

# Northwestern Journal of Law & Social Policy

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Volume 19  
Issue 1 *Volume 19, Issue 1 (Fall 2023)*

Article 2

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Fall 2023

## Name Takings

Gregory S. Alexander  
*Cornell Law School*

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### Recommended Citation

Gregory S. Alexander, *Name Takings*, 19 Nw. J. L. & Soc. POL'Y. 40 (2023).  
<https://scholarlycommons.law.northwestern.edu/njlsp/vol19/iss1/2>

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# Name Takings

Gregory S. Alexander\*

## ABSTRACT

*Personal names are an integral part of our identity. Names belong to us; they are ours. Names are a form of personal property and should be treated as such. Nevertheless, the state, both historically and still today, has perpetrated various forms of abuse of personal names, ranging from outright takings of personal names to official denials of preferred names. This Article surveys the variety of ways in which the state has committed these name-takings, as I call them. It includes historical examples of name denials such as African slaves and Canadian Indigenous school children. It then considers various forms of name discrimination still practiced today. It then briefly surveys the various ways in which the state continues practices that discriminate against people of color, LGBTQ couples and others on the basis of their names. Treating their names as property may be a means of dealing with such abuses.*

**Keywords:** property, names, discrimination, abuse

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\* A. Robert Noll Professor of Law Emeritus, Cornell Law School.

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### INTRODUCTION

At age six, Willie Littlechild was taken from his parents and his home on the Ermineskin reserve, Maskwacîs, in Alberta, Canada, to live in the Ermineskin Residential School, in northern Alberta. Ermineskin was one of the residential schools established for Indigenous children in Canada in the late nineteenth century. Littlechild spent fourteen years in that system until he graduated from high school and went on to college at the University of Alberta.<sup>1</sup>

Willie's home and family were not the only things taken from him. At Ermineskin, Willie was deprived of his name and instead given a number. He was called and known as "65." "65" was to be Willie Littlechild's name for the duration of his fourteen years in the residential school system. That system, acting under the authority of the Canadian government, had deprived him of his real name without his consent.

Littlechild was hardly the only Indigenous child whose name was taken by the authorities of the residential schools. Virtually every student who passed through that system experienced the same name-taking. As many of them later testified before the Truth and Reconciliation Commission,<sup>2</sup> what those Indigenous children experienced was not

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<sup>1</sup> J. Wilton Littlechild CM AOE MSC QC (born 1944), known as Willie Littlechild, is a Canadian lawyer and Cree chief who served as Grand Chief of the Confederacy of Treaty Six First Nations and as a member of the Canadian Parliament. His outstanding athletic and academic talents took him to the University of Alberta where he earned his undergraduate degree and later his law degree (becoming the first Alberta Treaty First Nation person to receive a law degree from the University of Alberta).

<sup>2</sup> The Truth and Reconciliation Commission of Canada was organized by the parties of the Indian Residential Schools Settlement Agreement. It was active from 2008 to 2015. Its purpose was to document the history and continuing effects of the Indigenous Canadian residential school system on indigenous students who were forced to attend those schools. In December 2015, the commission released its entire 6-volume final report, which concluded that the school system amounted to cultural genocide. *See Reports*, NAT'L CTR. FOR

simply the taking of their names but the taking of their personal identities.<sup>3</sup> The name takings had dehumanized them, leaving scars that remained for the rest of their lives.

Name taking is not unique to the Indigenous Canadian children.<sup>4</sup> It has occurred at other times and other places, but all with the same dehumanizing effect. The most powerful instance of this practice in the United States concerned African slaves, who, when forcibly brought to this country, were stripped of their given names and given new, Anglo names.<sup>5</sup> Self-naming by slaves also occurred, although these were not recorded.<sup>6</sup> There were other unrecorded names that the slaves sometimes used, referred to as “country names.”<sup>7</sup> All of these names, recorded and unrecorded, were adopted under conditions of denials of freedom, autonomy, and even complete humanity.

Related to name-taking are other forms of name abuses that are common practices in American society today. These include discrimination on the basis of names and state-compelled name mutilation. These abuses fall almost entirely on people of color, exacerbating racial disparities and mistreatment.

Names matter. They express our personal identities and our individualities. We might say, with Shakespeare, “What’s in a name?”<sup>8</sup> but the truth is that a lot is in a name. Names belong to us; they are *ours*. While the law does grant legal protection to names in limited contexts,<sup>9</sup> names should be treated as a form of personal property to prevent name-taking.

## I. NAME-TAKING AMONG CANADIAN INDIGENOUS CHILDREN

### A. *Canada’s Residential Schools: An Overview*

It can start with a knock on the door one morning. It is the local Indian agent, or the parish priest, or, perhaps, a Mounted Police officer. The bus for residential school leaves that morning. It is a day the parents have long been dreading. Even if the children have been warned in advance, the

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TRUTH AND RECONCILIATION, <https://nctr.ca/records/reports/> [https://perma.cc/UR7A-Y8YQ] (last visited Sept. 16, 2023).

<sup>3</sup> See TRUTH AND RECONCILIATION COMM’N OF CAN., THE SURVIVORS SPEAK 66–68 (2015) [hereinafter THE SURVIVORS SPEAK], [https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Survivors\\_Speak\\_English\\_Web.pdf](https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Survivors_Speak_English_Web.pdf) [https://perma.cc/VG2N-UURK].

<sup>4</sup> With the exception of quoted material, I will use the terms “Indigenous people” and “Indigenous person(s)” rather than “Indian” throughout this article. “Indigenous peoples” is a broad term that describes people around the world, whereas the term “Indian” is still used in reference to Native peoples in the United States. I will also use the term “enslaved person(s)” rather than “slaves” because “[w]ith the word ‘slave,’ we deny the humanity of the enslaved person; with ‘enslaved person,’ we recognize their enslaved state as imposed on them and not intrinsic to their identity as a human being.” The Vocabulary of Freedom, UNDERGROUND R.R. EDUC. CTR., <https://undergroundrailroadhistory.org/the-vocabulary-of-freedom> [https://perma.cc/5P3A-VN2S] (last visited Nov. 3, 2023).

<sup>5</sup> See John C. Inscoc, *Carolina Slave Names: An Index to Acculturation*, 49 J.S. HIST. 527, 527 (1983).

<sup>6</sup> *Id.*

<sup>7</sup> Margaret Williamson, *Slave Names and Naming in the Anglophone Atlantic*, OXFORD BIBLIOGRAPHIES (Apr. 22, 2020), <https://www.oxfordbibliographies.com/view/document/obo-9780199730414/obo-9780199730414-0291.xml> [https://perma.cc/HZ4D-FW9K].

<sup>8</sup> WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2, l. 46.

<sup>9</sup> See, e.g., CAL. CIV. CODE § 3344.

morning's events are still a shock. The officials have arrived and the children must go.<sup>10</sup>

From 1894 to 1947, a large percentage of Indigenous children in Canada attended residential schools that were established by the Canadian government and administered by Christian churches.<sup>11</sup> The residential school system grew out of the Gradual Civilization Act of 1857 (officially the “Act to Encourage the Gradual Civilization of the Indian Tribes in the Province”). It established a voluntary process by which any Indigenous male could become a regular British citizen. To do so, however, applicants were required to learn to read and write English and French, and to abandon their traditional names for government-approved surnames. Enfranchised Indigenous people would be granted an allotment of land and the ability to vote.<sup>12</sup> The Act was one of the most important legislative steps in the development of Canadian Indigenous persons policy.

The Indian Act of 1920 allowed the government to compel any Indigenous child to attend residential school, and attendance for children ages seven to fifteen was compulsory.<sup>13</sup> Some Indigenous children attended day schools. More than 100,000 children passed through 125 schools.<sup>14</sup> The nominal objective of these schools was education, but the real goals were deeper, more insidious goals than that. The real objective of the residential schools was indoctrinating Indigenous children into Euro-Canadian and Christian ways of living and assimilating them into mainstream white Canadian society.<sup>15</sup> The Final Report of the Truth and Reconciliation Commission (TRC) of Canada states that the founders of the residential school system wanted to turn the children into farmers and farmers' wives. Assimilation was to be at the lowest rung of the economic ladder so that the Indigenous children would not become competitors for jobs with European settlers.<sup>16</sup>

The TRC Final Report situated residential schools in the context of a relationship between the growing global, European-based empires and the Christian churches.<sup>17</sup> They

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<sup>10</sup> TRUTH AND RECONCILIATION COMM'N OF CAN., HONOURING THE TRUTH, RECONCILING FOR THE FUTURE: SUMMARY OF THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA 37 (2015) [hereinafter HONOURING THE TRUTH], [https://irsi.ubc.ca/sites/default/files/inline-files/Executive\\_Summary\\_English\\_Web.pdf](https://irsi.ubc.ca/sites/default/files/inline-files/Executive_Summary_English_Web.pdf) [<https://perma.cc/S279-4D5R>].

<sup>11</sup> See generally 1 TRUTH AND RECONCILIATION COMM'N OF CAN., CANADA'S RESIDENTIAL SCHOOLS: THE HISTORY, PART 1, ORIGINS TO 1939 (2015) [hereinafter THE HISTORY, PART 1], [https://publications.gc.ca/collections/collection\\_2015/trc/IR4-9-1-1-2015-eng.pdf](https://publications.gc.ca/collections/collection_2015/trc/IR4-9-1-1-2015-eng.pdf) [<https://perma.cc/MMU7-SGPD>].

<sup>12</sup> See An Act to Encourage the Gradual Civilization of Indian Tribes in this Province, and to Amend the Laws Relating to Indians, S.C. 1857, c 26 (Can.), <https://caid.ca/GraCivAct1857.pdf> [<https://perma.cc/52C3-8G9L>].

<sup>13</sup> See J.R. MILLER, SHINGWAUK'S VISION: A HISTORY OF NATIVE RESIDENTIAL SCHOOLS 169 (1996); JOHN S. MILLOY, A NATIONAL CRIME: THE CANADIAN GOVERNMENT AND THE RESIDENTIAL SCHOOL SYSTEM, 1879 TO 1986, at 70 (4th prt. 2003).

<sup>14</sup> Elazar Barkan, *Genocides of Indigenous Peoples: Rhetoric of Human Rights, in* THE SPECTER OF GENOCIDE: MASS MURDER IN HISTORICAL PERSPECTIVE 117, 130–31 (Robert Gellately & Ben Kiernan eds., 2003).

<sup>15</sup> Erin Hanson, Daniel P. Gamez, & Alexa Manuel, *The Residential School System*, INDIGENOUS FOUNDATIONS (2020), [http://indigenousfoundations.arts.ubc.ca/the\\_residential\\_school\\_system/](http://indigenousfoundations.arts.ubc.ca/the_residential_school_system/) [<https://perma.cc/ZT4V-6EJF>].

<sup>16</sup> See CONSTANCE DEITER, FROM OUR MOTHER'S ARMS: THE INTERGENERATIONAL IMPACT OF RESIDENTIAL SCHOOLS IN SASKATCHEWAN 15–16 (1999).

<sup>17</sup> HONOURING THE TRUTH, *supra* note 10, at 44.

represented a continuation of a project that began with Britain gaining control of Indigenous peoples' lands in British North America and continued in different forms well into the twentieth century. The project was premised on the belief of racial and cultural superiority.<sup>18</sup> In 1883, British Lord Rosebery, a future British prime minister, told an Australian audience, "It is on the British race, whether in Great Britain, or the United States, or the Colonies, or wherever it may be, that rest the highest hopes of those who try to penetrate the dark future, or who seek to raise and better the patient masses of mankind."<sup>19</sup> It was in the shadow of such claims that the Canadian residential schools were established.

Supervision at the schools was limited. The staff was inadequate in numbers and training, and they were rarely supervised. The buildings were poorly constructed, heated, and ventilated.<sup>20</sup> Children experienced frequent physical, emotional, and spiritual abuse. Students were severely punished physically if they broke any of the many strict rules. Survivors later testified that they were beaten and strapped, and some students were shackled to their beds. Some even had needles shoved in their tongues for speaking their native languages. Survivors also reported sexual abuse.<sup>21</sup> These abuses, together with deplorable living conditions at the schools, led to an abnormally high death rate.<sup>22</sup> Among the legacies of the system has been an increased prevalence of post-traumatic stress, alcoholism, substance abuse, suicide, and intergenerational trauma.<sup>23</sup>

Many of the children grew up in schools away from their parents for long periods of time. Some never returned home, others did so rarely. Some schools allowed children to return home for Christmas but only if their parents came to get them and returned them on time.<sup>24</sup> Some children died at the schools; others died in hospitals located in towns near the schools.

Gladys Chapman was one of these children. Gladys was a member of the Nlaka'pamux Nation and a student at Kamloops Indian Residential School in British Canada—one of the largest in Canada. Living conditions at Kamloops School were appalling. Neglect and abuse, of all manner, were rampant. Some children committed or tried to commit suicide. Overcrowding, poor sanitary and ventilation systems, inadequate clothing, malnourishment, and a lack of medical care led to communicable diseases, tuberculosis chief among them.<sup>25</sup> Gladys was twelve years old when she died of tuberculosis. While Gladys' mother learned of her death, many other Indigenous families

<sup>18</sup> *Id.* at 46–47.

<sup>19</sup> *Id.* at 50–51.

<sup>20</sup> THE HISTORY, PART 1, *supra* note 11, at 162.

<sup>21</sup> THE SURVIVORS SPEAK, *supra* note 3, at 59, 120, 133, 153–54.

<sup>22</sup> In 1907, government medical inspector P.H. Bryce reported that 24% of previously healthy Indigenous children were dying in residential schools. Hanson, Gamez, & Manuel, *supra* note 15.

