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# Naming, Identity, and Trademark Law

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# Naming, Identity, and Trademark Law<sup>†</sup>

Laura A. Heymann\*

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*As the process of creation in the age of digital media becomes more fluid, one pervasive theme has been the desire for attribution: from the creator's perspective, to receive credit for what one does (and to have credit not falsely attributed) and from the audience's perspective, to understand the source of material with which one engages. But our norms of attribution reflect some inconsistencies in defining the relationship among name, identity, and authenticity. A blog post by a writer identified only by a pseudonym may prove to be very influential in the court of public opinion, while the use of anonymous sources by established journalists may be viewed as unethical. Supreme Court jurisprudence both touts the benefits of anonymity and decries it as a barrier to the free flow of information. In the commercial realm, consumers file suit when the memoir they have purchased turns out to be largely fiction but seem far less concerned when a company emerges from a public relations disaster with a new name, leaving its old one to the dustbin of history.*

*This conflicted response may be further complicated by the fact that we think about names in a very personal way, as a core part of our identity. But names are not, strictly speaking, our identity—they are merely symbols of our identity that denote a particular set of characteristics at a particular time. Indeed, as naming*

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*theory tells us, the denotative function of a name is what makes a word a name at all. It is for this reason that an individual or a corporation can adopt a new name without being accused of fraud and why a company can sell products under more than one trademark.*

*Naming law—whether the law of personal names or the law of trademarks—tends to reflect these principles of naming theory. In large part, the law focuses on a name or mark’s denotative effect, interfering only when confusion or changes to the essential nature of the referent renders the name’s identifying function uncertain. And, indeed, in the instances when the law is inconsistent with naming theory—attempting to regulate the connotations associated with names rather than their denotative function—we might question whether it is achieving an appropriate goal. Confining naming law to this important but limited function achieves a balance between respecting the autonomy of individuals and entities to choose the names with which they represent themselves to the public and ensuring that such choices do not significantly frustrate the flow of information that allows the public to engage in decision making.*

#### INTRODUCTION

As the process of creation in the age of digital media becomes more fluid, challenging our ideas of authorship, ownership, and legal rights, one pervasive theme has been the desire for attribution: from the creator’s perspective, to receive credit for what one does (and to have credit not falsely attributed) and from the audience’s perspective, to be able to identify the source of material with which one engages. In an age in which traditional publishers play less of a role in distributing, and thus controlling the quality of, material disseminated to audiences, attributional concerns become more salient. Without a trusted intermediary to select and present information to us, we must rely more directly on attributional signals to facilitate the exchange of reputation-related information.

The fact that attribution appears to be a common and important interest does not, of course, mean that it requires attention from the law. Moral rights theorists seek enhanced legal protection for attribution to recognize the dignity of the human soul and of the creative process.<sup>1</sup> Other commentators propose that attribution interests be addressed via copyright law, either by amending the Copyright Act to incorporate attributional interests directly<sup>2</sup> or by strategic use by copyright owners of their ability to control their work.<sup>3</sup> Still others recognize the importance of this

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1. See generally Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006); Roberta Rosenthal Kwall, *Originality in Context*, 44 HOUS. L. REV. 871 (2007). But see Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263 (2009) (critiquing moral rights law and scholarship).

2. See Ben Depoorter, Adam Holland & Elizabeth Somerstein, *Copyright Abolition and Attribution*, 5 REV. L. & ECON. 1063 (2009) (proposing an attribution-focused system of copyright protection); Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41 (2007) (proposing the addition of a fifth fair use factor to address attributional concerns).

3. See ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 27 (2010) (noting that copyright owners can use their

interest but suggest that norms, rather than laws, are the preferable enforcement mechanism, given the difficulty of crafting effective legal remedies.<sup>4</sup> My own writing has examined the relationship between author and audience from a reader-response perspective, highlighting the importance of the reader to the interpretive effort and, therefore, positioning attribution as an important way of providing readers—either as actual or as interpretive consumers—with the source information they need, much as trademark law does for consumers in the marketplace.<sup>5</sup>

More broadly, attributional inquiries highlight the disjunction between name and identity, calling into question the relevance of identity to interpretation. When a significant amount of the material we encounter online is attributed only to screen names, and when politicians regularly employ speechwriters to craft the language that pundits analyze the next day, we might conclude that attribution to someone or something is often important to allow us to confer reputational credit, but that the name we use to do so need not bear any relationship to the moniker that appears on the creator's certificate of birth or incorporation. As long as there is a shared understanding of when the disjunction between producer and attribution is appropriate (a celebrity autobiography ghostwritten by another writer is sanctioned, but plagiarism by a college student is not; microbrews branded differently from the mass-market beer with which they share a brewery are acceptable, but writing under multiple online personas in order to create the impression of broad assent to one's ideas is not), the mere fact of the disjunction is not necessarily cause for concern.

Yet our norms of attribution reflect some inconsistencies in defining the relationships among name, identity, and authenticity. A blog post by a writer identified only by a pseudonym may prove to be very influential in the court of public opinion, while the use of anonymous sources by established journalists may be viewed as unethical. Supreme Court jurisprudence both touts the benefits of anonymity and decries it as a barrier to the free flow of information. In the commercial realm, consumers file suit when the memoir they have purchased turns out to be largely fiction but seem far less concerned when a company emerges from

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derivative works right under copyright law to address integrity and attribution concerns).

4. See Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 UTAH L. REV. 789.

5. See Laura A. Heymann, *The Birth of the Authonym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377 (2005) [hereinafter Heymann, *Authonym*]; Laura A. Heymann, *The Trademark/Copyright Divide*, 60 SMU L. REV. 55 (2007). For other views, see RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* 69 (2007) (“Trademarks and author ‘branding’ (by naming) coevolved as ways of protecting sellers and consumers as markets expanded and became impersonal.”); Jane C. Ginsburg, *The Author's Name as a Trademark: A Perverse Perspective on the Moral Right of “Paternity”?*, 23 CARDOZO ARTS & ENT. L.J. 379 (2005); Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171 (2005). Some commentators, however, are skeptical of a trademark-aligned approach to attributional concerns, largely on the ground that such an approach will inevitably result in an overexpansive property right, enabling creators to shut down uses of their work altogether. See Deven R. Desai, *Property, Persona, and Preservation*, 81 TEMP. L. REV. 67, 83 n.88 (2008); Tushnet, *supra* note 4, at 799–805 (warning of chilling effects).

a public relations disaster with a new name, leaving its old one to the dustbin of history.<sup>6</sup>

The unresolved nature of this interest may be due to the fact that we experience names in both economic and personal ways. We use brands in the marketplace to help us find the goods and services we want and in our social space to express aspects of our identities. Likewise, we use personal names both as file folders in which to sort assessments of and reactions to those we encounter and as expressive ways of endowing our children with the attributes we desire. In short, names are vehicles for communication, both social and commercial. And yet, because we each have a name,<sup>7</sup> to which we feel some level of personal attachment, if not a quasi-property right,<sup>8</sup> we may be unaccustomed to thinking about names in a functional sense.<sup>9</sup> Indeed, some of the most famous quotes from literature reflect the importance attached to one's name,<sup>10</sup> all essentially converging on the conclusion

6. In 2006, James Frey's memoir *A Million Little Pieces* was acknowledged to be largely fiction, leading to numerous lawsuits by readers. An eventual settlement allowed readers to request reimbursement; only 1729 readers did so, with claims totaling \$27,348. See *A Few Little Pieces*, N.Y. TIMES, Nov. 3, 2007, at B10. Cf. Harry R. Weber, *Time to Scrap BP Brand? Gas Station Owners Divided*, MSNBC.COM (July 30, 2010, 5:11 PM), [http://www.msnbc.msn.com/id/38493212/ns/business-us\\_business](http://www.msnbc.msn.com/id/38493212/ns/business-us_business) (reporting consumers' nonchalant reactions to hypothetical change to BP's corporate name after oil spill in Gulf region).

7. RICHARD D. ALFORD, NAMING AND IDENTITY: A CROSS-CULTURAL STUDY OF PERSONAL NAMING PRACTICES 1 (1987) ("Ethnographic research has failed to reveal a single society which does not bestow personal names on its members.").

8. One's name is highlighted as a subject of protection in at least one international agreement. See International Covenant on Civil and Political Rights, art. 24-2, Mar. 23, 1976, 999 U.N.T.S. 171 ("Every child shall be registered immediately after birth and shall have a name."); see generally Audrey Guinchard, *Is the Name Property?: Comparing the English and the French Evolution*, 1 J. CIV. L. STUD. 21 (2008).

9. See Andrew M. Colman, David J. Hargreaves & Wladyslaw Sluckin, *Psychological Factors Affecting Preferences for First Names*, 28 NAMES 113, 113 (1980) (suggesting that the psychological literature has neglected the study of personal names "partly due to the fact that we tend in our culture to take personal names for granted"). This neglect has since been remedied, in part, by the rise of onomastics (the study of names and naming practices) as a recognized and legitimate field of research.

10. Beyond the many oft-quoted Shakespeare references, see, for example, this passage from Lewis Carroll's *Through the Looking-Glass*:

"Don't stand chattering to yourself like that," Humpty Dumpty said, looking at her for the first time, "but tell me your name and your business."

"My name is Alice, but—"

"It's a stupid name enough!" Humpty Dumpty interrupted impatiently.

"What does it mean?"

"Must a name mean something?" Alice asked doubtfully.

"Of course it must," Humpty Dumpty said, with a short laugh: "my name means the shape I am—and a good, handsome shape it is, too. With a name like yours, you might be any shape, almost."

LEWIS CARROLL, THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE 108–09 (1902); see also 2 MARCEL PROUST, REMEMBRANCE OF THINGS PAST 252 (C.K. Scott Moncrieff & Stephen Hudson trans., 2006) ("Her social personality, which had been so

that a name is “one of the most permanent of possessions . . . [which] remains when everything else is lost; it is owned by those who possess nothing else.”<sup>11</sup> Yet, although we tend to think of our names as “belonging” to us and defining who we are (and note that in the United States, our names are often the response to the question “Who are you?”<sup>12</sup> while in many other countries, the question translates as “What/How are you called?”<sup>13</sup>), names are, in fact, much more like trademarks: serving as indicators of identity rather than as identity itself.

