

MAKING A NAME FOR THEMSELVES

Cori Alonso-Yoder^{1*}

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 are able to 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 by oppressed peoples. 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 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.”

^{1*} Visiting Professor of Law and Director of the Federal Legislation Clinic at Georgetown University Law Center. I wish to acknowledge Jane H. Aiken, Warren Binford, Julie A. Dahlstrom, Allison Freedman, Joceyln Getgen Kestenbaum, Jayesh Rathod, and Faraz Sanei who commented on drafts of the article. I am deeply grateful for the research assistance of Janée (J.D.) LeFrère, Katia Barron, and Lisa Ledvora. All errors are my own.

- Sojourner Truth²

TABLE OF CONTENTS

INTRODUCTION	2
I. DOMINATION, LIBERATION, AND THE DEVELOPMENT OF NAME CHANGE LAW	4
A. <i>Domination</i>	4
B. <i>Liberation</i>	6
C. <i>The Unique Nature and History of Name Change Law</i>	9
II. NAME CHANGE APPLIED TO LIBERATE AND DOMINATE	18
A. <i>Name Change & Black Liberation</i>	18
B. <i>Name Change & Women's Liberation</i>	23
C. <i>Name Change & LGBTQ Rights</i>	29
D. <i>Immigrants, Name Changes, and Self-Determination</i>	35
III. THE UNIQUELY AMERICAN FREEDOM TO DECIDE ONE'S NAME	48
CONCLUSION	54

1 INTRODUCTION

In 2015, Amanda Villanueva³ 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,

² ERLENE STETSON & LINDA DAVID, GLORYING IN TRIBULATION: THE LIFE WORK OF SOJOURNER TRUTH 88 (1994) (as recounted by Harriet Beecher Stowe who is quoted in, *Sojourner Truth, The Libyan Sibyl*, ATLANTIC (Apr. 1863), <https://www.theatlantic.com/magazine/archive/1863/04/sojourner-truth-the-libyan-sibyl/308775>).

³ Name changed to protect confidentiality. All other details accurately portray the experiences of my former client.

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 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 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, she has a university education, 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 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 arguing for an approach that remains true to the common law's protection of individual self-determination and liberation as enshrined in the 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.⁴ 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.”⁵

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

⁴ See George W. Ramsey, *Is Name-Giving an Act of Domination in Genesis 2:23 and Elsewhere?*, 50 CATH. BIBLICAL Q. 24, 25 (1988) (citing GERHARD VON RAD, GENESIS: A COMMENTARY 83 (1972) (“Name-giving in the ancient Orient was primarily an exercise of sovereignty, of command.”)).

⁵ James C. Scott, John Tehranian & Jeremy Mathias, *The Production of Legal Identities Proper to States: The Case of the Permanent Family Surname*, 44 COMP. STUD. IN SOC'Y & HIST. 4, 18 (2002).

implies questions of “identity affirmation as well as an exercise of power.”⁶ Professor of gender and sexuality studies Erica Rand puts it another way, “Representation is political. What gets represented, and when, and where, and how it does, depends on and affects relations of power.”⁷

Sociologists and historians have documented the ways in which naming has occurred across the generations and around the globe and 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, 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 1976 *Roots* told the story of Kunta Kinte, a young man kidnapped in the Gambia and held captive in slavery in the United States. 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 sprang.”⁹ 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.¹⁰ The idea of the name as domination becomes particularly clear and brutal in a

⁶ Laura Calabrese Steimberg, *The Act of Naming: New Perspectives on Media Discourse*, 140 *LANGAGE ET SOCIÉTÉ* 29, 30, (JPD Systems trans.), <https://doi.org/10.3917/ls.140.0029> (citing NOMS ET RE-NOMS: LA DÉNOMINATION DES PERSONNES, DES POPULATIONS, DES LANGUES, ET DES TERRITOIRES 35 (Salih Akin ed. 1999)).

⁷ ERICA RAND, *THE ELLIS ISLAND SNOW GLOBE* 98 (2005).

⁸ Scott, Tehranian & Mathias, *supra* note 5, at 20 (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 Michael Eric Dyson, *Haley’s Comet*, in *ROOTS: THE SAGA OF AN AMERICAN FAMILY* ix, ix (30th Anniversary ed., 2007).

¹⁰ See ALEX HALEY, *ROOTS: THE SAGA OF AN AMERICAN FAMILY* (30th Anniversary ed., 2007); *Roots* (ABC television broadcast, 1977).

scene from the miniseries, when Kunta Kinte is recaptured after a failed attempt at escape. 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. While this scene does not appear in Haley's novel, its artistic license illustrates the idea that Haley's protagonist embodied on the page and on the screen – 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 issues of equality, survival of a community of people, and the value of the woman as well.”¹¹ 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.”¹²

While cultural practices undoubtedly confirm majoritarian tendencies in naming practices, 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 name themselves,”¹³ 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. 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

¹¹ Yvonne M. Cherena Pacheco, *Latina Surnames: Formal and Informal Forces in the United States Affecting the Retention and Use of the Maternal Surname*, 18 T. MARSHALL L. REV. 1, 39 (1992) (in particular, Cherena Pacheco focuses her argument around 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).

¹² *Id.*

¹³ *Id.*

“name 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.”¹⁴ 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.¹⁵ 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.¹⁶ While such constitutional arguments are fascinating 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 simply by using the desired name over a period of time.¹⁷ In a decidedly unliberated statement, one court even put it this way, “[t]he

¹⁴ Leonard Broom, Helen P. Beem & Virginia Harris, *Characteristics of 1,107 Petitioners for Change of Name*, 20 AM. SOC. REV. 33, 39 (1955).

¹⁵ See, e.g., Ralph Slovenko, *On Naming*, 34 AM. J. PSYCHOTHERAPY 208, 210 (1980) (“[T]he current issue is whether or not a free choice of a name is an inherent natural right essential to liberty.”).

¹⁶ Julia Shear Kushner, *The Right to Control One’s Name*, 57 UCLA L. REV. 313 (2009).

¹⁷ See, e.g., *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 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 (internal citations altered).

proudest patronymic in the land is available to the lowliest individual and this without anyone's permission.”¹⁸

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.¹⁹ Especially in the post-civil rights era, a number of petitioners sought legal name changes with justifications premised on equality and anti-subordination.²⁰

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,²¹ the considerations that have animated many of the Court's conclusions in support of individual privacy rights suggest that any decision in this arena would benefit the individual as against the government.²² Indeed, the canon

¹⁸ Slovenko, *supra* note 15, at 211 (citing *In re Green*, 54 Misc. 2d 606, 283 N.Y.S. 2d 242 (1967)).

¹⁹ 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.); See also *In re Variable v. Nash*, 190 P.3d 354 (N.M. Ct. App. 2008) (denying a petitioner's application to change his name to Fuck Censorship!).

²⁰ See the case of Ellen Cooperperson discussed *infra* Part II.B.2.

²¹ 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 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, 222 (M.D. Ala. 1971); See discussion *infra* Part II.B.2.

²² 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

of statutory interpretation that favors avoiding constitutional questions suggests that any decision regarding this area of law would rest on the common law's broad protection of individual freedom in naming. Constitutional questions aside, the common law of name change's protection of the legitimate name change petitioner is plain and straightforward.