<sup>23</sup> Robyn Jane McQuaid, Amy Bombay, Opal Arilla McInnis, Courtney Humeny, Kimberley Matheson, & Hymie Anisman, *Suicide Ideation and Attempts Among First Nations Peoples Living On-Reserve in Canada: The Intergenerational and Cumulative Effects of Indian Residential Schools*, 62 CANADIAN J. PSYCHIATRY 422, 422 (2017), <https://pubmed.ncbi.nlm.nih.gov/28355491/> [<https://perma.cc/ZU2U-JMNN>].

<sup>24</sup> B.C. TCHRS.' FED'N, GLADYS WE NEVER KNEW: THE LIFE OF A CHILD IN A BC RESIDENTIAL SCHOOL 61 (2017),

[https://www.joycerain.com/uploads/2/3/2/0/23207256/gladys\\_we\\_never\\_knew\\_education\\_on\\_boarding\\_school.pdf](https://www.joycerain.com/uploads/2/3/2/0/23207256/gladys_we_never_knew_education_on_boarding_school.pdf) [<https://perma.cc/CV5G-5PVQ>].

<sup>25</sup> Nancy Knickerbocker, *The Gladys We Never Knew*, THE TYEE (July 4, 2015), <https://thetyee.ca/News/2015/07/04/The-Gladys-We-Never-Knew/> [<https://perma.cc/5FJB-9SA6>].

were never informed of their children's deaths. Some of these children were buried in unmarked graves near their schools.

The Final Report of the Truth and Reconciliation Commission of Canada states that “[a]s educational institutions, the residential schools were failures, and regularly judged as such.”<sup>26</sup> The education the schools provided was minimal at best. It focused on prayer and manual labor,<sup>27</sup> but even the vocational training was minimal.<sup>28</sup> The curriculum was essentially an elementary school curriculum, premised on the belief that indigenous people were intellectually inferior. The curriculum demeaned the Indigenous students' history, ignored their current conditions, and did not recognize them or their families as citizens. Some textbooks referred to Indigenous women as “squaws,” and used the word “redskin” to describe Indigenous people.<sup>29</sup>

Only a small fraction of the students completed the six grades the schools offered.<sup>30</sup> By any standard, including those at the time, the education was inadequate. Vocational training was also substandard. Training for skilled trades was minimized in favor of basic labor, such as clearing and fencing land, gardening and making improvements to school facilities. As the Truth and Reconciliation Commission concluded, “[s]tudents left the schools lacking the skills to succeed in their home communities or to succeed in the broader labour market.”<sup>31</sup>

Indigenous children were treated less as students and more as laborers. Students spent less time in the classroom and more time doing chores necessary to make the schools self-sustaining.<sup>32</sup> The schools were established on the premise that the combination of forced labor of students and poorly paid missionaries would enable the schools to operate on a nearly cost-free basis. That premise turned out to be false, as government funding continued to be the primary source of financial support for the schools, albeit on an inadequate scale. Meanwhile, the children were being trained to fill positions at the bottom of the labor market.

The schools' efforts to “take the Indian out of the child”<sup>33</sup> began as soon as the child arrived. Students' home clothing was taken from them and replaced with school apparel. One former student testified about her experience, which was common:

My mom had prepared me in Native clothing. She had made me a buckskin jacket, beaded with fringes . . . . And my mom did beautiful work, and I was really proud of my clothes. And when I got to residential school, that first day I remember, they stripped us of our clothes.<sup>34</sup>

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<sup>26</sup> HONOURING THE TRUTH, *supra* note 10, at 71.

<sup>27</sup> Hanson, Gamez, & Manuel, *supra* note 15.

<sup>28</sup> THE HISTORY, PART 1, *supra* note 11, at 293.

<sup>29</sup> HONOURING THE TRUTH, *supra* note 10, at 75.

<sup>30</sup> THE HISTORY, PART 1, *supra* note 11, at 324–26.

<sup>31</sup> *Id.* at 294.

<sup>32</sup> *Id.* at 162.

<sup>33</sup> Shaun Michaud, *An Inside Look at Canada's Program to Strip Indigenous Kids of Their Culture*, VICE (Jan. 26, 2016, 11:27 AM), <https://www.vice.com/en/article/avy8m5/an-inside-look-at-canadas-program-to-strip-indigenous-kids-of-their-culture> [<https://perma.cc/7EB9-83LG>].

<sup>34</sup> HONOURING THE TRUTH, *supra* note 10, at 40.

Another former student testified that as soon as he arrived, teachers took a “really nice, beautiful beaded” jacket his mother had made for him. He never saw the jacket again.<sup>35</sup> These stories were repeated by many former students, all of whom had brought clothes from home, many handmade by their mothers, taken and never returned. Their native apparel was replaced by institutional Anglo clothes. The forced replacement of clothes was part of the overall process of cultural erasure. Another part of that process was the removal of long hair. The students’ long hair, part of their cultural identity, was usually cut off, a practice that many considered part of a mourning tradition.

Students were also immediately given new Anglo names. For example, an indigenous child named Tlalis became Charles Nowell, while another child, Ochankugahe, became Daniel Kennedy.<sup>36</sup> As the Final Report of the Truth and Reconciliation Commission stated, “The first day of school was, in effect, an initiation into a continuing process of separation and loss.”<sup>37</sup>

Native languages were another casualty of residential school policies. Federal residential school policy was clear regarding the suppression of Aboriginal languages and their replacement with English (or, in a few cases, French).<sup>38</sup> Students were punished for “speaking Indian.”<sup>39</sup> Celia Haig-Brown writes that that her father “who attended Alberni Indian Residential School for four years in the twenties, was physically tortured by his teachers for speaking Tseshaht; they pushed sewing needles through his tongue, a routine punishment for language offenders.”<sup>40</sup> Former students recalled being slapped in the face for speaking Cree shortly after arriving at school. “How was I to learn English within three or four days the first week I was there?” a former student testified. “Was I supposed to learn the English words, so the nun would be happy about it? It’s impossible.”<sup>41</sup> The aim was not simply to suppress the use of Aboriginal languages but to facilitate their eventual oblivion from memory. The loss of native languages was one of the informal indices by which the success of government policy was measured.<sup>42</sup>

The government’s erasure of all matters distinctively Indigenous included their spiritual beliefs and practices. Conversion to Christianity was an essential part of this effort.<sup>43</sup> The vast majority of residential schools were run by churches, and although they were all Christian, they were of different denominations. This created conflicts among the denominations for students. Parents became pawns in the competition between different denominations as missionaries lobbied them to switch from one denomination to another.<sup>44</sup> The government declined to get involved in these conflicts.

The suppression of Aboriginal culture included bans on spiritual practices that played a central part in Aboriginal culture. Among these was the Potlatch ceremony, practiced by west coast First Nations. Potlatch was important for many purposes. It served to redistribute

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<sup>35</sup> THE SURVIVORS SPEAK, *supra* note 3, at 42.

<sup>36</sup> THE HISTORY, PART 1, *supra* note 11, at 599.

<sup>37</sup> *Id.* at 600.

<sup>38</sup> *Id.* at 615.

<sup>39</sup> HONOURING THE TRUTH, *supra* note 10, at 81.

<sup>40</sup> CELIA HAIG-BROWN, RESISTANCE AND RENEWAL: SURVIVING THE INDIAN RESIDENTIAL SCHOOL 11 (1988).

<sup>41</sup> THE SURVIVORS SPEAK, *supra* note 3, at 49.

<sup>42</sup> THE HISTORY, PART 1, *supra* note 11, at 620.

<sup>43</sup> *See id.* at 629–42.

<sup>44</sup> *Id.* at 633.



surplus, confer status and rank upon individuals, kin groups and clans, mark important events such as marriages, and strengthen relationships with spiritual forces.<sup>45</sup> The federal government banned the ceremony in the belief that “the Church and school cannot flourish where the ‘Potlatching’ holds sway.”<sup>46</sup> Enforcement of the ban was met with resistance as the ceremonies continued to be practiced, both openly and secretly. An ongoing struggle between Aboriginal resisters and government agents persisted well into the twentieth century.

The overall effects of the government’s measures were profound. The Introduction to the Final Report of the Truth and Reconciliation Commission of Canada states:

*Cultural genocide* is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next.

In its dealing with Aboriginal people, Canada did all these things.<sup>47</sup>

The residential schools played a central role in the cultural genocide that occurred against the Canadian Aboriginal peoples. Within that role name-taking itself played a key part. Aboriginal children had their names taken from them twice—first, when Native names were replaced with Anglo names; second, in school when their Anglo names were replaced by numbers. Students were immediately given new Anglo names. For example, an indigenous child named Tlalis became Charles Nowell, while another child, Ochankugahe, became Daniel Kennedy.<sup>48</sup> As the Final Report of the Truth and Reconciliation Commission stated, “The first day of school was, in effect, an initiation into a continuing process of separation and loss.”<sup>49</sup> Indigenous children were separated from their families, their names, and their entire cultures. To service the overall process of cultural erasure, Indigenous children were separated from their families, their names, and their entire cultures. Step by step, their personal identities, and indeed, their very humanity, were erased.

The last residential school closed in 1996.<sup>50</sup> By that point, about 150,000 First Nations, Inuit and Métis children had been forcibly removed from their families and placed into institutions whose basic objective was to eradicate those children’s indigenous culture and identities.<sup>51</sup>

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<sup>45</sup> *Id.* at 130.

<sup>46</sup> *Id.* at 636.

<sup>47</sup> *Id.* at 3.

<sup>48</sup> THE HISTORY, PART 1, *supra* note 11, at 599.

<sup>49</sup> *Id.* at 600.

<sup>50</sup> Andrew Woolford & Jeff Benvenuto, *Canada and Colonial Genocide*, 17 J. GENOCIDE RSCH. 373, 373 (2015).

<sup>51</sup> See MELANIE FLORENCE, RIGHTING CANADA’S WRONGS: RESIDENTIAL SCHOOLS 102 (2015); MILLOY, *supra* note 13, at 304.

### B. *The Experience of Indigenous Children in the Residential Schools*

Chief Willie Littlechild's experience in Canada's residential school was atypical in one sense, but it was not unique. Chief Littlechild was a gifted athlete who capitalized on his athletic skills to obtain higher education and eventually a distinguished career at the national level. Fundamentally, however, his experience mirrored that of thousands of other Native Canadian children who passed through the residential school system.

#### 1. De-Naming

Upon arrival at his new school, Peter Nakogee was instructed to write his name on a scribble pad. When he wrote his name in Cree syllabics, the Catholic nun got "really mad" that he was writing his Cree name, Ministik. "So I was whipped again because I didn't know my name was Peter Nakogee," he later told the Truth and Reconciliation Commission (TRC).<sup>52</sup>

Like Willie Littlechild, other Native students at the schools had their names stripped twice when they were assigned numbers in lieu of their Anglo names. Lydia Ross spoke to the experience:

My name was Lydia, but in the school I was, I didn't have a name, I had numbers. I had number 51, number 44, number 32, number 16, number 11, and then finally number one when I was just about coming to high school. So, I wasn't, I didn't have a name, I had numbers.<sup>53</sup>

Bernice Jacks felt that the practice numbering denied her any personal identity: "I was called," she stated, "Hey, 39. Where's 39? Yes, 39, come over here. Sit over here, 39." That was the way it was."<sup>54</sup>

The sense of losing one's personal identity was very common among the students. Antonette White, for example, said that "even though you have family, you still feel separated, you still, you don't have a name, you don't have an identity, you just have a number, and mine was 56."<sup>55</sup> The students first experienced this loss of personal identity when they entered their school. Immediately upon entry, the children's aboriginal names were replaced with Euro-Canadian ones. Each student was then assigned a number, and teachers commonly referred to students only by their numbers.<sup>56</sup> Students, including very young children, had to remember their number because their teachers and staff called them exclusively by their number. In some cases, if students forgot their numbers, they would be punished.<sup>57</sup> Most students remembered their numbers much later in life.

As the students remained at the schools, their numbers would change over the years. Gilles Petiquay was shocked by the numbering system. Like other students, his number periodically changed.

<sup>52</sup> THE SURVIVORS SPEAK, *supra* note 3, at 48.

<sup>53</sup> *Id.* at 66.

<sup>54</sup> *Id.* at 67.

<sup>55</sup> *Id.*

<sup>56</sup> Douglas Quan, 'Assault' on Residential School Students' Identities Began the Moment They Stepped Inside, NAT'L POST (June 2, 2015), <https://nationalpost.com/news/canada/assault-on-residential-school-students-identities-began-the-moment-they-stepped-inside> [<https://perma.cc/V8QB-3MSA>].

<sup>57</sup> See THE SURVIVORS SPEAK, *supra* note 3, at 67.

I remember that the first number that I had at the residential school was 95. I had that number—95—for a year. The second number was number 4. I had it for a longer period of time. The third number was 56. I also kept it for a long time. We walked with the numbers on us.<sup>58</sup>

Reducing children's identities to numbers in this way denied their identities and rendered them virtually anonymous. It minimized their uniqueness, indeed, their very humanity. There is an intimate relationship between a name and the self.<sup>59</sup> Name changes can have long-term psychological effects, and denying a person a name can cause profound life-long psychological damage. It is a form of emotional abuse, generating doubts about one's self-worth. In the case of the Canadian residential schools the denial of the students' indigenous names was part of the overall effort to erase their indigenous identities. The official Canadian policy was to eliminate Indigenous persons by assimilating them within white society, rather than the American approach of extermination.<sup>60</sup> "In other words, the extinction of the Indians as Indians is the ultimate end" of Canadian Indian policy.<sup>61</sup>

## 2. De-Hairing

An essential step in the process of extinguishing the students' Indigenous identity was removal of their long hair. Upon a child's arrival, a school official would cut the child's hair immediately, leaving barely any left. The given reason was always health-related; white officials assumed that Indigenous people's long hair carried lice. The real reason was assimilation within white society. The overall goal was to have the students groomed to look like middle-class white students in urban Canada.<sup>62</sup>

The loss of their hair was a traumatic event for the children. Long hair is an important aspect of Indigenous cultural identity. Native peoples consider long hair sacred, and it is significant to who they are as individuals, families, and communities. Part of the symbolic significance of long hair is establishing a connection with the Earth, whose own hair, prairie grass, is long.<sup>63</sup> Braided hair represents union with the infinite. Moreover, it symbolizes the strength of community: single strands are weak and easily broken, whereas a braid of many strands together is strong.<sup>64</sup> Hair is cut when there is a death in the immediate family. It is an outward symbol of the deep sadness and a physical reminder of the loss. When an Indigenous person's hair is cut, it is treated with respect, placed in a flowing river or buried.<sup>65</sup> It is against this background that the students' experiences upon arriving at the residential schools constituted a further taking of their identities. Campbell

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<sup>58</sup> *Id.* at 35.