Indeed, if one’s name were inextricably connected to one’s core identity, name changing would be viewed with much more skepticism.<sup>14</sup> Someone who changed his name for religious reasons, for example, would be considered to have committed a fraud on the public rather than simply communicating one new aspect of his persona at a particular point in time. Likewise, a company that adopted a new corporate identity or rebranded one of its products would be the target of claims of consumer deception, even if the motivation was simply to modernize its public persona. The fact that neither circumstance is of legal (or, for the most part, moral) concern suggests that, in some instances, we are fairly comfortable with the concept that a name is not coextensive with identity but, rather, serves a more functional purpose. Names, whether personal or trademark,<sup>15</sup> serve a signaling or source-

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vague, became clear to me as soon as I learned her name, just as when, after racking our brains over a puzzle, we at length hit upon the word which clears up all the obscurity, and which, in the case of a person, is his name.”).

11. ELSDON C. SMITH, *THE STORY OF OUR NAMES* 61 (1950).

12. ALFORD, *supra* note 7, at 51 (“If you ask most people: ‘Who are you?’ the response you are most likely to receive is a recital of their names.”); 1 J. THOMAS MCCARTHY, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 3:6 (4th ed. 2008) (analogizing the question “Who are you?” asked of a person, to which the usual response would be one’s name, to the function performed by a trademark and distinguished from the answer to the question “What are you?”); James F.T. Bugental & Seymour L. Zelen, *Investigations into the ‘Self-Concept’: I. The W-A-Y Technique*, 18 J. PERSONALITY 483, 493 (1950) (reporting the results of a study in which one’s name was one of the most frequent responses to the question “Who are you?” and concluding that “for all [respondents] the name seems to be a central aspect or representative of the Self-Concept”).

13. For example, in French, the question is “Comment vous appelez-vous?” and in Spanish, the question is “Como te llamas?” both of which translate directly as “How do you call yourself?” rather than “Who are you?”.

14. According to one report, the number of name change petitions filed in the New York Civil Court in Manhattan went from 202 in 1995 to 3109 in 2009. William Glaberson, *For Transgender People, Name Is a Message*, N.Y. TIMES, Jan. 25, 2010, at A12. As Merle Weiner has noted, one’s view of the connection between naming and identity may have cultural or gender-based components. Merle H. Weiner, “*We Are Family*”: *Valuing Associationalism in Disputes over Children’s Surnames*, 75 N.C. L. REV. 1625, 1649 (1997) (“[W]omen tend to think that changing a surname is natural, whereas men tend to see it as aberrational . . .”).

15. Although symbols, colors, trade dress, and various other visual elements can also serve as trademarks or service marks, I am concerned in this Article with word (lexical) marks. In addition, by “trademark” I mean to include not only trademarks and service marks as used in connection with particular goods and services (such as “iPod”) but also corporate names that serve as trademarks for a wide range of goods or services (such as “Apple”). The same word can obviously serve both of these functions. *Cf.* JOHN ALGEO, *ON DEFINING THE PROPER NAME* 14 (1973) (comparing “Onassis sold the Ford and bought a Volkswagen” with “Onassis sold Ford and bought Volkswagen”).

identifying function—they point to a particular referent in a particular context. They distinguish a good or person from another while at the same time associating that good or person with a set of qualities that are presumed to remain at least somewhat consistent over a period of time.

In fact, the law recognizes the functional aspect of names. In general, whether the name is personal or trademark, the law remains fairly agnostic with respect to one's choice of name, limiting that choice only in certain circumstances. The justification for these limitations can be more fully understood by greater attention to the philosophy of naming. Naming is typically explained either by a causal theory—that names function as such simply by continued reference to their object—or by a descriptive theory—that names function as such when connected to a particular set of characteristics. Naming law incorporates both of these theories: it permits the choice of virtually any name at any point in time, so long as that name has a clear referent (in context) and is associated with a core set of characteristics. When either of these relationships ceases to exist—when, for example, one adopts a name that confuses others as to the name's referent or when one alters the essential qualities associated with a particular name—the law's concern is heightened. But (with some exceptions) so long as the denotational link between reference and referent remains clear, the law is unconcerned with seriatim changes to the reference. One can be "Susan Anderson" today and "Susan Jones" tomorrow, or "ValuJet" today and "AirTran" tomorrow, without implicating any legally relevant concern with confusion or fraud. By taking this stance, the law strikes an appropriate balance between the autonomy interest in freely choosing one's name and the interests of others in using that name as an effective informational device.

As this Article suggests, fidelity to the principles of naming theory can provide guidance regarding the proper scope of naming law, both as to personal names and as to trademarks. The law's primary concern, I suggest, should be to preserve the core denotative and descriptive functions of the name in relation to its referent at a particular point in time. Attempts to restrict naming choices based on the emotional or other connotations associated with the name, or based on nonessential changes to the name's referent, should be seen as overreaching, precisely because such choices do not fundamentally impede others' ability to use the name as a referent but do frustrate the ability to engage in identity creation. Thus, naming theory provides little support for denying an individual the right to change his name to "Jesus Christ" or a maker of hammers to market its goods under the mark "Rolls Royce," given that it is highly unlikely that anyone will be confused by such uses. In further exploring this thesis, this Article proceeds as follows. In Part I, I provide an overview of the sociology and history of naming, describing how both names and trademarks have denotative and connotative effects. In Part II, I describe how these effects have informed the law's approach to the validity of a name, a view that, as with trademarks, focuses on whether the name at issue is used to indicate source to others. In Part III, I consider the courts' assessment of uses of names, noting that the law seems to be primarily concerned with whether the choice of name is likely to cause confusion as to source. Part IV moves from the descriptive to the normative, noting that while the law may, on occasion, set limitations on the types of name changes that can be effected, these limitations are not truly about consumer deception but, rather, focus on the much narrower concern of consumer confusion. I conclude by suggesting that, despite our personal attachments to names, the law's

view of naming is more functional than emotional, thus suggesting a reframing of how we think about attributional issues more broadly.<sup>16</sup>

### I. NAMING AND IDENTITY

The legal treatment of both trademarks and personal names—as source identifiers rather than as property—tracks the historical development of naming conventions and the related linguistic evaluation of the function of names. In both realms, history suggests that naming systems developed less as attempts to reflect personal or spiritual identity fulfillment and more as reference systems for others.

#### A. *The Sociology of Naming*

In earlier times, trademarks were unnecessary. Consumers bought goods from local sellers, face to face; if they needed to buy more of the same goods or complain about the goods they received, they could return directly to the seller.<sup>17</sup> Nothing in this process required that the goods be marked in some way to indicate the source of the goods to the consumer. As trade expanded to cover a broader geographical region, however, vendors developed marks that could be used to identify sellers.<sup>18</sup> These marks existed in one-to-one relationships with sellers; as Benjamin Paster noted, a master craftsman was required by his guild to “choose a mark . . . to use it on all goods he produced, and to retain it his entire life.”<sup>19</sup> Marks were, in effect, regulatory substitutes for the identity of sellers: mnemonics for consumers who bought directly from producers and symbolic codes for those purchasers further downstream.

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16. I am generally excluding from the scope of this Article name changes that take place in conjunction with family formation or dissolution events, including marriage, divorce, and adoption. These events raise important questions of the law’s proper reach, particularly in light of gender equity concerns, and for this reason cannot be given full treatment here. For further consideration of such issues, see, for example, Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761 (2007); Michele Hoffnung, *What’s in a Name? Marital Name Choice Revisited*, 55 SEX ROLES 817 (2006); Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. 893 (2010); Michael Rosensaft, *The Right of Men to Change Their Names upon Marriage*, 5 U. PA. J. CONST. L. 186 (2002); Weiner, *supra* note 14.

I should also note that while I occasionally refer to non-Western practices of personal naming for purposes of comparison, this Article focuses on U.S. naming law, both as to personal names and as to trademarks. The legal and practical aspects of naming in other jurisdictions, while intriguing and important, are beyond the scope of this project.

17. See Benjamin G. Paster, *Trademarks—Their Early History*, 59 TRADEMARK REP. 551, 551–52 (1969); see also, e.g., Sidney A. Diamond, *The Historical Development of Trademarks*, 65 TRADEMARK REP. 265 (1975); Daniel M. McClure, *Trademarks and Unfair Competition: A Critical History of Legal Thought*, 69 TRADEMARK REP. 305 (1979).

18. Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 575–77 (2006).

19. Paster, *supra* note 17, at 556.



The modern trademark experience is, of course, far different from the one Paster described. While traditional trademark doctrine still conceives of marks as source identifiers, divining the identity of the source is not as simple as it was previously. Companies are no longer restricted to a single mark; as Frank Schechter noted in 1925, “[t]he modern manufacturer may use a mark or several marks or no mark just as he pleases.”<sup>20</sup> Thus, a conglomerate might manage a stable of multiple products, each bearing a different trademark, none of which is identical to the company’s corporate name.<sup>21</sup> The source at issue today is no longer an identifiable individual or entity—in other words, the mark on the bottom of a piece of pottery is not a shorthand for “John the cooking pot seller”—but rather serves to indicate the identity or essence of the product itself. A consumer who encounters the “Pepsi” or “Cadillac” mark probably does not think of the particular place of manufacture of the product or the owner of the mark—assuming those are the same entity in an age of outsourcing—but references instead some set of qualities of the product itself. One might say, “I drink Pepsi because I think it tastes better than other soft drinks” or “I buy Cadillacs because I think they’re well-built cars that also impress my friends,” but this is a different sense of “source” from the one that describes the place to which a buyer returns to buy more of the same goods. To be sure, the product itself must come from a manufacturer, and so there is a connection of sorts between the set of qualities attached to the product and some sort of producer, but it is not at all clear that the consumer always cares which set of hands is responsible for creating a product, so long as its qualities are consistent. Indeed, the modern practice of outsourcing production supports this conclusion. While consumers may protest such practices as a matter of domestic job loss, trade policies, or labor conditions abroad, few presumably criticize outsourcing on the grounds that no entity other than the original manufacturer (and, by association, the original set of employees who produced the product at the time of the consumer’s first encounter with it) is capable of reproducing the qualities associated with a particular trademark.<sup>22</sup>

With the move to representing collections of qualities rather than individual manufacturers came a related expansion of branding conventions. In the colonial

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20. FRANK I. SCHECHTER, *THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARKS* 122 (1925). As Schechter describes, some courts were slow to adopt this view. *See id.* at 147; *see also* *Candee, Swan & Co. v. Deere & Co.*, 54 Ill. 439, 457 (1870) (“A trade mark denotes the origin of the article. No one man can have more than one mark or brand . . . . If the owner could have more than one mark by which to distinguish his property, great confusion and uncertainty would be produced, to such an extent as to defeat the object in view.”).