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.²³ 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. For generations, the law of inheritance developed in both countries along much of the same principles and practices. By the time of the French revolution, however, the laws began to diverge.²⁴ 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. What had previously been understood as an issue affecting the individual, now began to take on dimensions of importance to the state.²⁵

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. Instead, factors such as a

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. Pa. v. Casey*, 505 U.S. 833 (1992).

²³ Audrey Guinchard, *Is the Name Property? Comparing the English and French Evolution*, 1 J. CIV. L. STUD. 21 (2008).

²⁴ *Id.*

²⁵ *See generally id.*

person's reputed use of a different name and the regularity with which an individual used the name were considered most relevant. As a result, sufficient time and consistent use could be sufficient at common law 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. The U.S. Constitution 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 changes is one example of that common law by incorporation. Yet unlike other common law doctrines, the law of name changes 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.²⁶

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 commit fraud, for the name change to be legally valid. 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 changes.²⁷ 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

²⁶ Kushner, *supra* note 16.

²⁷ See, e.g., Ellen Jean Dannin, *Proposal for a Model Name Act*, 10 U. MICH. J.L. REFORM 153, 170 (arguing that "a statutory name change procedure which supersedes the common law is preferable because it fulfills the state's need for record keeping . . .")

has underscored), it also serves the administrative interests of the state in “maintaining accurate records of people’s legal names.”²⁸ 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.²⁹ Only about 20 percent kept their premarital names and about 10 percent opted for a third approach (such as hyphenating their last names or legally changing their names while informally using their premarital names).³⁰ 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,³¹ U.S. Citizenship and Immigration Services,³² or the states’ departments of motor vehicles³³ 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, the 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.”³⁴ 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.”³⁵ In this

²⁸ *In re Bicknell*, Nos. CA2000-07-140, CA2000-07-141, 2001 WL 121147, at *7 (Ohio Ct. App. Feb. 12, 2001) (Valen, J., dissenting).

²⁹ 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>.

³⁰ *Id.*

³¹ SOC. SEC. ADMIN., *RM 10212.025 Evidence of Name Change based on a US Ceremonial Marriage*, PROGRAM OPERATIONS MANUAL SYSTEM (POMS) (2012), <https://secure.ssa.gov/apps10/poms.nsf/lnx/0110212025>.

³² U.S. CITIZENSHIP & IMMIGR. SERVS., *Chapter 5 - Verification of Identifying Information*, 1 USCIS POLICY MANUAL pt E, ch 5 (Mar. 1, 2021), <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-5>.

³³ See, e.g., TEX. DEP’T OF PUB. SAFETY, *How to Change Information on Your Driver License or ID Card*, <https://www.dps.texas.gov/section/driver-license/how-change-information-your-driver-license-or-id-card> (last visited Mar. 5, 2021); D.C. DEP’T OF MOTOR VEHICLES, *Name Changes and Corrections*, <https://dmv.dc.gov/page/name-changes-and-corrections> (last visited Mar. 5, 2021).

³⁴ *Kruzel v. Podell* *infra* Part II.B.

³⁵ Dannin, *supra* note 27, at 159.

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 desire to use and be 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 suggest a policy preference for certain kinds of name changes over others. Indeed, the Department of State is the only agency I have found that has an established process for individuals seeking to change names under the common law, but not as a result of marriage. With the DS-60 Affidavit Regarding a Change of Name form, 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."³⁶ The instructions for the form permit an individual to change their name on their passport by providing certain public records (such as medical or employment records) and affidavits to establish the use of a new name. The most recent version of this form is currently valid through October of 2023, demonstrating that the common law of name change is alive and well at least for passport applicants. But, the passport procedure is 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. 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.³⁷ 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."³⁸ Instead, these statutes "merely affirm and are in aid of the common law rule" by providing an additional method for achieving a name change.³⁹

³⁶ U.S. DEP'T OF STATE, *DS-60 form, Affidavit Regarding a Change of Name* (Oct. 2020), <https://eforms.state.gov/Forms/ds60.pdf>.

³⁷ Kushner, *supra* note 16.

³⁸ Dannin, *supra* note 27, at 162 (quoting *In re Mohlman*, 216 S.E.2d 147, 151 (1975)).

³⁹ *Id.*

The justification for a judicial name change process is the state's interest in recordkeeping and documentation.⁴⁰ 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.⁴¹ 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.⁴² 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."⁴³

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.⁴⁴ In many cases, judges' reasons for denying a name change are plainly informed by sexism, racism, or other personal biases. These denials run contrary not only to the underlying spirit of the common law's accessible name change standard, they also contravene the efforts of many name change petitioners to 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.⁴⁵ Yet, even in these calls for greater definition of the statutory approach, an admiration for the adaptability and simplicity of the

⁴⁰ *Id.*

⁴¹ See *In re Mohlman*, 216 S.E.2d 147, 151 (1975).

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

⁴³ *In re Evetts*, 392 S.W.2d 781,784 (Tex. Civ. App. 1965) (affirming the trial court's denial of a woman's petition to revert to being known by her deceased husband's surname).

⁴⁴ See Margo Schlanger, *Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law*, 45 ST. LOUIS U. L.J. 769 (2001); Mia Carpiello, *Striking a Sincere Balance: A Reasonable Black Person Standard for "Location Plus Evasion"* *Terry Stops*, 6 MICH. J. RACE & L. 355 (2001).

⁴⁵ See generally Dannin, *supra* note 27.

common law's approach shines through.⁴⁶ 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 application 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 or two-year period following the conclusion of a jail sentence or supervision/probation.⁴⁷ A 2020 report authored by transgender advocates and the University of Texas School of Law Human Rights Clinic, found that this prohibition is particularly damaging to transgender individuals.⁴⁸ Not only is this group disproportionately incarcerated, but transgender individuals also face unique threats to their safety while incarcerated.⁴⁹ 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.

⁴⁶ *Id.* at 169 (noting "the common law as a whole has developed appropriate solutions to legal problems involving names, despite problems in interpretation").

⁴⁷ See TEX. FAM. CODE ANN. § 45.103 (West 2020).

⁴⁸ See generally HUM. RTS. CLINIC AT THE U. OF TEX. SCH. OF L., NAMING AND SHAMING: VIOLATIONS OF HUMAN RIGHTS OF TRANSGENDER PERSONS WITH FELONIES IN TEXAS (2020), <https://law.utexas.edu/wp-content/uploads/sites/11/2020/11/2020-HRC-Naming-and-Shaming.pdf>.

⁴⁹ *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 JAMES, HERMAN, RANKIN, KEISLING, MOTTET & ANAFI, NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 190 (2016). <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>)).

Despite the potential merit in doing so, the possibility of the Supreme Court taking up a case on the issue of name change law is 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 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.”⁵⁰ Among these manifestations of personality is one’s name.⁵¹ 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 stranger 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 Law affords no redress.”⁵²

So the law 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 status areas.”⁵³ A 1986 study found that men filed the majority of name change petitions.⁵⁴ 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

⁵⁰ Priscilla L. Rider, *Legal Protection of the Manifestations of Individual Personality—The Identity-Indicia*, 33 S. CAL. L. REV. 31, 34 (1959) (quoting RUDOLF CALLMANN, UNFAIR COMPETITION AND TRADE-MARKS 51–52 (2d ed. 1950)).