<sup>59</sup> See Darrel W. Drury & John D. McCarthy, *The Social Psychology of Name Change: Reflections on a Serendipitous Discovery*, 43 SOC. PSYCH. Q. 310, 310 (1980).

<sup>60</sup> MILLER, *supra* note 13, at 184.

<sup>61</sup> MILLER, *supra* note 13, at 184–85 (quoting Allan G. Harper, *Canada's Indian Administration: Basic Concepts and Objectives*, 5 AM. INDIGENA 119, 127 (1945)).

<sup>62</sup> MILLER, *supra* note 13, at 195.

<sup>63</sup> El Rubio, *Long Hair in Native American Culture*, THE LONG HAIRS (Oct. 16, 2016), <https://blog.thelonghairs.us/long-hair-native-american-culture> [<https://perma.cc/7L2T-TYF9>].

<sup>64</sup> Barbie Stensgar, *The Significance of Hair in Native American Culture*, SISTER SKY (Jan. 4, 2019), <https://sistersky.com/blogs/sister-sky/the-significance-of-hair-in-native-american-culture> [<https://perma.cc/P3VH-U38Q>].

<sup>65</sup> El Rubio, *supra* note 63.

Papequash's testimony about his de-hairing illustrates the typical process that indigenous children experienced. He testified:

[A]fter I was taken there they took off my clothes and then they deloused me. I didn't know what was happening but I learned about it later, that they were delousing me; 'the dirty, no-good-for-nothing savages, lousy.' And then they cut off my beautiful hair. You know and my hair, my hair represents such a spiritual significance of my life and my spirit. And they did not know, you know, what they were doing to me. You know and I cried and I see them throw my hair into a garbage can, my long, beautiful braids. And then after they deloused me then I was thrown into the shower, you know, to go wash all that kerosene off my body and off my head. And I was shaved, bald-headed.<sup>66</sup>

Helen Harry's hair was braided, and her braids were treated like trash:

And I remember not wanting to cut my hair, because I remember my mom had really long hair, down to her waist. And she never ever cut it, and she never cut our hair either. All the girls had really long hair in our family. And I kept saying that I didn't want to cut my hair, but they just sat me on the chair and they just got scissors and they just grabbed my hair, and they just cut it. And they had this big bucket there, and they just threw everybody's hair in that bucket.<sup>67</sup>

She continued that "there was other girls that were upset about their hair. They were mad and crying that they had to get their hair cut."<sup>68</sup> Victoria Boucher-Grant had a similar experience:

And they, they took my braids, and they chopped my, they didn't even cut it, they just, I mean style it or anything, they just took the braid like that, and just cut it straight across. And I remember just crying and crying because it was almost like being violated, you know, like when you're, when I think about it now it was a violation, like, your, your braids got cut, and it, I don't know how many years that you spent growing this long hair.<sup>69</sup>

Bernice Jacks had been proud of her long hair. She testified, "My mom used to braid it and French braid it and brush it. And my sister would look after my hair and do it."<sup>70</sup> When she arrived at her school a staff member promptly sat her down and cut her hair.

And I sat there, and I could hear, I could see my hair falling. And I couldn't do nothing. And I was so afraid my mom . . . I wasn't thinking about myself.

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<sup>66</sup> THE SURVIVORS SPEAK, *supra* note 3, at 32.

<sup>67</sup> *Id.* at 40.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 41.

<sup>70</sup> *Id.* at 40.

I was thinking about Mom. I say, “Mom’s gonna be really mad. And June is gonna be angry. And it’s gonna be my fault.”<sup>71</sup>

Many other Indigenous school survivors testified to similar effect. Beyond losing their hair, what they all shared was a feeling of being violated, not simply physically but spiritually as well. To most white people, hair is just hair, a matter of style but little else. For Indigenous people, hair is much more than that. De-hairing was another aspect of the complete process of identity erasure. Just as much as taking their names, taking the children’s hair deprived them of their individuality, attempting to transform them into someone other than who and what they were. The taking was not simply of hair but of the children’s identity and their culture.

## II. NAME- TAKING OF AFRICAN ENSLAVED PERSONS AND NAME-TAKING BY AFRICAN AMERICANS

The subject of naming of African enslaved persons is a highly complex and somewhat controversial one. Surprisingly, the historical development of racialized names has received relatively little scholarly attention.<sup>72</sup> In the literature that does exist scholars disagree about naming practices of enslaved persons, who controlled them, the owners or the enslaved persons, and what those practices were.<sup>73</sup> Practices almost certainly varied, and archival records are not always available. So, generalizations are hazardous.

Legally, enslaved people remained nameless from the time of their capture until their purchase by American owners. As one analyst points out, the naming and renaming of new enslaved persons upon their arrival from Africa was, for their owners, an integral part of taking possession.<sup>74</sup> One owner in the colonial Chesapeake Bay area alluded to this fact, stating “I nam’d them here & by their names we can always know what sizes they are & we repeated them so often to them that everyone knew their names & would readily answer to them.”<sup>75</sup>

Not all African captives lost their African names upon enslavement. In an unknown number of cases, names were the locus of resistance, as captives struggled to retain some form of their African identity even as their white captors tried to obliterate all such traces of their heritage.<sup>76</sup> Eighteenth-century slaveowners often thrust upon their enslaved person classical or literary names such as Pompey, Cato, Hercules, and Othello. Ira Berlin refers to such naming as “a kind of cosmic jest: the more insignificant the person in the eyes of

<sup>71</sup> *Id.* at 40–41 (internal quotations omitted).

<sup>72</sup> See Trevon Logan, Lisa D. Cook, & John Parman, *The Antebellum Roots of Distinctively Black Names 2* (Nat’l Bureau of Econ. Rsch., Working Paper No. 28101, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3731271](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3731271) [<https://perma.cc/PA7P-F2XS>].

<sup>73</sup> Williamson, *supra* note 7.

<sup>74</sup> Richard D. E. Burton, *Names and Naming in Afro-Caribbean Cultures*, 73 *NEW W. INDIAN GUIDE* 35, 41 (1999).

<sup>75</sup> IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST CENTURIES OF SLAVERY IN AMERICA* 41 (1998).

<sup>76</sup> See Liseli A. Fitzpatrick, *African Names and Naming Practices: The Impact Slavery and European Domination Had on the African Psyche, Identity and Protest* ii–iii (2012) (M.A. thesis, Ohio State University).

the planters, the greater the name.”<sup>77</sup> Other owners gave their male enslaved persons anglicized names such as Will, Charles, and Ben, while women’s names such as Hannah, Sarah, Lucy, and Grace were common.<sup>78</sup> There is evidence that a significant percentage of enslaved persons from what is now Angola already had Christian baptismal names by the time of their enslavement.<sup>79</sup>

At least during the colonial period, a substantial number of enslaved persons in the Carolinas had African names such as Quamino, Gimbo, Musso, and Simba.<sup>80</sup> In some cases the survival of African names signified resistance. The reluctance to give up African names is indicated in advertisements for runaway enslaved persons. The advertisements listed both the person’s African and owner-imposed English names, such as the notice for “‘TWO NEW NEGRO YOUNG FELLOWS; one of them . . . calls himself GOLAGA, the name given him here ABEL; the other a black fellow . . . calls himself ABBROM, the name given him here BENNET.’”<sup>81</sup> In other cases, African names did not signify resistance. Some slave owners appropriated African names as slave names, and to some extent, these names acquired a pejorative meaning among Blacks as well as whites.<sup>82</sup> The most common sources of African names were so-called “day-names,” which were a set of fourteen names, male and female, used in the custom of naming a child for the day of the week on which he or she was born.<sup>83</sup> Over time these day names became anglicized. A grandfather’s Cudjo became the father’s Monday whose own son might be Joe.<sup>84</sup>

The control that enslaved persons had in naming children increased with the succession of generations. The evidence indicates that most enslaved persons freely named their own children.<sup>85</sup> At least in some regions of the country this pattern may have varied over time as owners named the children of enslaved persons prior to the end of the eighteenth century.<sup>86</sup> Fathers often gave their own names to their sons.<sup>87</sup> Alternatively, enslaved persons named children for other kin, ancestors, or lateral kin.<sup>88</sup> Some enslaved persons adopted the given names of their owners or their wives, hoping to find favor with

<sup>77</sup> BERLIN, *supra* note 75, at 41. Berlin points out that slave owners presumably were unaware of the irony that some of these names actually reinforced, rather than undermined, the slaves’ sense of themselves. For example, the word “heke” means “large wild animal” in the African language Mende. *See id.* at 42.

<sup>78</sup> JUSTIN KAPLAN & ANNE BERNAYS, *THE LANGUAGE OF NAMES: WHAT WE CALL OURSELVES AND WHY IT MATTERS* 77 (Stenhouse ed., 1999) (citing NEWBELL NILES PUCKETT, *BLACK NAMES IN AMERICA: ORIGINS AND USAGE* (Murray Heller ed., 1975)).

<sup>79</sup> *See generally* Florita Cuhanga António Telo, *Tell Me Your Name and I Will Tell You Who You Are: The Construction of Names in Angola and the Colonial Influence*, in *NAMING AFRICANS: ON THE EPISTEMIC VALUE OF NAMES* 181 (Oyèrónké Oyèwùmí & Hewan Girma eds. 2023).

<sup>80</sup> Inscoc, *supra* note 5, at 532.

<sup>81</sup> *Id.* at 533 (quoting Allen W. Read, *The Speech of Negroes in Colonial America*, 24 J. NEGRO HIST. 251 (1939)).

<sup>82</sup> Susan Benson, *Injurious Names: Naming, Disavowal, and Recuperation in the Contexts of Slavery and Emancipation*, in *THE ANTHROPOLOGY OF NAMES AND NAMING* 178, 193 (Gabriele vom Bruck & Barbara Bodenborn eds., 2006).

<sup>83</sup> KAPLAN & BERNAYS, *supra* note 78, at 78–79.

<sup>84</sup> *Id.* at 79.

<sup>85</sup> *See* Inscoc, *supra* note 5, at 529; Logan, Cook, & Parman, *supra* note 72, at 3; Cheryll A. Cody, *There Was No “Absalom” on the Ball Plantations: Slave-Naming Practices in the South Carolina Low Country*, 92 AM. HIST. REV. 563, 595 (1987).

<sup>86</sup> Cody, *supra* note 85, at 579.

<sup>87</sup> *See* Inscoc, *supra* note 5, at 529.

<sup>88</sup> *See* Benson, *supra* note 82, at 193.

them. One mother christened her daughter Annie Virginia Cordelia Idella, receiving in turn a small gift from each of the women who had contributed to the name.<sup>89</sup> She promptly proceeded to call her daughter Tumps, manipulating the naming process to her own advantage.

For most people, their names are not simply their own. They are conferred upon them. The design of the name is to bestow some measure of honor, beauty, or distinction upon the child. In the case of the African enslaved persons, the benignity of their new names betrayed their design: erasure of African identity and culture. While the initial naming was an act of grace, the renaming was an act of violence.

Renaming was not always a violent exertion of control. Upon emancipation, many enslaved persons freely chose their own surnames. In many cases, they chose their owner's last name, if for no other reason than convenience. Many other formerly enslaved persons took names that reflected their new status, names such as "Freeman," "Newman," and "Liberty."<sup>90</sup> A substantial number of formerly enslaved persons exercised their new freedom by adopting surnames that had personal meaning to them.

Martin Jackson was one such person. Jackson lived a long and interesting life. Born into bondage in 1847, the property of one Alvy Fitzpatrick, Jackson had the distinction of serving in both the Civil War and World War I, both times as a cook.<sup>91</sup> When he was ninety years old, he stated that his earliest memory was when his old "boss" presented him to the boss' son as his property. Jackson was then five years old, and his new owner was just two.<sup>92</sup> His mother drowned herself when he was a small child. Jackson stated that although he did not know her reason for committing suicide, "it was said she started to lose her mind and preferred death to that."<sup>93</sup>

Regarding his own name, Jackson told an interviewer:

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[n] 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.<sup>94</sup>

The scholar Richard Burton, borrowing from Michel de Certeau, distinguishes between a culture of resistance and a culture of opposition. The latter is "derived from a dominant culture that, by definition, it cannot get entirely outside of in order to resist it, but

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<sup>89</sup> See KAPLAN & BERNAYS, *supra* note 78, at 79.

<sup>90</sup> Fitzpatrick, *supra* note 76, at 57. One source suggests that most of the formerly enslaved persons who took such names were veterans of the Civil War who fought in the Union Army. Burton, *supra* note 74, at 42.

