



MAKING A NAME FOR THEMSELVES

*Cori Alonso-Yoder**

ABSTRACT

The United States finds itself at a moment of reckoning with the past. Despite historical progress, Black Americans, women, immigrants, and LGBTQ communities continue to face pervasive societal injustices. Social media and popular calls for reform have only amplified these voices. From #TimesUp to #SayTheirNames, communities are joining together to demand legal reforms for generations of systemic abuse. Through new technologies, today's movements for change can organize for reforms in a way never before seen. Though the platforms are new, the problems are not. Racism, sexism, transphobia, homophobia, and xenophobia all continue to pervade U.S. society.

An area of law that touches on each of these struggles for social change has received little scholarly attention. It is the law of name change. This article tracks how name change law has served as a vehicle for liberation. Women, African Americans, immigrants, and LGBTQ individuals have all turned to the law of name change to assert their individual rights. Yet, as the legal name change process moved away from informal practice and toward judicial regulation, the opportunity for governmental intervention has often served to neutralize the emancipatory effect of the common law of name changes. Today, the common law of name change is still good law but is undermined by a judicial process that reflects systemic biases against oppressed

* Visiting Assistant Professor at Howard University School of Law for academic year 2021-2022 and Associate Professor of Fundamentals of Lawyering at the George Washington University Law School beginning summer 2022. I wish to acknowledge participants in the 2020 NYU Clinical Law Review Writer's Workshop and in the Latina Law Scholars Workshop for their valuable insights and contributions. I am deeply grateful for the institutional support of my prior appointments at American University Washington College of Law and Georgetown University Law Center as well as the research assistance of Janee (JD) LeFrere (American), Katia Barron (American), Lisa Ledvora (Georgetown), and Terrance D. Brown, Jr. (Howard). All errors are my own.

groups. By exploring the law and its history, the article argues for a name change system that promotes a more robust application of common law while deemphasizing the gatekeeping role played by judges. In so doing, it also illustrates the case for understanding the American law of name change as a uniquely progressive legal doctrine in the movement for civil rights and liberation.

“My name was Isabella; but when I left the house of bondage, I left everything behind. I wa’n’t goin’ to keep nothin’ of Egypt on me, an’ so I went to the Lord an’ asked him to give me a new name.” Sojourner Truth¹

TABLE OF CONTENTS

INTRODUCTION	913
I. DOMINATION, LIBERATION, AND THE DEVELOPMENT OF NAME CHANGE LAW	915
A. <i>Domination</i>	915
B. <i>Liberation</i>	918
C. <i>The Unique Nature and History of Name Change Law</i>	920
1. The History of Common Law Name Change	920
2. The Common Law Name Change Process Today	921
3. The Statutory Name Change Process	924
4. The Statutory Name Change Process Today	926
a. An Under-Litigated Area of Law	927
b. An Under-Examined Area of Law	927
c. Challenges in the Law Are Generally Absorbed by Individual Petitioners on the Margins	928
d. An Adequate Remedy at Common Law?	929
II. NAME CHANGE APPLIED TO LIBERATE AND DOMINATE	930
A. <i>Name Change & Black Liberation</i>	930
1. Oppression and Name Change Denials	934
B. <i>Name Change & Women’s Liberation</i>	936
1. Oppression and Name Change Denials	939
C. <i>Name Change & LGBTQ Rights</i>	941

1. ERLENE STETSON & LINDA DAVID, GLORYING IN TRIBULATION: THE LIFE WORK OF SOJOURNER TRUTH 87 (1994) (quoting Harriet Beecher Stowe, *Sojourner Truth, The Libyan Sibyl*, ATLANTIC (Apr. 1863), <https://www.theatlantic.com/magazine/archive/1863/04/sojourner-truth-the-libyan-sibyl/308775>).

2022] *MAKING A NAME FOR THEMSELVES* 913

1. Same-Sex Couples and Name Change Denials	943
2. Transgender Petitioners and Name Change Denials ...	944
D. <i>Immigrants, Name Changes, and Self-Determination</i>	948
1. The Myth of the Ellis Island Name Change	949
2. Immigrant Name Change and Agency.....	950
3. Intersecting Experiences: Transgender Immigrants	
Then & Now.....	952
a. Historically.....	952
b. Today	957
III. THE UNIQUELY AMERICAN FREEDOM TO DECIDE ONE'S NAME	962
CONCLUSION	969

INTRODUCTION

In 2015, Amanda Villanueva² applied to the D.C. Superior Court for a change of name. As a transgender asylum seeker from El Salvador, she had survived incredible brutality based on her gender expression. Of all the indignities she suffered, one of the most pernicious was being denied identity documents consistent with her gender identity. Before fleeing for her life, Amanda worked as an advocate for the transgender community in El Salvador. Among her advocacy efforts was the drafting of a gender identity law to amend Salvadoran law. The draft legislation would have provided Salvadorans like Amanda with the right to change their names and gender markers on government documents. Salvadoran law does not allow for either name or gender marker changes, and Amanda faced violence and discrimination when having to navigate society with documentation that outed her as transgender. Unfortunately, following a series of attacks, Amanda was forced to escape to the United States. Due to fears for her personal safety, she had to leave her efforts for legal name change reform in El Salvador unfinished.

Upon arriving to the United States, Amanda was determined to finally obtain legal documentation that accurately reflected her name and gender identity. Soon after securing a safe place to live and appropriate legal advice, her next step was to pursue a legal name change. She decided to pursue this option with the D.C. Court as she waited for her asylum application to process. Amanda was stunned to encounter in U.S. law a whole new series of bureaucratic challenges. It took Amanda three attempts to file her petition for a name change. On

2. Name changed to protect confidentiality. All other details accurately portray the experiences of my former client.

the first attempt, the court clerk refused to accept her birth certificate as proof of identity. When she returned weeks later with a copy of her birth certificate, baptismal certificate, and three clinic students from Georgetown Law, the clerk informed Amanda that the translations of the documents required a notarized seal. After advocacy on her behalf by the assembled law students, Amanda was finally able to press for acceptance of her identity documents. Then, the clerk insisted that Amanda's proof of residency, the same evidence she had presented without issue on the prior attempt, was now insufficient. Amanda diligently returned to her home, obtained another document linking her to the address, and finally succeeded in filing her petition for name change.

Amanda speaks English and she has a university education. At the time of preparing her name petition, she had access to more than one identity document, and she had a team of legal advocates on her side. In addition, Amanda was not deterred by the court's then-existing requirement that all noncitizens send legal notice of their petition to U.S. Immigration and Customs Enforcement ("ICE"). It is perhaps stunning to consider that this requirement, along with all of the other legal hoops that Amanda was made to clear, did not exist in D.C. law. Indeed, the common law, from which the D.C. law originates, requires even less. How does a law intended to promote liberal name changes square with the bureaucratic hassle that Amanda encountered? Dynamics of power and control—and in particular majoritarian reactions to the rights asserted by historically disadvantaged groups—tell the story.

This article explores that history and celebrates the stories of the many people who managed to attain some level of liberation in legally naming themselves—and who often did so despite the inability to find other protections in the law. In Part I, I explore the power dynamics of naming and how they have played into the U.S. law of name change. In Part II, I examine how historically disadvantaged groups have used name change law to achieve liberation. I also explore the ways in which these efforts have been subverted by the move toward a statutory name change process and its reliance on judges' discretion. In Part III, I compare U.S. name change law to the laws of other countries to show how U.S. law favors individual interests in naming. This emphasis on individual liberty is unique even among other modern liberal democracies and underscores the need to retain a flexible approach that deemphasizes the role of the judge in the name change process. I conclude by identifying the constitutional law dimensions of the right to change one's name as further legal support for administrative processes that facilitate legal recognition of common law name changes. By adapting their systems to account for these name changes, state and federal

agencies will more faithfully execute the common law's protection of individual self-determination and liberation as enshrined in the fundamental right to choose one's name.

I. DOMINATION, LIBERATION, AND THE DEVELOPMENT OF NAME CHANGE LAW

A. *Domination*

The idea that the act of naming relates to dynamics of power and control dates back to Biblical times. In the Old Testament, bestowing a name over a person or place constituted a form of domination.³ In modern history, dominion and renaming have often been key aspects of conquest. The Soviets converted Saint Petersburg into Leningrad, Spanish conquistadors dubbed modern-day Mexico New Spain, and European colonists devised the United States of America. According to some legal scholars:

The story of conquest, particularly in European settler colonies where the conquerors held overwhelming power, could be written as a vast project of renaming the natural world. Presto! Native names for flora, fauna, insects, mountains, valleys, birds were effaced and replaced by the nouns and taxonomies of the conquerors . . . Comprehensive re-labeling is a pre-condition for the transfer of power, management, and control.⁴

When it comes to personal names, the naming act has also served as a form of power and domination. Linguistics scholars have dissected and demonstrated how language interacts with the world through the act of naming. The position of the name giver relative to the subject of the name implies questions of "identity affirmation as well as an exercise of power."⁵ Professor of gender and sexuality studies Erica Rand puts it

3. See George W. Ramsey, *Is Name-Giving an Act of Domination in Genesis 2:23 and Elsewhere?*, 50 CATH. BIBLICAL Q. 24, 25 (1988). "Name-giving in the ancient Orient was primarily an exercise of sovereignty, of command." *Id.* at 25 n.5 (quoting GERHARD VON RAD, GENESIS: A COMMENTARY 83 (John H. Marks trans., Westminster Press rev. ed. 1972) (1854)).

4. James C. Scott et al., *The Production of Legal Identities Proper to States: The Case of the Permanent Family Surname*, 44 COMPAR. STUD. SOC'Y & HIST. 4, 18 (2002).

5. Laura Calabrese Steimberg, *The Act of Naming: New Perspectives for Media Discourse*, 140 LANGAGE ET SOCIÉTÉ I, II (JPD Systems trans. 2012) (citing NOMS ET RE-

another way, “[r]epresentation is political. What gets represented, and when, where, and how it does, depends on and affects relations of power.”⁶

Sociologists and historians have documented the ways in which naming has occurred across generations and around the globe including the unique values and importance expressed in a culture’s naming rituals. In the United States, those rituals have at times included naming conventions that subordinated the interests of marginalized groups. Women have been expected to assume the surnames of their fathers and husbands, enslaved Africans were often robbed of their hereditary names,⁷ and Native Americans were coerced into adopting a European-style surname system in order to achieve property and citizenship rights under federal law.⁸

In an example from popular culture, Alex Haley’s epic novel *Roots* told the story of Kunta Kinte, a young man kidnapped in the Gambia and held captive in slavery in the United States.⁹ Based in part on Haley’s study of his family genealogy, *Roots* became a cultural touchstone for reflecting back to Black America—a history long buried—and reminding white America of its attempts to revise the truth of its founding. Despite critiques of the book’s historical accuracy, scholar Michael Eric Dyson observes how “Haley’s quest for his roots changed the way black folk thought about themselves and how white America viewed them. No longer were we genealogical nomads with little hope of learning the names and identities of the people from whose loins and culture we

NOMS: LA DÉNOMINATION DES PERSONNES, DES POPULATIONS, DES LANGUES, ET DES TERRITOIRES 35 (Salih Akin ed., 1999)).

6. ERICA RAND, THE ELLIS ISLAND SNOW GLOBE 98 (2005).

7. Liseli A. Fitzpatrick, African Names and Naming Practices: The Impact Slavery and European Domination Had on the African Psyche, Identity and Protest 36 (2012) (M.A. thesis, Ohio State University), https://etd.ohiolink.edu/apexprod/rws_etd/send_file/send?accession=osu1338404929&disposition=inline (“The brutality of the enslavement of Africans in the Transatlantic Slave Trade beginning in the mid-15th century following the invasion of Europeans on the African continent, and the expansion of European empires, has, indeed, caused a people to be tattered, torn, and stripped of their names, identity, culture, language, customs, and most importantly humanness.”).

8. Scott et al., *supra* note 4, at 20–23 (examining how the 1887 Dawes Act required that Native Americans conform to a European naming convention that would “show family relations” while also being “comprehensible to the white people” (quoting Hamlin Garland, a writer who led the federal government’s effort to develop a centralized naming regime for Native Americans under the Dawes Act)).

9. ALEX HALEY, *ROOTS: THE SAGA OF AN AMERICAN FAMILY* 275–76 (30th Anniversary ed. 2007).

sprang.”¹⁰ In Haley’s novel and the television miniseries on which it was based, Kunta Kinte refuses to acknowledge the name “Toby” chosen for him by the slave master.¹¹ The idea of the name as domination becomes particularly clear and brutal in a scene from the miniseries, when Kunta Kinte is recaptured after a failed attempt at escape.¹² Upon his recapture he is doubly punished by a violent white overseer who forces him to recite his name as Toby while being publicly flogged.¹³ While this scene does not appear in Haley’s novel, its artistic license illustrates how Haley’s protagonist embodied the idea—on the page and on the screen—that to resist being named, is to resist domination.

In her article on the coercive effect of modern-day Anglo-American naming practices on Latinas, Professor Yvonne Cherena Pacheco observes that the question of personal names “is a societal issue as it covers the issues of equality, survival of a community of people, and the value of the woman as well.”¹⁴ Writing in the early 1990s during the period of burgeoning scholarship on critical race and Latinx critical theories, Cherena Pacheco explains that the white dominant naming practice “is not embedded in any principle of patriotism or tenet of law. Rather it is an arbitrary practice, which supports the experience of the majority of the citizenry, while removing others from a right to be autonomous in their self-naming.”¹⁵

While cultural practices undoubtedly confirm majoritarian tendencies in naming practices,¹⁶ a study of U.S. name change law yields a surprising result: the doctrine rejects these oppressive trends and protects minority rights. A broader survey of the communities who have accessed legal name changes throughout American history builds on Cherena Pacheco’s observations while simultaneously complicating her perspective. Indeed, in her call for society to “expand its beliefs to include as completely as possible the reality of why women and men choose to

10. Michael Eric Dyson, *Introduction* to ALEX HALEY, *ROOTS: THE SAGA OF AN AMERICAN FAMILY* ix, ix (30th Anniversary ed. 2007).

11. See HALEY, *supra* note 9, at 275–76; *Roots: Part II* (ABC television broadcast Jan. 24, 1977).

12. *Roots: Part II* (ABC television broadcast Jan. 24, 1977).

13. *Id.*

14. Yvonne M. Cherena Pacheco, *Latino Surnames: Formal and Informal Forces in the United States Affecting the Retention and Use of the Maternal Surname*, 18 T. MARSHALL L. REV. 1, 38 (1992). In particular, Cherena Pacheco focuses her argument on the lack of accommodation and consideration in the dominant U.S. culture for Hispanic naming traditions that transmit both the paternal and maternal surnames to children. *Id.* at 2–4.

15. *Id.* at 39.

16. See *infra* Part II.D.2.

name themselves,”¹⁷ she is essentially stating the legal standard for name change: individuals generally have a legal right to be recognized by whatever names they may choose.¹⁸ How individuals have used that right is key to understanding movements toward social liberation.

B. Liberation

If the imposition of a name is a form of domination, it follows that the effort to name oneself is an act of liberation. In a 1955 survey of over 1,107 legal name change petitioners in Los Angeles, researchers concluded that “[n]ame changing may be regarded as a mechanism to achieve desired statuses, roles, and participation otherwise impeded or prohibited by the symbolic connotation of the original name.”¹⁹ While many have wrestled with the nature of the right, including what other interests to balance against those of the bearer of a name, none have denied the bearer’s liberty interest in their name.²⁰ One commentator has even argued that the denial of the right to a name change may constitute an unconstitutional burden on an individual’s speech and fundamental privacy rights.²¹ While such constitutional arguments are important to consider, the fact is that many forms of name change denial are inconsistent to name change laws even without triggering analyses regarding constitutionality.

The original standard for name change is straightforward and has been readily used by Americans over the generations. Under the common law, an individual could change their name simply by open and notorious use. As long as no fraud is intended in the use, the person could effectuate the legal change by merely using the desired name over a period of time.²²

17. Cherena Pacheco, *supra* note 14, at 39.

18. See *infra* notes 22–23 and accompanying text.

19. Leonard Broom et al., *Characteristics of 1,107 Petitioners for Change of Name*, 20 AM. SOCIO. REV. 33, 34, 39 (1955).

20. See, e.g., Ralph Slovenko, *On Naming*, 34 AM. J. PSYCHOTHERAPY 208, 210 (1980) (“The current issue is whether or not a free choice of a name is an inherent natural right essential to liberty.”).