⁵¹ *Id.*

⁵² *Du Boulay v. Du Boulay* (1869) 2 LR 430 (PC).

⁵³ Leonard Broom, Helen P. Beem & Virginia Harris, *Characteristics of 1,107 Petitioners for Change of Name*, 20 AM. SOC. REV. 33, 37 (1955) (positing that the proportion of individuals changing name through common law is higher in “lower status areas”).

⁵⁴ 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 285 (1986)).

one commentator has observed as being. “at best outdated and at worst small minded and discriminatory.”⁵⁵

Taken together, the evidence suggests that the justice system has historically favored the petitions of applicant’s whose motivations more clearly reflect the cultural experiences of the courts deciding their merit; straight white cisgender men. By contrast, individuals historically excluded by the justice system have sought name change through the common law. Those 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.

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 to use it as an argument against any prejudice to the petitioner result 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.

⁵⁵ Kushner, *supra* note 16, at 317.

II. NAME CHANGE APPLIED TO LIBERATE AND DOMINATE

A. Name Change & Black Liberation

As of the year 2000, more than 90% of Americans bearing the surname Washington were Black.⁵⁶ 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.⁵⁷ In fact, historians say it is a myth that most enslaved Blacks used the surname of their owner and that many “had surnames that went unrecorded or were kept secret.”⁵⁸ 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. 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 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.⁵⁹

True to this narrative, many would retain the name of their oldest known relative as a link to a family-based identity.⁶⁰ But after emancipation, some historians theorize that large numbers of African Americans adopted the surname Washington “in the process of asserting their freedom.”⁶¹ According to historian Adam Goodheart, the decision to adopt the name was linked to a sense of understanding of the history and

⁵⁶ Jesse Washington, *Washington: The ‘Blackest Name’ in America*, SEATTLE TIMES (Feb. 20, 2011 at 9:01 PM), <https://www.seattletimes.com/nation-world/washington-the-blackest-name-in-america>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 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., 2012).

⁶⁰ Washington, *supra* note 56.

⁶¹ *Id.*

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.”⁶² 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.⁶³ Her first name, Sojourner, was to recognize her charge as an itinerant preacher traveling and “showin’ the people their sins.”⁶⁴ Recognizing that most people bore two names, she appealed to God for another. She explains that “Truth” was the name given to complete her identity and mission.⁶⁵

Harriet Tubman also turned to name change in reaction to the denial of her rights in other areas of the law. During slavery, legislation 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, seek education, or “exert dominion over their physical body or surroundings.”⁶⁶ Another major area of regulation and prohibition was in the right to marry.⁶⁷ Born Araminta Ross, Harriet Tubman later married John Tubman. As enslaved people, the couple had no legal claim to marriage. Thus, she adopted her husband’s surname and took her first name, Harriet, after her mother and sister.⁶⁸ 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. Journalist Martha S. Jones explains how Tubman’s “new name was a rebirth that raised Tubman up from slavery’s social death, even

⁶² *Id.*

⁶³ STETSON & DAVID, *supra* note 2.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Darlene Goring, *The History of Slave Marriages in the United States*, 39 J. MARSHALL L. REV. 299, 304 (2006).

⁶⁷ *See generally id.*

⁶⁸ 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>.

before she escaped and then valiantly rescued enslaved people.”⁶⁹ 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.”⁷⁰ 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 “X” and by unique names, signs of how the quest for freedom persists.⁷¹

According to historian Ira Berlin, many Black Americans adopted new names following landmark struggles for liberation. Berlin has studied name changes that groups of African Americans made after the Revolutionary War, Civil War, and the Civil Rights Movement.⁷² 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.”⁷³

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. 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. By 1978 he had changed his name to Kwame Ture as gesture of respect

⁶⁹ *Id.*

⁷⁰ 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>.

⁷¹ *Id.*

⁷² Washington, *supra* note 56.

⁷³ *Id.*

for the socialist leaders Kwame Nkrumah of Ghana and Ahmed Sekou Toure of Guinea who had served as mentors to him.⁷⁴ 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. 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.”⁷⁵ 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.”⁷⁶ 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.⁷⁷

However, the Black Power Movement reverberated in white backlash and skepticism. As individuals turned to name change for an affirmation of the 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.⁷⁸ In his petition, he cited his embrace of Islam as the motivation for seeking the name change and a desire to avoid the confusion of bearing one name for his religious practices and a second one for all other purposes.⁷⁹ In a 1967 decision dripping with condescension, Judge Maurice Wahl denied the Petitioner’s application for name change. In so doing, Wahl relied on his discretion and reasoned that the Petitioner should be proud of his birth name:

⁷⁴ 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>.

⁷⁵ DAWN-MARIE GIBSON, *A HISTORY OF THE NATION OF ISLAM: RACE, ISLAM, AND THE QUEST FOR FREEDOM* 52 (2012) (quoting ELIJAH MUHAMMAD, *MESSAGE TO THE BLACKMAN IN AMERICA* 43 (1997)).

⁷⁶ *Id.*

⁷⁷ *Id.* at 52–53.

⁷⁸ *In re Green*, 283 N.Y.S.2d 242 (N.Y. City Civ. Ct. 1967).

⁷⁹ *Id.*

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.⁸⁰

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."⁸¹ Despite citing this standard and other precedential decisions, Wahl concluded that none of these authorities was binding *or* persuasive to his decision.⁸² In fact, Wahl cited the common law remedy available as an alternative as further justification that the court was free in its discretion to deny the application. 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. 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].

The Petitioner represented himself in the appeal against two counsels appearing on behalf of the County. 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."⁸³ 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.⁸⁴

⁸⁰ *Id.* at 245.

⁸¹ *Id.* at 244

⁸² *Id.* at 245.

⁸³ *Lee v. Superior Court*, 11 Cal. Rptr. 2d 763, 764 (Cal. Ct. App. 1992).

⁸⁴ *Id.* at 765.

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. 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. 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.⁸⁵ Even this rather extreme case, demonstrates how the common law of name changes 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.⁸⁶

The Petitioner did not abandon his quest. In 1996, he again filed an application to change his name in Ventura County, this time to Mister Radical Aidid Super[n-word]. 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.”⁸⁷ Once again, his application was denied.⁸⁸

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 and the assumed adoption of a husband’s surname.⁸⁹ 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 changes gives effect to name changes for women in opposite sex marriages, but only when they adopt their husband’s name by use. 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

⁸⁵ *Id.* at 768.

⁸⁶ *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.”)

⁸⁷ Gregory Lewis, *N-Word Losing Capacity to Shock?*, SFGATE (Sep. 3, 1995, last updated Feb. 7, 2012, 7:48 PM), <https://www.sfgate.com/news/article/N-word-losing-capacity-to-shock-3132690.php>.

⁸⁸ PETER SILVERTON, *FILTHY ENGLISH: THE HOW, WHY, WHEN AND WHAT OF EVERYDAY SWEARING*, 243 (2009).