<sup>91</sup> *Slave Narratives*, TEX. GENEALOGY TRAILS, <http://genealogytrails.com/tex/state/slavenarra7.htm> [https://perma.cc/NV8A-5EKX] (last visited Sept. 15, 2023).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* The interview was part of the Federal Writers' Project of the Depression-era Works Progress Administration. ForeverFree, *Martin Jackson: Recollections of a Confederate Servant*, CIVIL WAR TALK (Sept. 1, 2014), <https://civilwartalk.com/threads/martin-jackson-recollections-of-a-confederate-servant.103774/> [https://perma.cc/74H5-55R6].

which it can only oppose from within by all the means of manoeuvre, manipulation, mimicry . . . .”<sup>95</sup> Martin Jackson’s account of his name is understandable in terms of such an oppositional culture. Jackson could not escape the government culture that demanded that everyone have names, but he refused to take the name of his former oppressor. Instead, he reached back to his African roots but transformed his traditional name into an Americanized version.

Frederick Douglass did his own name transformation without turning to his African sources. Frederick Douglass was born an enslaved person in Maryland in 1818 on Captain Aaron Anthony’s plantation to Harriet Bailey—who took the name Bailey from her own parents. His mother named him Frederick Augustus Washington Bailey.<sup>96</sup> In his escape to freedom, he took the disguise name “Stanley.”<sup>97</sup> When he reached New York, he initially took the name Johnson, but discovering that there were many people by that name, changed it to Douglass when he reached New Bedford, Massachusetts.<sup>98</sup> “Frederick” he would keep, however, for it was his core self. “I must hold on to that, to preserve a sense of my identity.”<sup>99</sup>

“Slavery does away with fathers,” he wrote, “as it does away with families.”<sup>100</sup> And so, it seems, it does with names, too. In Douglass’ case, however, the sweeping away was an act of his own agency, an exercise of freedom to declare his own identity as a free man.

Post-Emancipation naming practices changed in important ways. Renaming became common as formerly enslaved persons sought to establish their own identities. Various sources supplied new names. The conventional wisdom is that one source was the surnames of prominent Americans, especially politicians, although there are data challenging this conventional wisdom.<sup>101</sup> “Washington” was perhaps the most common of these names. Ninety percent of people recorded in the 2000 census with the surname “Washington” were African American.<sup>102</sup>

One such new Washington was the famous Booker T. Washington (1856-1915). Born into slavery on a Virginia plantation, Washington would go on to become one of the most important and influential African Americans of his time. Washington came upon his name in the same way as Frederick Douglass had—through an act of his own creation. As a small child on the plantation, he was simply called “Booker.” Not until he started school did he realize that most children, as he wrote in his autobiography, “had least two names

<sup>95</sup> Burton, *supra* note 74, at 55.

<sup>96</sup> Benson, *supra* note 82, at 194.

<sup>97</sup> FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE 81 (John R. McKivigan, Peter P. Hinks, & Heather L. Kaufman eds., Yale Univ. Press 2016) (1846).

<sup>98</sup> *Id.* He changed it at the suggestion of Nathan Bedford, who helped Douglass and his wife upon their arrival in New Bedford. Johnson was inspired by Sir Walter Scott’s poem *Lady of the Lake*, which he had recently read.

<sup>99</sup> *Id.* at 112.

<sup>100</sup> FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 48 (Celeste-Marie Bernier ed., Oxford Univ. Press 2019) (Miller, Orton & Mulligan 1855).

<sup>101</sup> See Lisa D. Cook, Trevon D. Logan, & John M. Parman, *Distinctively Black Names in the American Past*, (Nat’l Bureau of Econ. Rsch., Working Paper No. 18802, 2013), [https://papers.ssrn.com/sol3/papers.cfm?aabstract\\_id=2219062](https://papers.ssrn.com/sol3/papers.cfm?aabstract_id=2219062) [<https://perma.cc/K4P3-FMF6>].

<sup>102</sup> Henry Louis Gates Jr. & Meaghan E.H. Siekman, *Tracing Your Roots: Were Slaves’ Surnames Like Brands?*, THE ROOT (June 16, 2017), <https://www.theroot.com/tracing-your-roots-were-slaves-surnames-like-brands-1796141007> [<https://perma.cc/RL4B-DCKX>].



and some of them indulged in what seemed to me the extravagance of having three.”<sup>103</sup> When he was asked for his full name, “I calmly told him my name was ‘Booker Washington,’ as if I had been called by that name all my life . . . .”<sup>104</sup> Later in life he learned that his mother had given him the name “Booker Taliaferro” soon after he was born, but somehow the “Taliaferro” name had been lost. “[A]s soon as I found out about it I revived it, and made my full name ‘Booker Taliaferro Washington.’ I think there are not many men in our country who have had the privilege of naming themselves in the way I have.”<sup>105</sup>

Not many, perhaps, but Booker T. Washington was not the only formerly enslaved person to create his own name. As we have seen, Frederick Douglass was among those who had that privilege. Perhaps he and Washington were among those whom Washington would later say that with the end of slavery “a feeling got among the colored people that it was far from proper for them to bear the surnames of their former owners, and a great many of them took other surnames. This was one of the first signs of freedom.”<sup>106</sup>

Renaming frequently led to multiple and at times confusing identities for formerly enslaved persons. This ambiguity of identity is apparent in the case files of the U.S. Pension Bureau. This agency, a part of the Department of the Interior, administered an enormous pension system for Union veterans of the Civil War. African Americans who had served in the Union army and navy and their immediate families were able to apply for these pensions on an equal basis with whites. Like their white counterparts, African American veteran applicants were required to provide various information about themselves, including, of course, their identities. All of this documentation is now in the holdings of the National Archives.<sup>107</sup>

One of the more interesting cases in those files is that of Dick Barnett, a veteran who served in the Union army's 77th U.S. Colored Infantry (USCI). When Barnett applied for a pension, he claimed he served under the name “Lewis Smith” but was unable to provide satisfactory written evidence to back up his claim.<sup>108</sup> Unlike their white counterparts, whose greater social and material advantages typically enabled them to generate ample written evidence about their lives, Black Civil War veterans usually left no paper trail.<sup>109</sup> Their names seldom appeared in records, and they scarcely left any personal records themselves. In lieu of any writings, African American veterans depended on in-depth interviews of formerly enslaved persons by special examiners for the purpose of clarifying information on issues ranging from military service, identity, health and disability, and marital and family relationships, to employment, economic circumstances, and previous ownership. Dick Barnett was questioned by these Pension Bureau interviewers.

Barnett began his life story by telling the interviewer:

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<sup>103</sup> BOOKER T. WASHINGTON, *UP FROM SLAVERY: AN AUTOBIOGRAPHY* 17 (Philip Smith ed., Dover Publications 1995) (1901).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 11.

<sup>107</sup> Donald R. Shaffer & Elizabeth Regosin, *Voices of Emancipation: Union Pension Files Giving Voice to Former Slaves*, *PROLOGUE MAG.* (2005), <https://www.archives.gov/publications/prologue/2005/winter/voices.html> [<https://perma.cc/R572-9YW2>].

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

I was born in Montgomery Co. Ala. The child of Phillis Houston, slave of Sol Smith. When I was born my mother took the name of Phillis Smith and I took the name of Smith too. I was called mostly Lewis Smith till after the war, although I was named Dick Lewis Smith—Dick was the brother of John Barnett whom I learned was my father after I got back from the war, when my mother told me that John Barnett was my father.<sup>110</sup>

That Barnett's father was white is hardly surprising. Nor is it surprising that the Black veteran did not learn of his father's identity until much later in life, as there were common experiences of enslaved persons. More interesting for present purposes is the fluidity of his identity as he describes it. We find here three name variations. While he was an enslaved person he was known as Lewis Smith, but also as Dick Lewis Smith. After the war, he settled on yet a third name, Dick Lewis Barnett. What is particularly interesting is the fact that he took the name of his father after the war, even though John Barnett was white and apparently never acknowledged him. Dick Barnett later told his interviewer,

I was wearing the name of Lewis Smith, but I found that the negroes after freedom were taking the names of their father like the white folks. So, I asked my mother, and she told me my father was John Barnett, a white man, and I took up the name of Barnett.<sup>111</sup>

One wonders why he took the name of a white man and a man with whom he apparently had no close relationship. To Dick Barnett, being a free man meant taking the name of his father, regardless of the fact that he had been unaware of that man's identity until after the war.<sup>112</sup>

Dick Barnett's decision was abnormal. As we have seen, the more typical practice among formerly enslaved persons was to take a new name, motivated perhaps by Booker T. Washington's "feeling" that it was not proper to assume their former owners' surname. Ralph Ellison later made the same point but more pointedly in a famous 1964 essay:

[W]e must first come into possession of our own names. For it is through our names that we place ourselves in the world. Our names, being the gift of others, must be made our own. . . . When we are reminded so constantly that we bear, as Negroes, names originally possessed by those who owned our enslaved grandparents, we are apt . . . to be more than ordinarily concerned with the veiled and mysterious events, the fusions of blood, the furtive couplings, the business transactions, the violations of faith and

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Dick Barnett's pension application was approved, and he collected money for six years until his death. As his widow, Eliza, reported in an affidavit in her pension application, her husband "was feeble [sic] minded in his last days and wandered away from home on Aug. 6, 1918, and fell into the river and was drowned and was found early in the day of Aug. 7, 1918." *Id.*

loyalty, the assaults; yes, and the unrecognized and unrecognizable loves through which our names were handed down to us.<sup>113</sup>

Naming is a topic central to Ellison's most famous novel, *Invisible Man*,<sup>114</sup> published in 1952. The narrator is not only "invisible" but also nameless, at least to the reader. At one point, after he has had electric shock treatment, he finds that even he has forgotten his own name. The shock therapy has wiped away his entire memory. He is recruited by The Brotherhood (i.e., the Communist Party) and given a piece of paper with a name written on it. He is told that this is his new identity, and he is to commit it to memory. Frederick Douglass comes to mind for him:

Douglass came north to escape and find work in the shipyards; a big fellow in a sailor's suit who, like me, had taken another name. What had his true name been? Whatever it was, it was as *Douglass* that he became himself, defined himself. And not as a boatwright as he'd expected, but as an orator. Perhaps the sense of magic lay in the unexpected transformations. "You start Saul, and you end up Paul," my grandfather had often said.<sup>115</sup>

The narrator in *Invisible Man* eventually burns the slip of paper, overwhelmed by a feeling of self-loathing that he had allowed others to have "named me and set me running with one stroke of the pen."<sup>116</sup>

Names and renaming are at the core of another major novel, Toni Morrison's *Song of Solomon*,<sup>117</sup> published in 1977. The book illustrates the power of names to define and possess those whom they identify. The protagonist inherits the bizarre family name Macon Dead, bestowed years earlier by a drunken Yankee soldier. He is derisively nicknamed "Milkman" because his mother continues to breastfeed him at age four. Similar such nicknames prevail for the entire cast of characters, which is extensive. Railroad Tommy and Hospital Tommy are named after their respective careers. Guitar Bains is named after his love of musical instruments. The names of other members of the Dead family are drawn from the Bible. These include Pilate, Hagar, First Corinthians, and Magdalena. Most of the novel's characters are unable to recognize or accept their own personal and cultural

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<sup>113</sup> RALPH ELLISON, *Hidden Name and Complex Fate*, in *THE COLLECTED ESSAYS OF RALPH ELLISON: REVISED AND UPDATED 192–93* (John F. Callahan ed., 2003).

<sup>114</sup> RALPH ELLISON, *INVISIBLE MAN* (1952). The book won the National Book Award for Fiction in 1953, making Ellison the first African American to win that award. R.W.B. Lewis called it "the finest and richest work of fiction by an American novelist since the end of the second war." See KAPLAN & BERNAYS, *supra* note 78, at 82.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 83.

<sup>117</sup> TONI MORRISON, *SONG OF SOLOMON* (1977). Morrison herself was renamed; born Chloe Ardelia Wofford, she took the baptismal middle name Anthony (after St. Anthony of Padua) when she was baptized Catholic at age 12. Lyn Innes, *Toni Morrison Obituary*, *THE GUARDIAN* (Aug. 6, 2019), <https://www.theguardian.com/books/2019/aug/06/toni-morrison-obituary> [https://perma.cc/TG92-5JQQ]. That became the basis for her nickname, Toni. See JOHN N. DUVALL, *THE IDENTIFYING FICTIONS OF TONI MORRISON: MODERNIST AUTHENTICITY AND POSTMODERN BLACKNESS* 38 (2000). She later married Harold Morrison and took his last name. Innes, *supra*. They subsequently divorced. *Id.* The book was selected for the National Book Critics' Circle Award and among the works cited in awarding Morrison the 1993 Nobel Prize in Literature. *Id.*

identities and this problematizes their relations with others, with whom they can relate only in selfish or distorted ways.

“Power for Morrison is largely the power to name, to define reality and perception.”<sup>118</sup> Cynthia Davis points out that throughout the novel “the constant censorship of and intrusion on black life from the surrounding society is emphasized not by specific events so much as by a consistent pattern of misnaming.”<sup>119</sup> The upshot of this pattern of misnaming is that “a whole group of people have been denied the right to create a recognizable public self—as individuals or as a community.”<sup>120</sup>

If the names used in *Song of Solomon* were unusual, the same was not true for many African Americans following Emancipation. More than a few newly freed Blacks adopted familiar names from white society.<sup>121</sup> Names that had been rejected as stigmas during slavery took on new meaning to a now-free people. Assimilation, at least in nomenclature, became a way of looking forward rather than remembering the past.

Still, distinctive Black names persisted. No great shift to distinctively African American names occurred in the late 1960s, as has sometimes been argued.<sup>122</sup> This is not to say that no changes in Black naming occurred beginning in the late 1960s. This was a period of broad social and political change, of course. For African Americans it was a time of intensified social protest, marked by the rise of the Black Power movement and a greater emphasis on distinctive African American culture. Beginning in the 1960s, the Nation of Islam encouraged members and non-members alike to toss off their “slave names” and to adopt new names. Malcolm Little, also known as “Detroit Red” became Malcolm X.<sup>123</sup> LeRoi Jones became Amiri Baraka,<sup>124</sup> and, of course, Cassius Clay became Muhammad Ali.<sup>125</sup> The change was hardly limited to Black Muslims. Between 1968 and 1977, a clear trend to distinctively Black names emerged.<sup>126</sup> Many seemingly new names have as their bases existing names with prefixes and spelling alterations. So, “Sean” becomes “DaShawn.” Other names are even more creative, such as Shalondra and Shaday, Jenneta and Jonelle, Michandra and Milika.

