title is not discriminatory and, therefore, not unconstitutional, the precedence [given to the male over the female line] is not either. In other words, since it is accepted that peerages are consistent with the Constitution owing to their purely honorary nature and their purpose, which is to keep alive the historic memory of their grant, a specific element of that institution—the rules governing their transmission on death—cannot be regarded as being exempt from the conditions laid down in the royal charter of grants.¹⁷⁴

Recapitulating this argument somewhat grossly, the Court held that nobility titles are insignificant, they are just titles, and thus it is legitimate to pass them on unequally. And since they don't matter, women shouldn't care about inheriting them.

But titles matter. Even if they matter only as "*nomina honoris*" as the Spanish Court itself recognizes, then women should have equal access to whatever meaning and function this honorary name has in Spanish society.¹⁷⁵ The entrance of women into this system of honor would, in the eyes of the Constitutional Court, drain titles of their viability and debilitate titles' ability to carry honor. For women are not of this system; their entrance into it, just like giving boys' names to girls,¹⁷⁶ would erode the system by granting titles to those who cannot, are not made to, bear them stably and reliably across generations.

This reading of what underlies the Constitutional Court's decision is supported by the fact that the Court also protected the discriminatory succession rules with regard to titles that were given by the contemporary democratic state to people who earned them through merit rather than other qualities such as wealth.

¹⁷¹ *Id.* at 490–91.

¹⁷² *Id.*

¹⁷³ *Id.* at 493, 495.

¹⁷⁴ *Id.* at 491.

¹⁷⁵ *Id.* at 495.

¹⁷⁶ *See* Lieberman, Dumais, & Baumann, *supra* note 120.

[P]eerages are now passed on as they stand by succession. In most instances, these are titles that were attributed under the Old Regime and were defined in the historical past to which, precisely, they now refer Thus, the legal rule governing their transmission on death has, with time, itself become an inherent feature of nobiliary titles acquired by succession.¹⁷⁷

As with any cultural practice, the idea that it is possible (or desirable) to leave a practice intact throughout changing times, unaffected by the society that practices it, is a myth. The temporal hybridity of the character of the practice is inevitable if the practice is to remain a viable social institution. Every era understands itself in different ways and reshapes old practices by infusing them with new meanings. The Court itself acknowledged and affirmed such multiplicity by noting that contemporary titles that the King of Spain gives people of stature (such as authors) are based on contemporary standards of merits.¹⁷⁸ If this is a viable social practice that expresses contemporary values, and if this practice is recognized and regulated by a legal system for which sex equality is a constitutional value, then it is hard to see how women can be excluded from it.

The Applicants' argument that they "had been dispossessed of part of their social, cultural, family and physical links with their deceased fathers and ancestors solely on biological grounds, namely the fact they had been born female"¹⁷⁹ seems on point. The fact that a woman holds a name makes it short-lived, and this in turn renders women invisible, unidentifiable, and thus barely present in the memory of a culture. Women, in sum, are being denied access to stable identity markers that would enable them to have a continuous, stable, visible presence in family lineage, cultural memory, and history.

*Hüsler*¹⁸⁰ and *X*¹⁸¹, the first two name cases that reached the Court, involved women's access to the public sphere in the narrow, political sense, as voters and elected representatives. The cases reviewed in this Part already operate in a legal environment in which the laws of names of the member

¹⁷⁷ *De La Cierva Osorio De Moscoso*, 7 Eur. Ct. H.R. at 490–91. I am grateful to Professor Luis Peral from the Universidad de Madrid's law faculty for providing me background information about the case.

¹⁷⁸ *Id.* at 491.

¹⁷⁹ *Id.* at 496. The Applicants argue that:

[O]nce a person's right to use the title had been recognized, it necessarily concerned Article 8 of the Convention since it constituted an element of identification of the holder of the right with their parents, their lineage and their ancestors, one that was not unconnected with the holder's family life. Consequently, the holder could not be subjected to discrimination on the ground of sex.

Id.

¹⁸⁰ *Hagmann-Hüsler v. Switzerland*, App. No. 8042/77, 12 Eur. Comm'n H.R. Dec. & Rep. 202, 202 (1977).