⁸⁹ *See, e.g.,* Dannin, *supra* note 27.

use her pre-marriage name. While this may appear obvious under norms prevailing today, even in past generations many legal theorists recognized this straightforward application of the law.⁹⁰

A 1924 law review note analyzes 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.⁹¹ The note analyzed the assumptions underlying the Comptroller's policy decision, which had not yet been subject to judicial scrutiny. In its analysis, the note concluded that the Comptroller's decision was legally incorrect given the common law rule of names and that "a woman is not excluded from the benefits of these general rules, and can acquire a new name by usage."⁹² 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:

If 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.⁹³

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 1856.⁹⁴ In so doing, she consulted with legal experts including future Supreme Court Chief Justice, Salmon Chase.⁹⁵ Stone learned through these consultations that there was no legal impediment to using her premarital name and

⁹⁰ See *Kruzel v. Podell*, 226 N.W.2d 458, 459 (Wis. 1975) (concluding 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. If she continues to use her antenuptial surname, her name is unchanged by the fact that the marriage has occurred.").

⁹¹ Recent Cases, 73 U. PA. L. REV. 96, 110 (1924-1925).

⁹² *Id.*

⁹³ *Id.* at 111.

⁹⁴ SALLY G. McMILLEN, *"This Strange Union": Marriage and Motherhood*, in LUCY STONE: AN UNAPOLOGETIC LIFE, 114, 131 (2015).

⁹⁵ *Id.*

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.”⁹⁶ 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.⁹⁷ Coverture, or the concept that woman’s identity at law was subsumed into her husband, prevailed in U.S. law during Stone’s time. 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.”⁹⁸

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. 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.⁹⁹ 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.¹⁰⁰ 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

⁹⁶ Lucy Stone League, *[Front Cover]*, in 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. 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. McMILLEN, *supra* note 86, at 131.

⁹⁷ See *Coverture*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“[C]overture is by law applied to the state and condition of a married woman, who is *sub potestati viri*, (under the power of her husband) and therefore unable to contract with 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))).

⁹⁸ McMILLEN, *supra* note 94, at 129.

⁹⁹ Priscilla Ruth MacDougall, *The Right of Women to Name Their Children*, 3 *Law & Ineq.*, 91, 95 (1985).

¹⁰⁰ *Id.* at n.6.

used it exclusively for a stated period of time, and is known by such name in the community in which she resides.¹⁰¹

Despite the apparent extra effort involved for women who wished to have their surnames recognized, this regulation is 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 law of name change. Perhaps most stunning in this history is the opposition of the courts to a woman's 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.

2. 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.¹⁰² In her complaint before the U.S. District Court in Alabama, Forbush alleged an equal protection violation of her constitutional rights as well as a claim against the state of Alabama using the federal civil rights statute under § 1983 of U.S. Code Title 42 for a violation of her constitutional rights. The State argued in its defense, that it 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.¹⁰³ 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."¹⁰⁴ 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."¹⁰⁵ As further justification for denying relief to the plaintiff, the Court pointed to the existence of Alabama's name change

¹⁰¹ 22 C.F.R. § 33.20 (1938).

¹⁰² Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971).

¹⁰³ *Id.* at 219.

¹⁰⁴ *Id.* at 222.

¹⁰⁵ *Id.* at 221.

statute as a remedy that any harm to *Forbush* was purely *de minimis*.¹⁰⁶ Stunningly, the Supreme Court of the United States issued an opinion affirming the judgment of the District Court without comment in 1972.¹⁰⁷

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.¹⁰⁸ The National Organization of Women, American Civil Liberties Union, National Conference on Women and Law, and the Center for One's Own Name mobilized on the issue of a married woman's right to name retention.¹⁰⁹

The issue also became a popular topic for legal scholarship. Writing in 1976, Jean Dannin observed how courts in cases like *Forbush* had misapplied the law by requiring that women accept the surname of their husbands.¹¹⁰ The solution suggested by Dannin was to reform state name change statutes by adopting model legislation to make the correct standard plain.¹¹¹ 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.¹¹² 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."¹¹³

¹⁰⁶ *Id.* at 222.

¹⁰⁷ *Forbush v. Wallace*, 405 U.S. 970 (1972).

¹⁰⁸ Omi Morgenstern Leissner, *The Name of the Maiden*, 12 WIS. WOMEN'S L.J. 253, 258 (1997).

¹⁰⁹ *Id.* at 258–59.

¹¹⁰ Dannin, *supra* note 27, at 160 (citing *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd without opinion*, 405 U.S. 970 (1972)); *see also In re Kayaloff*, 9 F. Supp. 176 (S.D.N.Y. 1934).

¹¹¹ Dannin, *supra* note 27, at 170.

¹¹² Morgenstern Leissner, *supra* note 108, at 259.

¹¹³ *State v. Taylor*, 415 So. 2d 1043, 1047 (Ala. 1982) (quoting *Kruzel v. Podell*, 67 Wis. 2d 138, 144 (Wis. 1975))

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.¹¹⁴ Despite this course correction in relation to 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.

In 1976, Ellen Cooperperson sought a judge's approval to change her name from Ellen Cooperman. 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."¹¹⁵ She also explained that her belief "in the feminist cause" motivated the decision to seek the change.

Suffolk County Judge Jon F. Scileppi denied the name change for fear that approving the request would "have serious repercussions perhaps throughout the entire country."¹¹⁶ In denying the request, however, Scileppi noted that it was the petitioner's right to continue to use the name Cooperperson.¹¹⁷ Indeed, while Cooperperson has 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.¹¹⁸ On appeal, Ms. Cooperperson's petition was eventually approved in 1978.¹¹⁹ Today she is a successful businessperson and according to the website of her company, Cooperperson Performance Consulting, the Long Island Press named her one of their "50 Most Influential People" in 2014.¹²⁰

¹¹⁴ See, e.g., Change or Correct a Passport, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/passports/have-passport/change-correct.html> (last visited Nov. 17, 2020) (how to request a copy of a marriage certificate in order to document a legal name change by marriage).

¹¹⁵ *A Judge Rules '-person' Is Non Grata*, N.Y. TIMES 41 (Oct. 19, 1976), <https://www.nytimes.com/1976/10/19/archives/a-judge-rules-person-is-non-grata.html>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Slovenko, *supra* note 15, at 216.

¹¹⁹ *Id.*; News 12 Staff, *Cooperman to Cooperperson: LI Woman's Historic Name Change*, NEWS 12 LONG ISLAND (Mar. 30, 2018, 5:45 PM), <http://longisland.news12.com/story/37849153/cooperman-to-cooperperson-li-womans-historic-name-change>.

¹²⁰ COOPERPERSON PERFORMANCE CONSULTING, <https://www.cooperperson.com/about/ellen-cooperperson> (last visited Nov. 17, 2020).

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* to *Bostock v. Clayton County*, 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.¹²¹

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 less than 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.”¹²²

Rose was writing in 2002, one year before the landmark decision in *Lawrence v. Texas* that nullified anti-gay sodomy laws,¹²³ and before the nearly two decades of Supreme Court jurisprudence and social change that would promote equality for the LGBTQ community. Still, discrimination against the community continues, with particularly sharp inequities existing for transgender individuals. 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.¹²⁴

¹²¹ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

¹²² Katrina C. Rose, *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, 93 (2002).