What changed beginning in the late twentieth century were the names, not the distinctiveness of them. As we have seen,<sup>127</sup> distinctive names were common among African Americans in the nineteenth century, particularly prior to Emancipation but even thereafter. For example, census data from 1900 show that of the registered men whose first names were Booker, 85% were Black. In the 1920 census, that figure became 99.5%.<sup>128</sup> Similarly, of those named Prince, in 1900, 78% were Black, and in 1920, the percentage declined to 69%. The conclusion that emerges from these data is that the prevalence of

<sup>118</sup> Cynthia A. Davis, *Self, Society, and Myth in Toni Morrison's Fiction*, 23 CONTEMP. LITERATURE 323, 323 (1982).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 327.

<sup>121</sup> See Inscoc, *supra* note 5, at 553.

<sup>122</sup> See Roland G. Fryer, Jr. & Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 Q. J. ECON. 767, 770 (2004).

<sup>123</sup> MANNING MARABLE, MALCOLM X: A LIFE OF REINVENTION 96 (2011).

<sup>124</sup> KAPLAN & BERNAYS, *supra* note 78, at 87.

<sup>125</sup> *Id.* at 85.

<sup>126</sup> See Fryer, Jr. & Levitt, *supra* note 122, at 782.

<sup>127</sup> See Fitzpatrick, *supra* note 76; see also *supra* note 90.

<sup>128</sup> Cook, Logan, & Parman, *supra* note 101, at tbl. 2.

distinctively African American names was not a late twentieth or twenty-first century phenomenon.

Nevertheless, there was change. Booker and Purlie gave way to Rasheed and Tyrone.<sup>129</sup> Among women, the popularity of Biblical names such as Hagar largely disappeared, replaced by names such as Tamika and LaToya.<sup>130</sup> Strikingly, Molly, a popular white name, appears as a Black name in only nine of 2,248 cases in one study.<sup>131</sup>

What is characteristic of distinctively Black names since the late 1960s is their innovativeness. Beginning in the late twentieth century, innovation in first names is far more common among Blacks than among whites.<sup>132</sup> According to one major study, for example, while the percentage of innovative names for white girls born in Illinois between 1916 and 1989 remained more or less steady, at 25%, the comparable percentage for African American girls rose from 31% to 55% after peaking at 60% in 1980.<sup>133</sup>

Since the 1970s, it has become more common for African American parents to create names for their babies by combining their own set of preferred sounds and syllables. Popular prefixes such as *Sha*, *La*, *Ka*, *Shan*, or *Ty*, are combined with suffixes such as *isha*, *ika*, *onda*, *ae*, *ique*, or *ice*.<sup>134</sup> In the 1970s and 1980s, the most popular prefix was *La*, and Lashonda and Lashay were popular names. In the 1990s, *La* was replaced by *Sha* as the most popular prefix, leading to such names as Shameka, Shanae, and Shaniqua. By 2004, names beginning with *Ja* had come into vogue, so Jakayla, Jamya, and Janiyah became popular. But many names did not follow these conventions and were unique. Female names like Azanae, Kyaire, and Zatterria have become more common.<sup>135</sup>

Yet even these innovative names strongly tend to follow certain social conventions. The primary purpose of such convention is the communication of the child's gender. Just as standardized names such as John and Mary readily convey a person's gender, so too do recent African American innovative names. In one major study, white and African American participants were asked to guess the genders of certain innovative names, and the majority guessed correctly.<sup>136</sup> Moreover, they had an equal ability to guess the names. This suggests that even innovative names use existing linguistic customs that enable gender-signaling. For example, nearly 95% of respondents correctly guessed that the name Lamecca is a female name.<sup>137</sup> It turns out that the *a*-ending is a powerful clue to gender. So, Timitra, Maleka, and Sukoya are all female names, and in all three cases, a large

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<sup>129</sup> See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* app. tbl. 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. w9873, 2003), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=428367](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=428367) [<https://perma.cc/R7VK-XV8Z>].

<sup>130</sup> *Id.*

<sup>131</sup> Fryer, Jr. & Levitt, *supra* note 122, at 770 n.5.

<sup>132</sup> Stanley Lieberman & Kelly S. Mikelson, *Distinctive African American Names: An Experimental, Historical, and Linguistic Analysis of Innovation*, 60 AM. SOC. REV. 928, 932 (1995).

<sup>133</sup> *Id.* at 930 fig. 1.

<sup>134</sup> Cleveland Kent Evans, *Baby-Naming Trends: African-American Names*, HOWSTUFFWORKS (June 13, 2006), <https://lifestyle.howstuffworks.com/family/parenting/babies/baby-name-trends-ga3.htm> [<https://perma.cc/B9G6-TV6D>].

<sup>135</sup> See Lieberman & Mikelson, *supra* note 132, at 930 fig. 1.

<sup>136</sup> *Id.* at 934.

<sup>137</sup> *Id.* at 935.

percentage of respondents correctly guessed the gender.<sup>138</sup> By contrast, Joshua is the only male name in the top 100 ending in an *a*.

Another interesting and revealing name is Chanti. In the same study, 90% of respondents guessed it was a female name, and that is incorrect.<sup>139</sup> There are two possible linguistic cues that misled respondents. One is the initial *Ch* sound. The respondents may have assumed that *Ch* was pronounced like *Sh*. Names beginning with *Sh* tend to be female names. Of the leading recent African American females, four begin with *Sh* (Sharon, Shamika, Sheri, and Sheena), and three begin with *Ch* (Chantel, Charlene, and Chanel – all of which are pronounced like *Sh*).<sup>140</sup> None of the most popular male names begins with *Sh*.<sup>141</sup> The other possible linguistic cue is the *i* ending. This ending occurred only among the most popular female names, for both African Americans and whites.

These findings strongly suggest the existence of a widely shared assumption that names will be gender specific.<sup>142</sup> The data also indicate that certain sounds tend to be associated with particular genders. Hence, when parents choose inventive names for their children certain sounds are apt to be more appealing to them taking the child's gender into account. This is certainly not to say that androgenous names do not exist. They do. Studies suggest, however, that they are not nearly as common as gender-based names.<sup>143</sup>

The major insight of these findings is that the imagination that has given rise to recent innovative Black names is not entirely free. It has been bounded by cultural practices that cross racial lines. Some Black names do have African or Arabic roots, but even these tend to conform to existing cultural practices, especially regarding gender.

There is another dimension of the naming of African Americans that deserves attention. The question of how a subgroup that constitutes 12.4% of the American population<sup>144</sup> designates itself has evolved and been a matter of controversy for many years. In the mid- to late nineteenth century, the dominant term was “colored.” It was used both by whites and by African Americans,<sup>145</sup> although during the Jim Crow era whites used it as a slur.<sup>146</sup> One reason why the term found acceptance among nineteenth century African Americans is that it reflected no connection between them and Africa. They considered themselves no more African than whites were European.<sup>147</sup>

For the short time after the Civil War and during Reconstruction, the term “Negro” was used to defiantly assert pride of race,<sup>148</sup> but it wasn't until the late nineteenth century

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 937.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* The same pattern occurs for whites, albeit on a lesser scale.

<sup>142</sup> *Id.* at 939.

<sup>143</sup> *Id.* at 940.

<sup>144</sup> Nicholas Jones, Rachel Marks, Roberto Ramirez, & Merarys Ríos-Vargas, *2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html> [<https://perma.cc/5UYX-HXXM>].

<sup>145</sup> Tom W. Smith, *Changing Racial Labels: From “Colored” to “Negro” to “Black” to “African American,”* 56 PUB. OP. Q. 496, 497 (1992).

<sup>146</sup> Anita Kalunta-Crumpton, *The Inclusion of the Term ‘Color’ in Any Racial Label Is Racist, Is It Not?*, 20 ETHNICITIES 115, 116 (2020).

<sup>147</sup> See BRUCE G. TRIGGER, 15 HANDBOOK OF NORTH AMERICAN INDIANS: NORTHEAST 290 (1978).

<sup>148</sup> Lerone Bennett, Jr., *What's In a Name? Negro vs. Afro-American vs. Black*, 26 REV. GEN. SEMANTICS 399, 403 (1969).

that “Negro” grew in acceptance. Influential Black leaders such as Booker T. Washington and W. E. B. DuBois led the push to substitute “Negro” for “colored.”<sup>149</sup> In 1919, the *Negro Year Book* reported:

There is an increasing use of the word “Negro” and a decreasing use of the words “colored” and “Afro-American” to designate us as a people. The result is that the word “Negro” is, more and more, acquiring a dignity that it did not have in the past.<sup>150</sup>

This was accompanied by a campaign to capitalize “Negro,” and by 1930, the New York Times announced in an editorial that it would print the word “Negro” with a capital letter.<sup>151</sup> The editorial stated, “It is not merely a typographical change; it is an act in recognition of racial self-respect for those who have been for generations in ‘the lower case.’”<sup>152</sup> There was some pushback against the term “Negro,” however. Some feared that it would be conflated with the “n” word. In a well-known 1928 letter from a high school student, Roland A. Barton, to W. E. B. DuBois, the author argued, “The word ‘Negro,’ or ‘n---er,’ is a white man’s word to make us feel inferior.”<sup>153</sup>

Despite these concerns, the tide turned in favor of “Negro.” The term was seen to have several advantages over “colored.” For one, it was more specific than “colored.” The primary advantage was that it signified, both to African Americans and to whites, a shift in thinking about racial progress. Old traditions that were captured in the term “colored” were thrown aside, to be replaced by new attitudes and social practices.<sup>154</sup> The replacement of “Negro” for “colored” was gradual, and even by the mid-twentieth century “colored” continued to be used commonly.<sup>155</sup> By the 1950s, however, “Negro” (with the capitalized spelling) had gained the dominant place in usage, at least among Black organizations and the media.

With changes in African American culture in the late 1960s and 1970s, yet another vocabulary shift occurred. Many in the Black community viewed the term “Negro” as denoting subservience and Uncle Tomism. The preferred term was “Black,” which was promoted as standing for racial pride.<sup>156</sup> The initial push came from more militant quarters such as Stokely Carmichael, leader of the Student Nonviolent Coordinating Committee (SNCC), whose book *Black Power* forcefully argued in favor of abandoning “Negro” for

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<sup>149</sup> *Id.* at 405.

<sup>150</sup> *Id.* at 404 (internal quotations omitted).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Letter from Roland A. Barton to W.E.B. Du Bois (Jan. 26, 1928) (on file with the University of Massachusetts Amherst Library), <https://credo.library.umass.edu/view/full/mums312-b178-i177> [<https://perma.cc/JE9Q-2JEM>].

<sup>154</sup> Smith, *supra* note 145, at 498.

<sup>155</sup> *Id.*

<sup>156</sup> Bennett, Jr., *supra* note 148, at 409–12.

“Blacks.”<sup>157</sup> The association of the term “Blacks” with more radical exponents led more centrist African Americans and Whites to be wary of it.<sup>158</sup>

There were advantages to “Black” that favored its adoption. One was the linguistic balance to “Whites” it provided. The argument was that if “White” was the correct term for that race, then “Black” was the proper term for African-Americans.<sup>159</sup> Another perceived advantage to the term was that it was the antonym to “White” and thus denoted a certain separatism from Whites. Finally, as the term “Black power” indicated, to many minds “Black” connoted power, which was precisely the desired message.

Although the change was gradual, especially among Whites, by the early 1980s, “Black” had become the preferred name.<sup>160</sup> By this point, the term had lost all its association with radicalism. As one author points out, “Black” was not merely a substitute for “Negro”; the term had helped to instill and maintain a sense of group consciousness, racial pride, and a hope for racial justice.”<sup>161</sup>

The final name change has been from “Black” to “African American.” The move to replace “Black” with “African American” began with a 1988 meeting of Black leaders in Chicago. The head of the National Urban Coalition proposed the switch, and the group endorsed it. Jesse Jackson announced,

Just as we were called colored, but were not that . . . is just as baseless. Just as you have Chinese Americans who have a sense of roots in China . . . or Europeans, as it were, every ethnic group in this country has a reference to . . . some historical, culture base . . . To be called African American has cultural integrity.<sup>162</sup>

As Rev. Jackson’s comments suggest, the implication of the shift from “Black” to “African American” is to shift from a racial base to a cultural or ethnic base. This was a highly contentious suggestion, one that has not gained widespread acceptance over time.

Nevertheless, the term “African American” gained appeal apart from assertions of a cultural basis. The term became accepted more quickly than any of the previous terms for Blacks.<sup>163</sup> Leaders such as Benjamin Hooks, head of the NAACP, approved it even though his organization did not change its name, and it gained considerable traction within the mainstream Black community.<sup>164</sup> The mass media quickly adopted the term, either using it on the same basis as “Black” or replacing “Black” with “African American.”<sup>165</sup> In a 2019 Gallup poll, the large majority of Black Americans said that the use of “Black” vs. “African

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<sup>157</sup> See generally KWAME TURE & CHARLES V. HAMILTON, *BLACK POWER: POLITICS OF LIBERATION IN AMERICA* (1992); see also Stokely Carmichael, *Black Power* (1966), <https://www.blackpast.org/african-american-history/speeches-african-american-history/1966-stokely-carmichael-black-power/> [<https://perma.cc/35F9-S5PW>].

<sup>158</sup> Smith, *supra* note 145, at 501.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 502.