¹⁸¹ *X v. The Netherlands*, App. No. 9250/81, 32 Eur. Comm'n H.R. Dec. & Rep. 175, 175 (1983).

states are more egalitarian, at least formally—in the sense that they allow much more choice to couples in choosing their surnames. The kinds of legal questions that arrive at the European Court raise more subtle arguments, which move beyond easily identifiable formal and symmetrical equality. But as demonstrated above, the Court fails to provide adequate responses to these complex arguments. Rather than assisting in the opening of new realms for women, such as the formal realm of political rights, the law participates in excluding women from the informal public sphere as well. The cases discussed in this Part reflect and reproduce the ways in which women have been denied access to social honor, prestige, cultural representation, and historiographic visibility.

V. POETIC ACTS OF NAMING

The cases reviewed thus far have been political in their wish to destabilize the habitual ways of talking about men and women, but there is an unavoidable sense in which they still affirm, accept, and reify the existing naming order, whether obliviously or consciously. In this final Part, applicants make more radical and subversive challenges to the existing naming order, enabling the unraveling of some assumptions about names that previous cases did not expose. Section A sets the theoretical framework that enables recognition of why the cases studied in this Part present a different challenge to the legal logic. Section B analyzes these new kinds of cases, and outlines an alternative legal approach to them.

A. *“The Artist Formerly Known as Prince”*: Names beyond the Discrimination Paradigm

Although they sought to change traditional naming conventions, the applicants to the ECHR in the cases discussed thus far operated within identifiable, binary naming options (usually of competing between the wife’s premarital name and the husband’s name). Therefore, their applications were limited in their ability to radically challenge the given structure of naming. Certainly, these names were important to the female applicants in maintaining their sense of self and individuality, as these were the names they were born with and carried during their pre-married life. However, the surnames the women sought in these applications, the names that they struggled to hold as their own names, were ultimately men’s names. Thus it could be argued that their struggles remained within the patriarchal naming system.

But just because these applications remained, to some extent, within the patriarchal naming order, does not mean they should be dismissed as lacking a politically critical edge. It is crucial to observe the difficulties in formulating a legal name plea that would completely subvert the naming order. In theorizing women’s agency, feminist legal scholar Kathryn Abrams notes

that even when one acts critically, it is impossible to operate completely outside the socially available set of meanings through which one is constructed and within which one operates.¹⁸² One's sense of self is socially constituted, and completely dismantling or transcending these social constructions is not only impossible but unintelligible.¹⁸³ Consciousness of one's socially constructed roles and identities enables operation *within* the socially prescribed meanings, negotiating and reshaping them.

A woman may become aware, for example, that images or attitudes she has regarding her body, her competence to perform certain tasks, or her strength or vulnerability in relation to others, are shaped by norms that describe these matters at least partly as a function of gender. Developing this awareness does not permit her to transcend these socially conditioned visions of self, but it allows her greater room in which to affirm, reinterpret, resist, or partially replace them Though she does not have recourse to some complete, pre-social self that can be uncovered, she may draw on moments of insight that arise from her reflection on her experience, or attitudes she holds that are shaped by other social influences.¹⁸⁴

The applications discussed here are manifestations of critical awareness, notwithstanding the fact that the names the applicants seek are the names of their fathers. Abrams helps appreciate the difference between an untenable ideal of operating completely outside of one's situated knowledge, as if within an asocial and non-lingual vacuum, and operating within an available set of meanings. The applicants in the cases studied here operate within a language: the language of names. Acting within a language is simultaneously a constraint and an opportunity. To negotiate and reshape meaning, one must submit to a sufficient level of linguistic constraint. At the same time, it is exactly this linguistic toolkit that provides a set of possibilities to create new meanings.¹⁸⁵ The language of names enables the applicants to point to the ways in which prevailing methods of signification are

¹⁸² Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY. L. REV. 805, 832–33 (1999).

¹⁸³ *Id.* at 825–26.

¹⁸⁴ *Id.* For a similar approach, grounding critical consciousness and identity formation in social location and experience, see Satya P. Mohanty, *The Epistemic Status of Cultural Identity: On Beloved and the Postcolonial Condition*, in RECLAIMING IDENTITY: REALIST THEORY AND THE PREDICAMENT OF POSTMODERNISM 29, 55–56 (Paula M. L. Moya & Michael R. Hames-García eds., 2000).