¹²³ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹²⁴ SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET & MA’AYAN ANAFI, NAT’L CTR. FOR TRANSGENDER EQUALITY, 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

Since this study, inequities have only deepened. The former Trump administration took affirmative steps to allow discrimination against transgender people in the military¹²⁵ and in healthcare.¹²⁶ Killings of transgender individuals in the United States reached record highs in 2020.¹²⁷ 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 demonstrate the ways in which name change law has served as yet another forum for discrimination. 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. 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.

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.¹²⁸ According to their petitions, this same-sex couple sought the name change in order to “add to the level of commitment that they have for each other, as well as that of their unborn child.”¹²⁹ After a hearing on both petitions, the magistrate judge denied their

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.).

¹²⁵ See Donald J. Trump, *Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security Regarding Military Service by Transgender Individuals*, WHITE HOUSE (Mar. 23, 2018), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security-regarding-military-service-transgender-individuals>.

¹²⁶ Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160 (June 19, 2020).

¹²⁷ *Fatal 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 Oct. 27, 2020).

¹²⁸ Rose, *supra* note 122, at 101.

¹²⁹ *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).

petition in March of 2001, finding that, “[t]o grant their petitions would be contrary to the public good, contrary to encoded public policy, and contrary to natural law.”¹³⁰ Upon objections filed by the couple, the trial court declined to endorse the magistrate’s legal conclusions, yet still denied the petitions.¹³¹ The trial court ruling explained that the reason for its denial was because the 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 and withholds official sanction from non-marital cohabitation.”¹³² On appeal to the Ohio Supreme Court, the lower court decisions were reversed.¹³³ 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 name change applications” and that, “any 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.”¹³⁴ Indeed, the Court cemented its rejection of the lower court’s ruling by highlighting the name change statute’s liberal policy. Citing to a 1998 Pennsylvania case, the Ohio Supreme Court concluded, “we see no reason to impose restrictions which the legislature has not.”¹³⁵

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.”¹³⁶ 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 Supreme Court’s conclusion in *Bicknell*: “It is clear that the appellants have no criminal or fraudulent purpose for wanting to change their names.” 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.

¹³⁰ *In re Bicknell*, 771 N.E.2d 846, 847 (Ohio 2002) (citation omitted).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 849.

¹³⁴ *Id.*

¹³⁵ *Id.* (quoting *In re McIntyre*, 715 A.2d 400, 403 (Pa. 1998)).

¹³⁶ Rose, *supra* note 122, at 117.

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.¹³⁷ In a national survey, 30% of transgender individuals reported having legally changed their names with a total of 36% saying that they had attempted the legal name change process.¹³⁸ Of those 30% who managed to accomplish a legal name change, 96% reported having done so through a court order.¹³⁹ Less than 1% of respondents reported having changed their legal name through an immigration naturalization process.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² 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.¹⁴³

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

¹³⁷ See generally, *Identity Documents & Privacy*, NAT'L CTR. FOR TRANSGENDER EQUALITY, <https://transequality.org/issues/identity-documents-privacy> (last visited Nov. 3, 2020); TRANSGENDER L. CTR., *ID PLEASE: A GUIDE TO CHANGING CALIFORNIA & FEDERAL IDENTITY DOCUMENTS TO MATCH YOUR GENDER IDENTITY* (Feb. 2019), <http://transgenderlawcenter.org/wp-content/uploads/2020/03/ID-Please-Final-February-2019.pdf>.

¹³⁸ JAMES, HERMAN, RANKIN, KEISLING, MOTTET & ANAFI, *supra* note 124, at 82.

¹³⁹ *Id.* at 82–83.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Miller & Willis, *supra* note 29.

¹⁴³ JAMES, HERMAN, RANKIN, KEISLING, MOTTET & ANAFI, *supra* note 124, at 83.

In *In Re Anonymous*, a 1968 decision coming out of New York City, the court spent all of two 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 interference with 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.”¹⁴⁴ 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.

The court proceeds to expose a series of facts related to the Petitioner’s medical history, including a graphic discussion of her genitals, claiming that such an examination was “of necessity.”¹⁴⁵ 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 though unable to procreate. ‘Her’ physiological orientation is complete.”¹⁴⁶ Further graphic discussion of certain sexual conditions unrelated to the petitioner’s request follow this sarcastic comment. Despite all of this, the court ultimately ruled in favor of the petitioner in *Anonymous*. 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.

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. In that case, the court referenced its view (without citing to any authority) that “hormone imbalance, psychiatric disturbances, and physical mis-development” account for “sexual uncertainty.”¹⁴⁷ How this observation relates to the legal name change

¹⁴⁴ *In re Anonymous*, 293 N.Y.S. 834, 835 (1968).

¹⁴⁵ *Id.* at 836.

¹⁴⁶ *Id.*

¹⁴⁷ *In re Anonymous* 314 N.Y.S. 668, 669 (1970).

standard, correctly cited elsewhere in the court's opinion,¹⁴⁸ is unclear. Also unclear is how the court's discussion of the various "privileges"¹⁴⁹ that the petitioner would enjoy as a woman relates to the legal analysis. 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 time of the decision. 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."¹⁵⁰ Despite these musings, the court approved the name change petition. As with the earlier case, the court relied on the finding that as a result of surgical intervention, the petitioner "is and will be unable to engage in male procreative activities."¹⁵¹ 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. 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.¹⁵² In addition, the court permitted the Reverend John Paul Weyman – a person with no discernible connection to the Petitioner – to testify in opposition to the petition. 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 it had no bearing on whether the name change was being sought for a "fraudulent purpose."

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. In justifying the denial, the court cited to the earlier cases in New York where a sexual reassignment surgery had already been completed. 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

¹⁴⁸ *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.").

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 669.

¹⁵² *In re Dowdrick*, 4 Pa. D. & C.3d 681 (1978).

change.” In explaining this theretofore legally 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.”

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. 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. 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. 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 1954.¹⁵³ 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.

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. A number of historians have written exposing how these family legends lack documentary support. In addition to a lack of documentation to corroborate this supposed practice, historians also point to what is known about the ways

¹⁵³ Philip Sutton, *Why Your Family Name Was Not Changed at Ellis Island (and One That Was)*, N.Y. PUB. LIBR.: NYPL BLOGS (July 2, 2013), <https://www.nypl.org/blog/2013/07/02/name-changes-ellis-island>.

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 manifest of steamships, filled out by 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.¹⁵⁴

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. Yet, he concludes that based on the historical record, “it is more likely that immigrants were their own agents of change.”¹⁵⁵ There is evidence that immigrants changed their names in advance of immigrating and even more documentation to show that many immigrants altered their names after arriving to the United States. There are a number of reasons to explain those decisions, many of which indeed respond to the pressure to assimilate, yet these were ultimately decisions that individuals had the exclusive legal authority to make for themselves.

2. Immigrant Name Change and Agency

While the law of name change in the U.S. 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 above, Yvonne Cherena Pacheco explains that “a variety of mechanisms operates simultaneously” in coercing the use of a name that conforms to Anglo-American expectations.¹⁵⁶ Chief among these

¹⁵⁴ *Id.* (quoting VINCENT J. CANNATO, *AMERICAN PASSAGE: THE HISTORY OF ELLIS ISLAND* 402 (2010)).