21. In light of this phenomenon, David Aaker suggests that U.S. corporations “make only a temporary commitment to the family of products and brands within their portfolios. Their willingness to buy and sell businesses, thereby changing their corporate identity, makes it more difficult to justify investing in U.S. corporate brands.” DAVID A. AAKER, *BUILDING STRONG BRANDS* 114 (1996).

22. *See, e.g.*, James Brooke, *Factory Jobs Move Overseas as Japan’s Troubles Deepen*, N.Y. TIMES, Aug. 31, 2001, at A1 (quoting the chief economist for Merrill Lynch Japan, who referred to the “Nike model,” in which “you do the brand management in Seattle and the manufacturing in Indonesia”).

era, for example, trademarks were often coextensive with corporate or trade names; at most, the marks used were highly descriptive of each company's purpose, such as "Bridgeport Glass Company" or "United States Steel Corporation."<sup>23</sup> Throughout the twentieth century, however, as marks developed to reflect product qualities rather than sources, trademarks became correspondingly esoteric and ambiguous—for example, the change in one company's name from "International Harvester" to "Navistar."<sup>24</sup> Additionally, consistent with their association with qualities rather than strictly with producers, trademarks developed to respond to greater degrees of sophistication in marketing techniques by triggering emotional responses from consumers. Today, brand names span the spectrum detailed by Judge Friendly in *Abercrombie & Fitch Co. v. Hunting World, Inc.*: from highly descriptive names (which receive no protection without proof that they are seen by consumers as referring to the good or service in question) to "fanciful" or invented words (which can be protected without proof of consumer understanding).<sup>25</sup> Indeed, it would not be surprising to learn that the marketing department and the legal department in a typical company find themselves frequently at odds—the legal department recommending more fanciful names so as to acquire trademark protection more easily, and the marketing department desiring a more descriptive name that efficiently conveys to consumers the product's qualities without the need to spend millions of advertising dollars in consumer education.

The history of personal names largely, although not entirely, mirrors the development of trademarks. Cultural anthropologists describe that in small, typically premodern communities, extensive naming systems were largely unnecessary.<sup>26</sup> Everyone was familiar with the kin relationships of the village, and therefore only so much of a name was needed as would call to mind the individual all in the community knew.<sup>27</sup> Personal names, similar to early corporate names, were highly descriptive, useful only to a limited community, and not particularly evocative (such as "store Kasim" to identify the particular man named Kasim who

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23. Mary Ann Glynn & Rikki Abzug, *Institutionalizing Identity: Symbolic Isomorphism and Organizational Names*, 45 ACAD. MGMT. J. 267, 269 (2002).

24. See, e.g., J. Boddewyn, *Corporate Names and Change*, 40 BUS. HIST. REV. 250, 250–53 (1966) (tracing typical corporate forms over time); Glynn & Abzug, *supra* note 23, at 269 (same); Louise Pound, *Word-Coinage and Modern Trade-Names*, 4 DIALECT NOTES 29, 40–41 (1913) (noting the increase in invented trademarks in the late nineteenth and early twentieth centuries and expressing surprise that consumers did not view such neologisms with distrust). Glynn and Abzug suggest that the 1990s heralded a "[f]ocus on core industries" that saw a corresponding "[r]eturn to familiar brand names and descriptive words." Glynn & Abzug, *supra* note 23, at 269. This is not true of all industries, however. See John Jugensen, *From ABBA to ZZ Top, All the Good Band Names Are Taken*, WALL ST. J., Feb. 17, 2010, at A1 ("The available supply of punchy one- or two-word band names is dwindling. So, many acts are resorting to the unwieldy or nonsensical . . . [such as] And So I Watch You From Afar.").

25. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9–11 (2d Cir. 1976).

26. ALFORD, *supra* note 7, at 72 (noting that smaller, less complex societies rely more on kin terms, rather than personal names, for both address and reference).

27. See James C. Scott, John Tehranian & Jeremy Mathias, *The Production of Legal Identities Proper to States: The Case of the Permanent Family Surname*, 44 COMP. STUD. SOC'Y & HIST. 4, 8 (2002).

ran the local shop).<sup>28</sup> As commercial and personal life became more layered, however, naming practices changed to reflect the complexities inherent in modern life. Once an individual began to live and transact business in many and larger regions, one could no longer depend on individual familiarity to act as the guarantee attendant to a commercial or personal transaction.<sup>29</sup> This was particularly true of one's interaction with the government, which increasingly required systems of identification in order to monitor and regulate individuals' rights and obligations.<sup>30</sup>

Thus, it was not until the tenth or eleventh century that surnames began to be used and not until the beginning of the fourteenth century that they became prevalent (and patronymic).<sup>31</sup> Even then, however, surnames were highly functional and communicative, were often assigned by others, and changed to reflect the contemporaneous circumstances of one's life. So when John was born to William, he might be known as John Williamson; when he started work, his name would change to John Miller; when he moved near the field, his name would change to John Westfield; and so forth.<sup>32</sup> Surnames thus might differ among family members,<sup>33</sup> and men would often take the surnames of their wives (and children the surname of their mothers) if the woman was the one in the marriage who had the larger estate.<sup>34</sup> As between the two, the first name was seen as more important

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28. *See id.* (“[E]ach of these names is locally, but *only* locally, definitive; only a relative insider is likely to know who has the village reputation for laziness, who can recite the Koran, who tripped on his sarong, or which John is William’s son.” (emphasis in original)).

29. *Cf.* POSNER, *supra* note 5, at 68–69 (“As the market for expressive works expanded, the method of financing them shifted from patronage to sales. Because the new financiers of intellectual goods—the consumers—unlike the patrons did not know the author personally, it became important that he be identified by name so that consumers’ experience with one of his books could guide their decision on whether to buy other of his books.”).

30. Scott et al., *supra* note 27, at 6 (“[T]he use of inherited familial surnames represents a relatively recent phenomenon intricately linked to the aggrandizement of state control over individuals and the development of modern legal systems and property regimes.”).

31. *Smith v. U.S. Cas. Co.*, 90 N.E. 947, 948 (N.Y. 1910) (“In England surnames were unknown until about the tenth century, and they did not come into general use or become hereditary until many years later.”); *In re Snook*, 2 Hilt. 566, 568 (N.Y. Ct. Com. Pl. 1859); *Dunn v. Palermo*, 522 S.W.2d 679, 681 (Tenn. 1975); ALFORD, *supra* note 7, at 143; G.S. Arnold, *Personal Names*, 15 YALE L.J. 227, 227 (1906); Scott et al., *supra* note 27, at 11. *But see* Amy A. Kass & Leon R. Kass, *What’s Your Name?*, FIRST THINGS, Nov. 1995, at 14, 20 (stating that a Chinese emperor ordered the universal adoption of patronymics in 2852 B.C.).

32. SMITH, *supra* note 11, at 44; Scott et al., *supra* note 27, at 8.

33. *Smith*, 90 N.E. at 948 (“Father and son did not always have the same surname, and it was not regarded as important, for both frequently had more than one.”).

34. *In re Natale*, 527 S.W.2d 402, 403 (Mo. Ct. App. 1975) (“Gradually, the custom that all members of the family bear the same, fixed surname developed as surnames lost their character as descriptions of particular individuals.”); *Dunn*, 522 S.W.2d at 681; *see also* Sec’y of the Commonwealth v. City Clerk of Lowell, 366 N.E.2d 717, 725 (Mass. 1977) (“It has been reported that under English law an illegitimate child acquired no name at birth, and could acquire a surname only by reputation.” (citing W. HOOPER, *ILLEGITIMACY* 122–24 (1911))).

because it was conferred as a matter of ceremony,<sup>35</sup> such as a baptism, whereas the last name was a matter of circumstance. As one writer noted, “Today, we are apt to consider that a Mr. Brown is called William to distinguish him from the other Browns, but formerly he was only called Brown to distinguish him from the other Williams.”<sup>36</sup>

In the modern era, as with trademarks, many personal names have become more evocative and less directly descriptive. Naming conventions for children are today more diverse, drawing from cultural heritage, popular culture, commercial products, and parental innovation.<sup>37</sup> The increase in online communication has provided individuals with ever more opportunities to make naming choices, ranging from participation on blogs and message boards to the choice of one’s user name on a personal e-mail account. In this respect, individuals, like corporations, may choose names intended to trigger an emotional response from one’s audience and may use more than one moniker (whether offline or online), depending on the circumstances.<sup>38</sup> Nevertheless, as with trademarks, the choice of one’s name has an important relational component—to be most effective, a name must be something that others can remember, use, and rely on for future interactions.

This brief narrative highlights an important point: Names, whether personal or commercial, have historically been a way of communicating information to others, rather than a way of establishing some elusive characteristic or state of intrinsic, personal identity. Although individuals no longer change their surnames as frequently as in the fourteenth century (although this practice may now be replicated with online user names), vestiges of this level of descriptiveness remain, such as when a married or divorced individual changes his or her surname to communicate the fact of the newly acquired marital status, an individual adopts a new name to signal a religious conversion, or a corporation changes its name after a merger or divestment. I now turn to this communicative function of names.