¹⁸⁵ Kathleen Canning helpfully describes this movement between agency and structure:

[E]mphasis on construing, reframing, and reappropriating [one's conditions of life] implies that subjects do have some kind of agency, even if the meanings they make "depend on the ways of interpreting the world, on the discourses available to [them] at any particular moment." Indeed, experience, as the rendering of meaning, is inextricably entwined with the notion of agency, with a vision of

not self-evident and transparent and advocate new possibilities of representation through questioning and defamiliarizing existing naming norms.¹⁸⁶ This, as Abrams stresses,¹⁸⁷ can only be done within the language available to them. Defining acts of agency narrowly, limiting them to acts of radical departures or complete detachments from the vocabularies in which one is embedded, would be a futile idealization.¹⁸⁸

To illustrate this point, consider the case of Prince, who changed his name for a few years to an unpronounceable symbol.¹⁸⁹ This act is worlds apart from the name applications discussed in this Article, as it draws away from communicability.¹⁹⁰ Ironically, Prince's attempt to defy existing nam-

historical subjects as actors who . . . "put into practice their necessarily structured knowledge."

Canning, *supra* note 66, at 377 (citations omitted).

¹⁸⁶ As semiotician Marcel Danesi observes, the fact that language shapes the way we see the world should not be perceived as deterministic or pessimistic news (for example, the fact that English has a word for stone and another word for rock, rather than a common word for both rocks and stones tremendously affects the way we think about those two concepts). The curious thing about language, contends Danesi, is that it itself provides us with means to transcend it and rebel against its way of determining how we see the world. See generally MARCEL DANESI, OF CIGARETTES, HIGH HEELS, AND OTHER INTERESTING THINGS: AN INTRODUCTION TO SEMIOTICS 69–76 (1999).

¹⁸⁷ See Abrams, *supra* note 182, at 825.

¹⁸⁸ See also Bourdieu's observation that

the will to transform the world by transforming the words for naming it, by producing new categories of perception and judgment, and by dictating a new vision of social divisions and distributions, can only succeed if the resulting prophecies, or creative evocations, are also, at least in part, well-founded *pre*-visions, anticipatory descriptions.

Bourdieu, *supra* note 27, at 839.

¹⁸⁹ See Jon Bream, *Prince Takes His Place Among Rock Royalty*, STAR TRIB., NOV. 21, 2003, at 1B; see also Prince, VH1 Biography, <http://www.vh1.com/artists/az/prince/bio.jhtml> (last visited Nov. 9, 2009). Prince did not, as far as we know, try to have his new name registered in official state record, but it is likely that he would have failed had he tried to receive official state recognition. State bureaucratic mechanisms present many kinds of constraints to individuals, including the kinds of names citizens can choose, the way the name is written, and the length of the name. See, e.g., Noriko Watanabe, *Politics of Japanese Naming Practice: Language Policy and Script*, 8 CURRENT ISSUES IN LANGUAGE PLAN. 344 (2007) (discussing the collision between the government's official character lists for writing names and the desires of parents to use their own script); see also, e.g., Bundungsverfassungsgericht [BVerfG] [Federal Constitutional Court] May 5, 2009, No. 1 BvR 1155/03, http://www.bverfg.de/entscheidungen/rs20090505_1bvr115503.html (a recent ruling from Germany's Federal Constitutional Court, confirming a governmental policy to ban surnames that are composed of more than two names connected with a hyphen and rejecting a claim by a woman who wanted to add her surname to her new husband's name because her husband's surname was already composed of two names); Press Release, Federal Constitutional Office, Statutory Restriction to "Double Married Name" Compatible with Basic Law, Press Release No. 47/2009 (May 5, 2009) (summarizing the court's judgment in English); Nicholas Kulish, *High Court in Germany Pops Names that Balloon*, N.Y. TIMES, May 6, 2009, at A6 (reporting on the ruling).

¹⁹⁰ But we cannot say that it is absolutely outside the realm of meaningful iconicity. Prince's chosen name, ♪ could perhaps be deciphered by locating it within certain iconic traditions and contexts. It has been interpreted as "a combination of the male and female gender signs." Robert Walser, *Prince*, ENCYCLOPEDIA BRITANNICA ONLINE (2009), <http://>

ing patterns lead to a reverse effect, where his audience could only refer to him as “The Artist Formerly Known as Prince,”¹⁹¹ thereby repeatedly evoking his previous name as the only available anchor of reference. His failure to employ the existing tools within the language of names bounded him to his previous name even more than if he had changed his name to one less removed from existing name-formulas.

Studies of women's positions regarding their surname choices consistently convey this ambivalence. Many women are acutely aware of the way in which the existing system compromises their possibility to radically depart the patriarchal naming system.¹⁹² At the same time, they wish to express and sustain their sense of identity prior to the marriage, their ties to their parents and lineage. It is their fathers' names that were made available to them for doing so. The problem becomes even more complicated when they wish to signify their connection not only to their original family but also to their spouse and children.¹⁹³ As their choices of names demonstrate,

www.search.eb.com/eb/article-9117507. It also has been interpreted as connoting “the alchemy symbol for soapstone.” General Prince, Frequently Asked Questions (Jan. 26, 2002), <http://www.faqs.org/faqs/music/prince-faq/general-faq/>.