21. Julia Shear Kushner, *The Right to Control One’s Name*, 57 UCLA L. REV. 313, 319–20 (2009).

22. See, for example, *Smith v. U.S. Cas. Co.*, 90 N.E. 947, 948–50 (N.Y. 1910), where the court observed:

The elementary writers are uniform in laying down the rule that at common law a man may change his name at will. Mr. Throckmorton, in his article on Names in the Cyclopedia of Law and Procedure, says: “It is a custom for persons to bear the surnames of their parents, but it is not obligatory. A man may lawfully change his name without resort to legal proceedings, and for all purposes the name thus

In a decidedly unliberated statement, one court even put it this way, “[t]he proudest patronymic in the land is available to the lowliest individual and this without anyone’s permission.”²³

This flexible standard fostered an individual sense of agency and self-realization utterly unique to the experience of many marginalized communities whose rights were generally unprotected by the dominant U.S. society and its legal systems. People who had been routinely excluded from the legal process could pursue their own objectives under the law without resort to lawyers, courts, or judges. Even today, a time when the justice system has made strides towards greater protection of minority rights, individuals continue to seek legal name change as a means to express individual freedom. While many of these cases go unrecorded, the available legal and historical records demonstrate that for many, a change of name can be used as a form of social protest as well as an act of liberation.²⁴ Especially in the post-civil rights era, a number of petitioners sought legal name changes with justifications premised on equality and anti-subordination.²⁵

Indeed, in the evolution of Supreme Court jurisprudence, legal theories that support equality and individual liberty have only provided stronger support for the individual’s right to self-determination in naming. While the Court has not decided a case directly implicating this right,²⁶ the considerations that have animated many of the Court’s

assumed will constitute his legal name just as much as if he had borne it from birth.” [Archibald H. Throckmorton, *Names*, in 29 CYCLOPEDIA OF LAW AND PROCEDURE 261, 271 (William Mack ed., 1908)]. So a writer in the American & English Encyclopaedia of Law says: “At common law a man may lawfully change his name, or by general usage or habit acquire another name than that originally borne by him, and this without the intervention of either the sovereign, the courts, or Parliament; and the common law, unless changed by statute, of course, obtains in the United States.” 21 AM. & ENG. ENCYC. OF LAW (2d ed.) 311. “One may legally name himself or change his name or acquire a name by reputation, general usage, and habit.” 2 FIERO SP. PRO. (2d ed.) 847.

Id. at 950.

23. Slovenko, *supra* note 20, at 211 (citing *In re Green*, 283 N.Y.S.2d 242 (N.Y. Civ. Ct. 1967)).

24. See Nara Schoenberg, *What’s in a Name? Ask GoVeg.com*, CHI. TRIB. (July 18, 2003), <https://www.chicagotribune.com/news/ct-xpm-2003-07-18-0307180021-story.html>. In 2003, animal rights activist Karin Robertson changed her name to GoVeg.com. *Id.* But see *In re Variable for Change of Name v. Nash*, 190 P.3d 354 (N.M. Ct. App. 2008) (denying a petitioner’s application to change his name to Fuck Censorship!).

25. See the case of Ellen Cooperperson discussed *infra* Part II.B.1.

26. In *Forbush v. Wallace*, 405 U.S. 970 (1972), the Court summarily affirmed a decision of the District Court for the Middle District of Alabama, holding that an Alabama law requiring a woman to assume her husband’s surname at marriage was rationally

conclusions in support of individual privacy rights suggest that any decision in this arena would benefit the individual as against the government.²⁷ Indeed, the canon of statutory interpretation that favors avoiding constitutional questions²⁸ suggests that any decision regarding this area of law would rest on the common law's broad protection of individual freedom in naming. The common law's support of the legitimate name change petitioner is straightforward and bolsters the potential constitutional law protections of this important right.

C. *The Unique Nature and History of Name Change Law*

1. The History of Common Law Name Change

Many commentators have examined how name change law in the United States traces back to the Anglo-American common law. In this tradition, the advent of names as an indicator of personal identification was a somewhat recent innovation in the European history in which the law finds its foundations. For generations, names served primarily as modes of identification within communities whose scale and practical needs did not require a complicated personal nomenclature. Initially names, and particularly hereditary names, gained significance among the aristocracy where questions of property by inheritance and family line determined perpetuation of wealth and status.

In early common law, the English system of naming closely resembled the law in France, with both approaches rooted in early Roman law.²⁹ Under this approach, the idea of passing down one's family name and viewing the name as a transferrable commodity began to develop at law.³⁰ For generations, the law of inheritance developed in

related to the state's legitimate interest in "maintaining close watch over its licensees" for a driver's license. *Forbush v. Wallace*, 341 F. Supp. 217, 221–22 (M.D. Ala. 1971) (*per curiam*); *see also* discussion *infra* Part II.B.1.

27. *See* *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("[The framers] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation . . ."); *see also* *Lawrence v. Texas*, 539 U.S. 558 (2003); *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992).

28. *See* *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring).

29. *See generally* Audrey Guinchard, *Is the Name Property? Comparing the English and the French Evolution*, 1 J. CIV. L. STUD. 21, 28–29 (2008).

30. *Id.*

both countries along many of the same principles and practices. By the time of the French Revolution, however, the laws began to diverge.³¹ The French government began to take a much more active role in regulating legal naming and developed a series of laws to accomplish that purpose.³² What had previously been understood as an issue affecting the individual now began to take on dimensions of importance to the state.³³

As the French law shifted its approach, the English common law continued to retain a system of legal name change that did not require judicial intervention for a change to take hold.³⁴ Instead, factors such as a person's reputed use of a different name and the regularity with which an individual used the name were considered most relevant.³⁵ As a result, sufficient time and consistent use were enough to accomplish the desired legal name change.

The moment of divergence for the French and English legal name change standards corresponded with an important moment in the United States. In 1791, the First Congress passed the Bill of Rights to amend the U.S. Constitution.³⁶ The U.S. Constitution not only became the basis for statutory authority in the United States, but also provided a framework from which to understand the common law. In many areas of legal doctrine, jurists of the time assumed incorporation of the English common law into U.S. law and that it would continue to develop alongside the newly minted federal statutes. The law of name change is one example of that common law by incorporation. Yet unlike other common law doctrines, the law of name change remained mostly free of statutory interference at both the state and federal levels. By the mid to late 19th century, the states did come to create statutory authority for the common law practice, though many of these jurisdictions emphasized that the common law right to change one's name remained intact.³⁷

2. The Common Law Name Change Process Today

At first blush, it may appear that common law name changes are vestiges of a bygone era. As detailed above, at common law, an individual need only to have identified openly with the new name, without intent to

31. *Id.* at 29–30.

32. *Id.*

33. *See generally id.*

34. *Id.* at 34–35.

35. *Id.*

36. *Bill of Rights*, NAT'L ARCHIVES, <https://www.archives.gov/legislative/features/bor> (last visited Mar. 10, 2022).

37. Kushner, *supra* note 21, at 347.

commit fraud, for the name change to be legally valid.³⁸ In a time where documentation of one's identity was more limited, it may be tempting to discard the common law as impracticable for modern purposes. Today's proliferation of identity documents and legal processes would have made the average inhabitant of the 18th century dizzy.

As a result, some may argue that this modern context weighs against the practicability of the common law of name change.³⁹ This impulse suggests that the common law of name changes is a relic that no longer has place in a society where documentation of one's identity is of heretofore unmatched importance. Not only does a clear process for documenting one's name and name change help assure the rights of the individual, but—as many a court has underscored⁴⁰—it also serves the administrative interests of the state in “maintaining accurate records of people's legal names.”⁴¹ However, when it comes to this rationale, few have stopped to question how it applies to that most common of common law name changes—those of married heterosexual women.

According to a survey cited by the *New York Times* in 2015, the vast majority of married women change their names at marriage.⁴² Only about twenty percent kept their premarital names and about ten percent opted for a third approach—such as hyphenating their last names or legally changing their names while informally using their premarital names.⁴³ For these women, a statutory name change process is not required in order to register the new name. A married woman need only produce her marriage certificate to agencies ranging from the U.S. Social Security Administration,⁴⁴ U.S. Citizenship and Immigration Services,⁴⁵

38. Guinchard, *supra* note 29, at 23.

39. See, e.g., Ellen Jean Dannin, Note, *Proposal for a Model Name Act*, 10 U. MICH. J.L. REFORM 153, 170 (1976) (arguing that “[a] statutory name change procedure which supersedes the common law is preferable because it fulfills the state's need for record keeping”).

40. *Id.* at 153, 170–71, 179.

41. *In re Bicknell*, Nos. CA2000-07-140, CA2000-07-141, 2001 WL 121147, at *7 (Ohio Ct. App. Feb. 12, 2001) (Valen, J., dissenting).

42. See Claire Cain Miller & Derek Willis, *Maiden Names, on the Rise Again*, N.Y. TIMES (June 27, 2015), <https://www.nytimes.com/2015/06/28/upshot/maiden-names-on-the-rise-again.html>.

43. *Id.*

44. PROGRAM OPERATIONS MANUAL SYS., SOC. SEC. ADMIN., RM 10212.025, EVIDENCE OF NAME CHANGE BASED ON A US CEREMONIAL MARRIAGE (2012).

45. *Policy Manual: Verification of Identifying Information*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-5> (last visited Mar. 10, 2022).

or the states' departments of motor vehicles⁴⁶ in order to prove the legal change and be issued updated identity documentation.

Indeed, courts have supported the notion that a woman's name change at marriage is a function of the common law. In a 1975 Wisconsin case, a court concluded that "[a] woman upon [her] marriage adopts the surname of her husband by thereafter customarily using that name, but no law requires that she do so."⁴⁷ Commentators have observed how the common law of name change provides the legal authority for a married woman's name change as well: "It is through this [common law] method of use and repute that a woman acquires her husband's surname upon marriage."⁴⁸ In this context, various courts, state agencies, and society at large have for generations easily facilitated a married woman's transition to a marital name on the authority of a marriage certificate with little opposition.

Yet, beyond these logistical accommodations, the underlying legal operation by which a married woman changes her name does not differ from that by which a transgender woman is empowered to change her name. The act of using and being known by the new name is a sufficient condition for the legal change. That our systems and process have adapted to facilitate marital name change suggests a policy preference for certain kinds of name changes over others. Indeed, I have only found two agencies, the Massachusetts Registry of Motor Vehicles and the U.S. Department of State, that have established processes for individuals seeking to change names under the common law, but not as a result of marriage. In Massachusetts, the Registry of Motor Vehicles provides that an individual who desires to change their name on a standard driver's license may do so with "no documentation" but is encouraged to make the name change directly with the U.S. Social Security Administration⁴⁹—which only recognizes common law name changes associated with

46. See, e.g., *How to Change Information on Your Driver License or ID Card*, TEX. DEPT PUB. SAFETY, <https://www.dps.texas.gov/section/driver-license/how-change-information-your-driver-license-or-id-card> (last visited Mar. 10, 2022); *Name Changes and Corrections*, D.C. DEPT MOTOR VEHICLES, <https://dmv.dc.gov/page/name-changes-and-corrections> (last visited Mar. 10, 2022).

47. *Kruzel v. Podell*, 226 N.W.2d 458, 459 (Wis. 1975); see also *infra* Part II.B.

48. Dannin, *supra* note 39, at 159.

49. Commonwealth of Massachusetts, *Change Information on Your Driver's License or ID Card*, MASS.GOV, <https://www.mass.gov/how-to/change-information-on-your-drivers-license-or-id-card> (last visited Mar. 10, 2022); see also *USA Common Law Name Change Info: Mass Registry Motor Vehicles Policy*, COMMONLAW.NAME, <https://commonlaw.name/RMVpolicy.pdf> (last accessed Mar. 10, 2022).

marriage or domestic partnership.⁵⁰ Despite the encouragement to change the name first with the Social Security Administration, the Massachusetts Registry of Motor Vehicles will still make the name change update as long as the applicant provides their “previous name, date of birth, and Social Security [N]umber.”⁵¹

In the case of the U.S. State Department, the DS-60 Affidavit Regarding a Change of Name provides that applicants for a U.S. passport are eligible to demonstrate a change of name where the “name was not acquired by marriage or a court order.”⁵² The instructions for the form permit an individual to change their name on a U.S. passport by providing certain public records (such as medical or employment records) and affidavits to establish the use of a new name.⁵³ The most recent version of this form is currently valid through October of 2023,⁵⁴ demonstrating that the common law of name change is alive and well, at least for passport applicants. Yet Massachusetts’ motor vehicles agency and the passport procedure are far from representing the norm. The majority of agencies that issue identity documents require either a marriage certificate or a name change order issued by a judge.⁵⁵ That process presents a clear contrast to the relatively easy process for proving a name change by marriage.

3. The Statutory Name Change Process

Each state and the District of Columbia has a statutory scheme for legal name change.⁵⁶ While the authorities for these legal changes vary from jurisdiction to jurisdiction, many have recognized that these statutes “do not abrogate the common law” and its authority to permit “a person to change his name without resort to legal procedure.”⁵⁷ Instead, these statutes “merely affirm and are in aid of the common law rule” by providing an additional method for achieving a name change.⁵⁸ In a recently published article arguing that the concept of a legal name is a

50. PROGRAM OPERATIONS MANUAL SYS., SOC. SEC. ADMIN., RM 10212.010, EVIDENCE OF A NAME CHANGE ON THE SSN (2010).

51. *Mass Registry Motor Vehicles Policy*, *supra* note 49.

52. U.S. DEP’T STATE, DS-60 FORM, AFFIDAVIT REGARDING A CHANGE OF NAME (2020), <https://eforms.state.gov/Forms/ds60.pdf>.

53. *Id.*

54. *Id.*

55. *See infra* Part.I.C.4.

56. Kushner, *supra* note 21, at 328.

57. Dannin, *supra* note 39, at 162 (quoting *In re Mohlman*, 216 S.E.2d 147, 150 (N.C. Ct. App. (1975))).

58. *Id.*

specious legal and social construct, authors J. Remy Green and Austin Baker find that at least forty-three states still recognize the legal validity of common law name changes.⁵⁹

The justification for a judicial name change process is the state's interest in recordkeeping and documentation.⁶⁰ In establishing these processes, states have generally fallen into one of two approaches to the name change standard. In the first, the burden is on the petitioner to provide a reasonable justification for the change of name.⁶¹ In the other, the burden falls to the court who would deny the name change, permitting denial of a petition only where there is a showing of "substantial reason" for not approving the change.⁶² Despite this seemingly administrative function, courts have often operated as much more of a gatekeeper than a neutral recorder in the process of name change. Whereas only one factor prevents a change of name at common law—a fraudulent purpose—courts have invented a number of rationales for denying petitioners' applications for changes of name. One court has observed that "[a] person's right to change his name by court order is not absolute . . . even in the absence of a showing of fraud or the invasion of rights of another, the court may be justified in denying an application for a change of name."⁶³

Commentators in many areas of the law have observed that the reasonableness standard, present in both of the general approaches to the states' name change statutes, fails to account for perspectives outside of a white, cisgender male, heterosexual worldview.⁶⁴ In many cases, judges' reasons for denying a name change are plainly informed by sexism, racism, or other personal biases.⁶⁵ These denials run contrary not only to the underlying spirit of the common law's accessible name change standard, but they also contravene the efforts of many petitioners to

59. Austin A. Baker & J. Remy Green, *There Is No Such Thing as a "Legal Name,"* 53 COLUM. HUM. RTS. L. REV. 129, 140 n.30 (2021) (finding that the state of the common law is ambiguous in Wyoming and Vermont and that only Hawai'i, Illinois, Louisiana, Maine, and Oklahoma purport not to recognize common law name changes).

60. *Id.* at 160.

61. See *In re Mohlman*, 216 S.E.2d at 151.

62. See *In re Marriage of Banks*, 117 Cal. Rptr. 37, 42 (Cal. Ct. App. 1974).

63. *In re Evetts*, 392 S.W.2d 781, 784–85 (Tex. Civ. App. 1965) (affirming the trial court's denial of a woman's petition to revert to her deceased husband's surname).

64. See Margo Schlanger, *Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law*, 45 ST. LOUIS U. L.J. 769, 769–70 (2001); Mia Carpiniello, Note, *Striking a Sincere Balance: A Reasonable Black Person Standard for "Location Plus Evasion"* Terry Stops, 6 MICH. J. RACE & L. 355, 358 (2001).

65. See, e.g., *infra* notes 114–18, 203–08, 222–25 and accompanying text.

exercise some measure of power in their lives over their very identity and existence.

The broad discretion afforded to judges and the potential for its abuse have led to calls from commentators for the creation of model legislation that would promote consistency while regulating the potentially biased motivations of judges.⁶⁶ Yet, even in these calls for greater definition of the statutory approach, an admiration for the adaptability and simplicity of the common law's approach shines through.⁶⁷ A defining feature of the statutory authority for name change and the judicial decisions which have interpreted it, is an affirmation of the correctness of the common law standard. That an individual should have the right to use the name of their choice has been stated time and again throughout the generations. Yet, in practice, the application of that principle by statute and before various courts has yielded more controversial results.