### *B. The Function of Naming*

The previous section discussed the development of trademarks and personal names as a means of communication. In this section, I consider the range of information that trademarks and personal names can be said to communicate. In general, this information falls into three broad categories. First, both personal

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35. See Betsy Rymes, *Naming as Social Practice: The Case of Little Creeper from Diamond Street*, 25 LANGUAGE SOC’Y 237, 239 (1996) (referring to such a ceremony as an event that “fixes reference”).

36. SMITH, *supra* note 11, at 28; cf. William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J. L. & ECON. 265, 269 (1987) (“The benefit of the brand name is analogous to that of designating individuals by last as well as first names, so that, instead of having to say ‘the Geoffrey who teaches constitutional law at the University of Chicago Law School—not the one who teaches corporations,’ you can say ‘Geoffrey Stone—not Geoffrey Miller.’”).

37. For an overview of how personal names have changed over time, see STANLEY LIEBERSON, *A MATTER OF TASTE: HOW NAMES, FASHIONS, AND CULTURE CHANGE* (2000).

38. See Stephanie Rosenbloom, *Mi, a Name I Call Myself. And You Are?*, N.Y. TIMES, Apr. 13, 2006, at G1 (describing choices users make in designating screen names).

names and trademarks *denote*: they provide a shorthand for an entity that can be used by others as a reference. Second, both personal names and trademarks *connote*: they communicate, either directly or by suggestion, certain characteristics about a person or good, whether actual or aspirational. Third, both personal names and trademarks *associate*: they communicate relationships between or among entities through a shared name. Notably, as I describe below, none of these functions operates perfectly, in part because neither type of naming requires unique identifiers.<sup>39</sup> The marketplace permits several “Delta” trademarks, so long as they are operating in separate fields of use (Delta Airlines and Delta Faucet being just two examples); similarly, although we all would probably assert that each of us has a unique identity, very few individuals have unique names—a simple online search will typically reveal several other doppelgängers who share one’s name.<sup>40</sup> All that is required is that the speaker and the listener (or the company and the consumer) understand what is meant by a particular reference in a particular context.<sup>41</sup>

The importance of connotation to a name’s functionality depends on whether one favors a causal or descriptive theory of naming. Causal (or causal-historical) theorists hold that a name “is introduced into a linguistic community for the purpose of referring to an individual” and “continues to refer to that individual as long as its uses are linked to the individual via a causal chain of successive users.”<sup>42</sup> Although a name may carry associated descriptions, the shared system of reference, not its descriptive accuracy, is what qualifies a name as such. Under this theory, a male child can be named “Jennifer” and a manufacturer can use the trademark “Chicken Leg” for its donuts; so long as those names are used by others to refer to the individual or product in question, they serve as valid names. By contrast, the

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39. ALGEO, *supra* note 15, at 44 (“When a proper name refers to a single individual, it seems to be an accident of use, a fact of parole, and not a matter of the language system. There is nothing in English or apparently in any other natural language that requires a name to have unique reference.”).

40. In the summer of 2009, several media outlets reported on Kelly Katrina Hildebrandt, a Florida woman, who met (through Facebook) a man in Texas with the name Kelly Carl Hildebrandt. The couple subsequently decided to get married. *See, e.g.*, Rachel Hatzipanagos, *Couple Have More in Common than Most*, CHI. TRIB., July 22, 2009, at 21.

As Bob Brauneis has suggested to me, society tolerates a higher degree of duplication with respect to personal names than it does with trademarks. In part, this is due to the point at which the law engages with the naming decision, as I discuss later in the Article. *See infra* notes 75–79 and accompanying text. But this is also due in part to, as Brauneis also noted, the presence of other indicia in the context of personal names, such as Social Security numbers, that can be used for purposes of source identification.

41. At times, identification of the intended referent can become a bit metaphysical. *See* David McGowan, *Copyright and Convergence: A Pragmatic Perspective*, in INTELLECTUAL PROPERTY PROTECTION OF FACT-BASED WORKS: COPYRIGHT AND ITS ALTERNATIVES 233, 252–53 (Robert F. Brauneis ed., 2009) (discussing *Salomone v. Macmillan Publishing Co., Inc.*, 411 N.Y.S. 2d 105 (1978)) (characterizing assertion in children’s book about character named “Mr. Salomone” and described as the manager of the Plaza Hotel as not defamatory of the real Mr. Salomone, the manager of the Plaza Hotel in New York, because the statement was “of and concerning” the character and not the real individual).

42. Edouard Machery, Ron Mallon, Shaun Nichols & Stephen P. Stich, *Semantics, Cross-Cultural Style*, 92 COGNITION B1, B2–B3 (2004).

descriptivist view holds that a term functions as a name “if and only if it uniquely or best satisfies the description [of the set of properties] associated with it.”<sup>43</sup> Under this theory, “Shakespeare” is the name used by others to refer to the playwright who wrote *Romeo and Juliet*. If it turns out that such individual is not the man born in Stratford-upon-Avon in 1564 who currently is associated with that name but rather is the Earl of Oxford, a descriptivist would hold that “Shakespeare” now refers to the Earl of Oxford because “Shakespeare” refers to the individual who meets the description “the playwright who wrote *Romeo and Juliet*.” As I will discuss later in this Article, naming law—whether personal naming law or trademark law—reflects an amalgam of both theories, relying on a causal theory of naming when considering the relationship of a name’s function to its ontology, use, and connotations, and relying on a descriptive theory of naming when considering the relationship of a name’s function to the essential qualities of its referent.

### 1. The Function of Trademarks

A trademark’s primary function is denotative. As the typical explanation goes, when a consumer sees the “Mercedes” trademark, she identifies the car as one manufactured by the entity that makes Mercedes automobiles. (This is, of course, the Mercedes-Benz company, a division of the German corporation Daimler AG, but a consumer need not know this in order for the trademark to serve its denotative function.)<sup>44</sup>

Relatedly, a trademark also serves a connotative function, in that it calls to mind the collection of qualities that give the “Mercedes” mark its power of differentiation. For example, seeing or hearing the word “Mercedes” might cause a consumer to think about luxury, status, and quality, all attributes (at least arguably) of the automobile.<sup>45</sup> Here, too, it is evident that the “source” to which a trademark is typically said to refer is not the manufacturer of the product—the company probably cannot be described as “luxurious”—but the product itself. It is this connotative function that infringers presumably want to take advantage of when

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43. *Id.* at B2 (emphasis omitted); see also Adrienne Lehrer, *Names and Naming: Why We Need Fields and Frames*, in *FRAMES, FIELDS AND CONTRASTS: NEW ESSAYS IN SEMANTIC AND LEXICAL ORGANIZATION* 123, 124 n.1 (Adrienne Lehrer & Eva Feder Kittay eds., 1992) (distinguishing the two theories); Kwame Anthony Appiah, *The New New Philosophy*, N.Y. TIMES, Dec. 12, 2007, at 34 (Magazine) (describing the causal theory of naming as one in which names come to refer by a process “akin to baptism: once upon a time, someone or some group conferred the name on an object, and, through the causal chains of history, we borrow that original designation” and the descriptive theory of naming as one in which “a name is basically shorthand for a description that specifies the person or thing in question”).

44. In trademark law, this is known as the “anonymous source” doctrine. See 15 U.S.C. § 1127 (2006) (defining “trademark” as “any word, name, symbol, or device, or any combination thereof . . . [used] to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown”); MCCARTHY, *supra* note 12, §§ 3:7, 3:9.

45. Some of the marketing and trademark literature would use the term “brand” to comprise the connotations and meanings associated with a mark. See, e.g., Mark P. McKenna, *Testing Modern Trademark Law’s Theory of Harm*, 95 IOWA L. REV. 63, 92–94 (2009). This difference in terminology is, for purposes of this Article, immaterial.

they adopt a well-known trademark for their own goods, regardless of whether they also intend to confuse consumers into thinking that they are, or are related to, the trademark holder.

Finally, a trademark also serves an associative function, which builds on its denotative and connotative functions. In other words, the mark not only provides a linguistic link from the mark to the product and its qualities but also creates a “family” of products that share these denotative and connotative links. Accordingly, a consumer who sees a motorcycle in a showroom with a Mercedes logo on it might reasonably assume both that the motorcycle comes from the same company that makes the automobiles and that it shares the qualities associated with the car.

This combination of functions works to transform a word that may have an entirely separate meaning in a language into a trademark. The word “apple” as a common noun denotes a red fruit of the genus *Malus* and connotes the color red, a sweet, crunchy taste, and the concept of healthful food. Applied to consumer electronics, however, the word “Apple” both denotes and connotes something entirely different. The word, of course, is identical (save for the capital letter, which cannot be indicated in oral communication); it is the combination of functions that allows it to serve, in a particular context, as a trademark.

## 2. The Function of Personal Names

Like trademarks, personal names serve denotative, connotative, and associative functions. A name denotes in that it allows us to refer to or identify a particular person who is not immediately present (and thus could be pointed to), akin to trademark’s “source.”<sup>46</sup> Indeed, as one court noted, a name is, at root, “the label or appellation which [an individual] bears for the convenience of the world at large in addressing him or in speaking of him or in dealing with him.”<sup>47</sup> A personal name also connotes, in that it brings to mind a certain set of qualities or attributes about the individual to whom the name is attached. A personal name suggests that an individual is either male or female, that he or she is of a particular ethnicity or from a particular region, or that he or she is young or old.<sup>48</sup> Although naming trends

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46. JOHN I. SAEED, SEMANTICS 27–28 (3d ed. 2009) (“Names . . . are labels for people, places, etc. and often seem to have little other meaning. It does not seem reasonable to ask what the meaning of *Karl Marx* is, other than helping us to talk about an individual.” (emphasis in original)).

47. *Loser v. Plainfield Sav. Bank*, 128 N.W. 1101, 1103 (Iowa 1910).