¹⁹¹ A Google search of the phrase “artist formerly known as Prince” produced more than four million hits. My visits to some of these sites left me with the (anecdotal) impression that a surprisingly high portion of them expressed hostility or annoyance towards this name change. One website cynically announced that “[t]he . . . artist formerly known as Prince . . . formerly had a musical career known as successful. . . . The artist formerly known as Prince . . . apologized to an audience, formerly known as enthusiastic, for his silly assed ideas, formerly known as commercial.” The Artist Formerly Known as Prince, FactBites, <http://www.factbites.com/topics/The-Artist-Formerly-Known-As-Prince> (last visited Nov. 28, 2009) (quoting <http://members.aol.com/dummydown2/JU98-10.htm>). Another website provided an episode summary of the Muppets Show with Prince as a guest star, where the name change was heavily satirized. The Artist Formerly Known as Prince, Episode Summary, <http://mysite.verizon.net/ebrowne72/MuppetsTonight/ArtiPrin.html> (last visited Nov. 9, 2009). This episode is indexed at The Artist Formerly Known as Prince, Muppets Tonight, Season 2, Episode 1, Episode Guide, <http://www.tv.com/muppets-tonight/the-artist-formerly-known-as-prince/episode/53042/summary.html> (last visited Nov. 9, 2009); see also *Couple Tried to Name Baby “@”*, REUTERS, Aug. 17, 2007, <http://www.reuters.com/article/oddlyEnoughNews/idUSPEK36827920070816> (a Reuters report from Beijing about a different attempt to use an unconventional symbol as a name).

¹⁹² On the complexity of women's name choices within a patriarchal naming system see Emens, *supra* note 17, at 766–67 (explaining that judging individual women on their name choices would be wrong, considering the structural constraints on their choices), and at 774–85 (presenting the problematic nature of the surname possibilities available for women). For another account of women's dilemmas of whether to take the subversive and unconventional route in their personal choices, see Yofi Tirosh, *Weighty Speech: Addressing Body Size in the Classroom*, 28 REV. OF EDUC., PEDAGOGY, & CULTURAL STUD. 267, 272–76 (2006) (rejecting the view that women's choice to lose weight is necessarily a non-feminist practice).

¹⁹³ Numerous data suggest that it is the point at which children enter the picture that presents the most challenge to women, because they want to have ties to their children and to the nuclear family as a whole, indicated through the name. See, e.g., KUPPER, *supra* note 50, at 2–3 (discussing the contemporary debate in the meaning of women's desire to keep their maiden names). One author claims that until the problem of naming the children is resolved, all the noise about women's names following marriage is meaningless. See Morgenstern Leissner, *supra* note 16, at 298.

they do not operate from a place of rejecting all meaning of names. Rather, they acknowledge the ways in which names work in their society, and try to find an optimal solution within this set of constraints—a solution that will remain legible and effective in conveying the meanings they wish to convey within the language of names.

B. Legal Challenges to the Functionalist Approach to Names

In the final two cases analyzed in this Article, applicants wish to deviate farther away from familiar name patterns, thus pushing legal thinking to develop a more complex understanding of names and their relation to personhood. But the more radical nature of these applications is met, unsurprisingly, with even firmer judicial rejection. This rejection manifests itself by projecting a lukewarm tone in the opinions' text, refusing to engage with the stories and meaning that the applicants bring with them to the court.

In *K.B. v. the Netherlands*,¹⁹⁴ a man whose mother was seriously ill sought to add the mother's maiden name to his own surname, wishing, in the Commission's language, "to express the special bond between him and his mother, who had stimulated him in many respects."¹⁹⁵ The Applicant's claim about the importance of the name he sought for himself requires a somewhat different analysis than that employed by the earlier cases. When men or women choose to keep their premarital surname, we understand almost intuitively that this has to do with their wish to maintain their identity as they enter into the marriage. When they want to give their name to their children, we similarly feel we know what this may mean for them. But in the present case it is harder to formulate the Applicant's claim in terms of gender equality or to classify it under a clear category of identity. Here, the legal subject submitted to the court a narrative of very personal and particular meanings that his chosen names held for him.