4. The Statutory Name Change Process Today

Today's process for judicial name change by statute varies from state to state but retains certain features in common. Most applicants for a name change must file a petition for name change with a court of appropriate jurisdiction over their place of residence, provide certain documents, pay a filing fee (or apply for a fee waiver), serve notice on certain interested parties, and justify the change to a judge who may approve or deny the request. Certain states have made the process even more challenging by imposing additional restrictions on disfavored name change applicants. In Texas, individuals with felony convictions are statutorily ineligible for a legal name change absent an executive pardon for two-year period following the conclusion of a jail sentence or term of supervision/probation.⁶⁸ A 2020 report authored by transgender rights advocates and the University of Texas School of Law Human Rights Clinic found that this prohibition is particularly damaging to transgender individuals.⁶⁹ Not only is this group disproportionately incarcerated, but transgender individuals also face unique threats to

66. *See generally* Dannin, *supra* note 39.

67. *See id.* at 169 (noting "the common law as a whole has developed appropriate solutions to legal problems involving names, despite problems in interpretation").

68. *See* TEX. FAM. CODE ANN. § 45.103(a)–(b) (West 2021).

69. *See generally* HUM. RTS. CLINIC, UNIV. TEX. SCH. L., NAMING AND SHAMING: VIOLATIONS OF THE HUMAN RIGHTS OF TRANSGENDER PERSONS WITH FELONIES IN TEXAS 4 (2020).

their safety while incarcerated.⁷⁰ For vulnerable individuals, this multistep process presents the potential for failure at any one of the steps. And at its worst, it prevents them from seeking a name change at all.

Despite the potential merit in doing so, the possibility of the Supreme Court taking up a case on the issue of name change law seems unlikely. At a time of heated political and legal debate around racism and criminal justice reform, reproductive rights, and LGBTQ equality, the right to change one's name is certainly far from the top of the Court's agenda. Yet, this right is related to many of those legal struggles. Case law and history reveal that race, class, gender, and sexual identity have all been animating factors in the application of name change law. Despite this, scholars and lawyers have paid little attention to this area of the law. A number of factors may account for this.

a. An Under-Litigated Area of Law

First, name change law arises outside of a traditional adversarial litigation context. As mentioned throughout, under the common law, the seeker of a name change need not have sought approval from any particular decision maker in achieving the desired name change. Even in the judicial name change process, the only party generally implicated in a name change matter is the petitioner.

I will explore in further detail how judges in these matters have at times played the role of the adversary. But theoretically, the judge's part in the proceeding is to assure fidelity to the legal standard, not to antagonize or oppose the petitioner. As a result, the law of name change has often gone untested by the litigation process and has remained largely unchanged.

b. An Under-Examined Area of Law

Name change law is also something of a misfit in doctrine and practice. Because it does not fit neatly into the other branches of the legal family tree, it can be seen as an odd addendum to legal practice. It is rarely studied or taught in the law school curriculum. A casual internet search for "name change law bar exam" reveals a number of threads

70. *Id.* at 18 (explaining that "transgender people experience[] more than five times as many incidents of non-sexual physical victimization" during incarceration as compared to their non-transgender counterparts (quoting Lori Sexton et al., *Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons*, 27 JUST. Q. 835, 857–58 (2010))).

responding to the question of when to change one's name when taking the bar. But law students can rest assured that they will not face examination on their knowledge of name change law, theory, or procedure any time soon. So, while name change may intersect with areas of criminal law, family law, and others, it is still somewhat separate and apart.

Some commentators have suggested that name change law may be understood as a kind of property law. Writing in the decades prior to the Supreme Court's jurisprudence on individual privacy rights, one scholar even suggested that identity rights may be greater than property rights: "personality [which] embraces man's association with culture whereas his property interests comprehend only his connection with economy. The right of personality is therefore the greatest of all private rights, embracing the highest interests of mankind."⁷¹ Among these manifestations of personality is one's name.⁷² But courts have rejected the concept that an individual has a property right in their name. In the 1869 matter of *Du Boulay v. Du Boulay*, the English Privy Council concluded that, "the mere assumption of a name, which is the patronymic of a family, by a [s]tranger who had never before been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our [l]aw affords no redress."⁷³

So, the law of name change continues to elude categorization and study while simultaneously being one of the most pervasive legal processes. Nearly every person has some relationship to a legal name change—whether it be in their own experience, or the experience of a friend or loved one. Yet there is little collective inquiry, much less mobilization to push the contours of name change law.

c. Challenges in the Law Are Generally Absorbed by Individual Petitioners on the Margins

The structure of name change law is such that in many jurisdictions, an individual may have the right to change their name either through the common law process or by statutory judicial process. In the 1955 survey of the characteristics of over 1,000 judicial name change petitions mentioned above, researchers posited that the proportion of individuals resorting to the common law for a name change was higher in "lower

71. Priscilla L. Rider, *Legal Protection of the Manifestations of Individual Personality—The Identity-Indicia*, 33 S. CAL. L. REV. 31, 34 (1959) (quoting 1 RUDOLF CALLMANN, *THE LAW OF UNFAIR COMPETITION AND TRADE-MARKS* 51–52 (2d ed. 1950)).

72. *Id.*

73. *Du Boulay v. Du Boulay* [1869] 16 Eng. Rep. 638 (PC) (appeal taken from W.I.).

status areas.”⁷⁴ A 1986 study found that men filed the majority of name change petitions.⁷⁵ What we do know about the identities of people whose name change petitions were denied is through the scant appellate record that exists. This record shows how some courts have justified these denials for reasons that one commentator has observed as being, “at best outdated and at worst small minded and discriminatory.”⁷⁶

Taken together, the evidence suggests that the justice system has historically favored the petitions of applicants whose motivations more clearly reflect the cultural experiences of the courts deciding their merit—straight white cisgender men.⁷⁷ By contrast, individuals historically excluded by the justice system have sought name change through the common law.⁷⁸ Those historically excluded individuals who have resorted to a judicial proceeding have at times faced discriminatory denials and have not always had the opportunity to join their individual claim to larger movements for law reform.⁷⁹

d. An Adequate Remedy at Common Law?

Historically, the common law has provided an accessible and flexible standard that has permitted individual applicants for a name change to “prevail” in their choice of name, even if denied that remedy by a court. As referenced, many petitioners have legally changed their names under the common law’s authority, having never approached a court for approval. Moreover, many courts have blithely denied a petitioner’s request for a name change, citing the petitioner’s existing rights under common law. While historically an individual may well have succeeded in accomplishing a legal change of name under the common law, that is not the case today. Modern identity documents are much more complex, varied, and ubiquitous than ever before. Documents that prove status and identity are crucial tools to operate in society and lack of documentation of one’s identity can lead to any number of legal, social, and economic difficulties. Yet the status of the common law’s continued existence as a prevailing authority on name change law allows the courts

74. Broom et al., *supra* note 19, at 34, 37.

75. Susan Cotts Watkins & Andrew S. London, *Personal Names and Cultural Change: A Study of the Naming Patterns of Italians and Jews in the United States in 1910*, 18 SOC. SCI. HIST. 169, 173 (1994) (citing Arthur Scherr, *Change-of-Name Petitions of the New York Courts: An Untapped Source in Historical Onomastics*, 34 NAMES 284 (1986)).

76. Kushner, *supra* note 21, at 317.

77. See, e.g., *infra* notes 114–18, 203–08, 222–25 and accompanying text.

78. See *infra* Part II.

79. See *infra* Part II.

to use it as an argument against any prejudice to the petitioner resulting from the name change denial. As a result, the common law of name change has served as both a vehicle of liberation and a pretext for justifying oppressive name change denials. Examples of this tension abound in the individual stories of name change found in history and case law.

II. NAME CHANGE APPLIED TO LIBERATE AND DOMINATE

A. *Name Change & Black Liberation*

As of the year 2000, more than ninety percent of Americans bearing the surname Washington were Black.⁸⁰ While there is a common belief that this name traces back to George Washington and his slaveholding practices, only a handful of the people owned by Washington bore his surname.⁸¹ In fact, historians say it is “a myth that most enslaved [B]lacks” used the surname of their owner, however, it is true that many “had surnames that went unrecorded or were kept secret.”⁸² Instead, historians believe that the prevalence of the Washington surname can be traced to African Americans’ special history with name change law in the United States.⁸³ While the stifling oppression of slavery meant that many did not exercise the name change right, after emancipation the freedom to choose a name flourished among formerly enslaved African Americans. Martin Jackson recounted his name change story in 1930:

The master’s name was usually adopted by a slave after he was set free. This was done more because it was the logical thing to do and the easiest way to be identified than it was through affection for the master. Also, the government seemed to be in a almighty hurry to have us get names. We had to register as someone, so we could be citizens. Well, I got to thinking about all us slaves that was going to take the name Fitzpatrick. I made

80. Jesse Washington, *Washington: The ‘Blackest Name’ in America*, SEATTLE TIMES (Feb. 20, 2011, 9:01 PM), <https://www.seattletimes.com/nation-world/washington-the-blackest-name-in-america>.

81. *Id.*

82. *Id.*

83. *See id.*

up my mind I'd find me a different one. One of my grandfathers in Africa was called Jeaceo, and so I decided to be Jackson.⁸⁴

True to this narrative, many would retain or adopt the name of their oldest known relative as a link to a family-based identity.⁸⁵ But after emancipation, some historians theorize that large numbers of African Americans embraced the surname Washington “in the process of asserting their freedom.”⁸⁶ According to historian Adam Goodheart, the decision to adopt the name was linked to a sense of understanding of the history and politics of the United States, and what it means to be American: “That they would embrace the name of this person who was an imperfect hero shows there was a certain understanding of this country as an imperfect place, an imperfect experiment, and a willingness to embrace that tradition of liberty with all its contradictions.”⁸⁷ Whatever the motivation and whatever the name, newly emancipated individuals found that the American common law of names supported them in their quest for freedom.

Indeed, some of the most famous formerly enslaved abolitionists would exercise the name change right as a political, moral, and spiritual act of liberation. Activist and preacher Sojourner Truth famously changed her name as an act of religious awakening. Truth explained that her name was given to her as a direct message from God and consistent with His plan that she should evangelize as part of her abolitionist mission.⁸⁸ Her first name, Sojourner, was to recognize her charge as an itinerant preacher traveling and “showin’ the people their sins.”⁸⁹ Recognizing that most people bore two names, she appealed to God for another.⁹⁰ She explains that “Truth” was the name given to complete her identity and mission.⁹¹

Harriet Tubman also turned to name change in reaction to the denial of her rights in other areas of the law.⁹² During slavery, legislation

84. Interview by Unknown with Martin Jackson, Ex-Slave, in San Antonio, Tex. (Date Unknown), in *VOICES FROM SLAVERY: 100 AUTHENTIC SLAVE NARRATIVES* 173, 175 (Norman R. Yetman, ed., Dover Publications, Inc. 2000) (1972).

85. Washington, *supra* note 80.

86. *Id.*

87. *Id.*

88. STETSON & DAVID, *supra* note 1, at 87–88.

89. *Id.*

90. *Id.* at 88.

91. *Id.*

92. See Martha S. Jones, *Ida, Maya, Rosa, Harriet: The Power in Our Names*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/style/self-care/sojourner-truth-harriet-tubman-slavery-names.html>.

through the slave codes promoted slavery by governing the rights and conduct of the enslaved. These restrictions limited enslaved people's rights to property, contract, seeking education, or "exert[ing] dominion over their physical body or surroundings."⁹³ Another major area of regulation and prohibition was in the right to marry.⁹⁴ Born Araminta Ross, Harriet Tubman later married John Tubman.⁹⁵ As enslaved people, the couple had no legal claim to marriage.⁹⁶ Nevertheless, she adopted her husband's surname and took her first name, Harriet, after her mother and sister.⁹⁷ Through a legal name change, Tubman found a measure of self-determination and liberation that was unavailable to her in the legal systems of the time.⁹⁸ Journalist Martha S. Jones explains how Tubman's "new name was a rebirth that raised Tubman up from slavery's social death, even before she escaped and then valiantly rescued enslaved people."⁹⁹ Every indication is that Tubman achieved this legal name change via her own initiative and under the authority of the common law.

The name change experiences of Sojourner Truth and Harriet Tubman are high profile examples of the ways in which Black women in particular have "used naming in a way to evoke power."¹⁰⁰ Summarizing the history and culture in which Black women have exercised power through choice of name, Jones observes:

Naming is one essence of freedom. Some enslaved people . . . changed their names, hoping to elude greedy owners and brutal slave catchers. With emancipation, many more threw off the names given to them by slaveholders, acquiring for the first time last names such as Freeman that passed on how it felt to savor the first moments of liberty. Even today, some of us carry the names of the families who called our forebears property. Also among us are those who are called by "X" and by unique names, signs of how the quest for freedom persists.¹⁰¹

93. Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 303–04 (2006).

94. *Id.* at 301.

95. Jones, *supra* note 92.

96. *Id.*

97. *Id.*

98. *See id.*

99. *Id.*

100. *Id.*

101. *Id.*

According to historian Ira Berlin, many Black Americans adopted new names following landmark struggles for liberation.¹⁰² Berlin has studied name changes that groups of African Americans made after the Revolutionary War, Civil War, and the Civil Rights Movement.¹⁰³ In a 2011 interview, he explains that “[w]henver we have these kinds of emancipatory moments, suddenly people can reinvent themselves, rethink themselves new, distinguish themselves from a past where they were denigrated and abused,” and that “[n]ew names are one of the ways they do it.”¹⁰⁴

Indeed, a major feature of the Black Power movement that would emerge in the late 1960s was a closer identification with the experience of worldwide struggles for Black liberation.¹⁰⁵ Stokely Carmichael, a leader during the height of the movement for Black voting and civil rights is credited with coining the term “Black Power” in the late 1960s.¹⁰⁶ By 1978, he had changed his name to Kwame Ture as a gesture of respect for the socialist leaders Kwame Nkrumah of Ghana and Ahmed Sekou Toure of Guinea who had served as mentors to him.¹⁰⁷ In the case of the Nation of Islam, adherents to the teachings of Elijah Muhammad also turned to name change as an act of religious awakening and in response to white racism and oppression.¹⁰⁸ Writing about the name change of Muhammad Ali, Elijah Muhammad explained, “[y]ou have seen, and recently, that Africa and Asia will not honor you or give you any respect as long as you are called by the White man’s name.”¹⁰⁹ In Muhammad’s view, “[j]ust a change of name has given Brother Muhammad Ali a name of honor and a name of praise that will live forever.”¹¹⁰ For his part, Muhammad Ali considered the change to what the Nation considered his “original name” to be one of the most important events of his life.¹¹¹

However, the Black Power Movement reverberated in white backlash and skepticism. As individuals turned to name change for an affirmation

102. Washington, *supra* note 80.

103. *Id.*

104. *Id.*

105. See Michael T. Kaufman, *Stokely Carmichael, Rights Leader Who Coined ‘Black Power,’ Dies at 57*, N.Y. TIMES (Nov. 16, 1998), <https://www.nytimes.com/1998/11/16/us/stokely-carmichael-rights-leader-who-coined-black-power-dies-at-57.html>.

106. *Id.*

107. *Id.*

108. See DAWN-MARIE GIBSON, *A HISTORY OF THE NATION OF ISLAM: RACE, ISLAM, AND THE QUEST FOR FREEDOM* 50–52 (2012).

109. *Id.* at 52 (quoting ELIJAH MUHAMMAD, *MESSAGE TO THE BLACKMAN IN AMERICA* (1965)).

110. *Id.* (quoting MUHAMMAD, *supra* note 109).

111. *Id.* at 52–53.

of their political and individual identities, legal structures of oppression reacted to their efforts. The name change process administered by courts at times reflected some of this bias.

1. Oppression and Name Change Denials

In a case during the early part of the Black Power Movement, a New Yorker sought judicial approval to change his name from Earl Green to Merwon Abdul Salaam.¹¹² In his petition, he cited his embrace of Islam as the motivation for the change and a desire to avoid the confusion of bearing one name for his religious practices and a second one for all other purposes.¹¹³ In a 1967 decision dripping with condescension, Judge Maurice Wahl denied the Petitioner's application for name change.¹¹⁴ In so doing, Wahl relied on his discretion and reasoned that the Petitioner should be proud of his birth name:

Green is a name that possesses an American echo in politics, government, finance, in peace, and in war. The Revolutionary War produced the Green Mountain boys, who so valiantly fought and bled for their, and now our, glorious country. . . . This birthright should not conceal itself behind such an alien shield. It has sufficient buoyancy to float upon the sea of time and in years to come the petitioner may hopefully add luster to the name of Green.¹¹⁵

In this decision, Wahl substituted his own personal preferences and worldview for the Petitioner's. His romanticizing of American history fails entirely to account for the Black experience of U.S. history and society that led many Americans, like the Petitioner, to seek a new religion and identity. Moreover, the decision is inconsistent to New York law, which embraces the common law permitting "the free use of any name a person may choose."¹¹⁶ Despite citing this standard and other precedential decisions, Wahl concluded that none of these authorities were binding *or* persuasive to his decision.¹¹⁷ In fact, Wahl cited the common law remedy available as an alternative for further justification

112. *In re Green*, 283 N.Y.S.2d 242, 244 (N.Y. Civ. Ct. 1967).