48. See ALFORD, *supra* note 7, at 69 (noting that naming systems “serve two central functions: differentiation and categorization” (emphasis in original)); ALGEO, *supra* note 15, at 55 (“The fact that [a dog is named] Fido may not have any necessary logical implications, but the ordinary use of the name *Fido* in ordinary language certainly presupposes that the entity so named is a dog, and not a cat or a boy.” (italics in original)); 1 JOHN STUART MILL, A SYSTEM OF LOGIC: RACIOCINATIVE & INDUCTIVE, bk. I, ch. 2, § 5, at 20 (Longmans, Green & Co. 1900) (“The name, therefore, is said to signify the subjects *directly*, the attributes *indirectly*; it *denotes* the subjects, and implies, or involves, or indicates, or as we shall say henceforth *connotes*, the attributes.” (emphasis in original)); Adrian G. Carpusor & William E. Loges, *Rental Discrimination and Ethnicity in Names*, 36 J. APPLIED SOC. PSYCHOL. 934,

prevent overgeneralization in this area, one might plausibly guess that a woman named Agnes or Lois is older than a woman named Britney or Madison.<sup>49</sup> Indeed, this associational function is robust enough that, as studies have demonstrated, individuals are in some circumstances inclined to make employment, rental, and other decisions largely based on the attributes they associate with a given personal name.<sup>50</sup> For example, researchers have shown that employers prone to engage in racial discrimination may assume an individual's race from how his or her name is rendered on the application<sup>51</sup> and that women with typically masculine names achieve greater career success in the law than women with typically feminine names.<sup>52</sup>

This belief in the connotative effect of a personal name may also be reflected in the naming decision itself. In many cultures, including in the United States, the first

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936 (2006) (describing information disclosed by names); Janet Finch, *Naming Names: Kinship, Individuality and Personal Names*, 42 *SOCIOLOGY* 709, 709 (2008) (same); William Petersen, *Surnames in US Population Records*, 27 *POPULATION & DEV. REV.* 315, 315 (2001) (noting that the U.S. government has used individuals' surnames to chart the country's ethnicity); Sidney Zink, *The Meaning of Proper Names*, 72 *MIND* 481, 482 (1963) (describing denotation, connotation, or a combination of the two as three possible theories of proper names).

49. Sixty years from now, of course, the reverse will likely be true. See SMITH, *supra* note 11, at 11 (describing influence of literature on naming of children); Stanley Lieberman, *Reply to Philippe Besnard*, 100 *AM. J. SOC.* 1317, 1319 (1995) (describing the diffusion of first names through a "central stimulus" in the mass media, such as "the names of appealing fictional characters or appealing performers").

50. See, e.g., Stanley Lieberman, *What's In a Name? . . . Some Sociolinguistic Possibilities*, 45 *INT'L J. SOC. LANGUAGE* 77 (1984); Ralph Slovenko, *The Destiny of a Name*, 11 *J. PSYCHIATRY & L.* 227 (1983).

51. See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal?: A Field Experiment on Labor Market Discrimination*, 94 *AM. ECON. REV.* 991, 992 (2004) (concluding that employers' perceptions of applicants' race based on the name on their resumes affects callback rate); Carpusor & Loges, *supra* note 48, at 935 (noting that naming studies agree that "names elicit different treatment of individuals because of the associated expectation attached to them"); *id.* at 949 (concluding that landlords might discriminate among applicants based on names); Jerlean E. Daniel & Jack L. Daniel, *Preschool Children's Selection of Race-Related Personal Names*, 28 *J. BLACK STUD.* 471, 486–88 (1998) (describing study in which white children "significantly selected African American names more often for negative than positive behavior attributions" but noting that result may be due to familiarity with names rather than stereotypes); Herbert Harari & John W. McDavid, *Name Stereotypes and Teachers' Expectations*, 65 *J. EDUC. PSYCHOL.* 222, 225 (1973) (study concluding that teacher evaluation of student writing is based, in part, on stereotypes based on the student's name). Some earlier scholarship on naming reflected such views directly. See, e.g., SMITH, *supra* note 11, at 113 ("For Christian names the Negroes have chosen some of the oddest, gaudiest, most humorous, most picturesque, and sometimes most unaccountable, appellations."); *id.* at 114 ("Ignorant whites sometimes bestow outlandish names on their offspring, so that peculiar given names from the South do not always stamp one as having a dark skin.").

52. Bentley Coffey & Patrick A. McLaughlin, *Do Masculine Names Help Female Lawyers Become Judges?: Evidence from South Carolina*, 11 *AM. L. & ECON. REV.* 112, 131–32 (2009) (finding support for hypothesis that "females with masculine names fare better in legal careers than females with feminine names").



name of a child is sometimes chosen for its connotative meaning, reflecting the parents' feelings about the birth<sup>53</sup> or aspirations for the child<sup>54</sup> or for themselves.<sup>55</sup> For example, parents who give a child (most often a boy) the name of a relative may hope that he will carry on the family line or emulate that relative's qualities,<sup>56</sup> whereas parents who give a girl a less conventional female name may hope that she will not be bound by traditional gender roles.<sup>57</sup> This connotative function is also what has led some well-known individuals to change their names from the names they were given at birth.<sup>58</sup> For example, Rembrandt reportedly changed his surname from Gerretz to van Ryn "on account of [the latter's] greater dignity,"<sup>59</sup> and Napoleon Bonaparte changed his name from the (Italian) Napoleone

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53. See SMITH, *supra* note 11, at 6 ("The early Puritans considered the names *Lament* and *Trial* appropriate for girls born out of wedlock."); *id.* at 20–22 (summarizing reasons for naming children).

54. See, e.g., Colman et al., *supra* note 9, at 113–14 (noting that among the Ashanti people of West Africa, a child's name reflects the day of the week of his or her birth, which is believed to correspond to temperament); Nathan Miller, *Some Aspects of the Name in Culture-History*, 32 AM. J. SOC. 585, 592 (1927) (noting in some cultures that "[t]he place and time of birth, circumstances connected with it, things then seen and heard, are all memorialized in the name of the child"); *id.* at 594 (describing instances in which a child's name "is chosen with a view to transferring, through the process of contagion or sympathetic magic, the desired or admired qualities of bird, beast, or plant").

55. SMITH, *supra* note 11, at 11–12 ("Romantic people reflect the names of popular novel heroes and heroines; enthusiastic ones mark famous incidents and commemorate great men; fashionable people select the new names currently popular at the moment; pious persons are careful to adopt the names approved by their church; nonconformists choose unusual names."); Stanley Lieberson & Eleanor O. Bell, *Children's First Names: An Empirical Study of Social Taste*, 98 AM. J. SOC. 511, 544 (1992) (suggesting that, at minimum, "households with less educated mothers tend to favor names for their daughters and sons *after* those names have been used in households with more highly educated mothers" (emphasis in original)).

56. Alice Rossi, *Naming Children in Middle-Class Families*, 30 AM. SOC. REV. 499, 510 (1965) (concluding that "naming sons seems to fulfill the symbolic function of stressing the continuity of the paternal line"); see also Lieberson & Bell, *supra* note 55, at 516 (discussing Rossi study).

57. Lieberson & Bell, *supra* note 55, at 533–34 (speculating that "names ending in a consonant are less 'frilly' or obviously feminine in their connotation" and that "highly educated mothers generally find names ending with an *n*-consonant sound more appealing for their daughters because they understate a glaring gender gap, yet clearly mark the child as female"). But see Philippe Besnard, *The Study of Social Taste Through First Names: Comment on Lieberson and Bell*, 100 AM. J. SOC. 1313, 1315 (1995) (criticizing the scope of Lieberson and Bell's study and suggesting that "vertical diffusion process might be a better explanation than class differences"); Lieberson, *supra* note 49, at 1317–19 (responding to critique).

58. Cf. W.W. Thornton, *Names of Persons*, 22 CENT. L.J. 220, 220 (1886) (noting that in the Roman Empire, "names were frequently changed to suit the fancy of the person named").

59. *Smith v. U.S. Cas. Co.*, 90 N.E. 947, 949 (N.Y. 1910).

Buonaparte “after his amazing victories had lured him toward a crown and he wanted a grander name to aid his daring aspirations.”<sup>60</sup>

Finally, personal names also have an associational function. In the same way the shared mark “Mercedes” can indicate a family of related goods, a surname can indicate a family of related people and an indication of one’s social identity.<sup>61</sup> Initiation into other social structures, such as fraternities or gangs, may be accompanied by new names that represent the new associations; indeed, as early as fifteenth-century Italy, “virtually the only Tuscan family names were those of a handful of great families . . . whose kin, including affines, adopted the name as a way of claiming the backing of a powerful corporate group.”<sup>62</sup>

As with a trademark, a personal name may be coextensive in appearance with a common word in the language at issue, such as when a girl is named “Faith” or “Hope.” Although the word’s primary meaning may contribute to the connotative function of the mark, when used as a personal name the word develops a secondary meaning in context as a reference to the individual at issue. Thus, just as the trademark “Bank of America” may have the dictionary meaning in English of “national financial institution” but develop a secondary meaning once it is used sufficiently as a trademark, a personal name changes similarly. The word “faith” or “hope” has a meaning in the English language, and that meaning may have been part of the intended connotations of the name when bestowed on the individual as a child. But when used as a name, the primary meaning of the name fades into the background, and the secondary meaning of the name as an identifier comes to the forefront.<sup>63</sup>

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60. *Id.* at 948; *see also* 1 WILLIAM MILLIGAN SLOANE, LIFE OF NAPOLEON BONAPARTE 39 (1909) (“The chameleon-like character of the name corresponds exactly to the chameleon-like character of the times, the man, and the lands of his birth and his adoption.”).

61. *See, e.g.*, ALFORD, *supra* note 7, at 29. In this way, a personal name marks someone both as an individual and as part of a social or kin network. Finch, *supra* note 48, at 711. Some individuals take steps to detach themselves from such associations. *See, e.g.*, Aaron Smith, *Madoff’s Daughter-in-Law Wants Her Name Changed*, CNNMONEY.COM (Feb. 25, 2010), [http://money.cnn.com/2010/02/25/news/companies/madoff\\_name\\_change/](http://money.cnn.com/2010/02/25/news/companies/madoff_name_change/) (describing efforts of daughter-in-law of Bernard Madoff to change her and her children’s surname to Morgan).