<sup>161</sup> *Id.*

<sup>162</sup> Lillian Williams, *Blacks: Call Us African American*, CHI. SUN-TIMES, Dec. 20, 1988, at 1.

<sup>163</sup> Smith, *supra* note 145, at 509.

<sup>164</sup> *Id.* at 504 tbl. 2.

<sup>165</sup> *Id.* at 510.



American” does not matter to them.<sup>166</sup> Starting in 1997, the United States Government officially classified Black people as Black or African American.<sup>167</sup> Today, it seems, the two terms are used equally.

### III. NAME-AGGRESSIONS: NAME PROHIBITION, NAME MUTILATION, AND NAME DISCRIMINATION

Still today, not everyone controls the use of their own names. There are other name-aggressions that either directly prohibit the use of preferred names or involve speech acts that mutilate personal names. A particularly insidious form of name-aggression is discrimination on the basis of personal names. This Part examines these three forms of aggressions against personal names.

#### A. *State Prohibition of Names*

Owing to our cultural diversity, there is a wide variety of personal names in the United States. There are few legal restrictions on what name may be given to a person or what name a person may take. This tolerance extends far enough to allow one New Jersey man to name his son after Adolf Hitler.<sup>168</sup> Such freedom in naming is permitted by a New Jersey statute which provides, “The designation of a child’s name including the surname is the right of the child’s parent(s).”<sup>169</sup> Further, “the child may be given any chosen name(s) or surname.” Suppose, however, a parent wishes to name their child “Lućia,” a very common name, especially in the Latinx community. If the child lives in California, their name, as written, will not appear on their birth certificate. California prohibits the use of diacritical marks or accents on official documents. Over one-third of the state’s population is Hispanic, and diacritical marks and accents are used in many Hispanic names. Yet state law does not permit such marks to be used in important official records, including birth certificates.<sup>170</sup>

The law of names is surprisingly complex. Regarding parental choice of personal names, state law varies, with some states having few to no restrictions while many others impose various restrictions. Typically, states prohibit obscenities, numerals, pictograms, diacritical marks, and overly long names.

Some states also restrict parental choice of surnames, leaving others to have no restrictions at all. The most restrictive state laws require a child of a married couple to bear the surname of the husband.<sup>171</sup> However, if both the husband and the wife agree, the surname “may be the maiden name of the mother or a combination of the surname of the

<sup>166</sup> Lydia Saad, *Gallup Vault: Black Americans’ Preferred Racial Label*, GALLUP (July 13, 2020), <https://news.gallup.com/vault/315566/gallup-vault-black-americans-preferred-racial-label.aspx> [<https://perma.cc/U34P-F2K9>].

<sup>167</sup> See JESSE MCKINNON, U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: THE BLACK POPULATION: 2000 (2001), <https://www2.census.gov/library/publications/decennial/2000/briefs/c2kbr01-05.pdf> [<https://perma.cc/99G2-549L>].

<sup>168</sup> Lisa W. Foderaro, *Naming Children for Nazis Puts Spotlight on the Father*, N.Y. TIMES, Jan. 20, 2009, at A28. The same man named his daughters “Honszlynn Hinler Jeannie Campbell,” in homage to Heinrich Himmler, and “JoyceLynn Aryan Nation Campbell.” *Id.*

<sup>169</sup> N.J. ADMIN. CODE § 8:2-1.4 (2022).

<sup>170</sup> CAL. DEP’T OF PUB. HEALTH, BIRTH REGISTRATION HANDBOOK 103 (2016).

<sup>171</sup> See LA. STAT. ANN. § 40:34.2(2)(a) (West 2022).

husband and the maiden name of the mother.”<sup>172</sup> More common are restrictions with respect to unmarried mothers. Here, too, variety reigns. Under North Dakota law, the surname of nonmarital children must be shown “on the birth record as the current legal surname of the mother at the time of birth unless an affidavit or an acknowledgment of paternity signed by both parents is received stating the surname to be that of the father.”<sup>173</sup> Mississippi law provides that in cases of court-determined paternity, “the surname of the child shall be that of the father, unless the judgment specifies otherwise.”<sup>174</sup>

Oddly enough, a few states have no requirement that a child’s name be entered on the birth certificate. Connecticut is one of these states, a fact that a Connecticut court discovered to its surprise.<sup>175</sup> This left open, the court noted, the possibility of naming a child “CP30 [sic].”<sup>176</sup>

The more common statute imposes restrictions on obscenities, numerals, or symbols as part of a child’s name.<sup>177</sup> The restriction is embedded in California’s official handbook for birth registration,<sup>178</sup> creating a problem for Elon Musk and his partner, who initially wished to name their new child “X Æ A-12.” They subsequently changed it to “X Æ A-Xii.”<sup>179</sup>

### B. Name Changes

Restrictions also exist on name changes. Many people wish, for their own reasons, to change their name, first, last, or both, and statutes and the common law allow them to do so. At least in theory, at common law, even today, a person may change names without judicial assistance.<sup>180</sup> Common-law name change is affected simply by using it.<sup>181</sup> There are advantages, however, to having a court approve a proposed name change. All states have enacted statutory processes for changing names. These statutory procedures augment rather than supplant the common law right, and they offer greater advantages to it, such as the ability to change various identifying documents to match one’s new name. In California, this is done by a simple court petition.<sup>182</sup> Nearly all states grant courts broad discretion in ruling on the petitions and do not limit the types of names courts must deny or grant. Most do not provide any guidelines at all.<sup>183</sup>

Usually name-change petitions pose no controversy or reason for denial. Other cases push the envelope. In 2004, a New Mexico appellate court reversed a lower court decision denying Snaphappy Fishsuit Mokiligon’s petition to change his name to Variable.<sup>184</sup>

<sup>172</sup> *Id.*

<sup>173</sup> N.D. CENT. CODE § 23-02.1-13.6 (2022).

<sup>174</sup> MISS. CODE ANN. § 93-9-9 (1) (2022).

<sup>175</sup> *Shockley v. Okeke*, 856 A.2d 1054, 1063–64 (Conn. Super. Ct. 2004), *aff’d in part, rev’d in part*, 882 A.2d 1244 (Conn. App. Ct. 2005).

<sup>176</sup> *Id.* at 1063.

<sup>177</sup> *E.g.*, N.J. ADMIN. CODE § 8:2-1.4 (2022).

<sup>178</sup> CAL. DEP’T OF PUB. HEALTH, *supra* note 170.

<sup>179</sup> *Elon Musk Changes His Newborn’s Name to Comply With California Law*, ABC NEWS (May 25, 2020), <https://abc7news.com/elon-musk-grimes-baby-name-kid-x--a-12-pronunciation/6210635/> [<https://perma.cc/M8X3-56DG>].

<sup>180</sup> *See Smith v. U.S. Cas. Co.*, 90 N.E. 947, 948-50 (N.Y. 1910).

<sup>181</sup> *See id.*

<sup>182</sup> CAL. CIV. PROC. CODE §§1275–1279.6 (West 2018).

<sup>183</sup> Julia Shear Kushner, Note, *The Right to Control One’s Name*, 57 UCLA L. REV. 313, 330 (2009).

<sup>184</sup> *In re Mokiligon*, 106 P.3d 584 (N.M. Ct. App. 2004).

Sometime later, Variable petitioned to have his name changed to Fuck Censorship!<sup>185</sup> The trial court denied the petition, stating that the desired name was “obscene, offensive and would not comport with common decency.”<sup>186</sup> The appellate court affirmed the trial court’s decision.<sup>187</sup>

Just how courts will react to a given name change petition is quite unpredictable. Consider, for example, the use of symbols or other non-alphabetical marks. As we have discussed, these are not permitted on birth certificates in most states.<sup>188</sup> For name changes, however, some courts have been more lenient. So, Jennifer Lee successfully petitioned to have her name changed to “Jennifer 8. Lee.”<sup>189</sup> The California Court of Appeals, however, affirmed a lower court’s denial of Darren Lloyd Bean’s petition to change his name to “Darren QX Bean!”<sup>190</sup>

Some of the reasons why courts deny petitions for name changes are entirely reasonable. Fraud is an example. In one case a man petitioned to change his name to Peter Lorie, Jr.<sup>191</sup> The court denied his petition because he was planning to pass himself off as the son of the famous actor Peter Lorre.<sup>192</sup> Another seemingly plausible reason is to avoid public confusion, but what may cause public confusion is often in the eyes of the beholder. For instance, two courts have reached opposite conclusions on this point where the petitioner sought to change his name to Santa Claus.<sup>193</sup>

The problem becomes more insidious when courts use confusion as a pretext for their own social values. This has become apparent in recent years in the context of petitions for name changes by transgender petitioners. In *In re Golden*,<sup>194</sup> the New York Appellate Division reversed a lower court decision denying the petition of a transgender woman to change her name. Assigned male at birth, but now identifying as a female, the petitioner wanted to change her name from “Earl William” to “Elisabeth Whitney Golden.” The trial court denied the petition on the ground that the proposed change from a traditionally male name to a traditionally female name “is fraught with possible confusion.”<sup>195</sup> The court noted that although the potential for confusion is relevant, it is not, standing alone, a sufficient basis for denying a name-change petition “inasmuch as ‘confusion is a normal

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<sup>185</sup> *In re Variable for Change of Name v. Nash*, 190 P.3d 354 (N.M. Ct. App. 2008).

<sup>186</sup> *Id.* at 355–56 (quoting the opinion of the lower court).

<sup>187</sup> *Id.*

<sup>188</sup> *E.g.*, N.J. ADMIN. CODE § 8:2-1.4 (2022).

<sup>189</sup> Jennifer 8. Lee, *Yes, 8 Is My Middle Name*, BOSTON GLOBE (Aug. 8, 1996), copied in Adam Mordecai, *Why Does Jennifer 8. Lee Have a Numerical Middle Initial?*, QUORA (Feb. 25, 2012), <https://www.quora.com/Why-does-Jennifer-8-Lee-have-a-numerical-middle-initial/answer/Adam-Mordecai/log> [<https://perma.cc/3FBS-KSYD>].

<sup>190</sup> *Bean v. Superior Court*, No. D048645, 2006 WL 3425000, at \*1 (Cal Ct. App. Nov. 28, 2006).

<sup>191</sup> *Weingand v. Lorre*, 41 Cal. Rptr. 778, 779 (Ct. App. 1964).

<sup>192</sup> *Id.*

<sup>193</sup> *Compare In re Handley*, 736 N.E.2d 125, 127 (Ohio Prob. Ct. 2000) (denying petitioner’s request because he failed to establish sufficient reason for the change and because the change would violate public policy and mislead children), with *In re Porter*, 31 P.3d 519, 522 (Utah 2001) (reversing a denial of a petition; the change would not result in confusion).

<sup>194</sup> 867 N.Y.S.2d 767, 767 (App. Div. 2008).

<sup>195</sup> *Id.*

concomitant of any name change.”<sup>196</sup> Confusion exists either way, however, if the transgender person wishes to continue to use the new name.

Some courts avoid pretext, openly citing public policy as the basis for denying name-change petitions. This has occurred in the context of same-sex and other non-heterosexual couples where one or both parties wish to change last names to a shared name. For LGBTQ couples, the default of both partners taking the groom’s name often is not available. One alternative has been creating a new shared surname by combining elements of each of their own surnames. Another alternative has been choosing an original shared surname. But this route has not always worked, even for heterosexual couples. One California married couple discovered such a hurdle when they were unable to create the name they originally wanted, Sera. A 2007 California statute provides that each party to a marriage may adopt a common surname by combining “all or a segment of” the current last name or the last name of either spouse given at birth.<sup>197</sup> The couple wanted to combine their last names, Yang and Cser, but “ser” and “a” were not considered segments of each name under the statute.<sup>198</sup>

Some courts have relied on public policy as the basis for denying name change petitions. Most of these cases arose prior to legal recognition of same-sex marriage, and in several of them the lower court’s decision denying the petition was reversed on appeal. For example, in *In re Bacharach*,<sup>199</sup> the New Jersey appellate court reversed the lower court’s denial of a petition for a name change to include her same-sex partner’s last name. No fraud or other improper motive was involved, but the trial court reasoned that the name change would give the appearance of approval of a same-sex marriage.<sup>200</sup> The appellate court concluded that this concern was ill-conceived. The court noted that the petitioner and her partner can “exchange rings, proclaim devotion in a public or private ceremony, call their relationship a marriage, use the same surname, adopt and rear children.”<sup>201</sup> All of these actions can be done in public view.

Unsurprisingly, public policy has also been used pretextually. This has occurred in the context of attempts by married women who wish to retain their birthnames. In these cases, mostly from earlier eras, women who wish to keep their family names were labelled harshly. In an Indiana case from the 1970s, for example, the state Attorney General described a married woman who wished to resume her birthname as “kind of odd ball” and

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<sup>196</sup> *Id.* at 768 (quoting *In re Halligan*, 361 N.Y.S.2d 458 (App. Div. 1974)). Other factors have led the New York courts to deny name-change petitions for transgender persons. In *In re D.C.S.*, 125 N.Y.S.3d 538, 544 (App. Div. 2020), the court denied a petition to a transgender woman who wished to change her first and middle names to reflect her transgender female identity and to change her surname to that of her longtime romantic partner. Petitioner was a civilly-committed sex offender, and the court distinguished *In re Golden*, 867 N.Y.S.2d 767, on that basis. 125 N.Y.S.3d at 543. As a registered sexually violent offender, Petitioner was required to comply with stringent reporting requirements for the rest of her life, and the State Attorney General argued that changing the first, middle and last names would cause potential confusion and misrepresentation as to Petitioner’s criminal past, specifically her sexual conviction. *Id.* The court was persuaded by this argument, concluding that this factor provided “ample, ‘demonstrable reason[s]’ from which indications of ‘fraud, misrepresentation or intent to interfere with others’ rights’ may be inferred.” *Id.*

<sup>197</sup> CAL. FAM. CODE § 306.5 (West 2020).