113. *Id.*

114. *Id.* at 245.

115. *Id.*

116. *Id.* at 244.

117. *Id.* at 245.

that the court was free in its discretion to deny the application.¹¹⁸ While the Petitioner's race is never revealed in the *Green* case, a critical reading of the facts in context suggest that he was Black.

A 1992 case from California features a name change denial in which the Petitioner's race was referenced explicitly.¹¹⁹ In that case, Russell Lawrence Lee, an African American educator, appealed from a decision of the court in Ventura County denying his application to change his name to Misteri (pronounced "Mister") [N-word].¹²⁰

The Petitioner represented himself in the appeal against two counsels appearing on behalf of the County.¹²¹ He explained that his intention with seeking the name change was to achieve some measure of social justice by "steal[ing] the stinging degradation—the thunder, the wrath, shame and racial slur—from the word."¹²² The court denied the petition, ruling that to approve the change would amount to a state endorsement of racial discrimination in violation of the Fourteenth Amendment.¹²³

The court presumed the applicant had a First Amendment right to seek the name change, but denied the change in part based on a "fighting words" exception to the applicant's free speech rights.¹²⁴ The court determined that between the questions of racial discrimination and a duty to prevent incitements to violence there was a "substantial reason" to deny the petition.¹²⁵ Moreover, the court reasoned that any threat to the applicant's First Amendment rights was diminished by the existence of his common law right to use any name he may choose—even one so offensive as to violate public policy, were it approved by the court.¹²⁶ Even this rather extreme case demonstrates how the common law of name change has promoted individual liberty while in the end denying an effective remedy to the petitioner. Despite the court's strident rejection of the applicant's choice of name, it recognized that his right to use the name at common law was practically absolute.¹²⁷

118. *Id.*

119. *See Lee v. Ventura Cnty. Superior Ct.*, 11 Cal. Rptr. 2d 763, 764 (Cal. Ct. App. 1992).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 765.

124. *Id.* at 767–68.

125. *Id.* at 765–768 (citing *In re Ross*, 67 P.2d 94, 96 (Cal. 1937)).

126. *Id.* at 768.

127. *Id.* at 764 ("Appellant has the common law right to use whatever name he chooses. He may conduct whatever social experiment he chooses. However, he has no statutory right to require the State of California to participate therein.")

The Petitioner did not abandon his quest. In 1995, he again filed an application to change his name in Ventura County, this time to Mister Radical Aidid Super[n-word].¹²⁸ Again, Lee cited his desire to “disarm” the word, reasoning that, “[i]f the word’s not going to go away, that’s the answer.”¹²⁹ Once again, his application was denied.¹³⁰

B. Name Change & Women’s Liberation

A number of name change questions arose out of the women’s liberation movement of the 1960s, 70s, and 80s. Many legal scholars writing during this time examined the particular harm done to women by loss of their premarital identity due to the assumed adoption of a husband’s surname.¹³¹ Yet, here again is an example where the customary naming practice and the cultural assumptions it incorporates do not reflect the state of the law. The common law of name change gives effect to name changes for women in heterosexual marriages, but only when they adopt their husband’s name by use.¹³² Yet, under the same common law of name change, many courts have recognized that a name change is not automatic if the woman continues to use her premarital name.¹³³ While this may appear obvious under norms prevailing today, even in past generations many legal theorists recognized this straightforward application of the law.¹³⁴

A 1924 law review note analyzed the decision of the Comptroller General of the United States denying the right of a married woman employed in the federal government, Doctor X, to draw pay under her premarital name.¹³⁵ The note analyzed the assumptions underlying the Comptroller’s policy decision, which had not yet been subject to judicial scrutiny.¹³⁶ In its analysis, the note concluded that the Comptroller’s decision was legally incorrect given the common law rule of names and

128. Gregory Lewis, *N-Word Losing Capacity to Shock?*, SFGATE (Sep. 3, 1995), <https://www.sfgate.com/news/article/N-word-losing-capacity-to-shock-3132690.php>.

129. *Id.*

130. PETER SILVERTON, *FILTHY ENGLISH: THE HOW, WHY, WHEN AND WHAT OF EVERYDAY SWEARING* 243 (2009).

131. See, e.g., Dannin, *supra* note 39, at 160–61.

132. See *Kruzel v. Podell*, 226 N.W.2d 458, 459 (Wis. 1975).

133. *Id.*

134. See *id.* (“[A] woman upon marriage adopts the surname of her husband by thereafter customarily using that name, but no law requires that she do so. If she continues to use her anti-nuptial surname, her name is unchanged by the fact that marriage has occurred.”).

135. Editorial, *Recent Cases*, 73 U. PA. L. REV. 96, 110 (1924-1925).

136. *Id.* at 110–11.

that “[a] married woman is not excluded from the benefits of these general rules, and can acquire a new name by usage.”¹³⁷ The analysis acknowledges that a woman who assumes her husband’s surname has indeed fallen within the bounds of the common law rule for a new name by usage. But the note goes on to explain that this action is done in accordance with custom, not by operation of law:

[I]f the woman did not acquiesce in the custom, but persisted in the use of her maiden name, as in the instant case, it would seem that she would not gain a new name by marriage, but would retain her former name. Since Doctor X’s maiden name is her legal name, we are forced to conclude that the basis of the Comptroller- General’s ruling is unsound.¹³⁸

As early as the mid-19th century, the question of a woman’s legal name became an issue of women’s liberation. Lucy Stone, a prominent American suffragist and abolitionist, adopted her husband’s surname for the first year of her marriage, before reverting to her premarital name in 1856.¹³⁹ In so doing, she consulted with legal experts including future Supreme Court Chief Justice, Salmon Chase.¹⁴⁰ Stone learned through these consultations that there was no legal impediment to using her premarital name and persisted in its use throughout her life reasoning: “A wife should no more take her husband’s name than he should hers. My name is my identity and must not be lost.”¹⁴¹ That the common law of name change would grant Stone this legal authority over her own name and person was a unique departure from other aspects of common law that held a married woman legally subservient to her husband.¹⁴² *Coverture*, or the concept that a woman’s identity at law was subsumed

137. *Id.*

138. *Id.*

139. SALLY G. McMILLEN, *LUCY STONE: AN UNAPOLOGETIC LIFE* 131 (2015); *see also* Debra Michals, *Lucy Stone*, NAT’L WOMEN’S HIST. MUSEUM (2017), <https://www.womenshistory.org/education-resources/biographies/lucy-stone>.

140. McMILLEN, *supra* note 139, at 132.

141. *Id.*; Lucy Stone League, *Front Cover of SALLY G. McMILLEN, LUCY STONE: AN UNAPOLOGETIC LIFE* (2015). Lucy Stone’s insistence on using her name was seen as particularly radical for its time. McMILLEN, *supra* note 139, at 131. Contemporaries, such as Elizabeth Cady Stanton, adopted a compromise position by using their full names to include their premarital surnames along with their husbands’ surnames. *Id.*

142. *See, e.g., Coverture*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“*Coverture* is by law applied to the state and condition of a married woman, who is *sub potestate viri*, (under the power of her husband) and therefore unable to contract with any to the damage of herself or husband, without his consent and privity, or his allowance and confirmation thereof.” (quoting THE POCKET LAWYER AND FAMILY CONVEYANCER 96 (3d. ed. 1833))).

into her husband, prevailed in U.S. law during Stone's time.¹⁴³ In fact, on the occasion of their marriage, Lucy Stone and her husband Henry Blackwell published the "Protest" in which they proclaimed that their marriage, "imply[d] no sanction of, nor promise of voluntary obedience to such of the present laws that refuse to recognize a wife as an independent, rational being."¹⁴⁴

Throughout her life, Stone continued to advocate for reform of coverture and other laws that subordinated women and entreated women to understand how these laws operated to their detriment.¹⁴⁵ The common law of name change was a notable exception to these oppressive laws. A generation later, women drew on Lucy Stone's study of the law and her decision to retain her legal name. By the time the federal government had denied Doctor X's entitlement to earnings under her premarital name in the 1920s, the Lucy Stone League was suing government agencies nationwide over married women's rights to have their surnames recognized.¹⁴⁶ Their efforts resulted in a 1938 regulation in the very first edition of the Code of Federal Regulations, codifying that a woman has a right to have a passport issued to her in her premarital surname.¹⁴⁷ The now defunct regulation required that:

A married woman desiring a passport issued in her maiden name must submit with her application the affidavits of two or more persons to the effect that she uses her maiden name exclusively, has used it exclusively for a stated period of time, and is known by such name in the community in which she resides.¹⁴⁸

Despite the apparent extra effort involved for women who wished to have their surnames recognized, this regulation was a legally sound articulation of the common law that simultaneously accounted for the minority of married women who retained their surnames at marriage.

Regulations like the 1938 rule on passport issuance were necessary due to a general ignorance of the common law of name change. Perhaps most stunning in this history is the opposition of the courts to a woman's

143. See *id.*; Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 771 (2007); MCMILLEN, *supra* note 139, at 114.

144. MCMILLEN, *supra* note 139, at 129.

145. *Id.* at 131–32, 148.

146. Priscilla Ruth MacDougall, *The Right of Women to Name Their Children*, 3 L. & INEQ. 91, 95 n.6 (1985).

147. *Id.*

148. 22 C.F.R. § 33.20 (1938).

right to choose her name. Case law reveals that many women have encountered judges who misapplied the name change standards, forcing them to litigate the right to retain or adopt a name of their choice.

1. Oppression and Name Change Denials

Where courts and legislatures have intervened in the naming process, the result has tended toward the suppression of women's rights. In 1971, Wendy Forbush sued a group of Alabama officials, led by Governor George C. Wallace, for denying her a state driver's license issued in her premarital name.¹⁴⁹ In her complaint before the U.S. District Court for the Middle District of Alabama, Forbush alleged an equal protection violation of her constitutional rights as well as a claim against the State of Alabama under 42 U.S.C. § 1983.¹⁵⁰ The state employed an "unwritten regulation" requiring each married female applicant for a driver's license to use her husband's surname and that the state's common law rule was that a husband's surname became a married woman's legal name.¹⁵¹ In its decision, the district court ruled against Forbush and upheld the State's denial as reasonably related to its legitimate interest in "maintaining close watch over its licensees."¹⁵² In its analysis, the district court misstated the common law of name change, asserting that it was settled law that "upon marriage the wife by operation of law takes the husband's surname."¹⁵³ As further justification for denying relief to the plaintiff, the court pointed to the existence of Alabama's name change statute as a remedy such that any harm to Forbush was purely *de minimis*.¹⁵⁴ Stunningly, the Supreme Court of the United States issued an opinion affirming the judgment of the district court without comment in 1972.¹⁵⁵

This decision coincided with a growing women's liberation movement. The issue of marital naming and involuntary changing of women's surnames became a policy priority.¹⁵⁶ The National

149. Forbush v. Wallace, 341 F. Supp. 217, 219 (M.D. Ala. 1971), *aff'd*, 405 U.S. 970 (1972).

150. Forbush, 341 F. Supp. at 219.

151. *Id.*

152. *Id.* at 221–23.

153. *Id.* at 221.

154. *Id.* at 222.

155. See generally Forbush v. Wallace, 405 U.S. 970 (1972).

156. Omi Morgenstern Leissner, *The Name of the Maiden*, 12 WIS. WOMEN'S L.J. 253, 258–59 (1997); see also Emens, *supra* note 143, at 771–73 (arguing for administrative and policy changes to more fairly distribute the marital name change decision and process between men and women).

Organization of Women, American Civil Liberties Union, National Conference on Women and Law, and the Center for a Woman's Own Name mobilized on the issue of a married woman's right to name retention.¹⁵⁷

The issue also became a popular topic for legal scholarship. Writing in 1976, Ellen Jean Dannin observed how courts in cases like *Forbush* had misapplied the law by requiring that women accept the surname of their husbands.¹⁵⁸ The solution Dannin suggested was to reform state name change statutes by adopting model legislation to make the correct standard plain.¹⁵⁹ While statutory reform initially seemed promising, efforts to change legislation stalled and women increasingly returned to the courts to have their rights to a premarital name recognized.¹⁶⁰ Eventually, the Supreme Court of Alabama corrected the misstatement of law promulgated in *Forbush*. In a 1982 opinion, *State v. Taylor*, the highest court in Alabama concluded that:

Our research has convinced us that *Forbush v. Wallace* does not accurately state the common law on names, and that the case of *Kruzel v. Podell* correctly holds that the common law of England could be summarized as follows: "When a woman on her marriage assumes, as she usually does in England . . . the surname of her husband in substitution for her father's name, it may be said that she acquires a new name by repute The change of name is in fact, rather than in law, a consequence of the marriage."¹⁶¹

Over time, the right of a woman to retain her name upon marriage has become increasingly uncontroversial, and has tended toward state and federal agencies assuming the continuation of a premarital name absent affirmative efforts to update identity documents with proof of marriage.¹⁶² Despite this course correction on the common law and married women's naming rights, the paternalistic biases of the courts are on display in other applications for a woman's name change where marital status is irrelevant.

157. Morgenstern Leissner, *supra* note 156, at 258–60.

158. Dannin, *supra* note 39, at 160 (citing *Forbush*, 341 F. Supp. 217).

159. *Id.* at 170–71.

160. Morgenstern Leissner, *supra* note 156, at 258–59.

161. 415 So. 2d 1043, 1047 (Ala. 1982) (citations omitted) (quoting *Kruzel v. Podell*, 226 N.W.2d 458, 461 (Wis. 1975)).

162. See, e.g., *Change or Correct a Passport*, U.S. DEPT OF STATE BUREAU OF CONSULAR AFFS., <https://travel.state.gov/content/travel/en/passports/have-passport/change-correct.html> (last visited Mar. 10, 2022) (requesting a copy of a marriage certificate in order to document a legal name change by marriage).

In 1976, Ellen Cooperperson sought a judge's approval to change her name from Ellen Cooperman.¹⁶³ In seeking the petition, she explained that she intended to make the change because the desired name "more properly reflects her sense of human equality than does the name Cooperman."¹⁶⁴ She also explained that her belief "in the feminist cause" motivated the decision.¹⁶⁵ Suffolk County Judge John F. Scileppi denied the name change for fear that approving the request would "have serious repercussions perhaps throughout the entire country."¹⁶⁶ In denying the request, however, Scileppi noted that it was the petitioner's right to continue to use the name Cooperperson.¹⁶⁷ Indeed, while Cooperperson had a common law right to this name change, she explained that the decision to seek judicial approval was due to a refusal by financial institutions to recognize the name change.¹⁶⁸ On appeal, Ms. Cooperperson's petition was eventually approved in 1978.¹⁶⁹ Today she is a successful businessperson and, according to her company's website Cooperperson Performance Consulting, the *Long Island Press* named her one of their "50 Most Influential People" in 2014.¹⁷⁰

C. Name Change & LGBTQ Rights

When it comes to recent successes in civil rights, protections for LGBTQ Americans are some of the most remarkable. From *United States v. Windsor*¹⁷¹ to *Bostock v. Clayton County*,¹⁷² the last ten years have seen landmark legal developments for the community. Perhaps the most sweeping has been the affirmation of the legal right to marriage. In *Obergefell v. Hodges*, the Supreme Court ruled that denying the fundamental right of marriage to same-sex couples violated the Due Process and Equal Protection Clauses of the U.S. Constitution.¹⁷³

163. *A Judge Rules 'person' Is Non Grata*, N.Y. TIMES (Oct. 19, 1976), <https://www.nytimes.com/1976/10/19/archives/a-judge-rules-person-is-non-grata.html>.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. Slovenko, *supra* note 20, at 216.

169. *Id.*; *Cooperman to Cooperperson: LI Woman's Historic Name Change*, NEWS12 LONG ISLAND (Mar. 30, 2018, 5:45 PM), <http://longisland.news12.com/story/37849153/cooperman-to-cooperperson-li-womans-historic-name-change>.

170. *About CPC & Ellen Cooperperson*, COOPERPERSON PERFORMANCE CONSULTING, <https://www.cooperperson.com/about/ellen-cooperperson> (last visited Mar. 10, 2022).

171. 570 U.S. 744 (2013).

172. 140 S. Ct. 1731 (2020).

173. 576 U.S. 644, 647 (2015).

Many have commented on the relatively rapid evolution of the equal rights movement for LGBTQ Americans, but very little legal scholarship has discussed the unique role that name change law has played in that struggle. Indeed, writing twenty years ago about name change cases for transgender petitioners and same-sex couples, legal historian Katrina C. Rose opined, “[t]here are those in the legal community—in practice as well as in academia—who do not consider discourse on the issues analyzed in this article to be legitimate scholarship: Gay rights are denigrated as political correctness run amok; transgender rights even more so.”¹⁷⁴

Rose was writing in 2002, one year before the landmark decision in *Lawrence v. Texas* that nullified anti-gay sodomy laws,¹⁷⁵ and before the nearly two decades of Supreme Court jurisprudence and social change that would promote equality for the LGBTQ community.¹⁷⁶ Still, discrimination against the community continues, with particularly sharp inequities existing for transgender individuals.¹⁷⁷ According to a 2016 study by the National Center for Transgender Equality, transgender individuals were more than twice as likely to be living in poverty than the general population and represented an unemployment rate that was three times the national average.¹⁷⁸ Since this study, inequities have only deepened. The former Trump administration took affirmative steps to allow discrimination against transgender people in the military¹⁷⁹ and in healthcare.¹⁸⁰ Killings of transgender individuals in the United States

174. Katrina C. Rose, Note, *Three Names in Ohio: In re Bicknell, In re Maloney and Hope for Recognition that the Gay-Transgender Twain Has Met*, 25 T. JEFFERSON L. REV. 89, 92–93 (2002).