62. Scott et al., *supra* note 27, at 11.

63. As with trademarks, it is probably not entirely coherent to talk about a personal name having a “meaning” beyond its function as reference. *See* 1 KEITH ALLAN, LINGUISTIC MEANING 72 (1986) (noting that proper names have no definition beyond, for example, “name for a male”); John R. Searle, *Proper Names*, 67 MIND 166, 173 (1958) (contending that proper names do not have a sense beyond being “logically connected with characteristics of the object to which they refer” and then only a sense “in a loose sort of way”); *In re Snook*, 2 Hilt. 566, 567–68 (N.Y. Ct. Com. Pl. 1859) (“The meaning of the word constituting the name of a person, is of no importance, for, considered as a name, it derives its whole significance from the fact that it is the mark or *indicia* by which he is known.” (italics in original)).

### 3. The Importance of Context

The ability of common words to serve as trademarks and personal names and the fact that some products and some individuals may share a name both mean that we often depend on context to make their references pellucid. If, in a conversation with a friend, I suggest that we meet at Tiffany's tomorrow afternoon, my friend is likely to know (or will know with some additional context) whether I intend for us to meet at a restaurant called Tiffany's Diner, at our friend Tiffany's home, or at the well-known jewelry store; if I refer to spending money with Delta last year, context will illuminate whether I am talking about air travel or home improvement. Similarly, if a speaker makes a reference to "Bill Richardson," the context will generally make clear whether the speaker intends to refer to the governor of New Mexico or to an individual in the speaker's neighborhood.<sup>64</sup>

More generally, it is context that indicates whether an unknown term is functioning as a trademark or name or in some other way. A consumer who has never before encountered the word "Zazy" will likely assume, when she sees it on the front of a box of cereal in stylized script, that the word is functioning as a trademark.<sup>65</sup> Thus, the linguistic content of the reference is largely irrelevant to its denotative ability (although it may be highly relevant to whether it is memorable); so long as it is used consistently within the relevant consumer group, a luxury watch can be called "Rolex" or "Trela" or any other combination of letters.<sup>66</sup> A trademark may be descriptive of the qualities of the good or service with which it is associated (although it cannot be merely descriptive), but its descriptiveness is not what qualifies it to serve as a trademark. Put in terms of the causal theory of naming:

"NN" is a name of  $x$  if there is a community  $C$

1. in which it is common knowledge that members of  $C$  have in their repertoire the procedure of using "NN" to refer to  $x$  (with the intention of referring to  $x$ )

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64. SAUL A. KRIPKE, NAMING AND NECESSITY 8–9 (1980) (noting that context makes clear whether "Aristotle" refers to the philosopher or to Mr. Onassis); Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 529 (2008) ("Have you ever put your suitcases into a cab in a major U.S. city, asked for 'American' or 'United,' and received the response 'Which one?' No rational cab driver would take a person who said 'American' to the local American Apparel or a person who said 'United' to the local United Van Lines."). Cf. *Raffles v. Wichelhaus*, (1864), 159 Eng. Rep. 375 (Ex.); 2 H. & C. 906 (finding no binding shipping contract when parties had different understandings of the ship to which the name "Peerless" referred).

65. Color, graphic design, and other nonlexical elements may contribute to (or, indeed, be the primary driver of) this effect, such that some consumers may interpret generic terms as trademarks. See generally Thomas R. Lee, Eric D. DeRosia & Glenn L. Christensen, *An Empirical and Consumer Psychology Analysis of Trademark Distinctiveness*, 41 ARIZ. ST. L.J. 1033 (2009).

66. Christopher Kirwan, *On the Connotation and Sense of Proper Names*, 77 MIND 500, 509 (1968) (noting that a proper name, in order to be a useful tool for communicating, must "carry a presupposition which is invariant to the speaker and occasion of utterance and also to the object referred to").

2. the success in reference in any particular case being intended to rely on common knowledge between speaker and hearer that “NN” has been used to refer to *x* by members of *C* and not upon common knowledge of the satisfaction by *x* of some predicate embedded in “NN.”<sup>67</sup>

Indeed, the law has historically recognized the importance of both context and consistency in determining naming presumptions. Similar to the canon of statutory interpretation that presumes that a legislature intends a term to have a consistent meaning throughout a piece of legislation, courts presume that a name has a consistent reference throughout a single document: “The general rule is that identity of name is presumptive of identity of person.”<sup>68</sup> Thus, for example, in a document conveying rights to real property, “where the name of the grantee of land and that of a prior holder and grantor are the same, it will be presumed they designate the same person.”<sup>69</sup> But where such a presumption cannot be made—for example, “where the place of residence was in a large city or town” or where “the name is very common”—additional information is typically consulted to make the reference clear.<sup>70</sup>

Of course, there are both trademarks and personal names that are so well-known (or, in trademark parlance, “famous”) that they tend to bring to mind only one referent and so require little, if any, context. As Richard Alford writes, such names are very likely to “reliably and powerfully evoke associations” with the famous referent even when those names are used to denote others.<sup>71</sup> The associations connected with a trademark such as “Coca-Cola” or a personal name such as “Adolf Hitler” are therefore likely to overwhelm any use of those names for other denotative purposes, although such associations do not, of course, deprive such names of their denotative function altogether. The decision to call a child “Adolf Hitler” may be extremely troubling,<sup>72</sup> but so long as the child is consistently so referenced, the decision represents a legitimate act of naming.

Thus, in order to be a successful name (whether personal or commercial), a name must fulfill a certain denotative function. The connotative effects of a choice of name may drive the selection of a name—or may inspire reactions from others—but no connotative function need be fulfilled in order for a name to be a name. A

67. Gareth Evans & J.E.J. Altham, *The Causal Theory of Names*, 47 PROC. ARISTOTELIAN SOC’Y (Supp.) 187, 202 (1973).

68. *Aultman, Miller & Co. v. Timm*, 93 Ind. 158, 160 (1883).

69. *Thornton*, *supra* note 58, at 227; *see also* *Loser v. Plainfield Sav. Bank*, 128 N.W. 1101, 1105 (Iowa 1910).

70. 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 278d (16th ed. Boston, Little, Brown & Co. 1899) (noting that the general rule does not apply “where the place of residence was in a large city or town, in which case, proof of some additional circumstances seems to be necessary”); *Thornton*, *supra* note 58, at 228 (“If the name is very common some courts refuse to hold presumptively the name to be identical with the person.”).

71. ALFORD, *supra* note 7, at 116.

72. *See* Lisa W. Foderaro, *Naming Children for Nazis Puts Spotlight on the Father*, N.Y. TIMES, Jan. 20, 2009, at A28 (describing controversy over a New Jersey couple who named their child Adolf Hitler Campbell); *see also* Colman et al., *supra* note 9, at 116 (noting that the name “Adolf” has “virtually disappeared since the Second World War”).

newly invented personal name or trademark is as much a name as a highly connotative name, so long as it is used by others to refer to a person or a product.<sup>73</sup> Indeed, as the *Abercrombie* hierarchy suggests, an invented name might be more easily recognized (in context) by others as a name for the precise reason that it does not carry any other connotations.<sup>74</sup>

## II. THE LAW OF NAMING: THE VALIDITY OF NAMES

The fact that trademarks and personal names share much in their history and functionality does not, however, compel the conclusion that they should be treated in the same way legally. There are still some structural differences between trademarks and personal names that suggest that different legal treatment might be appropriate.

To begin with, the law interacts with the naming process in different ways and at different times for trademarks and for personal names in the United States. Because, as described below, the government does not require registration either for personal names or for trademarks before they can be used, the first legal review of these naming decisions typically comes after the name or trademark has already been introduced to the public.<sup>75</sup> For a personal name, this legal review takes place when an individual petitions a state court for official approval of a name change,<sup>76</sup>

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73. ALGEO, *supra* note 15, at 44 (“[I]t is enough to know whether a speaker intends that two terms shall have the same or different referents; whether those referents are of this nature or of that is a problem that the grammarian is happy to leave to the philosopher. . . . For the linguist, *Xanadu* is as good a referent as *Canada*, and in neither case does it make any difference to him what sort of referent it is.”).

74. *But see* STEVEN PINKER, *THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE* 311 (2007) (“[I]nteresting neologisms tend to fail precisely because they are interesting—not because their construction is clever but because the coiner is really commenting on something rather than naming something.” (emphasis omitted)).

75. This is not the case for registration applications filed under the Lanham Act’s intent-to-use provisions. *See* 15 U.S.C. § 1051(b) (2006).

76. When an individual does seek judicial approval of a proposed name change, the court’s decision will typically be made against the provisions of a state statute. Nineteen states rely on the common law precedent of generally permitting name changes; most such states indicate that a name change request should be denied only if the request was made for a fraudulent or illegal purpose. *See* GA. CODE ANN. § 19-12-4 (West 2007); IND. CODE § 34-28-2-1 (2008); IOWA CODE § 674.4 (1998); MINN. STAT. § 259.11 (2007); MO. REV. STAT. § 527.270 (2002); MONT. CODE ANN. § 27-31-204 (2009); N.H. REV. STAT. ANN. § 547:3-i (2007); N.J. STAT. ANN. § 2A:52-1 (West 2000); OKLA. STAT. ANN. tit. 12, § 1634 (West 1993); VT. STAT. ANN. tit. 15, § 811 (2002 & Supp. 2010); VA. CODE ANN. § 8.01-217(C) (West 2007); WASH. REV. CODE § 4.24.130(1) (2005 & Supp. 2010); *Esco v. State*, 179 So. 2d 766, 770 (Ala. 1965); *Isom v. Circuit Court of Tenth Judicial Circuit*, 437 So. 2d 732 (Fla. Dist. Ct. App. 1983); *Jech v. Burch*, 466 F. Supp. 714, 717 (D. Haw. 1979); *Burke v. Hammonds*, 586 S.W.2d 307 (Ky. 1979); *Schroeder v. Broadfoot*, 790 A.2d 773 (Md. 2002); *Marshall v. Marshall*, 93 So. 2d 822, 827 (Miss. 1957); *Traugott v. Petit*, 404 A.2d 77, 78–79 (R.I. 1979).