¹⁵⁵ *Id.*

¹⁵⁶ Yvonne M. Cherena Pacheco, *Latina Surnames: Formal and Informal Forces in the United States Affecting the Retention and Use of the Maternal Surname*, 18 T. MARSHALL L. REV. 1, 15 (1992).

factors is the government and its agents whose systems and bureaucracies have left little room for names that deviate from culturally dominant norms.¹⁵⁷ Examples include government forms which assume that names will follow a certain convention and structure. The result, she argues, is “what appears on its face, an equality in name usage, is misleading because the government is 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.¹⁵⁸ In addition to these kinds of subtle signals, individuals whose names fall outside of the expected norms may meet out and out 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, “You are accepted, but really you cannot be an intern with a name like that. Our paging operators could not pronounce it. There isn’t enough space on the lab slip to write it.” The result? Emanuel Tenenwerzel became Dr. Emanuel Tanay.¹⁵⁹

A much more familiar narration of the immigrant name change is found in a letter to the editor of the Wall Street Journal in 1979. In response to a columnist’s article about his own experience of variations of his name, many readers shared their families’ naming lore. In one, immigration officials recorded the family name of a Czech immigrant, Grunburgher, simply as “G.” The members of the family subsequently adopted variations including Green and Grauman. 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.’”¹⁶⁰ 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’s tempting to consider these name changes exclusively as reactions to efforts to assimilate, that the legal right to change one’s name was truly 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. Indeed, for many fleeing persecution,

¹⁵⁷ *Id.* at 15–16.

¹⁵⁸ *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.

¹⁵⁹ Slovenko, *supra* note 15, at 215.

¹⁶⁰ Rich Jaroslovsky, *Whatsisname Strikes a Chord with Our READERS*, WALL ST. J., Feb. 27, 1979, at 24.

naming was one of the legal mechanisms by which governments oppressed minority groups. In the case of Prussia in the nineteenth century, state-imposed surnames served to subjugate and discriminate against the country's Jewish population.¹⁶¹ 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."¹⁶²

By contrast, European Jews immigrating to the United States were legally free to adopt any name of their choosing. In the 1955 survey of name change petitions mentioned above, researchers found that petitioners with Jewish European names opted for changes of name that incorporated both their American and Jewish identities.¹⁶³ On the whole, these petitioners did not choose names in order to assimilate, say by talking 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 rarely used by the dominant Anglo-Saxon populace of the time.¹⁶⁴ 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."¹⁶⁵

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.

¹⁶¹ See Scott, Tehranian & Mathias, *supra* note 5.

¹⁶² *Id.*

¹⁶³ Leonard Broom, Helen P. Beem & Virginia Harris, *Characteristics of 1,107 Petitioners for Change of Name*, 20(1) AM. SOCIOLOGICAL REV. 33 (1955).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

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.” On October 3, 1908, a Canadian immigrant by the name of Frank Woodhull returned to his residence in the United States after a trip to England.¹⁶⁶ Arriving at the port of New York, immigration officials at Ellis Island processed him for inspection and admission.

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.¹⁶⁷ 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.¹⁶⁸ According to a 1908 article in the New York 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 traveled in male attire for fifteen years. I have never been examined by a doctor in all my life, and I beg of you not to make an examination of me now.”¹⁶⁹ Despite these protests, Woodhull was examined by a matron and later by surgeons who confirmed that he was not carrying tuberculosis. Immigration Commissioners learned of the arrival of Woodhull and detained him for further inquiry.

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.¹⁷⁰ The story of Frank Woodhull made headlines nationwide.¹⁷¹ Reporters visited him during his detention at Ellis

¹⁶⁶ See Sutton, *supra* note 153.

¹⁶⁷ *She Posed as Man for Fifteen Years: “Frank Woodhull,” Passenger on the New York, Was in Fact Mary Johnson. Secret at Last Disclosed*, N.Y. TIMES 18 (Oct. 5, 1908), <https://www.nytimes.com/1908/10/05/archives/she-posed-as-man-for-fifteen-years-frank-woodhull-passenger-on-the.html> [hereinafter *She Posed as Man for Fifteen Years*].

¹⁶⁸ *Lived 15 Years as Man: Woman Wore Disguise Until Halted at Ellis Island*, N.Y. DAILY TRIB., Oct. 5, 1908, at 14.

¹⁶⁹ *Id.*

¹⁷⁰ I use male pronouns and the name Frank Woodhull to reference this individual, except when directly quoting the sources cited here. I am convinced of the accuracy and authenticity of this approach taken by Erica Rand who explains that, “when the names and pronouns assigned to people do not match the ones of their choice, the latter should be the default mode. This is an act of respect that makes analytical sense.” ERICA RAND, THE ELLIS ISLAND SNOW GLOBE 105 (2005).

¹⁷¹ See, e.g., *Men’s Clothes Made Life Easy: California Woman Says She Has Worn Masculine Apparel for Years*, HAWAIIAN STAR 2 (Oct. 21, 1908), <https://www.newspapers.com/image/49606642> (Hawaii); *Adopts Men’s Clothes Because*

Island and attended his examination by the Commissioner of Immigration who interrogated him about his background and intentions upon arriving to the United States.¹⁷²

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 example), 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.¹⁷³ 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. 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. He explained that he had worked most recently in New Orleans and that the city was his ultimate destination.¹⁷⁴

In the many articles written about the Woodhull case, reports included that he was detained for further inquiry on the suspicion of an Assistant Commissioner that crossdressing was a crime in New York.¹⁷⁵ 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.¹⁷⁶

Nature Had Given Her a Mustache, MITCHELL CAP. 2 (Oct. 9, 1908), <https://chroniclingamerica.loc.gov/lccn/sn2001063112/1908-10-09/ed-1/seq-2> (South Dakota); *Paraded as a Man*, ELK CITY MINING NEWS 3 (Oct. 17, 1908), <https://chroniclingamerica.loc.gov/lccn/sn88087183/1908-10-17/ed-1/seq-3> (Idaho); *She Lived as Man: After Fifteen Years, Woman Admits Her Masquerade*, FORREST CITY TIMES 1 (Oct. 9, 1908), <https://chroniclingamerica.loc.gov/lccn/sn84022960/1908-10-09/ed-1/seq-1> (Arkansas); *Woman Lived Years as Man: Was Discovered When She Sought to Re-Enter this Country as Steerage Passenger from England*, PENSACOLA J. 8 (Oct. 6, 1908), <https://www.newspapers.com/newspage/80923696> (Florida).

¹⁷² See *She Posed as Man for Fifteen Years*, *supra* note 167; [Sun article](#)

¹⁷³ Cite to NYT article.

¹⁷⁴ *Id.*

¹⁷⁵ Cite to Garden Globe article. See also Sun article.

¹⁷⁶ NYT article.