The Deputy Minister of Justice refused the son's request. His request could not be classified into the existing legally prescribed categories of permissible name changes and it also failed to provide any reasons for the Deputy to use his special discretionary power. The Deputy Minister "did not find that the Applicant's *personal interest* in having his name changed was of such a nature that his request should nevertheless be granted."¹⁹⁶

The Commission's opinion provided very little detail about the reasoning of the Deputy Minister's decision, so it is hard to know for sure why this

¹⁹⁴ App. No. 18806/91, Eur. Ct. H.R. (1993), <http://www.echr.coe.int/echr>.

¹⁹⁵ *Id.*; see also Gross, *supra* note 6, at 277. The mother died during the proceedings for the requested in The Netherlands.

¹⁹⁶ *K.B.*, App. No. 18806/91, Eur. Ct. H.R. (1993), <http://www.echr.coe.int/echr> (emphasis added). Notably, the Dutch law enables adding the mother's surname to one's paternal surname in case this name is extinct or threatened with extinction, so the formula of having two surnames, a patronymic and a matronymic, is not foreign to Dutch law or naming conventions.

request was rejected. It is known that there *may* be personal interests that are of such special nature that they will prompt the legal official to make an exception. It is not known what such circumstances may be, or how they would be characterized. What is known is that wishing to express one's deep ties and respect for one's dying mother is simply not enough; it does not amount to the legally recognized special circumstance, such as allowed "categories contained in the applicable directives" and "personal interest."¹⁹⁷ This quasi-scientific dissection of the Applicant's story, done in a casual manner of running the business of government administration, denies the meaningful spirit behind the requested name change.

The surname that the Applicant wished to take for himself was not meant to fulfill an instrumentalist function of better identification. The name was not meant as an index of his identity, but rather as a way to represent something vaguer and less definite about his personhood. Rather than denote who the Applicant was, this surname would connote it.

In previous work, I dubbed this type of claim as a claim about "the poetics of personhood."¹⁹⁸ I suggested a normative model in which "the law would shift from treating names or clothes as *propositional statements* that have an informative function of correctly marking the identity of their bearers, to treating such appearances as *poetic occurrences*."¹⁹⁹ Poetic language is a helpful trope in this context because, just like the surname that the Applicant in *K.B.* seeks for himself, poetic language does not function instrumentally to make an accurate statement that directly reflects the meaning behind words. Rather, poetic language "calls attention to itself. In poetry, the medium is inseparable from the meaning."²⁰⁰ Asking the Applicant in *K.B.* to articulate his request to change his surname in terms of a precise identity claim would be to misunderstand how names (and other ways of marking ourselves—such as clothes or hair) operate in relation to personhood.

Whereas the law treats personal markers as conveyers of *what* the legal subject claims to be through his or her appearance (i.e., as conveyers of identity), markers tell us not the *what* but the *how* of identity: Appearance has more to do with what we might call the texture of the self and its ways of going about the world, and less with a predetermined essence.²⁰¹

In wishing to take his mother's premarital surname, the Applicant was seeking to create a more open-ended meaning to his identity. His existing paternal surname indeed reflected his identity correctly, but only in an indexical

¹⁹⁷ *Id.*

¹⁹⁸ See Tirosh, *supra* note 15, at 57.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 104.

way, providing a quick way to decipher his lineage in the conventional, patriarchal sense. His maternal surname would have the power to tell a more complex story about who he was.

The fact that this name application resists easy deciphering or clear-cut classification under a preexisting legal category of identity renders it even more incommunicable to the law than the applications discussed thus far. Indeed, “[a]ccommodating this intermediacy of markers would require appearance adjudication to endure much more uncertainty and complexity regarding the meaning of markers than it currently tolerates.”²⁰²

A similar refusal to converse, an emptying of meaning by dilution in doctrine, occurred when the case arrived at the European Commission of Human Rights. The Commission refused the request, explaining that there may be “exceptional cases where the carrying of a particular name creates such suffering or practical difficulties”²⁰³ that this may affect the right for private and family life. In this case, however, the Applicant “does not allege that his present family name is causing him any inconveniences”²⁰⁴ The Commission found that the competing considerations presented by The Netherlands—stability in the rules governing family names and prevention of arbitrariness—were weighty enough to justify rejection of the request.²⁰⁵