Eighteen states and the District of Columbia allow a name change request to be denied only if there is a substantial or principled reason to deny it. *See* ARIZ. REV. STAT. ANN. § 12-601(c) (Supp. 2010); CAL. CIV. PROC. CODE § 1278(a) (West 2007); COLO. REV.

a petition that is likely to result in a written opinion only for more contentious requests. For a trademark, this legal review is likely to take place earlier in the trademark's life cycle: either when the trademark holder seeks to register the trademark with the U.S. Patent and Trademark Office or when the mark is made the subject of an infringement or dilution proceeding. Such reviews, given the nature of judicial and administrative processes, are more likely to result in written opinions. As a result, the number of published opinions concerning the validity of name choices in trademark law is likely to be greater than the number of such opinions concerning the validity of personal name choices. Moreover, the nature of any injunction issued is also likely to differ. In a trademark case, the court can enjoin an infringer from using the challenged mark in connection with the goods or services at issue. In a personal name case, the court can deny a proposed name change or enjoin particular activities on the part of the individual but is not likely to issue a broad injunction requiring an individual to abandon or change his or her birth name.<sup>77</sup>

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STAT. § 13-15-101(c)(2)(a) (West 2005 & Supp. 2010); CONN. GEN. STAT. § 52-11(a) (2005 & Supp. 2010); DEL. CODE ANN. tit. 10, §§ 5901, 5904 (1999); D.C. CODE § 16-2503 (2001 & Supp. 2010); IDAHO CODE ANN. § 7-804 (2010); 735 ILL. COMP. STAT. 5/21-101 (2003 & Supp. 2010); ME. REV. STAT. ANN. tit. 18-A, § 1-701(f) (1998 & Supp. 2010); MASS. GEN. LAWS ch. 210, § 12 (2003); N.M. STAT. § 40-8-1 (2003); N.Y. CIV. RIGHTS LAW § 63 (McKinney 2009); OR. REV. STAT. § 33.410 (2009); 54 PA. CONS. STAT. § 701(a.1)(5) (2009); S.C. CODE ANN. § 15-49-20(c) (1977 & Supp. 2009); TENN. CODE ANN. § 29-8-101(b)(2) (West 2000), *amended by* 2009 Tenn. Legis. Serv. 385 (West); TEX. FAM. CODE ANN. § 45.103(a) (West 2008 & Supp. 2010); WIS. STAT. § 786.36(1) (2001 & Supp. 2010); WYO. STAT. ANN. § 1-25-101 (2009).

Twelve states allow a name change request to be granted only if there is a good or sufficient reason to allow it. *See* ALASKA STAT. § 09.55.010 (2008); ARK. CODE ANN. § 9-2-101(a) (2009); KAN. STAT. ANN. § 60-1402(c) (2005); LA. REV. STAT. ANN. § 13:4752 (2006); MICH. COMP. LAWS § 711.1(1) (2002); NEB. REV. STAT. § 25-21,271(3) (2004 & Supp. 2010); NEV. REV. STAT. § 41.290(1) (2006); N.C. GEN. STAT. § 101-2(a) (2008); N.D. CENT. CODE § 32-28-02(3) (2010); OHIO REV. CODE ANN. § 2717.01(a) (West 2008); S.D. CODIFIED LAWS § 21-37-5 (2004); UTAH CODE ANN. § 42-1-2 (West 2005); W. VA. CODE § 48-25-103(a) (2009).

Finally, some states provide for greater scrutiny for name changes for certain classes of individuals, such as registered sex offenders. *See, e.g.*, ALA. CODE § 15-20-36 (2010); CONN. GEN. STAT. §§ 45a-99, 52-11 (2006); DEL. CODE ANN. tit. 10, § 5901 (2010). Many thanks to Taylor Davidson for compiling the information in this footnote.

77. For the most part, the U.S. government does not interfere with the initial choice of name parents make for their children, although disputes do arise as to the surname a child will bear, particularly when the parents are no longer in a committed relationship. *See, e.g.*, *Kay v. Bell*, 121 N.E.2d 206, 208 (Ohio Ct. App. 1953) (directing that the child of a divorced couple be enrolled in school under the father's surname rather than the mother's maiden name). Other countries do not have the same policy of non-interference. Finland reportedly will not recognize a birth unless the parents have selected an approved name, *see* Sam Kean, *What's in a Name?*, N.Y. TIMES, Oct. 28, 2007, § 6 (Magazine), at 25; Germany regulates naming choices "start to finish, fore to family," *see* Nicholas Kulish, *German Court Bans Very Long Names*, N.Y. TIMES, May 6, 2009, at A6; Swedish authorities can disallow a name if it is offensive, inappropriate or could "cause discomfort for the one using it," *see* *Baby Named Metallica Rocks Sweden*, BBC NEWS (Apr. 4, 2007), <http://news.bbc.co.uk/2/hi/entertainment/6525475.stm>; and China has long maintained a list

Additionally, administrative convenience may suggest a difference in practical treatment between trademarks and personal names. Although modern technology may already obviate such difficulties, older computer databases could impose limitations on the kinds of characters that can be entered as part of a name, rejecting certain types of punctuation marks or graphic symbols. Personal names are more likely to be the subject of such restrictions than trademarks, given the greater number of “official” databases in which personal names are entered as compared to trademarks. While courts have not always been deferential to administrative convenience as a basis for denying a name change request,<sup>78</sup> and while technology may cease to be an issue in many jurisdictions, petitioners in communities without updated technology may risk the denial of their requests before even entering the courtroom, depending on the information they are given by front-line government employees as to the feasibility of the request.<sup>79</sup>

These differences in remedy and administration may affect the timing, scope, and number of legal reviews of naming choices, but they do not broadly affect the

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of acceptable characters to use in typical tasks such as naming children, *see* Sharon LaFraniere, *Your Name's Not on Our List? Change It, Beijing Officials Say*, N.Y. TIMES, Apr. 21, 2009, at A1. *See also* Roderick Munday, *The Girl They Named Manhattan: The Law of Forenames in France and England*, 5 LEGAL STUD. 331, 339 (1985) (discussing prohibition in France of first names “which are not obviously consecrated as French forenames by general usage” (internal quotation marks omitted)).

78. *In re Ritchie*, 206 Cal. Rptr. 239, 241 (Cal. Ct. App. 1984) (“[I]n an era of high technology where all important data are processed by computers, it is not unreasonable to conclude that the usage of numbers for designating or describing persons might cause inherent confusion in public records which, in turn, may well facilitate deception or fraud of individuals, institutions, or the public as a whole.”) (request to change name to roman numeral III). *But see, e.g., In re Application of Ferner*, 685 A.2d 78, 83 (N.J. Super. Ct. Law Div. 1996) (declining to conclude that use of a single name would cause “havoc and chaos” with recordkeeping systems) (request to change name to single name “Koriander”). One might also suspect that administrative convenience is occasionally used as the justification for denials of name change requests for other reasons. *See, e.g., In re Brast*, 334 A.2d 483, 484 (Conn. Super. Ct. 1974) (denying request to change name from Bruce Alexander Brast to Abdullah Al-Badri Ben Alexander Brast on the grounds that the requested name contained too many names given “standard forms and records”). Ease of administration is typically invoked when denying an inmate’s petition for a name change. *See, e.g., In re Verrill*, 660 N.E.2d 697, 699 (Mass. App. Ct. 1996) (concluding that granting prisoner’s name change petition would “cause significant confusion in the criminal justice system if he were ever released” because petitioner might be able “later to elude criminal prosecution and conceal his identity”); *Brown v. Wyrick*, 626 S.W.2d 674, 679 (Mo. Ct. App. 1981) (“The desire of petitioners to change their names, however well motivated, must yield to the harm which the evidence bears out would be inflicted on the Missouri State Penitentiary if they were permitted to change their names while still members of the prison population.”); *In re Rouson*, 465 N.Y.S.2d 155, 155 (Co. Ct. 1983) (denying petition of inmate to change his name because, among other reasons, “the granting of a name change to a convicted felon now serving an indeterminate sentence of imprisonment would result in confusion and create record keeping problems” for correctional facilities).

79. As Elizabeth Emens notes, government employees, whether intentionally or innocently, can frustrate naming choices by suggesting to applicants that approval of particular choices will prove difficult or impossible. Emens, *supra* note 16, at 810 (discussing the “steering of choices” in marital names by government functionaries).

fundamental question at the heart of each review: Is this a name that the law permits one to use? As it turns out, the law treats personal names very much like trademarks in this regard, remaining fairly agnostic as to the choice of name, except in a few limited instances. The relevant considerations—use, ontology, and connotative effects—all involve a causal theory of naming in that the resolution of the question focuses (or should focus) on whether the name effectively fulfills its denotative function.

#### A. Use

The fact that one can seek governmental approval of one's choice of name or trademark does not mean that such approval is required. As with trademarks, courts have emphasized that individuals have a common law right to acquire rights in a name through use.<sup>80</sup> As the attorney general of California wrote in a 2000 opinion:

The purpose of the statutory procedure is to have, wherever possible, an official record of the change. But resort to the statutory procedure is not necessary either prior to commencing use of a new name, or afterward, for the purpose of rendering a prior name change valid. The statutory method for changing names does not repeal or displace the common law ability to change one's name.<sup>81</sup>

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80. See 15 U.S.C. § 1127 (2006) (defining a “trademark” as a symbol “used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown”); *In re Ritchie*, 206 Cal. Rptr. at 240 (“The common law recognizes the right of a person to change his name without the necessity of legal proceedings; the purpose of the statutory procedure is simply to have, wherever possible, the change recorded.”); *In re Bacharach*, 780 A.2d 579, 582 (N.J. Super. Ct. App. Div. 2001) (“It is well-settled that an adult can legally and properly change his or her name at will and without need of judicial approval simply by using the desired name in ordinary life so long as the adopted name is not used for a criminal or fraudulent purpose.”) (reversing denial of petition to change name so as to incorporate surname of same-sex partner); *Patronymics*, NEW YORKER, July 18, 1936, at 8 (“Occasionally a judge will refuse to honor a [name change] petition; which of course is his privilege. It is also the privilege of the petitioner to go right ahead and adopt his new name without permission, and to hell with His Honor.” (emphasis in original)).