According to the results of the examination before the Board of Special Inquiry, it was determined that “there 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.”¹⁷⁷ 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.”¹⁷⁸ 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.¹⁷⁹ 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 Johnson and Woodhull was sent on his way “to go out and as Frank Woodhull again face the world”.¹⁸⁰ 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. 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.¹⁸¹

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.”¹⁸² 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.”¹⁸³ 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*.”¹⁸⁴

¹⁷⁷ Cite to the Sun article

¹⁷⁸ Cite to NY Tribune

¹⁷⁹ Cite to the Sun Article)

¹⁸⁰ Sutton, *supra* note 153 (Citing NYT article)

¹⁸¹ Sun citation

¹⁸² NYT article

¹⁸³ See Sutton, *supra* note 153.

¹⁸⁴ *Id.* (emphasis added).

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, 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,”¹⁸⁵ and told a reporter that: “It is too bad that I have been discovered. Do you think that they will let me in? I have been quite happy during my later years. You know a man can live on much less than a woman.”

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.” While of uncertain reliability, a couple of genealogy websites suggest that Woodhull obscured part of his history and intentions when arriving to Ellis Island. According to census records, a Frank Woodhull from Canada married Johanna (Josie) Thomas in 1887 and later adopted a child, Maizie.¹⁸⁶

The dates and places of birth for this Woodhull line up with the Woodhull intercepted at Ellis Island, but that’s 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. 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. 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 criminalized 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 other misdemeanor involving moral turpitude,” but also for “insane persons.”¹⁸⁷ Concern about being

¹⁸⁵ The Sun article

¹⁸⁶ https://www.wikitree.com/wiki/Woodhull-215#_note-0 see also <https://www.weremember.com/frank-woodhull/6r1u/memories>

¹⁸⁷ Immigration Act of 1891.

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 unwelcome scrutiny that could come of the immigration process. He explained that he had never “taken out citizenship papers” for fear that doing so would “reveal [his] sex.”¹⁸⁸ While the legal immigration process exposed Woodhull to scrutiny, its plain that the legal name change process offered him an opportunity for self-determination, self-definition, and in his own estimation, “independence and freedom.”¹⁸⁹ 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 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 26 years prior to Woodhull’s journey back to U.S. shores. 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.¹⁹⁰ In that case, the Second Circuit Court of Appeals observed that the portion of immigration law barring people from

¹⁸⁸ Supra to note above with this quote.

¹⁸⁹ Supra to note above with this quote.

¹⁹⁰ *Lennon v. INS*, 527 F.2d 187, 189. In an interesting piece of legal name change trivia, this case is captioned under Lennon’s full name “John Winston Ono Lennon.” According to biographer Ray Coleman, Lennon changed his name in 1969 to John Winston Ono Lennon following his marriage to Yoko Ono. 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. *See* John Ono Lennon p.64.

entry “is like a magic mirror, reflecting the fears and concerns of past Congresses.”¹⁹¹ Indeed, as the front door closed to little more than a crack, unauthorized immigration to the United States reached critical levels in a trend that continues into the present day. A growing anti-immigrant sentiment reflected a new kind of magic mirror complete with newly invented restrictions placed on name change petitioners.

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 Immigration and Customs Enforcement in order to petition the Court for a change of name.¹⁹² Through efforts of name change advocates at Whitman-Walker Health and law students with Georgetown University Law Center’s Community Justice Project, those restrictions were finally removed from the D.C. Court’s Form for Name Change of an Adult.¹⁹³

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 under the Civil Rights Law.”¹⁹⁴ 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.¹⁹⁵ Conversations with court staff and judges in the District of Columbia revealed a similar concern for the

¹⁹¹ *Id.*

¹⁹² See Documenting Transition Report (on file with the author).

¹⁹³ Include link to current DC form.

¹⁹⁴ *In re Mohamed* 3 Misc.3d. 775 N.Y.S.2d 488 (S.Ct. Rockland County, 2004); *In re Boquin* 24 Misc.3d 473 (quoting *in re Mohamed*); see also *In re Cesar* 46 Misc.3d 8 (overturning the lower court’s denial of the name change of an undocumented immigrant).

¹⁹⁵ *Mohomed, Boquin.*

prevention of terrorism behind the rationale to create an immigration notification requirement.¹⁹⁶

These fears may be related to the case of David Coleman Headley, an American of Pakistani descent who changed his name from Daood Gilani.¹⁹⁷ After changing his name in 2005, Headley was convicted as one of the masterminds behind a deadly 2008 terrorist attack in Mumbai, India.¹⁹⁸ 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."¹⁹⁹ 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 applicants²⁰⁰ 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.²⁰¹ 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."²⁰² The Supreme Court 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."²⁰³ 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

¹⁹⁶ Documenting Transition report pp. 33-34 (on file with the author) (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).

¹⁹⁷ <https://www.pbs.org/wgbh/frontline/article/in-effort-to-spot-terrorists-nypd-shadows-muslims-who-change-names/>

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Documenting Transition (on file with the author) (describing how the requirement to notify Immigration & 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).

²⁰¹ *In re Cesar* 46 Misc.3d 8

²⁰² *Id.*

²⁰³ *Id.*

officials of her name change process.²⁰⁴ Today, name change court forms for the State of New York require an attestation of U.S. citizenship,²⁰⁵ while the petition for the City of New York makes no such mention.²⁰⁶ This discrepancy continues in spite the state of New York's name change law statute, which does not include citizenship status as a consideration in granting a name change.²⁰⁷

²⁰⁴ *Id.*

²⁰⁵ <https://www.nycourts.gov/forms/ncpetition.pdf>

²⁰⁶ <https://www.nycourts.gov/courts/nyc/civil/forms/namechangeadult.pdf>

²⁰⁷ NY Civ Rts § 61 (if anything, § 61 creates an additional hurdle for native born petitioners by requiring production of a birth certificate for applicants born in New York State (*see* § 3 below)).

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 inmate 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.

One state that has explicitly included citizenship status in its name change statute is Indiana. Under Indiana Code 34-28-2-2.5(a)(5), “proof that the person is a United States citizen” must be included in the name change petition.²⁰⁸ In 2020, the Court of Appeals of Indiana 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.²⁰⁹ In that case, the Court of Appeals acknowledged that the Indiana statute presented the potential for constitutional equal protection issues. As a result, the Court chose to interpret the statute in such a way as to avoid the constitutional issue. 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 listed by statute but cannot be provided, the petitioner is relieved of the requirement.²¹⁰ 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 Indiana and the overall framework of the name change statutes.²¹¹

²⁰⁸ Sec. 2.5. (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. (emphasis added).

²⁰⁹ <https://www.maldef.org/wp-content/uploads/2020/05/IndianaNameChangerule.pdf>

²¹⁰ *Id.*

²¹¹ *Id.*

Pursuant to that ruling, both men's cases were remanded to the trial court. This ruling is important in a number of respects. First, it demonstrates how the common law of name changes 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.” 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 to the common law, it is 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.²¹²

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.” No further justification is requested in the immigration naturalization form, nor are any additional fees required for the name change.²¹³ This statutory authority for name change via the

²¹² 8 USC 1447(e)

²¹³ See <https://www.uscis.gov/sites/default/files/document/forms/n-400instr.pdf>

naturalization process dates back to at least 1906 and has changed little in over one hundred years.²¹⁴

In his 1942 book, *What's Your Name*, Slovenian-American journalist Louis Adamic profiles various cases of immigrant name change *and* name adherence. In one case, he relates the experience of, George, an immigrant enlisted in the U.S. military in 1917.²¹⁵ For the convenience of his commanding officer he adopted name "Sprague" and was eventually naturalized under that name. This anecdote illustrates the common place 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."