175. *Id.*; *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

176. *Gay Rights*, HISTORY, <https://www.history.com/topics/gay-rights/history-of-gay-rights> (last updated May 27, 2021).

177. *Id.*

178. SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 5 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>. Based on a survey of 27,715 transgender respondents, the researchers found that the percentage of those living in poverty was 29% and the rate of unemployment was 15%, compared to general rates of poverty and unemployment of 12% and 5%, respectively. *Id.* at 4–5.

179. See Memorandum from President Donald J. Trump to the Sec’y of Def. and the Sec’y of Homeland Sec. (Mar. 23, 2018), <https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security-regarding-military-service-transgender-individuals/>.

180. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160, 37,161–62, 37,168 (June 19, 2020).

reached record highs in 2020.¹⁸¹ Despite the emphasis on legal and social advances for LGBTQ rights in the United States, violence and oppression based on sexual orientation, and especially gender identity, continue to be commonplace.

Rose's 2002 exploration of the denials of name change applications demonstrates the ways in which name change law has served as yet another forum for discrimination.¹⁸² Examining the experiences of LGBTQ petitioners in three cases, Rose expertly highlights how courts have inappropriately exercised statutorily-granted discretion to arrive at decisions that are contrary to the law of name change.¹⁸³ In these cases, lower court judges misuse their own discretion, misconstrue the law, and rely on ill-defined concepts of public policy to deny name changes to gay and transgender petitioners. Most perniciously, these decisions, once entered against the petitioners, are then selectively cited as authority for name change denials in other jurisdictions.¹⁸⁴

1. Same-Sex Couples and Name Change Denials

In Ohio, Jennifer Lane Bicknell and Belinda Lou Priddy each filed a petition to change their last names to Rylen.¹⁸⁵ According to their petitions, this same-sex couple sought the name change in order to “add to the level of commitment they have for each other, as well as that of their unborn child.”¹⁸⁶ After a hearing on both petitions, the magistrate judge denied their petition in March of 2000, finding that, “[t]o grant their petitions would be contrary to the public good, contrary to encoded public policy, and contrary to natural law.”¹⁸⁷ Upon objections filed by the couple, the probate court declined to endorse the magistrate's legal conclusions, yet still denied the petitions.¹⁸⁸ The probate court justified its ruling by explaining that its approval of the name change would “give an aura of propriety and official sanction to their cohabitation and would undermine the public policy of this state which promotes legal marriages

181. *Violence Against the Transgender and Gender Non-Conforming Community in 2020*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020> (last visited Mar. 10, 2022).

182. Rose, *supra* note 174, at 92–93.

183. *Id.*

184. *Id.* at 93.

185. *Id.* at 101.

186. *In re Bicknell*, Nos. CA2000-07-140, CA2000-07-141, 2001 WL 121147, at *1 (Ohio Ct. App. Feb. 12, 2001), *rev'd*, 771 N.E.2d 846 (Ohio 2002).

187. *In re Bicknell*, 771 N.E.2d at 847 (internal quotation marks omitted).

188. *Id.*

and withholds official sanction from non-marital cohabitation.”¹⁸⁹ On appeal to the Ohio Supreme Court, the lower court decisions were reversed.¹⁹⁰ The Ohio Supreme Court reasoned that the justifications given by the petitioners for their applications did not reveal an “intention to have this court validate a same-sex union by virtue of granting the name-change applications” and that, “[a]ny discussion, then, on the sanctity of marriage, the well-being of society, or the state’s endorsement of nonmarital cohabitation is wholly inappropriate and without any basis in law or fact.”¹⁹¹ Indeed, the court cemented its rejection of the lower court’s ruling by highlighting the name change statute’s liberal policy.¹⁹² Citing to a 1998 Pennsylvania case, the Ohio Supreme Court concluded, “we see no reason to impose restrictions which the legislature has not.”¹⁹³

In an analysis of this decision, Katrina Rose concludes that the Ohio Supreme Court’s ruling was “a rational interpretation of the name change statute as it exists in concert with the entirety of Ohio law.”¹⁹⁴ The common law’s commitment to the validity of a name change in all cases, except where there is an intended fraud, clearly animated the Ohio Supreme Court’s conclusion in *Bicknell*: “It is clear that appellants have no criminal or fraudulent purpose for wanting to change their names.”¹⁹⁵ This expression of the plain common law standard allowed for the Rylens to achieve their emancipatory purpose—some level of legal recognition for their commitment to one another, in spite of an application of the laws that denied them the right of a formal marital relationship.

2. Transgender Petitioners and Name Change Denials

In the cases of individuals who seek to change their names to achieve consistency with a gender identity that differs from the sex assigned at birth, name change is perhaps one of the most common legal needs.¹⁹⁶ In a national survey, 30% of transgender individuals reported having legally changed their names with a total of 36% saying that they had

189. *Id.*

190. *Id.* at 847–48.

191. *Id.* at 849.

192. *Id.*

193. *Id.* (quoting *In re McIntyre*, 715 A.2d 400, 403 (Pa. 1998)).

194. Rose, *supra* note 174, at 117.

195. *In re Bicknell*, 771 N.E.2d at 849.

196. See generally *Identity Documents & Privacy*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues/identity-documents-privacy> (last visited Mar. 10, 2022); TRANSGENDER L. CTR., *ID PLEASE!: A GUIDE TO CHANGING CALIFORNIA & FEDERAL IDENTITY DOCUMENTS TO MATCH YOUR GENDER IDENTITY* (2019), <http://transgenderlawcenter.org/wp-content/uploads/2020/03/ID-Please-Final-February-2019.pdf>.

attempted the legal name change process.¹⁹⁷ Of those 30% who managed to accomplish a legal name change, 96% reported having done so through a court order.¹⁹⁸ Less than 1% of respondents reported having changed their legal name through an immigration or naturalization process.¹⁹⁹ The remainder, less than 4% of respondents, reported having used the common law provisions of a name change pursuant to marriage or by use of an assumed name to accomplish their change of name.²⁰⁰ This meager share of the transgender community is stunning when compared to the roughly 70% of married women—who are presumably primarily cisgender and in heterosexual marriages—that have changed their names pursuant to the common law provisions at marriage.²⁰¹ Additional information about the experiences of the transgender respondents who pursued a legal name change confirms the inequities experienced by these petitioners. Of those who initiated the legal name change process, but did not achieve a legal change, the most common reasons were running out of money to complete the process, being denied by the court, or simply giving up.²⁰²

Case law reflects the systemic challenges faced by transgender name change petitioners. Court rulings stretching back decades reflect the indignities experienced by these individuals in the judicial process for a change of name.

In *In Re Anonymous*, a 1968 decision coming out of New York City, the court spent only a few sentences discussing the law in a case of a transgender woman seeking a name change: “That an individual may assume any name, absent fraud or an interference with the rights of others, is a right that existed at common law. This right is not restricted or impaired by Article 6 of the Civil Rights Law.”²⁰³ Given the total absence of any facts suggesting fraud or interference with others’ rights, the court could have readily granted the woman’s petition. Instead, the decision characterized the issue as one of first impression requiring closer examination of questions wholly unrelated to the simple legal standard cited in the first page of the decision.²⁰⁴

The court proceeds to expose a series of facts related to the petitioner’s medical history, including a graphic discussion of her

197. JAMES ET AL., *supra* note 178, at 82.

198. *Id.*

199. *Id.* at 82–83.

200. *Id.* at 83.

201. See Miller & Willis, *supra* note 42.

202. JAMES ET AL., *supra* note 178, at 83.

203. *In re Anonymous*, 293 N.Y.S.2d 834, 835 (N.Y. Civ. Ct. 1968).

204. *Id.* at 835–37.

genitals, claiming that such an examination was “of necessity.”²⁰⁵ In its analysis, the court also insists on referring to the petitioner using male gender pronouns, except to derisively observe: “The petitioner is now capable of having sexual relations as a woman although unable to procreate. ‘Her’ physiological orientation is complete.”²⁰⁶ Further graphic discussion of certain sexual conditions unrelated to the petitioner’s request follow this sarcastic comment.²⁰⁷ Despite all of this, the court ultimately ruled in favor of the petitioner in *Anonymous*.²⁰⁸ But not all’s well that ends well.

By classifying the case as one of first impression and tying the standard for name change to a question of physical anatomy, the court established a troubling precedent. Future petitioners would be forced to expose some of the most intimate aspects of their life and person in a way not contemplated for cisgender petitioners. This precedent served to effectively graft a new criterion onto the ancient standard, but only for a certain category of petitions. Now those seeking to change a name from an “obviously ‘male’ name to an obviously ‘female’ name”—or vice versa—would be required to make some factual showing regarding their genitalia.²⁰⁹

Just two years later, in another New York case for an anonymous petitioner, the court again proceeded to include harmful dicta irrelevant to the name change standard.²¹⁰ In that case, the court referenced its view—without citing to any authority—that “[h]ormone imbalance, psychiatric disturbances, and physical mis-development” account for sexual uncertainty.²¹¹ How this observation relates to the legal name change standard, correctly stated elsewhere in the court’s opinion, is unclear.²¹² Also unclear is how the court’s discussion of the various “privileges” that the petitioner would enjoy as a woman relates to the legal analysis.²¹³ Indeed, these perceived privileges, including “exclusion from jury duty,” were among the discriminatory laws and policies vigorously opposed by the women’s liberation movement active at the

205. *Id.* at 836.

206. *Id.*

207. *See id.* at 836–37.

208. *Id.* at 838.

209. *Id.* at 835.

210. *In re Anonymous*, 314 N.Y.S.2d 668, 669 (N.Y. Civ. Ct. 1970).

211. *Id.*

212. *Id.* at 670 (“[O]ne has the right at common law to adopt or use any name, so long as fraud or prejudice to others is nonexistent.”).

213. *Id.* at 669–70.

time of the decision.²¹⁴ The suggestion that women of the time enjoyed greater privileges than men is stunning enough but is particularly confusing when the court quickly identifies that these *sua sponte* questions “are matters not within the jurisdiction of this Court and therefore may not be determined on this application.”²¹⁵ Despite these musings, the court approved the name change petition.²¹⁶ As with the earlier case, the court relied on the finding that, as a result of surgical intervention, the petitioner “is and will continue to be unable to engage in male procreative activities.”²¹⁷ The precedent set forth by the two New York cases was adopted in other jurisdictions.

In a 1978 Pennsylvania case, Mary Ellen Dowdrick sought to have her name changed from the name assigned to her at birth.²¹⁸ The harassment she experienced as a result of filing her petition included being publicly outed, repeatedly misgendered by the court, and subjected to detailed discussions of her medical and psychiatric history.²¹⁹ In addition, the court permitted the Reverend John Paul Weyma—a person with no discernible connection to the petitioner—to testify in opposition to the petition.²²⁰ Why the court allowed this presumably harassing testimony is unclear. In the decision, the presiding judge correctly concluded that the testimony did not constitute a “lawful objection” given that the name change was not being sought for a “fraudulent purpose.”²²¹

Indications of the judge’s motivations in handling the petition and proceeding are evident throughout the ruling, most notably in the court’s decision to heap denial of the petition atop the other indignities suffered by the petitioner.²²² In justifying the denial, the court cited to the earlier cases in New York where a sexual reassignment surgery had already been completed.²²³ Indeed, the court effectively conditioned the approval of a name change on surgical intervention: “Until the sex reassignment surgery is completed, I decline to exercise the court’s discretion in favor of the name change.”²²⁴ In explaining this theretofore legally

214. *Id.* at 670; *see also* Laughlin McDonald, *A Jury of One’s Peers*, ACLU (Mar. 18, 2011, 11:20 AM), <https://www.aclu.org/blog/smart-justice/mass-incarceration/jury-ones-peers>.

215. *In re Anonymous*, 314 N.Y.S.2d at 669–70.

216. *Id.* at 670.

217. *Id.* at 669.

218. *In re Dowdrick*, 4 Pa. D. & C.3d 681, 682 (Ct. Com. Pl. 1978).

219. *Id.* at 682–83.

220. *See id.*

221. *Id.* at 683.

222. *Id.* at 683–85.

223. *Id.* at 684 (citing *In re Anonymous*, 293 N.Y.S.2d 834 (N.Y. Civ. Ct. 1968); *In re Anonymous*, 314 N.Y.S.2d 668 (N.Y. Civ. Ct. 1970)).

224. *Id.*

unsupported bright line rule, the judge laid bare his own biases: “In my judgment, for the court to permit a change of name at this time would not comport with good sense, common decency and fairness to all concerned, especially the public.”²²⁵

While much of the legal and historical record has been silent on the experience of LGBTQ name change petitioners, many of the cases denying name change lend some insight into their experiences. As demonstrated by the findings of the National Center for Transgender Equality’s 2015 survey, many transgender petitioners today are able to achieve legal name changes via the statutory process.²²⁶ Yet additional name change requirements regarding limitations for individuals caught up in the criminal justice system or who are not citizens of the United States continue to cause harm for transgender petitioners and suggest the need for greater reforms.²²⁷ Immigrant name change experiences in particular emphasize how modern name change restrictions for noncitizens are incompatible with law, policy, and U.S. history.

D. Immigrants, Name Changes, and Self-Determination

Perhaps some of the richest narrative around the experience of name change in the United States comes from the stories of immigrants, mostly European, arriving to this country during the late nineteenth and early twentieth century.²²⁸ During this time period, the United States experienced a surge in immigration. This era, and its conjuring of huddled masses yearning to breathe free, witnessed the arrival of over twelve million individuals through the immigration inspection station on Ellis Island off the New Jersey coast between 1892 and 1954.²²⁹ Many myths of the American experience trace their origins to these individuals’ original interactions with the United States. Included in these is the tale that explains how upon arriving many family names were changed by impatient, or perhaps even well-meaning, immigration officials.²³⁰

225. *Id.* at 685.

226. *See* JAMES ET AL., *supra* note 178, at 81–83.

227. *See id.* at 84–85, 184.

228. Philip Sutton, *Why Your Family Name Was Not Changed at Ellis Island (and One That Was)*, N.Y. PUB. LIBR. (July 2, 2013), <https://www.nypl.org/blog/2013/07/02/name-changes-ellis-island>.

229. *Id.*

230. *Id.*

1. The Myth of the Ellis Island Name Change

Despite the persistence of this narrative, the historical record tells a different story—these name changes likely did not occur.²³¹ A number of historians have written exposing how these family legends lack documentary support.²³² In addition to a lack of documentation to corroborate this supposed practice, historians also point to what is known about the ways in which immigration officials processed the newly-arrived. Historian Vincent J. Cannato explains that:

Names were not changed at Ellis Island. The proof is found when one considers that inspectors never wrote down the names of incoming immigrants. The only list of names came from the manifests of steamships, filled out by ship officials in Europe. In the era before visas, there was no official record of entering immigrants except those manifests. When immigrants reached the end of the line in the Great Hall, they stood before an immigration clerk with the huge manifest opened in front of him. The clerk then proceeded, usually through interpreters, to ask questions based on those found in the manifests. Their goal was to make sure that the answers matched.²³³

Historian Philip Sutton acknowledges the possibility that a number of external forces may have accounted for immigrant name changes—such as misspellings caused by transliteration of names in one language to another or clerical errors.²³⁴ Yet, he concludes that based on the historical record that “it is more likely that immigrants were their own agents of change.”²³⁵ There is evidence that immigrants “changed their name[s] in advance of” immigrating and even more documentation to show that many immigrants altered their names after arriving to the United States.²³⁶ There are a number of reasons to explain those decisions—many of which indeed respond to the pressure to assimilate—yet they were ultimately decisions that individuals had the exclusive legal authority to make for themselves.²³⁷

231. *Id.*

232. *See id.*

233. *Id.* (quoting VINCENT J. CANNATO, AMERICAN PASSAGE: THE HISTORY OF ELLIS ISLAND 402 (2009)).