<sup>198</sup> Suzannah Weiss, *Creating a Name for Themselves*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/fashion/weddings/name-change-after-marriage-not-always-easy.html> [https://perma.cc/6K7M-TBVE].

<sup>199</sup> 780 A.2d 579, 585 (N.J. Super. Ct. App. Div. 2001).

<sup>200</sup> *Id.* at 580.

<sup>201</sup> *Id.* at 585.

“a sick and confused woman” who needed a psychiatrist.<sup>202</sup> Another court refused to allow a petitioner whose birth name was Earl Green to change his name to Merwon Abdul Salaam after his conversion to Islam.<sup>203</sup> The court observed, “Petitioner should realize that he bears an honored name and should not hide his original identity by the assumption of another name totally and strangely different from the one he has borne since birth. . . . [T]he petitioner should measure himself by the American standard and be proud not only of being an American citizen but manifest esteem for the honorable name by which he has been known for nigh a generation.”<sup>204</sup> Presumably, today such denials would be reversed as abuses of discretion or on other grounds.

Another form of name change that is worth mentioning is the adoption of English given names by Chinese individuals. Large numbers of Chinese students now study abroad for various periods of time, and it has become a common practice among the students who study in English-speaking countries to adopt an English personal name rather than using their Chinese names. In one study of 156 Chinese students, 97.4% reported having a non-heritage (i.e., English) name (NHN).<sup>205</sup> Among those who did adopt an NHN, many did not regard their NHNs as replacing their Chinese given names. One respondent commented, “Chinese giving name cannot be changed but my English name is my choice so I can change it at my will.”<sup>206</sup>

Researchers have found a variety of reasons why Chinese individuals adopt English personal names. One commonly given reason is convenience, meaning that English names are easier for non-Chinese speakers to pronounce.<sup>207</sup> Mandarin is a very tonal language, and non-Chinese speakers who have not learned Mandarin by an early age never get the tones quite right. Mispronunciation leads to a different name, and many individuals prefer to take English names rather than have their Chinese names mispronounced and mistaken. A respondent in one study stated, “My name sounds really ugly when foreigners try to say it. It’s just not my name, so why not choose an English name that I like and they can say.”<sup>208</sup>

There are a number of strategies used in choosing English names. One common strategy is to choose a name that resembles the Chinese name phonologically.<sup>209</sup> So, *Lijie* might become *Leslie* or *Linda*.<sup>210</sup> Among the reasons that respondents gave for adopting

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<sup>202</sup> See *In re Hauptly*, 312 N.E.2d 857, 861 (Ind. 1974) (Hunter, J., concurring) (quoting Reply Brief of Petitioner-Appellant, *In re Hauptly*, 312 N.E.2d 857 (Ind. 1974) (No. 674S124)). This and other issues concerning naming are discussed in Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761 (2007).

<sup>203</sup> *In re Green*, 283 N.Y.S.2d 242, 245 (Civ. Ct. 1967).

<sup>204</sup> *Id.*

<sup>205</sup> Peter Sercombe, Tony Young, Ming Dong, & Lin Lin, *The Adoption of Non-Heritage Names among Chinese Mainlanders*, 62 NAMES 65, 69 (2014).

<sup>206</sup> *Id.* at 69.

<sup>207</sup> See, e.g., Laurie Duthie, *Western Names for Chinese Identities: The Acquisition and Use of Western Personal Names among Chinese Business Professionals in Foreign-Invested Corporations*, 6 ASIAN ANTHROPOLOGY 53, 66 (2007).

<sup>208</sup> *Id.* at 69.

<sup>209</sup> *Id.* at 65.

<sup>210</sup> T. Leo Schmitt, *The Practice of Mainland Chinese Students Adopting English Names and Its Motivations* 44 (2019) (Ph.D. dissertation, City University of New York) (on file with City University of New York).

NHNs were pleasantness of sound and being easy for foreigners.<sup>211</sup> Another strategy is simply to choose a common Anglo name, often found in Chinese-English dictionaries.<sup>212</sup>

### C. Name Discrimination

Perhaps the most insidious form of injury involving names is discrimination on the basis of one's personal name. Hermeisha Robinson and Dorneshia Zachery both applied for jobs at St. Louis' Mantality Health center and were rejected. In e-mails informing them, the company said it did not hire candidates that have what it said are "ghetto names."<sup>213</sup> The company later told a news outlet that the company's account was hacked and that it believes a disgruntled employee sent the emails. Even if true, the damage was done. Both women were deeply hurt.<sup>214</sup>

Discrimination on the basis of distinctly African American or ethnic names is illegal under Title VII of the Civil Rights Act.<sup>215</sup> Social science experiments have repeatedly documented the phenomenon that Hermeisha Robinson and Dorneshia Zachery both experienced, employment discrimination on the basis of so-called racialized names. In one major study conducted nearly twenty years ago, Marianne Bertrand and Sendhil Mullainathan found significant discrimination against African American names: White names receive 50% more callbacks for interviews.<sup>216</sup> Responding to help-wanted ads in Chicago and Boston newspapers, they sent resumes with either African American or White-sounding names and then measured the number of callbacks each resume received for interviews. Half of the applicants were assigned African American names that are "remarkably common" in the Black population, the other half White sounding names, such as Emily Walsh or Greg Baker.<sup>217</sup> Job applicants with White names needed to send about ten resumes to get one callback; those with African American names needed to send around fifteen resumes to get one callback. Noting that this 50% gap is statistically significant, the authors observed that a White name yields as many more callbacks as an additional eight years of experience.<sup>218</sup>

In another large study researchers sent more than 83,000 fictitious applications with randomized characteristics to geographically dispersed jobs posted by 108 of the largest U.S. employers.<sup>219</sup> Half the applications had distinctively appearing African American names, the other half had distinctively White names. The researchers found that "[e]mployers are significantly less likely to contact applicants with distinctively Black names."<sup>220</sup> Specifically, they found that distinctively Black names reduce the likelihood of employer contact relative to distinctively White names by 2.1 percentage points, which has

<sup>211</sup> Sercombe, Young, Dong, & Lin, *supra* note 205, at 69.

<sup>212</sup> See Schmitt, *supra* note 210, at 44.

<sup>213</sup> Alanna Vagianos, *Multiple Women Rejected From Jobs After Company Says They Have 'Ghetto Names'*, HUFFPOST (Aug. 16, 2018), [https://www.huffpost.com/entry/multiple-women-were-rejected-from-jobs-because-of-their-ghetto-names\\_n\\_5b757be4e4b0df9b093cdd40](https://www.huffpost.com/entry/multiple-women-were-rejected-from-jobs-because-of-their-ghetto-names_n_5b757be4e4b0df9b093cdd40) [https://perma.cc/9ZQX-478P].

<sup>214</sup> *Id.*

<sup>215</sup> See U.S.C. §2000e-2(a).

<sup>216</sup> Bertrand & Mullainathan, *supra* note 129, at 1.

<sup>217</sup> *Id.* at 2.

<sup>218</sup> *Id.* at 3.

<sup>219</sup> Patrick Kline, Evan R. Rose, & Christopher R. Walters, *Systemic Discrimination Among Large U.S. Employers*, 137 Q.J. ECON. 1963, 1963 (2022).

<sup>220</sup> *Id.* at 1976.

an effect equal to 9% of the Black mean contact rate.<sup>221</sup> They note that one potential explanation for the smaller proportional effect in their study is that larger firms exhibit less severe discrimination, as reported in previous studies.<sup>222</sup> Importantly, their results showed that patterns of discrimination against Black names vary substantially across employers. Discrimination was disproportionately clustered in sectors that involved social interaction with customers, such as the auto services and sales sector and certain forms of retail.<sup>223</sup> This is so regardless of whether the specific job itself required social interaction.<sup>224</sup> Further, the authors found that firm characteristics are stronger predictors of discrimination than job or establishment characteristics. Interestingly, more-profitable firms are less biased against Black applicants.<sup>225</sup> Unlike previous studies, the Kline study found that discrimination is rather concentrated. The top 20% of most discriminatory firms in the study were responsible for 50% of the callbacks lost to discrimination.

Name discrimination is not confined to employment. Another study found evidence name discrimination in the context of housing and the rental market. Economists from Harvard Business School found significant evidence of widespread discrimination against Airbnb guests with distinctively African American names.<sup>226</sup> Specifically they found that applications from guests with distinctively African American names were 16% less likely to be accepted relative to identical guests with distinctively White names. Moreover, such discrimination was most pronounced among hosts who had never had an African American guest.<sup>227</sup> Indeed, in their study discrimination disappeared among hosts who have previously accepted African American guests.<sup>228</sup>

Although the question is not settled, it appears that such discrimination is not covered by the Fair Housing Act for most, though not all, Airbnb housing. As one scholar points out, Airbnb hosts operate in a “soft spot” of the law, between the commercial sphere, where discrimination clearly is prohibited, and the intimate sphere, which the government does not regulate.<sup>229</sup> The intimate sphere is characterized by relative smallness, a high degree of selectivity, and seclusion from others.<sup>230</sup> Airbnb relationships bear none of these features. They are remote, numerous, and hardly the same sort of secluded arrangements as families. Viewed as within the commercial sphere, Airbnb may escape the FHA’s prohibition of discrimination because of the so-called “Mrs. Murphy exception.”<sup>231</sup> This provision exempts from compliance any “establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of

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<sup>221</sup> *Id.* at 1976–77, 1977 tbl. 1.

<sup>222</sup> *Id.* at 1980 (citing Rupa Banerjee, Jeffrey G. Reitz, & Phil Oreopoulos, *Do Large Employers Treat Racial Minorities More Fairly? An Analysis of Canadian Field Experiment Data*, 44 CANADIAN PUB. POL’Y 1 (2018)).

<sup>223</sup> *Id.* at 1967.

<sup>224</sup> *Id.* at 1998.

<sup>225</sup> *Id.* at 1967.

<sup>226</sup> Benjamin Edelman, Michael Luca, & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J. 1 (2017).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 17.

<sup>229</sup> Michael Todisco, *Share and Share Alike: Considering Racial Discrimination in the Nascent Room-Sharing Economy*, 67 STAN. L. REV. ONLINE 121, 123 (2015).

<sup>230</sup> See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619–20 (1984).

<sup>231</sup> 42 U.S.C. § 3603(b)(2).

such establishment as his residence.”<sup>232</sup> Airbnb hosts who rent out just a single room in their own personal residences almost certainly qualify, but such hosts are probably not typical. More common are hosts who rent out second homes or apartments, while living there themselves occasionally. Do such hosts “actually occupy” these places? Congress envisioned mom-and-pop landlords, not the hotel-like operators who constitute the vast majority of Airbnb hosts today, but the statute can be read broadly to include Airbnb hosts.

#### IV. NAMES AS COMMODITIES; NAMES AS PROPERTY

Name-taking continues today. It not only continues, it has increased exponentially. Under the label “identity theft,” name-taking is part of a wider phenomenon that includes various means of stealing personally identifiable information. Identity theft is usually committed to gain financial advantages or obtain credit and other benefits.<sup>233</sup> Names are not the only piece of information that hackers and other thieves seek to obtain from their victims, but names certainly are a valuable subject of theft. The fact that personal names are a valuable commodity throws into clear relief their property potential.

Another means of commodifying a personal name is by registering it as a trademark under the federal Lanham Act.<sup>234</sup> The Lanham Act permits a trademark to be abandoned when “its use has been discontinued with intent not to resume such use.”<sup>235</sup> In *Vais Arms, Inc. v. Vais*,<sup>236</sup> George Vais acquired a trademark for “Vais Arms,” the name of his firm which manufactured firearm muzzle brakes. He later sold the business to Ronald Bartlett who continued the business under the same trademark name. Vais later began manufacturing and marketing muzzle brakes under a new mark name, VAIS. Vais Arms sued under the Lanham Act claiming that the VAIS mark infringed on the Vais Arms. Holding for Vais Arms, Inc., the court that George had abandoned name trademark when he sold his business.

Things are different as to non-trademarked personal names. Such names remain personal, and personal names ordinarily cannot be abandoned.<sup>237</sup> In *Abdul-Jabbar v. General Motors, Inc.*,<sup>238</sup> basketball legend Lew Alcindor led the UCLA men’s basketball team to national championships in 1967, 1968, and 1969. In 1971, while starring in the NBA for the Los Angeles Lakers, Alcindor legally changed his name to Kareem Abdul-Jabbar as an affirmation of his Muslim faith. During the 1983 Men’s College Basketball Tournament, General Motors ran advertisements for its Oldsmobile Eighty-Eight that compared the car’s record of excellence to Lew Alcindor’s (being named NCAA Most Valuable Player three years in a row). Abdul-Jabbar sued General Motors for violating his trademark rights in his birth name. Abdul-Jabbar conceded that he had stopped using the

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<sup>232</sup> *Id.*

<sup>233</sup> See Chris Jay Hoofnagle, *Identity Theft: Making the Known Unknowns Known*, 21 HARV. J.L. & TECH. 97 (2007).

<sup>234</sup> The Trademark (Lanham) Act, 15 U.S.C. §§ 1051–1141n.

<sup>235</sup> 15 U.S.C. § 1127.

<sup>236</sup> 383 F.3d 287 (5th Cir. 2004).

<sup>237</sup> Personal names cannot be abandoned as such, but they can be changed. In California, for example, the process involves filing a name change petition with the superior court and following certain procedures, including providing notice. Assuming there are no problems, the process takes about two months, at the end of which the court issues an order. See CAL. CIV. PROC. CODE §§ 1276–1279.5 (West 2022).