The legal question that the Commission addressed here is a valid and an appropriate question: what sorts of name concerns would fall under the protected scope of “private life” that the Convention covers? It might be that, after contemplation, the conclusion would be that this case indeed falls outside of the protected area of Article 8. Such contemplation, however, did not occur, and there was persistent refusal to conduct it. The Applicant’s argument was denied any depth by a flattening rhetoric of technical reasoning. The Applicant approached the law to convey his sense that his private life was diminished by the refusal to allow him to add his mother’s surname to his own. He cared much for her, she cared much for him, and he lost her. Now he was looking for a way to commemorate her (a word whose prefix serves as a reminder that the act of invoking a memory is inherently dialogic, that significance requires signification). He was looking for a way to integrate her memory into his life in order to achieve, as it were, a new sense of integrity of identity, a way to incorporate this difficult event of her illness and death into his life narrative. Like all the other applicants in the cases reviewed in this Article, he sought to achieve integration between his own understanding of himself and how his identity could be externally signified.

Indeed, this interpretation of the meaning that the mother’s surname had for her bereaved son is merely hypothetical. The available texts, and what they report, allow only speculation. Reading these cases is challenging be-

²⁰² *Id.* at 105.

²⁰³ *K.B. v. The Netherlands*, App. No. 18806/91, Eur. Ct. H.R. (1993), <http://www.echr.coe.int/echr>.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

cause they suppress the stories of the applicants. The challenge is to recover the applicants' absent narratives of identity that lead them to seek a new name. These narratives are kept out by using legalistic and thin language.²⁰⁶ By the very usage of this thin rhetoric the judges free themselves of the obligation to engage with these stories.

That judges should engage with stories means neither that they should accept them at face value, nor that they should rule in favor of the applicants and grant them any name they wish. The standard of engagement in a conversation invoked here aims at envisioning a judicial process in which courts function as responsive interlocutors in conversations that the applicants initiate. Such responsiveness starts with openly acknowledging the issues that the applicants try to raise in the courtroom, along with why they matter to these applicants. Engaged judicial response means genuinely attempting to grasp the gist of what the parties are trying to convey. For example, writing opinions that contain a rich account of each party's argument, echoing the world and voice of the parties (particularly individual applicants as opposed to state or institutional actors) would be a desired judicial practice (and would produce better law).

It is the lack of engagement in these cases that calls for filling in the gaps and recovering the conversation by different strategies of animating the applicants' arguments.

The opinion's laconic report about the son's argument prevents the reader from truly understanding the importance he ascribed to his mother's surname. Indeed, his story could be any of a thousand stories—a story of trying to make up for guilt in not being there for his mother when she was sick,²⁰⁷ a story of trying to comfort his mother's relatives by this name-changing gesture, or a story of simply liking the sound of this name—the possibilities are infinite here. The point is, whatever the story was, it was a story of significance—a story of why this name mattered for the son.²⁰⁸ But all that was provided by the Commission was that the son failed to demon-

²⁰⁶ In recognizing that legal texts fail to provide a full-bodied account of the experience of legal subjects, Kenji Yoshino turns to external narratives describing situations similar to those in the cases. "Narrative teaches lawyers to unlearn the distinction between social and legal harm that they have internalized as part of their acculturation into the profession. It reminds lawyers that the ability to critique the law correlates with the ability to describe thickly the social harms they seek to redress." Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769, 880 (2002).

²⁰⁷ Cf. Avner Falk, *Identity and Name Changes*, 62 *PSYCHOANALYTIC REV.* 647, 652 (1975–76) (detailing a psychoanalytical clinical report of a man who changed his surname—his father's name—at age sixteen, and felt unable to cope with his father's death, fearing that he had symbolically killed his father by divesting himself of his name); Kupper, *supra* note 50, at 37 (detailing a personal account of a woman who after her divorce chose to hyphenate her father's surname with her mother's premarital name "feeling that I am more like my mother than my father, feeling entitled to her name as a birthright, and feeling that she deserves some recognition for her contribution . . .").

²⁰⁸ On the ability to create significance as an inherent part of being a person, see Charles Taylor, *The Person*, in *THE CATEGORY OF THE PERSON: ANTHROPOLOGY, PHILOSOPHY, HISTORY* 257 (Michael Carrithers, Steven Collins & Steven Lukes eds., 1985).

strate any inconvenience associated with his present surname. One would think that fighting for a name change all the way to the ECHR would be an indication of at least some inconvenience. But there seems to be much at stake for the law in acknowledging this. Such acknowledgement might destabilize the gender order of names. If sons bear their mothers' names, this might make ships more like boats and boats more like ships and alter our way of perceiving these vessels.