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

2. Immigrant Name Change and Agency

While the law of name change in the United States has not necessarily supported the external imposition of a name on the individual, involuntary naming has occurred throughout the generations. In addition to the experience of Native Americans mentioned in Part I,²³⁸ Yvonne Cherena Pacheco explains that “[a] variety of mechanisms operate[] simultaneously” in coercing the use of a name that conforms to Anglo-American expectations.²³⁹ Chief among these factors is the government and its agents whose systems and bureaucracies have left little room for names that deviate from culturally dominant norms.²⁴⁰ Examples include government forms, which assume that names will follow a certain convention and structure.²⁴¹ The result, she argues, is “[that] what appears on its face, an equality in name usage, is misleading because the government is a part of the larger American society in which daily behaviors and unthinking individual actions do, in fact, compel” the loss of one’s identity as expressed by their name.²⁴²

In addition to these kinds of subtle signals, individuals whose names fall outside of the expected norms may meet outright hostility to their names. In one anecdote, hostility in the form of employment discrimination colludes with bureaucratic justification when an American medical student of Israeli heritage was told in an interview, “[y]ou are accepted, but really, you cannot be an intern here with a name like that. Our paging operators could not pronounce it. There isn’t enough space on the lab slip to write it.”²⁴³ The result? Emanuel Tenenwerzel became Dr. Emanuel Tanay.²⁴⁴

A much more familiar narration of the immigrant name change is found in a letter to an editor of the *Wall Street Journal* in 1979.²⁴⁵ In response to a columnist’s article about his own experience of variations of his name, many readers shared their families’ naming lore.²⁴⁶ In one, immigration documents recorded the family name of a Czech immigrant,

238. See *supra* text accompanying note 8.

239. Cherena Pacheco, *supra* note 14, at 15.

240. See *id.* at 15–16.

241. *Id.* at 16.

242. *Id.* at 23. While Cherena Pacheco discusses the specific experience of Latinas in U.S. culture, her observations hold true for the various individuals of disparate cultural and linguistic backgrounds implicated in broader U.S. society over the generations. See *id.*

243. Slovenko, *supra* note 20, at 215.

244. *Id.*

245. Rich Jaroslovsky, *Whatsisname Strikes a Chord with Our Readers*, WALL ST. J., Feb. 27, 1979, at 24.

246. *Id.*

Grunburgher, simply as “G.”²⁴⁷ The family members subsequently adopted variations including Green and Grauman.²⁴⁸ The author of the letter to the editor explained that he had opted to return to his family’s American roots, so to speak, and use the name from his great-great grandfather’s immigration record: “Mr. G says his relatives don’t like his innovation. But, he says, ‘my wife and I disagree. We feel it adds a Kafkaesque touch to our lives.’”²⁴⁹ This anecdote demonstrates the adaptability of the U.S. approach to naming—within one family, at least four different variations on one name.

While it is tempting to consider these name changes exclusively as reactions to efforts to assimilate, that the legal right to change one’s name was truly an American freedom cannot be ignored. As explored in greater detail in Part III, the countries from which many immigrants derived did not include a right to name change.²⁵⁰ Indeed, for many fleeing persecution, naming was one of the legal mechanisms by which governments oppressed minority groups. In the case of Prussia in the 19th century, state-imposed surnames served to subjugate and discriminate against the country’s Jewish population.²⁵¹ By instituting a fixed and immutable list of Jewish names that identified bearers as Jews, these restrictions on naming fostered tragic consequences: “When Germany implemented the Final Solution, the closed list of Jewish patronyms made the task of genocide terrifying simple.”²⁵²

By contrast, European Jews immigrating to the United States were legally free to adopt any name of their choosing. In a study of early twentieth century naming patterns in European immigrant communities, researchers found that petitioners with Jewish European names opted for changes of name that incorporated both their American and Jewish identities.²⁵³ On the whole, these petitioners did not choose names in order to assimilate, say by taking on Anglo-Saxon names that would obscure their cultural roots. Instead, Jewish name changes in the United States became something unique to the Jewish-American cultural experience. In a review of the turn of the twentieth century naming patterns of American Jews, two Russian Jewish immigrants surveyed explained that their siblings bore “American” names that were in fact

247. *Id.*

248. *Id.*

249. *Id.*

250. *See infra* Part III.

251. *See* Scott et al., *supra* note 4, at 16–17.

252. *Id.* at 17.

253. Watkins & London, *supra* note 75, at 169–70, 189–90.

rarely used by the dominant Anglo-Saxon populace of the time.²⁵⁴ The commentators observed that the participants of the survey likely identified these “American” names as such because they were the product of name change upon arrival to the U.S. The result, the surveyors noted, is the creation of the “new ethnic identity . . . of Jews born in the United States and could thus be just as easily called American as Jewish.”²⁵⁵

3. Intersecting Experiences: Transgender Immigrants Then & Now

While transgender and immigrant communities have each developed unique relationships to American name change law, the experience of transgender immigrants is revelatory. At that intersection, name change law has represented a particularly vital form of liberation.

a. Historically

In an examination of the historic record related to name changes at Ellis Island, historian Philip Sutton describes the story of one immigrant Sutton refers to as the “exception to the rule” that names were not changed by immigration officials.²⁵⁶ On October 4, 1908, a Canadian immigrant by the name of Frank Woodhull returned to his residence in the United States after a trip to England.²⁵⁷ Arriving at the Port of New York, immigration officials at Ellis Island processed him for inspection and admission.²⁵⁸

Upon a visual inspection, a surgeon conducting examinations of the arriving passengers observed that Woodhull was “slight of build” and may be ill with tuberculosis.²⁵⁹ The surgeon signaled that the returning immigrant should undergo a closer examination and he was detained with a group of other men for further examination.²⁶⁰ According to a 1908 article in the *New York Daily Tribune*, when asked by the examining surgeon to remove his clothes, Woodhull exclaimed, “I might as well tell you all. I am a woman, and have travelled in male attire for fifteen years. I have never been examined by a doctor in all my life, and I beg of you

254. *Id.* at 189–90.

255. *Id.* at 190.

256. *See* Sutton, *supra* note 228.

257. *Id.*; *She Posed as a Man for Fifteen Years*, N.Y. TIMES, Oct. 5, 1908, at 18.

258. Sutton, *supra* note 228.

259. *She Posed as a Man for Fifteen Years*, *supra* note 257.

260. *See Lived 15 Years as Man*, N.Y. DAILY TRIB., Oct. 5, 1908, at 14.

not to make an examination of me now.”²⁶¹ Despite these protests, Woodhull was examined by a matron and later by surgeons who confirmed that he was not carrying tuberculosis.²⁶² Immigration Commissioners learned of the arrival of Woodhull and detained him for further inquiry.²⁶³

Under questioning, Woodhull explained that he was born Mary Johnson in Canada and had begun using the name Frank Woodhull after immigrating to the United States as a young adult.²⁶⁴ The story of Frank Woodhull made headlines nationwide.²⁶⁵ Reporters visited him during his detention at Ellis Island and attended his examination by the Commissioner of Immigration who interrogated him about his background and intentions upon arriving to the United States.²⁶⁶

While the accounts of his initial encounter with immigration officials is somewhat sensationalized by the media of the time—accounts differ regarding his precise reaction and remarks upon further inspection, for example²⁶⁷—the facts of his examination by the Immigration Commissioner happened in the course of a quasi-judicial “Board of Special Inquiry” proceeding and maintained a more faithful record of Woodhull’s experience.²⁶⁸ In that proceeding, Woodhull explained that he arrived in the United States from Canada after the death of his parents and found difficulty in maintaining employment.²⁶⁹ He related that he was able to eventually support himself by adopting a male persona, initially finding employment in California, but later working in a number of sales jobs.²⁷⁰ He explained that he had worked most recently in New Orleans and that the city was his ultimate destination.²⁷¹

In the many articles written about the Woodhull case, reports included that he was detained for further inquiry on the suspicion of an

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*; Sutton, *supra* note 228.

265. See, e.g., *Men’s Clothes Made Life Easy*, HAWAIIAN STAR, Oct. 21, 1908, at 2; *Adopts Men’s Clothes Because Nature Had Given Her Mustache*, MITCHELL CAP. (South Dakota), Oct. 9, 1908, at 2; *Paraded as a Man*, ELK CITY MINING NEWS (Idaho), Oct. 17, 1908, at 3; *She Lived as Man*, FORREST CITY TIMES (Arkansas), Oct. 9, 1908, at 1; *Woman Lived Years as Man*, PENSACOLA J. (Florida), Oct. 6, 1908, at 8.

266. See *She Posed as Man for Fifteen Years*, *supra* note 257; see also *Mustached, She Plays Man: Mary Johnson Says She Had to Live Up to Her Face*, SUN (N.Y.), Oct. 5, 1908, at 1 [hereinafter *Mustached, She Plays Man*].

267. See sources cited *supra* note 265.

268. *She Posed as Man for Fifteen Years*, *supra* note 257.

269. *Id.*

270. See *Mustached, She Plays Man*, *supra* note 266.

271. See *id.*

Assistant Commissioner that crossdressing was a crime in New York.²⁷² In response to this concern raised at his inquiry, Woodhull explained:

I have never attempted to take out citizenship papers. I knew that to do so would be either to reveal my sex or else become a lawbreaker. I have never been the latter. I did not know that there was a law against women wearing male attire in this State or I would have sailed to another port.²⁷³

According to the article published by the *Sun* at the time, it was determined that “[t]here is no statute [in] this State that says that a woman must wear petticoats when she walks abroad, and the Constitution is silent on the subject.”²⁷⁴ The accounts explain that Woodhull had demonstrated himself to be free of disease, of sufficient financial means, proven to be “an alien, but not an undesirable one.”²⁷⁵ Ultimately, Woodhull was released by immigration officials. Given the intense public scrutiny on the case, reporters wondered whether he would be required to assume feminine clothing or face other consequences.²⁷⁶ But according to reports of the time, after the special inquiry determined that no law had been broken, his entry record was updated to reflect the name Mary Johnson²⁷⁷ and Woodhull was sent on his way “to go out and as Frank Woodhull again face the world.”²⁷⁸ Notably, while records of the time opined about the potential illegality of Woodhull’s actions, none questioned the legality of a new name. Indeed, in an article from the *Sun* newspaper, one reporter recounted:

It is likely that Miss Johnson will be discharged to-day [sic]. Whether she will keep on men’s clothes when she departs from the island or be requested to go in the dress usually worn by her sex depends much on Commissioner Watchorn. Her spirit of obedience to the law is very strong, and if he says she should wear petticoats she may do it.²⁷⁹

272. See, e.g., *Has Posed for Years as Man: Woman in Male Attire Finally Discovered by Immigration Officials*, GARLAND GLOBE (Utah), Nov. 7, 1908, at 4; see also *Mustached, She Plays Man*, *supra* note 266.

273. *She Posed as Man for Fifteen Years*, *supra* note 257.

274. *Mustached, She Plays Man*, *supra* note 266.

275. *Lived 15 Years as Man*, *supra* note 260.

276. *Id.*

277. See Sutton, *supra* note 228.

278. *She Posed as Man for Fifteen Years*, *supra* note 257.

279. *Mustached, She Plays Man*, *supra* note 266.

For his part, Woodhull described his decision to assume a new name and male identity explaining, that, his “life . . . has always been a struggle. I come of an English-Canadian family, and I have had most of my fight to make all alone.”²⁸⁰ He is said to have also related that, “[w]omen have a hard time in this world . . . and now and then when a woman comes to the front who does not care for dress she is looked upon as a freak and a crank.”²⁸¹ He went on to observe that “[m]en can work at many unskilled callings, but to a woman only a few are open, and they are the grinding, death-dealing kinds of work. Well, for me, I prefer to live a life of *independence and freedom*.”²⁸²

It may be anachronistic to describe Woodhull as transgender, a term not coined until the late twentieth century and not commonly used until the early 2000s,²⁸³ but his desires for the expression of his own identity are plain from the accounts of his experiences on Ellis Island. Besides the overarching consideration of how he presented himself upon arrival to the United States, Woodhull “refused to give up her male dress,”²⁸⁴ and told a reporter that: “It is too bad that I have been discovered. Do you think they will let me in? I have been quite happy during my later years. You know a man can live on so much less than a woman.”²⁸⁵

Though this quote highlights Woodhull’s efforts to insist that his assumption of a male identity was a pragmatic and utilitarian solution, it also reveals his comfort in that experience. This is critical because, not only was Woodhull required to establish that he was not financially or physically unfit to enter the United States, he also needed to convince immigration officials that he was not prone to acts of “moral turpitude.”²⁸⁶ While of uncertain reliability, a couple of modern genealogy websites suggest that Woodhull obscured part of his history and intentions when arriving to Ellis Island.²⁸⁷ According to census records,

280. *She Posed as Man for Fifteen Years*, *supra* note 257.

281. Sutton, *supra* note 228.

282. *Id.* (emphasis added).

283. See generally Mary Schmich, *The Speedy Evolution of the Term Transgender*, CHI. TRIB. (May 10, 2016, 8:17 PM), <https://www.chicagotribune.com/columns/mary-schmich/ct-transgender-schmich-20160510-column.html>.

284. *Mustached, She Plays Man*, *supra* note 266.

285. *Happy as a Man She Says, After 15 Years Posing*, EVENING WORLD (N.Y.C.), Oct. 5, 1908.

286. *See Lived 15 Years as Man*, *supra* note 260. Under immigration law, an alien who commits crime involving “moral turpitude” is inadmissible to the United States. Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084 (1891) (current version at 8 U.S.C. § 1182 (a)(2)(A)(i)).

287. *Frank Woodhull (1858–1936)*, WIKITREE, <https://www.wikitree.com/wiki/Woodhull-215> (last updated July 14, 2021); see also Carol Ann Gellerman, Comment to *Frank*

a Frank Woodhull from Canada married Johanna (Josie) Thomas in 1887 and later adopted a child, Maizie.²⁸⁸

The dates and places of birth for this Woodhull line up with the Woodhull intercepted at Ellis Island, but that is where the similarities end. The census and vital records for Frank Woodhull do not lead to California or New Orleans, but instead suggest a nuclear family in the Midwest.²⁸⁹ Indeed, Woodhull took pains to assure Ellis Island officials and reporters that he was a law abiding, pragmatist who donned men's clothing merely as a means to the end of supporting himself as a single person.²⁹⁰ If Woodhull indeed married a woman and was raising a child, he might have been accused of homosexuality at his time of return to the United States. At the time, same-sex acts were criminalized²⁹¹ and Woodhull would have been well-advised to protect himself and his family from the scrutiny that would have followed their discovery. The 1891 Immigration Act provided exclusion not only for individuals convicted of an "infamous crime or misdemeanor involving moral turpitude[.]" but also for "insane persons."²⁹² Concern about being labeled with either one of these grounds could have reasonably led Woodhull to obscure his identity and fabricate certain aspects of his story in order to protect his family.

Indeed, Woodhull revealed that he understood the unwelcomed scrutiny that could come from the immigration process. He explained that he had never tried "to take out citizenship papers" for fear that doing so would "reveal [his] sex."²⁹³ While the legal immigration process exposed Woodhull to scrutiny, it is plain that the legal name change process offered him an opportunity for self-determination, self-definition, and in his own estimation, "independence and freedom."²⁹⁴ Whether or not the Woodhull detained at Ellis Island is the same Frank Woodhull who fathered Maizie and married Josie, it is clear that his ability to take

Woodhull, WE REMEMBER, <https://www.weremember.com/frank-woodhull/6r1u/memories> (last visited Mar. 10, 2022).

288. *Frank Woodhull (1858–1936)*, *supra* note 287; Gellerman, *supra* note 287.

289. *Frank Woodhull (1858–1936)*, *supra* note 287.

290. *See supra* notes 269–70 and accompanying text.

291. Emilia Brandimarte, *The History of Decriminalizing Homosexuality in the United States*, HOMOGLOBIN (Oct. 6, 2020), <https://www.homoglobin.org/blog/the-history-of-decriminalizing-homosexuality-in-the-united-states> ("Sodomy was a federal crime in every state until 1962.").

292. Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084 (1891) (current version at 8 U.S.C. § 1182(a)(2)(A)(i)).

293. *She Posed as Man for Fifteen Years*, *supra* note 257.

294. *See Sutton*, *supra* note 228.

on a name of his choice without judicial approval, allowed him to achieve the life he desired in his adopted country.

b. Today

At the time of Frank Woodhull's arrival to the United States, immigration enforcement was in its early stages. Widely recognized as the very first immigration regulation, the Chinese Exclusion Act had been enacted a mere twenty-six years prior to Woodhull's journey back to U.S. shores.²⁹⁵ Though there had been a number of developments in immigration restrictions since that first legislative effort in 1882, namely the public charge and moral turpitude restrictions discussed above, they were a thin patchwork compared to today's labyrinth of immigration laws and regulations.

As immigration restrictions grew throughout the twentieth century, additional grounds of inadmissibility and requirements for entry pushed the front door of the United States increasingly closed. A 1975 case regarding the deportation of rock legend, John Lennon, for a U.K. drug conviction references a list of "thirty-one classes of 'excludable aliens'" ineligible to enter into the United States.²⁹⁶ In that case, the Second Circuit Court of Appeals observed that the portion of immigration law barring people from entry "is like a magic mirror, reflecting the fears and concerns of past Congresses."²⁹⁷ Indeed, as the front door closed to little more than a crack, unauthorized immigration to the United States in the decades following *Lennon* reached critical levels, creating the present massive population of undocumented immigrants ineligible for immigration status without legislative reform.²⁹⁸ A growing anti-immigrant sentiment reflected a new kind of magic mirror complete with newly invented restrictions placed on name change petitioners.

295. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943).

296. *Lennon v. Immigr. & Naturalization Serv.*, 527 F.2d 187, 188–89 (2d Cir. 1975). In an interesting piece of legal name change trivia, this case is captioned under Lennon's full name "John Winston Ono Lennon." *Id.* at 187. According to biographer Ray Coleman, Lennon changed his name in 1969 to John Winston Ono Lennon following his marriage to Yoko Ono. See RAY COLEMAN, 2 JOHN ONO LENNON, 1967–1980, at 64–66 (1984). In the United Kingdom, the legal process for this change was through a declaratory poll deed, but under British law, Lennon was precluded from dropping his middle name from birth. *Id.* at 66.

297. *Lennon*, 527 F.2d at 189.

298. RANDY CAPPS ET AL., MIGRATION POL'Y INST., UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES: STABLE NUMBERS, CHANGING ORIGINS 1 (2020), https://www.migrationpolicy.org/sites/default/files/publications/mpi-unauthorized-immigrants-stablenumbers-changingorigins_final.pdf.

In 2011, the District of Columbia Superior Court adopted additional requirements for noncitizen name change applicants. These requirements forced immigrant petitioners to disclose their citizenship status and report themselves to ICE in order to petition the court for a change of name.²⁹⁹ Through efforts of name change advocates at Whitman-Walker Health and law students with Georgetown University Law Center's Community Justice Project,³⁰⁰ those restrictions were finally removed from the D.C. court's Application for Change of Name of an Adult.³⁰¹

The tendency to read in additional immigration status requirements, despite the absence of such considerations in the law, has cropped up in other jurisdictions over the last several years. In New York and Indiana, judges have denied name change applications over questions of immigration status.

In a series of cases out of New York, judges denied immigrant name change petitioners despite recognizing that "citizenship is not a prerequisite to obtaining a change of name under the Civil Rights Law."³⁰² Initially, these denials were premised on the assertion that name change law should account for the "realities of the world we live in after the events of September 11, 2001" without any further analysis as to how greater enforcement of name changes relates to deterrence of terrorism.³⁰³ Conversations with court staff and judges in the District of Columbia revealed a similar concern for the prevention of terrorism behind the rationale to create an immigration notification requirement.³⁰⁴

These fears may be related to the case of David Coleman Headley, an American of Pakistani descent who changed his name from Daood

299. See CMTY. JUST. PROJECT, GEO. UNIV. L. CTR., DOCUMENTING TRANSITION: THE DC NAME CHANGE PROCESS AND ITS IMPACT ON TRANSGENDER IMMIGRANTS 30–32 (on file with author) [hereinafter DOCUMENTING TRANSITION REPORT].

300. See generally *id.*

301. Application for Change of Name of an Adult, D.C. SUPER. CT. CIV. DIV. (Aug. 2020), <https://www.dccourts.gov/sites/default/files/2020-10/Adult-Name-Change.pdf>.

302. *In re Mohomed*, 775 N.Y.S.2d 488, 489 (Sup. Ct. 2004); *In re Boquin*, 875 N.Y.S.2d 788, 789 (Sup. Ct. 2009); see also *In re Cesar*, 997 N.Y.S.2d 589, 589–90 (App. Term 2014) (per curiam) (overturning lower court's denial of the name change of an undocumented immigrant).

303. *In re Mohomed*, 775 N.Y.S.2d at 490; *In re Boquin*, 875 N.Y.S.2d at 789 (quoting *In re Mohomed*, 775 N.Y.S.2d at 490).

304. DOCUMENTING TRANSITION REPORT, *supra* note 299, at 33–34 (in a meeting with name change advocates and law students from the Georgetown University Law Center, court staff and judges suggested that the name change requirement was added to thwart would-be terrorists who would use the alias to further terrorist activities).

Gilani.³⁰⁵ After changing his name in 2005, Headley was convicted as one of the masterminds behind a deadly 2008 terrorist attack in Mumbai, India.³⁰⁶ Headley's case contributed to the New York Police Department's ongoing surveillance of Muslim communities after 9/11, including investigations of name change applicants "whose names sound Arabic or might be from Muslim countries."³⁰⁷ However, this apparently isolated incident of an *American citizen* changing his name to advance a terrorist plot fails to justify how subjecting *noncitizens* to a heightened standard for name change deters terrorist acts.

Indeed, these judge-made requirements have harmed more transgender name change applicants³⁰⁸ than they have thwarted would-be terrorists. In a 2014 case, a transgender petitioner from Costa Rica was granted a name change on appeal in the Supreme Court of New York.³⁰⁹ In that case, no mention was made of any concerns of terrorism. Instead, the lower court denied the petition claiming that changing the name of an undocumented immigrant posed a risk of "fraud and confusion."³¹⁰ The Supreme Court, Appellate Term of New York disagreed, finding that the petitioner's inability "to provide the court with proof of citizenship or lawful immigration status was not fatal to the otherwise meritorious name change application."³¹¹ Despite the supreme court's ruling that lawful immigration status is not a requirement for legal name change in New York, it is important to highlight that the court still required the noncitizen in that case to notify federal immigration officials of her name change process.³¹² Today, name change court forms for the State of New York require an attestation of U.S. citizenship,³¹³ while the petition for the City of New York makes no such mention.³¹⁴ This discrepancy continues in spite of the state of New York's name

305. Gretchen Gavett, *In Effort to Spot Terrorists, NYPD Shadows Muslims Who Change Names*, PBS: FRONTLINE (Oct. 27, 2011), <https://www.pbs.org/wgbh/frontline/article/in-effort-to-spot-terrorists-nypd-shadows-muslims-who-change-names>.

306. *Id.*

307. *Id.*

308. DOCUMENTING TRANSITION REPORT, *supra* note 299, at 4, 7–8 (describing how the requirement to notify Immigration and Customs Enforcement officials as a pre-requisite to a name change in the District of Columbia deters transgender immigrant petitioners from pursuing their right to a name change).

309. *In re Cesar*, 997 N.Y.S.2d 589, 589–90 (App. Term 2014).

310. *Id.* at 590.

311. *Id.*

312. *Id.*

313. Petition for a Name Change, N.Y. CTS., <https://www.nycourts.gov/forms/npetition.pdf> (last visited Mar. 10, 2022).

314. Petition for Individual Adult Change of Name, N.Y. CIV. CT. (Aug. 2009), <https://www.nycourts.gov/courts/nyc/civil/forms/namechangeadult.pdf>.

change law statute, which does not include citizenship status as a consideration in granting a name change.³¹⁵

One state that has explicitly included citizenship status in its name change statute is Indiana. Under Indiana Code section 34-28-2-2.5(a)(5), “[p]roof that the person is a United States citizen” must be included in the name change petition.³¹⁶ In 2020, the Court of Appeals of Indiana

315. N.Y. CIV. RTS. LAW § 61 (McKinney 2021). If anything, Section 61 creates an additional hurdle for native-born petitioners by requiring production of a birth certificate for applicants born in New York State:

1. The petition shall be in writing, signed by the petitioner and verified in like manner as a pleading in a court of record, and shall specify the grounds of the application, the name, date of birth, place of birth, age and residence of the individual whose name is proposed to be changed and the name which he or she proposes to assume. The petition shall also specify (a) whether or not the petitioner has been convicted of a crime or adjudicated a bankrupt; (b) whether or not there are any judgments or liens of record against the petitioner or actions or proceedings pending to which the petitioner is a party, and, if so, the petitioner shall give descriptive details in connection therewith sufficient to readily identify the matter referred to; (c) whether or not the petitioner is responsible for child support obligations; (d) whether or not the petitioner’s child support obligations have been satisfied and are up to date; (e) the amount of a child support arrearage that currently is outstanding along with the identity of the court which issued the support order and the county child support collections unit; (f) whether or not the petitioner is responsible for spousal support obligations; (g) whether or not the petitioner’s spousal support obligations have been satisfied and are up to date; and (h) the amount of spousal support arrearage that currently is outstanding along with the identity of the court which issued the support order.

2. If the petitioner stands convicted of a violent felony offense as defined in section 70.02 of the penal law or a felony defined in article one hundred twenty-five of such law or any of the following provisions of such law sections 130.25, 130.30, 130.40, 130.45, 255.25, 255.26, 255.27, article two hundred sixty-three, 135.10, 135.25, 230.05, 230.06, subdivision two of section 230.30 or 230.32, and is currently confined as an incarcerated individual in any correctional facility or currently under the supervision of the department of corrections and community supervision or a county probation department as a result of such conviction, the petition shall for each such conviction specify such felony conviction, the date of such conviction or convictions, and the court in which such conviction or convictions were entered.

3. Upon all applications for change of name by persons born in the state of New York, there shall be annexed to such petition either a birth certificate or a certified transcript thereof or a certificate of the commissioner or local board of health that none is available.

Id.

316. IND. CODE ANN. § 34-28-2-2.5 (West 2016). Requirements for petitioners who are at least seventeen years of age:

decided the case of two transgender men, one with status as a lawful permanent resident and the other who was a beneficiary of the Deferred Action for Childhood Arrivals (“DACA”) program.³¹⁷ In that case, the court of appeals acknowledged that the Indiana statute presented the potential for constitutional equal protection issues.³¹⁸ As a result, the court chose to interpret the statute in such a way as to avoid the constitutional issue.³¹⁹ In so doing, the court reasoned that the statute’s mention of U.S. citizenship status was merely “directory” as opposed to mandatory in its intent, such that when a document is listed by statute but cannot be provided, the petitioner is relieved of the requirement.³²⁰ Not only did the petitioners, the court, *and* the State of Indiana recognize that the statutory citizenship requirement likely rendered it unconstitutional, the court harkened to the historical framework for name changes:

At first blush, the statute appears to require proof of United States citizenship before a name change may be granted. Such an interpretation, however, not only leads to constitutional problems—as acknowledged by the State—but is counter to the history of liberally allowing nonfraudulent name changes in

(a) If a person petitioning for a change of name under this chapter is at least seventeen (17) years of age, the person’s petition must include at least the following information:

- (1) The person’s date of birth.
- (2) The person’s current:
 - (A) residence address; and
 - (B) if different than the person’s residence address, mailing address.
- (3) The person’s valid:
 - (A) Indiana driver’s license number;
 - (B) Indiana identification card (as described in IC 9-24-16) number; or
 - (C) Indiana photo exempt identification card (as described in IC 9-24-16.5) number.
- (4) A list of all previous names used by the person.
- (5) *Proof that the person is a United States citizen.*
- (6) A statement concerning whether the person holds a valid United States passport.
- (7) A description of all judgments of criminal conviction of a felony under the laws of any state or the United States that have been entered against the person.

Id. (emphasis added).

317. *In re Doe*, 148 N.E.3d 1147, 1149 (Ind. Ct. App. 2020).

318. *Id.* at 1149.

319. *Id.* at 1150.

320. *See id.* at 1153–54.

Indiana and the overall framework of the name change statutes.³²¹

Pursuant to that ruling, both men's cases were remanded to the trial court.³²² This ruling is important in several respects. First, it demonstrates how the common law of name change evolved in statute and application to disadvantage an unpopular group—immigrants, and in the particular application here, transgender immigrants. Yet, the ruling supports another critically important consideration: in the modern day, the court still embraces and recognizes the validity of the common law of name change and its “liberally allowing nonfraudulent name changes.”³²³ The common law continues not only to thrive, but can also be used to protect the rights of minority petitioners in a comparable fashion to legal protections found in constitutional law. Indeed, it is still practicable and desirable as a policy, even in the case of a politically unpopular group in a jurisdiction whose statutes reveal a level of hostility to that group.

III. THE UNIQUELY AMERICAN FREEDOM TO DECIDE ONE'S NAME

That immigrants should encounter opposition to their efforts to change their names is not only inconsistent with the common law, but also incompatible with other areas of law implicating name change. An illustration of this disconnect is located—rather counterintuitively—in immigration and nationality law. Despite the notoriously complicated and labyrinthine structure of immigration law, perhaps the most liberal and straightforward application in all of U.S. name change law is found in the statutes on naturalization. At 8 U.S.C. § 1447(e), a simple formulation for a judicial grant of name change is found:

It shall be lawful at the time and as a part of the administration by a court of the oath of allegiance under section 1448(a) of this title for the court, in its discretion, upon the bona fide prayer of the applicant included in an appropriate petition to the court, to make a decree changing the name of said person, and the certificate of naturalization shall be issued in accordance therewith.³²⁴

321. *Id.* at 1151.

322. *Id.* at 1154.

323. *Id.* at 1151.

324. 8 U.S.C. § 1447(e).

While this standard does reference a court exercise of discretion, case law reveals no record of a court denying an individual's name of choice in a naturalization proceeding. Also, besides discretion, the request to change name need only be "bona fide."³²⁵ No further justification is requested in the immigration naturalization form, nor are any additional fees required for the name change.³²⁶ This statutory authority for name change via the naturalization process dates back to at least 1906 and has changed little in over one hundred years.³²⁷

In his 1942 book *What's Your Name?*, Slovenian-American journalist Louis Adamic profiles various cases of immigrant name change *and* name adherence.³²⁸ In one case, he relates the experience of George, an immigrant enlisted in the U.S. military in 1917.³²⁹ For the convenience of his commanding officer he adopted the surname "Sprague" and was eventually naturalized under that name.³³⁰ This anecdote illustrates the commonplace occurrence, encouragement, and ease of name change in the naturalization process. It of course also recognizes the pressure to assimilate that led many immigrants to resort to a change of name. But the story does not end there. Adamic continues the story of George's name change journey: "Twenty-odd years later, however, George Sprague appeared in a Chicago court. 'I'm tired of being called by a name I was not born to,' he said. 'I want my real name again.' He left the courtroom as George Stanislauskas."³³¹

Though the general law of name change should be straightforward enough, the process through naturalization is even more streamlined. In his telling of the story, Adamic suggests that it was George's superior officer who changed the enlisted man's name.³³² Yet, the naturalization process required that George appear personally and take several steps to

325. *Id.*

326. See Instructions for Application for Naturalization, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 2019), <https://www.uscis.gov/sites/default/files/document/forms/n-400instr.pdf>.

327. Compare Naturalization Act of 1906, ch. 3592, § 6, 34 Stat. 596, 598 (repealed 1940), with 8 U.S.C. §1447(e). The Naturalization Act of 1906 states:

It shall be lawful, at the time and as a part of the naturalization of any alien, for the court, in its discretion, upon the petition of such alien, to make a decree changing the name of said alien, and his certificate of naturalization shall be issued to him in accordance therewith.

Id.

328. See generally LOUIS ADAMIC, *WHAT'S YOUR NAME?* (1942).

329. See *id.* at 93.

330. *Id.*

331. *Id.*

332. See *id.*

acknowledge the name Sprague as his intended name moving forward.³³³ Though the decision may not have been free of an oppressive influence, George ultimately had the final say in what his name would be in that proceeding. He also had the prerogative, as he clearly exercised, to liberally seek a legal name change via a court petition.³³⁴ This he ultimately did when he opted to resort to his name of birth.³³⁵ Happily, the law *and* the court supported him in this endeavor.³³⁶

That the federal law of name change should so warmly embrace, and indeed expect, that a noncitizen would opt to change their name in the United States makes state laws that deter noncitizens from name changes all the more perplexing. Indeed, a comparative overview of naming laws around the world demonstrate how unique the liberal law of name change in the United States truly is.

Traditionally, other Western countries have policed naming, prohibiting names related to political ideologies (Argentina) that do not comport to religious or cultural norms (France) or where a name is deemed “improper” or “extravagant.”³³⁷ The Nordic countries have even, dictated by law, carefully regulated and codified practices for naming.³³⁸ In the case of Iceland, the requirements are particularly rigid. The Icelandic Names Act requires conformity to the Icelandic language as well as gender specificity, among other requirements.³³⁹ As a result, with regard to gender and naming the Act requires that “[g]irls shall be given women’s names and boys shall be given men’s names.”³⁴⁰

The Spanish naming traditions also took a particularly rigid approach to naming. The role of Christianity in Spanish custom was so

333. See Naturalization Act of 1906, ch. 3592, §§ 4, 6, 9, 34 Stat. 596–99 (repealed 1940).

334. ADAMIC, *supra* note 328, at 321.

335. *Id.*

336. *Id.*

337. Slovenko, *supra* note 20, at 211.

338. Elin Hofverberg, *What’s in an Icelandic (Legal) Name?*, LIBR. CONG. (Sept. 21, 2015), <https://blogs.loc.gov/law/2015/09/whats-in-an-icelandic-legal-name>. These countries include Iceland, Denmark, Finland, Norway, and Sweden. *Id.*

339. *Id.* (citing Lög um mannanöfn 1996 nr. 45 17. maí [Personal Names Act No. 45 of 17th May 1996] (Ice.), translated in *Personal Names Act, No. 45 of 17th May 1996*, GOV’T OF ICE. (Jan. 08, 2018), <https://www.government.is/publications/legislation/lex/2018/01/08/Personal-Names-Act-No.-45-of-17th-May-1996>).