Though the general law of name changes 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. Yet, the naturalization process required that George appear personally and take several steps to acknowledge the name Sprague as his intended name moving forward.²¹⁶ 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. This he ultimately did when he opted to resort to his name of birth. Happily, the law *and* the court, supported him in this endeavor.

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.

²¹⁴ Section 6 of the Naturalization Act of June 29, 1906, 34 Stat.pt. 1

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.

²¹⁵ Adamic, p.93

²¹⁶ See Naturalization Act of 1906 Sec. 9

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.”²¹⁷ The Nordic countries have even dictated by law carefully regulated and codified practices for naming.²¹⁸ 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.²¹⁹ 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.”²²⁰

The Spanish naming traditions also took a particularly rigid approach to naming. The role of Christianity in Spanish custom was so influential that if a name submitted for registry was not Christian, the civil servant would reject it outright.²²¹ 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.²²² As a result, one commentator has recognized the naming tradition in Hispanic societies as “an almost sanctified ritual.”²²³

In French law, the justification for the state gatekeeping function on name changes related to interests of the state in policing civil documentation.²²⁴ 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.²²⁵ 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.”²²⁶ This fealty to the civil register and its quelling of attempts at name change, although originally motivated in part by a monarchy seeking

²¹⁷ Slovenko, *supra* note 15, at 211.

²¹⁸ <https://blogs.loc.gov/law/2015/09/whats-in-an-icelandic-legal-name/> (These countries include Iceland, Denmark, Finland, Norway, and Sweden).

²¹⁹ *Id.* (citing Art.5 of the Names Act of Iceland).

²²⁰ *Id.*

²²¹ Cherena Pacheco, *supra* note 127 at 13.

²²² *Id.* at 12.

²²³ *Id.* at 14.

²²⁴ Slovenko, *supra* note 15, at 211.

²²⁵ Guinchard, *supra* note 23, at 50.

²²⁶ *Id.*

to consolidate power, 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 all citizens.²²⁷ Scholars point to this move as the moment in which the legal doctrine of name changed between French and English law officially diverged. The rigidity of the French system continued, and went as far as to criminalize certain name changes in 1858.²²⁸

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."²²⁹ When it came to individual naming, a matter seen as being tied to an individual's civil liberties, the English Crown could only move to block a name changed to claim a title.²³⁰ 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.²³¹ 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.²³² These structures supported the English approach to name change law that served as the foundation for what would develop in the United States. Namely, that "English law sees the name as part of one's personal privacy, free from interference from the State."²³³

The tension between English and French law with regards 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 St. Lucia sought to force the discontinuation of the use its family name against the child of a formerly enslaved mother.²³⁴ After her emancipation, Rose Du Boulay used the name of the family to whom she

²²⁷ Id. At 51

²²⁸ Id.

²²⁹ Id. At 50

²³⁰ Id. At

²³¹ Id.

²³² Id. at 50.

²³³ Id. at 57.

²³⁴ See *Du Boulay at Belisle Du Boulay v Jules Rene Hermenegilde Du Boulay*, 16 E.R. 638 (1869).

had previously been enslaved.²³⁵ Her freeborn son Jules René Herménégilde also used the surname at least since the age of seventeen.²³⁶ 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.²³⁷ On review by the appellate Court of the Windward Islands, the court sitting en banc rendered a decision of two to one in favor of Jules René Herménégilde Du Boulay.²³⁸ In the majority, Chief Justice of Tobago H.J. Woodcock wrote a scathing opinion that swept beyond the legal name question at bar:

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 Great grandchildren of the almost forgotten Slave have, by education and integrity, won for themselves an equal place with their fellowmen.²³⁹

While the state of name change law occupied the bulk of the Privy Council's review on appeal of the decision of the Windward Islands Court, this concern from the lower court is critical. The colonial context is important to understand as well. While St. Lucia was a British colony by the time of the litigation in *Du Boulay*, it had been formerly under French control and aspects of French law remained in force. 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

²³⁵ *Du Boulay at Belisle Du Boulay v Jules Rene Hermenegilde Du Boulay*, 16 E.R. 638 (1869) at 645

²³⁶ *Id.*

²³⁷ *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"(citing to the lower court's ruling))

²³⁸ *Id.* at 640.

²³⁹ *Id.* (quoting the 1866 decision of Chief Justice of Tobago, H.J. Woodcock).

which he is in the daily habit of administering.”²⁴⁰ In referencing that potentially clouded view, the Privy Council’s decision affirmed the state of English law, affirming 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.”²⁴¹

Though Chief Judge Woodcock’s opinion at the lower court 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. Indeed, Jules René Herménégilde Du Boulay admitted no claim of family relationship to the Du Boulays. Whether the question in this case ultimately involved attempts to disadvantage a biological child, the issue 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 of either their reputed Fathers or of their Masters of white complexion, or, indeed of any white man inhabiting the French Colonies.”²⁴² 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.”

Instead, it rested its decision on a discussion of the state of French law prior to the revolutionary ordinance and concluded that the ordinance 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.²⁴³ 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.”²⁴⁴ This principle was carried over into American name change law and continued to be cited in cases well into the end of the twentieth century.²⁴⁵

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

²⁴⁰ Id. at 644.

²⁴¹ Id.

²⁴² Id.

²⁴³ Guinchard, *supra* note 23, at 54 (citing DuBoulay at 446).

²⁴⁴ Id. p. 40 (citing DuBoulay at 441).

²⁴⁵ See Application of Dengler 287 N.W.2d 637 (1979).

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.”²⁴⁶ 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.²⁴⁷

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, 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 another²⁴⁸ – 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 peoples, no U.S. laws restricted their right to a change of name.

2 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

²⁴⁶ Aeyal M. Gross, *Rights and Normalization: A Critical Study of European Human Rights Case Law on the Choice and Change of Names*, 9 HARV. HUM. RTS. J. 269, 269 (1996).

²⁴⁷ See generally Gross.

²⁴⁸ See e.g.

https://www.census.gov/history/www/through_the_decades/index_of_questions/1850_1.html

(As an illustration of this concept, the U.S. Census of 1850 was the first decennial census to request the names of individuals counted. However, “slave inhabitants” of a household were listed under the slaveholder’s household by age, sex, and color – but not by name).

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, they have also relied on the authority of the common law to justify their misconstruction of the law. In many of the cases explored here, judges have rationalized their denial of a name change by arguing that the petitioner has 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 to 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. By denying name changes with which courts disagree while suggesting that petitioners carrying on using their chosen name under the common law, courts are promoting a result inconsistent to both the common law and statutory schemes.

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 straightforward and uncontroversial manner. In those cases, married women often need only to present a marriage certificate in order 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 Department of State has created a process for a name change by open and notorious use. By developing a procedure and making that option available, passport applicants are able to demonstrate a legal name change by common law through evidence of the use of the new name.

This kind of procedure, whereby an individual presents documentation to establish a name change in lieu of a court order, could be provided for in state laws and 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 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 she smiled and said, “I finally exist.”