This Article's journey through the major surname cases of the ECHR will conclude with another application that stresses the poetic aspect of names. In the 1992 case of *T.B. v. Sweden*,²⁰⁹ the Applicant petitioned the ECHR because her country refused to allow her to change her name from her ex-husband's name to a name held by her ancestors. She argued that the name presently used by her father's family line was a historical distortion of the name she sought to adopt.²¹⁰ The latter was distorted by eighteenth-century Swedish armed forces. It is not indicated, however, whether this historical distortion was the primary reason for her lack of interest in her father's name (i.e. her premarital name). The case does not cite historical accuracy as her primary motivation in seeking this ancestral name. All that is known is that this historical argument was a way to establish a factual link to the name she sought.

The Commission found the petition inadmissible, reasoning that Swedish law only allowed, "during a marriage or following its dissolution, [for a person to] take back the surname that he or she carried before marrying."²¹¹ Her only option under Swedish law, then, was to go back to her premarital name.

The Applicant argued that Sweden's refusal violated her right to respect for private and family life guaranteed in Article 8.²¹² Earlier, the problematic juxtaposition of "private" and "family" in framing this right was discussed.²¹³ The Commission's reasoning in rejecting the Applicant's claim provides a grim realization of the concerns raised above, because it conflates the right to private life and the right to family life, not recognizing that in this case there was a contradiction between the two, which requires balancing:

The Commission observes that the applicant's present surname is that of her former husband, whom she divorced in 1946. However, her request to have this name changed was not lodged until 1987. The Commission further notes that she could have availed

²⁰⁹ *T.B. v. Sweden*, App. No. 16878/90, Eur. Ct. H.R. (1992), <http://www.echr.coe.int/echr>; see also Gross, *supra* note 6, at 274–75

²¹⁰ *T.B.*, App. No. 16878/90, Eur. Ct. H.R. (1992), <http://www.echr.coe.int/echr>.

²¹¹ *Id.*

²¹² *Id.*

²¹³ See *supra* note 38 and accompanying text.

herself of the possibility [under Swedish law] to take back her maiden name. This possibility is still open.²¹⁴

Here, then, the Applicant argued for her right to respect for her *private* life, but the Commission is unable to see her as bearing a right to anything but her *family* life. When it comes to women's surnames, individual identity and familial identity become merged beyond distinction. If the issue is a woman's surname, it is surely an issue of family life. She is trapped within the only existence allotted to her as a woman in the realm of surnames.

Importantly, the Commission did take note of her argument that it was *not vis-à-vis* her former husband or her understanding of her familial status that she sought this change, but that she pursued this change because this was how she best understood who she was. The Commission wrote:

The reason for her request appears to have been an attempt to manifest a closer link with her ancestors, as she did not refer to any particular inconvenience caused by her present name.²¹⁵

T.B.'s attempt to gain presence by signifying herself in ways other than her status as a maiden or a wife failed because the law was unable to perceive her as anything outside of those two roles. She could be *either* a boat *or* a ship. To bear an ancestral name would be to become an unidentifiable vessel, and this was intolerable to the law.

Referring back to the notion of poetics of identity, it becomes evident here how the judicial logic is unable to decipher the case by using its familiar toolkit of gendered categories of identity. The Applicant's narrative is pressed into the available categories of legal reasoning, and when the narrative does not fit, the Applicant loses.

Finally, it is important to realize that there is more in this case. Not only were the two available categories for this woman her father's and her husband's names, but also *she was expected to move between them with ease*. When marrying, she was expected to easily and quickly part ways from her surname thus far. After almost five decades, she was telling a story about her sense of affiliation and expressing her wish that her surnames reflected this understanding of herself. But this was not an option. The law left her within the binary of "maiden" or "Mrs." She was now expected to re-adjust comfortably to her name prior to marriage, to regain intimate connection and identification with this name. Recalling the discussion of the instability of women's names in Part IV, women's subjectivity is constructed here as amoebic, ever changing and fluid, easily adjustable and malleable, and lacking any backbone.²¹⁶

²¹⁴ *T.B.*, App. No. 16878/90, Eur. Ct. H.R. (1990), <http://www.echr.coe.int/echr>.

²¹⁵ *Id.*

²¹⁶ For a critical discussion of the extreme changeability of women's surnames, see STANNARD, *supra* note 113, at 72–79.