<sup>238</sup> *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996).



name Lew Alcindor for commercial purposes more than a decade earlier. General Motors argued that this non-use amounted to abandonment. The Ninth Circuit rejected this argument, holding in favor of Abdul-Jabbar. The court stated that the abandonment defense has never been applied to a person's name or identity, and the court refused to stretch the federal trademark law to include such a defense. The court continued:

One's birth name is an integral part of one's identity; it is not bestowed for commercial purposes, nor is it "kept alive" through commercial use. A proper name thus cannot be deemed "abandoned" throughout its possessor's life, despite his failure to use it, or continue to use it, commercially.<sup>239</sup>

The court's statement that proper names cannot be abandoned underscores a common misperception regarding names. We tend to think of names as fixed. The truth is very much otherwise, however. Not only can names be voluntarily changed, but they can also be taken without consent, as we have seen. Name-takings, whether done by the state or by thieves, underscores the detachability of names, and it is detachability that enables their property-ness and conversion to commodities.

Converting names to items of property changes their functions. Names have both external and internal functions. Externally, names implicate us in relations with others by inserting us into social matrices.<sup>240</sup> Through them, we become entangled in the life histories of others. They are one means of structuring social relations. Personal names express information about social classification in multiple respects. In Western societies they provide information about gender, ethnicity, marriage, and so on. Matters are more complex in non-western societies. In some, names are changed as social status changes.<sup>241</sup> In others, naming practices may include family names, mother/father names, clan names, praise names, and so on. Such practices enable social classification, but, as the anthropologist Lévy-Bruhl pointed out, names are more than classification labels. For some people, they *are* their names. As Lévy-Bruhl states,

[they] regard their names as something concrete and real and frequently sacred . . . [For such a person, a name is] a distinct part of his personality, just as much as are his eyes . . . and believes that injury will result as surely from the malicious handling of his names as from a wound inflicted on any part of his physical organism.<sup>242</sup>

Internally, names are bound up with our self-identities. They contribute to our sense of uniqueness.<sup>243</sup> A person's name anchors where they expect themselves to be. One scholar has argued that a personal name is the most important anchor point of self-

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<sup>239</sup> *Id.* at 411.

<sup>240</sup> See Barbara Bodenhorn & Gabriele vom Bruck, 'Entangled in Histories': An Introduction to the Anthropology of Names and Naming, in *THE ANTHROPOLOGY OF NAMES AND NAMING*, *supra* note 82, at 3.

<sup>241</sup> *Id.* at 9.

<sup>242</sup> LUCIEN LÉVY-BRUHL, *HOW NATIVES THINK* 37 (Lilian A. Clarke trans., Wash. Square Press 1966) (1926).

<sup>243</sup> Meike Watzlawik, Noemi Pizarroso, Danilo Silva Guimarães, Nilson Guimarães Doria, Min Han, Chuan Ma, & Ae Ja Jung, *First Names as Signs of Personal Identity: An Intercultural Comparison*, *PROC. OF THE 10TH WORLD CONG. OF THE INT'L ASS'N FOR SEMIOTIC STUD.* 1159, 1160 (2012).

identity.<sup>244</sup> Another has asserted that a person's first name could be “a determining factor in the development of personality, acquisition of friends, and, in all probability, in his success or failure in life.”<sup>245</sup> Psychologists have used several different methods to study the relationship between names and self-identity. A classic and still frequently used technique is to ask respondents to answer questions such as “Who are you?” or “Who am I?”<sup>246</sup> As to the first question, the researchers found that the respondent’s name was the single, most frequent type of response, easily outnumbering references to all other categories other than sex and occupation.<sup>247</sup> The second question – “Who am I?” – invited the respondents to ask themselves who they were. This change presumably would change the frequency of name references since the respondents knew their own names. Nevertheless, the responses still showed the influence of names upon personal identity.<sup>248</sup> The results of these and other methods for determining self-perception converge on finding a strong link between names and self-identity.<sup>249</sup>

In some cases, the anchor gives way, as the person feels that their given name no longer fits their images of themselves. Perhaps a nickname is dropped in favor of a more formal name. In other cases, it is the family name that a person feels must be changed. An adopted person who is reunited with their biological family may experience such an alteration of their self-identity that they no longer feel that their adopted familial name conforms with their new sense of personal identity. Personal estrangement from families may also lead individuals to take the step of changing their familial names, as they no longer feel any identification with the network of people in which they were raised. If a woman has taken her husband's name upon marriage, she may decide to reclaim her family name upon separation or divorce or take on an entirely new name. Transgender people often request name changes to reflect gender. Still another reason for changing names is religious conversion. For example, the great basketball star Kareem Abdul-Jabbar, who played for the Los Angeles Lakers, was formerly known as Lew Alcindor when he played at UCLA, but he changed his name when he converted to Islam.<sup>250</sup>

Self-identity and a sense of uniqueness are personal functions of names, but names may simultaneously be personal and property. Some celebrities choose to use their personal names to market commodities, thereby commodifying their own names. In such cases is the integrity of their personal names lost, or can the personal coexist with the commodity? Stated differently, when a celebrity uses their own name for market purposes, have they thereby abandoned its personal dimension? Consider the case of Michael Jordan.

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<sup>244</sup> See generally GORDON W. ALLPORT, *PERSONALITY: A PSYCHOLOGICAL INTERPRETATION* (1937). See also James F.T Bugental & Seymour L. Zelen, *Investigations into the ‘Self-Concept’: I. The W-A-Y Technique*, 18 J. PERSONALITY 483, 493, 496 (1950).

<sup>245</sup> W.E. Walton, *The Affective Value of First Names*, 14 J. APPLIED PSYCH. 396, 396 (1937).

<sup>246</sup> Kenneth L. Dion, *Names, Identity, and Self*, 31 NAMES 245, 246 (1983).

<sup>247</sup> Bugental & Zelen, *supra* note 244, at 493.

<sup>248</sup> See, e.g., Chad Gordon, *Self-Conceptions: Configurations of Content*, in *THE SELF IN SOCIAL INTERACTION I: CLASSIC AND CONTEMPORARY PERSPECTIVES* 115, 125 (Chad Gordon & Kenneth J. Gergen, eds., 1968).

<sup>249</sup> Dion, *supra* note 246, at 250.

<sup>250</sup> *Kareem Abdul-Jabbar*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Kareem\\_Abdul-Jabbar-Religion\\_and\\_name](https://en.wikipedia.org/wiki/Kareem_Abdul-Jabbar-Religion_and_name) [https://perma.cc/5CWP-5WDA] (last visited Sept. 13, 2023).

Considered one of the greatest basketball players ever to have played the game,<sup>251</sup> Michael Jordan has permitted his name to be used in marketing several products, but most notably the famous basketball shoe brand, “Air Jordan.” Known around the world, this brand name has been hugely successful, largely because of its identification with Michael Jordan. By attaching his name to the famous brand, has Michael Jordan sacrificed the personal dimension of his name?

Let us separate out two distinct elements here. It is important to distinguish between the celebrity factor and the commodity factor because the two are not coextensive. There are many celebrities who have not marketed their names. Denzel Washington appears to be one such case. No one would gainsay Denzel Washington’s celebrity.<sup>252</sup> As far as I have been able to determine, Washington has never allowed his name to be used to market commercial products. His name has remained strictly personal; there is no commodity dimension to it. Still, his name is extraordinarily familiar, known to millions around the world. The question is whether such recognition undermines the functions of his name, especially the internal function of self-identity. This seems highly unlikely. One finding of the social science research on names and self-identity is that it is the distinctiveness of our names that is most salient to our self-identity.<sup>253</sup> Distinctiveness is not the same as uniqueness. Many people share their names with others, yet retain a sense of distinctiveness about their own names.<sup>254</sup> A person may have a very common name, yet consider it distinctive to themselves. Some may use their middle name to add to its distinctiveness. From this perspective Denzel Washington very likely regards his own name as distinctive despite its celebrity.

Does commodification of one’s name change matters? Michael Jordan is both a worldwide celebrity and someone whose name is attached to highly successful commercial products. The question is whether the commercialization of his name undermines its distinctiveness. A person’s identity is complex, fluid, and comprised of many different factors. In Jordan’s case his commercialized status is one such factor. Although it may be important to his own sense of identity, it is hardly likely to be the dominant or even a dominant aspect of his sense of who he is. His celebrity, like that of Denzel Washington, must also be one strand in the complex web of his self-identity. Both of those factors, however, are relatively recent contributions to his identity, whereas his name has been his since birth. Were we, hypothetically, to ask Jordan who is, to describe to us his identity, what would he tell us first about himself? It seems highly improbable that he would announce his commercial endorsements or even inform us of his celebrity, for that matter. He would want us to know his name. Asked who he is, he *is* Michael Jordan, first and foremost.

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<sup>251</sup> His biography on the official NBA website states: “By acclamation, Michael Jordan is the greatest basketball player of all time.” *Legends Profile: Michael Jordan*, NBA (September 14, 2021), <https://www.nba.com/news/history-nba-legend-michael-jordan> [<https://perma.cc/T77Y-G8YS>].

<sup>252</sup> See *Denzel Washington*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Denzel\\_Washington](https://en.wikipedia.org/wiki/Denzel_Washington) [<https://perma.cc/7ZJV-AEHV>] (last visited Sept. 13, 2023).

<sup>253</sup> Dion, *supra* note 246, at 248.

<sup>254</sup> In my own case I share the name “Gregory Alexander” with many other people, both in the United States and elsewhere in the world. I was once introduced to give a talk to an academic audience in Scotland, and my host added that his closest friend in school in that country bore the same as mine.

## V. PROTECTING NAMES AS PROPERTY

As the discussion in Part III revealed, names are vulnerable to various forms of abuse by the government, ranging from denial to discrimination. Suppose the law recognized names as a type of property. The idea is not entirely fanciful. Names are legally protected as a kind of property interest for certain limited purposes already. For example, “most states now recognize the right of publicity as a kind of property interest, assignable during life and descendible at death, either as a matter of common law or by statute.”<sup>255</sup> The right of publicity prevents the unauthorized commercial use of a person’s name, likeness, and other aspects of one’s identity and gives the individual the exclusive right to license the commercial use of these personal features. So, if James opens several men’s styling salons and names them “Donald Trump Men’s Hair Salon,” the former president could enjoin James from using his name. The right of publicity provides protection only for commercial purposes, however. It does not give an individual control over more personal aspects of her name, aspects that affect her identity and sense of self. What is wanted is an interest that enables the individual to determine what her name is and to compel the state to recognize her choice.

The right to naming need not and should not be as robust as conventional property rights. Ordinarily, property rights have a strong right to exclude. Subject to limited exceptions, owners are entitled to prevent others from using, possessing, or otherwise unduly interfering with their property. The naming right cannot and should not be that strong. Imagine a person named Jane Smith. Suppose she claims an exclusive right to that name. Such a claim cannot be given any credence, of course. There are many Jane Smiths in the world, and all of them, quite understandably, want to keep their names. A regime of exclusive personal names would be both unworkable and unfair.

But property interests, although normally exclusive, need not be so, at least not absolutely. Easements, for example, may be exclusive or non-exclusive. A non-exclusive easement exists when one party has an easement on or over land, but the landowner can grant additional easements to other parties on or over the same land. Public easements are another example of property rights in which the possessory interests are non-exclusive. That Jane Smith in Dubuque, Iowa, shares her name with many other Jane Smiths around the world does not mean that she lacks a property right to her own name nor that she should not be entitled to legal protection of it as such.

A property right in one’s own name would enable individuals to resist the various acts of name-aggression. Certainly, it would deny the power of institutions such as schools from depriving individuals of their original or preferred names. The kinds of abuses to names that occurred in Indigenous residential schools should never occur again, either in schools or in other state or state-supported institutions.

States would be required to accept personal names with diacritical marks. Muñoz and Munoz are two very different names. A person whose name is Muñoz does not simply have a right to have the state recognize their correct name; they have a property right to that name, one that the state ought to respect and protect.

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<sup>255</sup> JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL S. SCHILL, & LIOR JACOB STRAHILEVITZ, *PROPERTY: CONCISE EDITION* 73 (3d ed. 2021).

Name-changes should also be subject to one's own power. As previously discussed,<sup>256</sup> nearly all states grant courts broad discretion in ruling on the petitions and do not limit the types of names courts must deny or grant. Few guidelines are provided.<sup>257</sup> It is hard to justify giving courts such discretion when the petitioner's personal identity is at stake and the state's interests are very limited. Statutory guidance can limit denial of name-change petitions to cases of fraud. Confusion should not be grounds for denial because, as we have seen,<sup>258</sup> courts have used confusion as a pretext for their own social values, especially in cases of transgender individuals. Similarly, public policy, which is used either pretextually or openly to discriminate against LGBTQ persons, should be dropped as a ground for name-change denial. Couples in the LGBTQ community should be free to choose whatever surname they wish, and not be required to adopt all or any part of either party's original surname.

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Names matter. They identify who we are, and they express our individuality. All names, including those of places and objects, economize on the information costs of identifying and locating the referents, but the personal names of people do more than that. Commonly, but not invariably, they tell us the person's gender. They may tell us something about the person's national origin, ethnicity, even race. Names are still more than that, however. They carry deep personal, cultural, familial, and historical connections. There is, as Ralph Ellison put it, a "certain magic" to them. They are a core part of how we present ourselves to the world and how we interact with the world. Names can influence the first impressions we make on others, often based on stereotypes. Names are also formative in shaping a sense of ourselves. There is evidence that our names may influence our behavior. They may even influence our paths in life. They deserve respect, from others and from the state. Recognizing them as a form of property is one means of doing so.

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<sup>256</sup> Kushner, *supra* note 183.

<sup>257</sup> *Id.*

<sup>258</sup> *See, e.g., In re Golden*, 867 N.Y.S.2d 767 (App. Div. 2008); Weiss, *supra* note 198.