340. *Id.* Recent efforts from gender inclusivity activists have led to some reforms, but Iceland’s naming system still remains quite rigid. Names must be approved through the country’s Naming Committee who assures that among other attributes, the “name must not be in conflict with the Icelandic language system.” See Linda Becker, *What’s in a Name? Nonbinary People in Iceland Finding Their Voice*, REYKJAVÍK GRAPEVINE (May 17, 2021), <https://grapevine.is/news/2021/05/17/whats-in-a-name-nonbinary-people-in-iceland-finding-their-voice/>.

influential that if a name submitted for registry was not Christian, the civil servant would reject it outright.³⁴¹ Any changes to the name in this tradition were historically recognized only upon achievement of certain sacraments—baptism, confirmation, marriage—or even upon joining a religious order.³⁴² As a result, one commentator has recognized the naming tradition in Hispanic societies as “an almost sanctified ritual.”³⁴³

In French law, the justification for the state gatekeeping function on name changes related to interests of the state in policing civil documentation.³⁴⁴ Like the Spanish, the French also tied name change to certain life events—such as marriage and death—but instead of looking to the church as the confirming authority, proof from the civil register was required for name change under a 1667 ordinance.³⁴⁵ This move away from witness testimony and toward the civil authorities limited the freedom to change one’s name in France and “progressively obliged ordinary people to keep the name they had been registered under at birth and later at marriage.”³⁴⁶ This fealty to the civil register and its quelling of attempts at name change, although originally motivated in part by a monarchy seeking to consolidate power,³⁴⁷ was retained after the French Revolution’s dissolution of the monarchy. In 1794, five years after the French Revolution, legislation was adopted to ratify the existing ordinance on the immutability of names and extended it to all citizens.³⁴⁸ Scholars point to this move as the moment of divergence in French and English name change law.³⁴⁹ The rigidity of the French system continued and went as far as to criminalize certain name changes in 1858.³⁵⁰

Despite their initial historical similarities, the divergence of French and English name change law owed much to the role of the monarchy in each of those countries. Whereas the French name change law developed as the result of a monarchical power grab, the legal intervention of the English royal authorities was dramatically more limited. In England, “the relationship between the State and its citizens or subjects was that of fierce non-interference.”³⁵¹ When it came to individual naming, a

341. Cherena Pacheco, *supra* note 14, at 13.

342. *Id.* at 12 & n.50.

343. *Id.* at 14.

344. *See* Slovenko, *supra* note 20, at 211.

345. Guinchard, *supra* note 29, at 50.

346. *Id.*

347. *Id.* at 49.

348. *See id.* at 51.

349. *See id.*

350. *Id.*

351. *Id.* at 50.

matter seen as being tied to an individual's civil liberties, the English Crown could only move to block a name change to claim a title.³⁵² An English civil status registry was not established until the mid-19th century, and even then the registry did not seek to control a person's name nor to maintain a rigid uniformity of a person's name throughout their life.³⁵³ As a result, a person's name in the English civil status registry could vary in the registry from the name on the birth certificate.³⁵⁴ These structures supported the English approach to name change law that served as the foundation for what would develop in the United States.³⁵⁵ Namely, that "English law sees the name as part of [] one's personal privacy, free from interference from the State."³⁵⁶

The tension between English and French law with regard to the legal status of the name is at the heart of an 1869 case where race, gender, and social class combine. In *Du Boulay v. Du Boulay*, a formerly slaveholding family in Saint Lucia sought to force the discontinuation of the use of its family name against the child of a formerly enslaved mother.³⁵⁷ After her emancipation, Rose Du Boulay used the name of the family to whom she had previously been enslaved.³⁵⁸ Her freeborn son Jules René Herménégilde also used the surname at least since the age of seventeen.³⁵⁹ In that case, the plaintiffs argued that Jules René Herménégilde Du Boulay's use of the family name was an interference with the plaintiffs' property rights, and the trial court agreed.³⁶⁰ On review by the Court of Appeals for the Windward Islands, the court sitting en banc rendered a decision of two to one in favor of Jules René Herménégilde Du Boulay.³⁶¹ In the majority, Chief Justice of Tobago H.J. Woodcock wrote a scathing opinion that swept beyond the legal name question at bar:

352. *Id.*

353. *Id.*

354. *Id.*

355. Kushner, *supra* note 21, at 325.

356. Guinchard, *supra* note 29, at 57.

357. *Du Boulay v. Du Boulay* [1869] 16 Eng. Rep. 638 (PC) 639–40 (appeal taken from W.I.).

358. *Id.* at 645.

359. *Id.*

360. *Id.* at 639 (The lower court held that "the name of Du Boulay belonged to the Appellants and their family, and the Respondent was prohibited from taking, bearing, or signing in future the name of Du Boulay; and it was further ordered, that the name of Du Boulay should cease to be recognized as the surname in signing all deeds, registers, and other documents, both public and private, executed by the Respondent.").

361. *Id.* at 640.

The baneful influence of slavery in the West Indies, under which the possession of the Slave rendered the unfortunate bondswoman the mere creature of her Master's lust, produced a race degraded by the Mother's shame and the Father's crime; although this class for many years were refused an entrance within the circle of refined society, and although the law denied to its members, as being illegitimate, an inheritance, the present suit is the only attempt I have ever heard of to deprive them or their progeny of a name, and this after thirty years of emancipation, and after the Grandchildren and Greatgrandchildren of the almost forgotten Slave have, by education and integrity, won for themselves an equal place with their fellowmen.³⁶²

While the state of name change law occupied the bulk of the Privy Council's review on appeal of the decision of the Court of Appeals for the Windward Islands, this concern from the lower court is critical. The colonial context is important to understand as well. While Saint Lucia was a British colony by the time of the litigation in *Du Boulay*,³⁶³ it had been formerly under French control, and aspects of French law remained in force.³⁶⁴ The English Privy Council acknowledged this difficulty by observing that "[w]hen a Judge is called upon to decide a question depending upon Foreign Law, there is always some danger of his being influenced by notions derived from that Law which he is in the daily habit of administering."³⁶⁵ In referencing that potentially clouded view, the Privy Council's decision affirmed the state of English law, concluding that "[i]n this country we do not recognize the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a Stranger."³⁶⁶

Though Chief Judge Woodcock's opinion at the Court of Appeals for the Winward Islands presumed some filial relationship between the slaveholding Du Boulays and the formerly enslaved Du Boulays, the Privy Council stated the issue as unrelated to family relationship.³⁶⁷ Indeed, Jules René Herménégilde Du Boulay admitted no claim of family

362. *Id.* (quoting the appellate court's 1866 decision by the Chief Justice of Tobago, H.J. Woodcock).

363. *Id.* at 641.

364. *Id.* at 644.

365. *Id.*

366. *Id.*

367. *See id.* at 647.

relationship to the Du Boulays.³⁶⁸ Whether or not the question in this case ultimately involved attempts to disadvantage a biological child was not only explicitly invoked in the earlier decision, but formed part of the prevailing law at the time. According to French colonial law as pleaded by the plaintiffs, “coloured persons, free or manumitted, were forbidden to take the surnames either of their reputed Fathers or of their Masters of white complexion, or, indeed, of any white man inhabiting the French Colonies.”³⁶⁹ Ultimately, the Privy Council declined to render its decision in terms of the specific ordinances developed to regulate the French colonies according to racial distinctions and also rejected Chief Judge Woodcock’s “moral considerations.”³⁷⁰

Instead, it rested its decision on a discussion of the state of French law prior to the revolutionary ordinance and concluded that neither of the ordinances at issue had been incorporated into the law of Saint Lucia.³⁷¹ The Privy Council ultimately decided that the “mere assumption of a name . . . by a Stranger . . . whatever cause of annoyance it may be to the family, is a grievance for which our Law affords no redress.”³⁷² This principle was carried over into American name change law and continued to be cited in U.S. cases well into the end of the twentieth century.³⁷³

The survey of name change law discussed in *Du Boulay* is instructive. The French immutability of the name, be it justified by rationales related to property or to governmental administration, continues to be the norm in European law. Only recently have these countries begun to grapple with the coercive effect on individual rights that restrictions on naming present. In recent years, the European Commission and Court of Human Rights have reexamined limitations on name change as “de facto limits on the individual’s zone of privacy.”³⁷⁴ Their decisions have revealed an understanding of the choice of name as a question implicating human rights yet have still allowed states to infringe on this right.³⁷⁵

368. *Id.* at 640.

369. *Id.*

370. *Id.* at 643.

371. *Id.* at 646–47. Ordonnance of 1555 never became the law of France or Saint Lucia, and Ordonnance of 1803 had not been incorporated from French law into the law of Saint Lucia because it occurred at the time of a transfer of the control of the island to the British. *Id.*; see also Guinchard, *supra* note 29, at 54–55.

372. *Du Boulay*, 16 Eng. Rep. at 644–45; see also Guinchard, *supra* note 29, at 40.

373. See, e.g., *In re Dengler*, 287 N.W.2d 637, 639 n.1 (Minn. 1979).

374. Aeyal M. Gross, Note, *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, 269 (1996).

375. *Id.* at 270.

These countries' wrestling with the name change right makes the liberal name change regime in the United States all the more apparent by contrast. That the law began from a liberal tendency and supported liberation throughout generations is all the more remarkable. That the biased decisions of judges have at times undermined this emancipatory approach does not negate this reality. Immigrants arriving to the United States, then as now, encountered the possibility of a new legal identity that was impossible in their countries of origin. Even systemic structures of legal racism meant to subjugate African Americans did not prevent them from obtaining legal name changes as was the state of the law in other European colonies. While the assumption of the name of "any white man" was prohibited in the French colonies,³⁷⁶ American practices embraced the concept of African Americans assuming new names. While this practice was clearly not intended to be emancipatory in and of itself—indeed, the conferring of the slaveholder's family name helped to reinforce and trace ownership of one human being over another³⁷⁷—the legal freedom to change one's name was unique in U.S. law. Moreover, despite the series of laws that served to further restrict the legal freedoms of enslaved people, no U.S. laws restricted their right to a change of name.

CONCLUSION

A critical examination of the law and history of name change in the United States reveals how the law has been at its core an emancipatory legal right. Unfortunately, name change petitioners have often had their naming rights corrupted by statutory authority that gives judges the discretion to approve name changes. As a result, legislation that designates judges as the ultimate arbiters of these requests has shifted the authority away from individuals to determine their own names. Not only have judges misused this authority in the cases of some of the most vulnerable petitioners, but they have also relied on the authority of the

376. *Du Boulay*, 16 Eng. Rep. at 644.

377. See, e.g., *Index of Questions: 1850*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/index_of_questions/1850_1.html (last visited Mar. 10, 2022). As an illustration of this concept, the U.S. Census of 1850 was the first decennial census to request the names of individuals counted. *Id.* However, "slave inhabitants" of a household were listed under the slaveholder's household by age, sex, and color—but not by name. *Id.*

common law to justify their misconstruction of the law.³⁷⁸ In many of the cases explored here, judges have rationalized their denial of a name change by arguing that petitioners have the right to change their name at common law. Yet, it is petitioners who are harmed by these denials as they have difficulty operating in society absent a judicial order. Moreover, this approach is inconsistent with the underlying rationale for regulating name changes through a judicial process. Historically, name changes through the court have been justified as a way for the state to simply maintain an administrative record of the change.³⁷⁹ By denying name changes with which courts disagree while suggesting that petitioners carry on using their chosen name under the common law, courts are promoting a result inconsistent to both the common law and statutory schemes.

In addition to being inconsistent with statutory and common law, a court's denial of an individual's choice of name creates potential problems of constitutional law. As the history of legal name change demonstrates, the authority to choose one's name is deeply rooted in personal autonomy and individual identity. While legally, this right is found in the authority of the common law and its incorporation into statute, jurisprudence in constitutional law suggests that the U.S. Constitution also supports an individual's choice of legal name. In the last fifty years, the U.S. Supreme Court has recognized that the Fourteenth Amendment's guarantee of due process protects "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."³⁸⁰ Not only does name choice implicate the dignitary and liberty interests of the individual contemplated by the Court's modern jurisprudence, but it also qualifies as a fundamental right under the Court's recognition of the liberties enumerated in the Bill of Rights.³⁸¹ As other scholars have argued, the interest in one's name implicates a First Amendment free speech right.³⁸²

Moreover, the Court has most recently supported the right of businesses to register trademarks even for names that may be considered offensive or disparaging. In *Matal v. Tam* and *Iancu v. Brunetti*, the Court ruled that the Lanham Act's prohibition on certain controversial

378. See, e.g., *In re Green*, 283 N.Y.S.2d 242, 244 (N.Y. Civ. Ct. 1967); *In re Mohlman*, 216 S.E.2d 147, 151 (N.C. Ct. App. 1975); *In re Marriage of Banks*, 117 Cal. Rptr. 37, 42 (Cal. Ct. App. 1974); *In re Doe*, 148 N.E.3d 1147, 1149–50 (Ind. Ct. App. 2020).

379. See *supra* text accompanying note 41.

380. *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015); see also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965).

381. *Obergefell*, 576 U.S. at 663.

382. See Kushner, *supra* note 21, at 319–20.

trademarks was a form of viewpoint discrimination that was unconstitutional under the First Amendment.³⁸³ That businesses but not individuals would enjoy this right even to a controversial name would appear to be a legal inconsistency. This is especially true when one considers, as one scholar has stated, that “[t]he history of personal names largely . . . mirrors the development of trademarks.”³⁸⁴

In addition, much of the case law in name change denial reveals discriminatory motives on the part of state legislators and judges,³⁸⁵ suggesting a compelling argument that marginalized petitioners are denied equal protection of the law in violation of the Fourteenth Amendment. As discussed above, as recently as 2020, the Court of Appeals of Indiana in the case *In re Doe* acknowledged that the state’s name change statute requiring citizenship status presented constitutional equal protection problems.³⁸⁶ By constructing the statute in a manner consistent with Indiana’s statutory support for the common law, the court in Indiana avoided the constitutional question.³⁸⁷ While urging that the right to a name change has support in constitutional law, I highlight the Indiana decision as a highly pragmatic solution. In the vast majority of the states, the law’s embrace of common law name changes is sufficient for honoring an individual’s change of name without resort to additional court processes—much less constitutional litigation. At least forty-three states³⁸⁸ claim to recognize the common law of name change, but as a practical matter, the agencies and authorities tasked with issuing identification documents fail to provide an effective process for recognizing non-marital common law name changes.

In order to correct this illogical result and revive the spirit of the law in favor of an individual’s name change, states should evolve their name change processes to account for recognition of name change by operation of common law. Despite claims regarding the impracticability of administering a process for common law name change, the most common form of name change—by women in heterosexual marriages—is routinely practiced by individuals and processed by the administrative state in a

383. *Matal v. Tam*, 137 S. Ct. 1744, 1760–61 (2017); *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297 (2019).

384. Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 IND. L.J. 381, 389 (2011).

385. See, e.g., *supra* notes 114–18, 203–08, 222–25 and accompanying text.

386. *In re Doe*, 148 N.E.3d 1147, 1149–50 (Ind. Ct. App. 2020); see *supra* notes 316–18 and accompanying text.

387. *In re Doe*, 148 N.E.3d at 1153, 1153–54; see *supra* notes 317–18 and accompanying text.

388. Baker & Green, *supra* note 59, at 140 n.30.

straightforward and uncontroversial manner. In those cases, married women often need only to present a marriage certificate to demonstrate the change of name and be issued documentation in the new name. Such a system could be incorporated for individuals seeking to change their names by common law. Indeed, as discussed above, the Massachusetts Registry of Motor Vehicles and U.S. Department of State have both created processes for a name change by open and notorious use.³⁸⁹ In the case of the State Department, applicants are able to demonstrate a legal name change by common law through evidence of the use of the new name—public documents as well as affidavits of witnesses who can attest to the name change.³⁹⁰

This kind of procedure, whereby an individual presents documentation to establish a name change in lieu of a court order, is arguably already provided for in state laws that recognize the common law of name change and should be built into the procedures of various federal, state, and local administrative agencies. In such a system, the goal should be to promote an applicant's option for a name change through routine recording, instead of aggressive identity policing. This approach would spare vulnerable applicants of having to convince a hostile judge of their merit, while still promoting the interest of the state in registering name changes.

Such a process could have helped my former client, Amanda Villanueva, in more readily changing her name without having to navigate the various obstacles on her name change journey. In the end, and after much persistence and advocacy in two countries, Amanda received a grant of legal name change. Walking out of the courthouse with the law students who supported her, she smiled and said to them, "I finally exist."

389. *See supra* notes 49–55 and accompanying text.

390. *See supra* notes 52–54 and accompanying text.