The cases discussed in this Part convey ways in which the gendered name order informs legal decisions even when gender equality or gender roles are not the applicants' primary concern. The lack of a conventional communicative and informative function of the names the applicants desired results in a particularly illusive judicial rhetoric, which in its formal technicality strips the applicants' claims of any viable meaning. These cases also demonstrate the difficulty for a system preoccupied with categorization of identity to decipher narratives of identity that resist easy classification.

CONCLUSION

This Article explores the intricate yet consistent ways in which the legal discourse denies the political nature of names, and at the same time uses them to sustain conservative gender ideologies.

The argument made here is that the framework for understanding the law's lack of responsiveness to the name-concerns of legal subjects pertains to the nature of names as signs, and the way in which symbolic orders work: names, and signs in general, work best when they are unnoticed and naturalized, constructed not only as the most valid and reliable representation of what they signify but as the only way of seeing.

Indeed, it is not the law alone that unequally allocates surname-control to women and men. Legal norms of naming are rooted in social practices. There is no simple and perfect alternative to the current naming systems—a model that will be completely egalitarian and that could be consistently applied across the generations. In critically examining the case law, this Article's approach has been to ask not what would be the ideal surname system, *but whether it is the law's role to guard against changes in naming conventions*. The applicants in the cases examined here are agents of such socio-legal changes. Judicial decisions to prefer the consideration of sustaining the conservative, often discriminatory naming system over the autonomy and equality interests of legal subjects require compelling reasons. No such reasons were found in the cases studied here. Law here serves as a self-nominated, covert guard of a secure symbolic order, in which social signs function reliably and stably and serve to categorize individuals according to pre-existing classifications.

The judicial opinions reviewed here participate not only in sustaining existing gender norms but in the discursive maintenance of the legitimate naming order.²¹⁷ Language is preserved here both as a transparent medium that represents reality objectively *and* as disconnected from this reality and

²¹⁷ According to Bourdieu,

[a]ll symbolic domination . . . [is achieved] neither [through] passive submission to external constraint not a free adherence to values. The recognition of the legitimacy of the official language has nothing in common with an explicitly professed, deliberate and revocable belief, or with an intentional act of accepting a 'norm.' It is inscribed, in a practical state, in dispositions which are impalpably

thus insignificant. The applicants to the ECHR attempted to render the seemingly neutral symbolic order visible. The judicial opinions rejecting these attempts were successful in that their audience (the legal community, the states and individuals yielding to the Court's authority) accepted them as ordinary practices of judicial authority. In Bourdieu's terms, they were successful because they impalpably inculcated a particular way of seeing while purporting to apply legal rules impartially and uniformly to the case before them.

The adjudication studied here conveys courts' difficulty in protecting women's surname interests (as well as men's interest when they want to diverge from the conventional patriarchal naming conventions). This difficulty is infused by—and serves to sustain—the still liminal state of women, navigating between the private and public spheres, between having an identity that is derived from their affiliations to men (fathers, husbands, sons) and being agentic and autonomous.

Names both carry and generate meaning. Rather than denying these meanings, the legal discourse should recognize that these meanings can and sometimes should be contested. The ECHR's jurisprudence repeatedly conveys its commitment to sex equality,²¹⁸ but it fails to see that discrimination takes place in the domain of symbols and representation just as in the domain of rights that are considered substantial and basic. For rights to be human rights, they have to be designed with care to the fact that humans are signifying animals, creating and seeing meaning in signs, surnames included. An accountable jurisprudence, one that recognizes the law as a central site for meaning-making, should come to terms with the complexity of language and refrain from clinging to reductive, nominalist approaches. Such jurisprudence would recognize the formative nature of signifiers of identity, and enable new ways of seeing when such ways are called for. Invoking the metaphor from this Article's opening quotation, modern jurisprudence should recognize ways of seeing boats not in comparison to ships, but beyond this dichotomous dyad. Even more, such jurisprudence should allow room to question whether that which we thought was a ship remains a ship even when it is not contrasted to a boat. Perhaps defining and naming both vessels does not require resolute certainty and an urge to classify, but rather demands humility, attentiveness, playfulness and genuinely curious interest in the vessels of this world.

inculcated, through a long and slow process of acquisition, by the sanctions of the linguistic market.

BOURDIEU, *supra* note 2, at 51.

²¹⁸ See OVEY & WHITE, *supra* note 7, at 347–60; see also, e.g., *Bijleveld v. The Netherlands*, App. No. 42973/98, Eur. Ct. H.R. (2000), <http://www.echr.coe.int/ECHR> (“The Court further reiterates that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be put forward before a difference in treatment on the sole ground of sex could be regarded as compatible with the Convention.”).