81. 83 Op. Att’y Gen. Cal. 00-205 (2000), at 2 (citations omitted); see also *Piotrowski v. Piotrowski*, 247 N.W.2d 354, 355 (Mich. Ct. App. 1976) (“[C]hange of name statutes do not abrogate or supersede the common law. To the contrary, they affirm the common law right and afford an additional method by which a name change may be effected as a matter of public record.”); Frederick Dwight, *Proper Names*, 20 YALE L.J. 387, 387 (1911) (“[T]he statutory proceeding simply fixes a date upon which the transfer goes into effect, whereas by the informal method a person would have to ‘grow into’ the new designation, as it were.”); 65 C.J.S. *Names* § 22 (2010) (“[S]tatutes prescribing a method for effecting a change of name do not affect or abrogate the common-law right of an individual to change his name without application to the courts and merely give an additional method of effecting a change of name . . . .”) (footnotes omitted); Jane M. Draper, Annotation, *Circumstances Justifying Grant of Denial of Petition to Change Adult’s Name*, 79 A.L.R. 3d 562, ¶ 2[a] (1977) (“[Name change] statutes have been held to be in aid of the individual’s common-law right,



Although this passage suggests a much more ministerial role for courts with respect to name change requests than turns out to be the case, it highlights the fact that, as with trademarks, an individual may choose to bypass registration altogether without forfeiting legal rights in his or her name. Use is the event that creates association for a name or trademark, as it establishes its denotative function; a name that is never used in connection with a referent is simply a word. Thus, the law's inquiry here is concerned with the question of whether there has been sufficient use of the name or the mark to create a denotative effect.<sup>82</sup>

Given the requirement in trademark law that the use must be commercial, courts have focused on whether a connection has been established in the minds of the relevant consumers between the mark and its referent.<sup>83</sup> Similarly (although not as frequently), courts evaluating actual use of personal names have denied name change requests when the evidence suggested that the petitioner did not truly intend to adopt the new name in dealing with others.<sup>84</sup> In *Eisenberg v. Strasser*,<sup>85</sup> the petitioner, who was born Anatoly Eyzenberg, sought to have his name listed on the ballot for City Council as "Tony Eisenberg" so as to "appear more American and reduce the likelihood that he would be discriminated against by voters because of his Russian name."<sup>86</sup> The Board of Elections rejected his request absent a court order evidencing the name change. The court rejected the petitioner's argument that he had already effected a common-law change of name through use, noting that the petitioner had not used the name on any of his official documents, such as a mortgage, lease, driver's license, passport, or tax return, all of which bore the name "Anatoly Eyzenberg."<sup>87</sup> Similarly, in *Appeal of Evetts*,<sup>88</sup> a Texas appellate court found no abuse of discretion when the trial court denied a woman's petition to

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giving the advantages of a public record of such change and a specific time at which the change is made.").

82. Cf. Guinchard, *supra* note 8, at 35 (characterizing English and early French law as concerned with the "assumption of a name for a period of time long enough for the person to secure the use of his name").

83. See 15 U.S.C. § 1127 (defining "use in commerce"); see also, e.g., *Planetary Motion, Inc. v. Techsplosion, Inc.* 261 F.3d 1188, 1193–1200 (11th Cir. 2001); *Chance v. Pac-Tel Teletrac, Inc.*, 242 F.3d 1151, 1159 (9th Cir. 2001) (applying a "totality of the circumstances test").

84. One court has held, however, that trademark law's abandonment doctrine does not apply to personal names. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 412 (9th Cir. 1996) ("[A]n individual's decision to use a name other than the birth name—whether the decision rests on religious, marital, or other personal considerations—does not therefore imply intent to set aside the birth name, or the identity associated with that name.") (holding that Kareem Abdul-Jabbar had not abandoned his birth name of Lew Alcindor despite the fact that he had not used the latter name in over ten years).

85. 768 N.Y.S.2d 773 (N.Y. Sup. Ct. 2003).

86. *Id.* at 775.

87. *Id.* at 777. The appellate courts affirmed the lower court's order on different grounds, noting without extensive comment that the petition should not have been rejected on the naming issue alone. *Eisenberg v. Strasser*, 763 N.Y.S.2d 782, 782–83 (N.Y. App. Div. 2003) ("[W]e find that under the circumstances of this case, there is no reason to disqualify the candidate for using the name 'Tony Eisenberg' in place of 'Anatoly Eyzenberg.'"), *aff'd*, 801 N.E.2d 370 (N.Y. 2003).

88. 392 S.W.2d 781 (Tex. Civ. App. 1965).

change her surname back to that of her (deceased) first husband. The petitioner, who was the plaintiff in a wrongful death suit involving the death of her first husband, sought to conceal from the jury that she had since remarried. In light of her second husband's testimony that he would avoid the awkwardness that (in that era) would have resulted from his having a different surname from his wife by introducing her to others only by her first name, the lower court concluded that the petitioner had no true intent to adopt the surname that was the subject of the petition and denied the request.<sup>89</sup>

In both realms, however, it is not enough simply to announce one's name to the world. In order for the name to fulfill its denotative function, it must be used by others to indicate the particular individual or good. Courts have noted, for example, that a producer's intent has no bearing on trademark significance,<sup>90</sup> and commentators have described trademarks as "property purely of consumers' minds."<sup>91</sup> Likewise, an individual can insist that others call him or her by a particular nickname, but that nickname will not become a functioning signifier until others accede to that request, even though the individual may insist that the nickname is his or her name.<sup>92</sup> Indeed, consumers can develop trademark meaning

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89. *Id.* at 784.

90. *See, e.g.,* Co-Rect Prods., Inc. v. Marvy! Adver. Photography, Inc., 780 F.2d 1324, 1332 (8th Cir. 1985) ("Desires or intentions of the creator . . . are irrelevant. Instead, it is the attitude of the consumer that is important.").

91. Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020, 2021 (2005) ("Trademarks exist only to the extent that consumers perceive them as designations of source."); *see also* Stephen R. Baird, *Moral Intervention in the Trademark Arena: Banning the Registration of Scandalous and Immoral Trademarks*, 83 TRADEMARK REP. 661, 772 (1993) ("A trademark has no inherent meaning. Its meaning is derived from the association that the mark has with the goods and services it identifies."). It is for this reason that, at least on the trademark side, thousands of dollars are spent on consultants to develop a name for a new product or business, and thousands more in focus group testing to assess the typical consumer's reaction to the sound of the name. *See, e.g.,* Ruth Shalit, *The Name Game*, SALON.COM (Nov. 30, 1999), <http://www.salon.com/media/col/shal/1999/11/30/naming/print.html> (describing branding companies) (corrections at <http://archive.salon.com/letters/corrections/2000/index.html>); *see also, e.g.,* GEOFFREY NUNBERG, *A Name Too Far*, in *THE WAY WE TALK NOW* 223, 224 (2001) ("The one thing you can be sure of is that whatever the reason for picking a new corporate name, it will be more fanciful and less descriptive than the old one. This might be simply a consequence of the outsourcing process. When you pay several hundred thousand dollars to a corporate identity consultant with a gaggle of linguists and marketing specialists on its staff, you don't expect them to come back with the suggestion that you call yourself U.S. Tanks and Boilers. You want syllables that buzz with the promise of marketing magic."); Chiranjeev Kohli & Thomas M. Hennes, *A Corporation by Any Other Name . . . ?*, BUS. HORIZONS, Nov.-Dec. 1995, at 29-33 (providing advice to corporations on name changes).

92. As one court noted, "[W]ithout the aid of [legislation] a man may change his name or names, first or last, and, when his neighbors and the community have acquiesced and recognized him by his new designation, that becomes his name." *Laflin & Rand Powder Co. v. Steytler*, 23 A. 215, 217 (Pa. 1892). *But see* 83 Op. Att'y Gen. Cal. 00-205 (2000), at 3 (stating that a common law name change is "valid" because validity does not turn on whether others accept the change). The recording artist Prince tested this requirement when he changed his name in 1993 to an unpronounceable glyph, leading the media and others to

independent from (and even in opposition to) any such efforts from the company. In *Coca-Cola Co. v. Busch*,<sup>93</sup> for example, the Coca-Cola Company obtained an injunction against the defendant's use of "Koke" for its beverage, despite the fact that Coca-Cola was not itself using the word "Coke" and, indeed, had discouraged any shortened form of the trademark in some of its advertising. Because the public was using "Coke" to signify the Coca-Cola beverage, it functioned as a trademark and, therefore, merited protection as such.<sup>94</sup> Relatedly, a nickname or other publicly conferred moniker can be adopted by its referent despite the fact that he or she did not originate it. One example from popular culture is the application by Nadya Suleman, who gave birth to eight children via assisted reproduction technology, to register "Octomom"—an appellation conferred on her by the media—as a trademark.<sup>95</sup>

Despite ultimate interpretive authority residing with the audience, it cannot be ignored that the relevant audience may be persuaded to adopt a name in response to the power or persuasion, economic or otherwise, of the naming entity. Thus, in the trademark realm, the oft-intoned mantra "the consumer is king" reflects that this power lies squarely with the consumer as the creator of trademark significance, but it is certainly the case that a producer with economic resources can attempt to influence this interpretation in ways unavailable to producers without such resources. (Witness, for example, the advertisements by the Xerox Corporation reminding consumers to use the term "Xerox" only for photocopiers made by the company and not as a generic term.)<sup>96</sup> With respect to personal names, the likelihood of such adoption is similarly related to the power the individual conferring the name holds.<sup>97</sup> Indeed, commentators have long recognized that

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call him "The Artist Formerly Known as Prince" instead. Bob Morris, *The Night: A Name That Got Away, An Odd Receiving Line*, N.Y. TIMES, July 17, 1994, § 1, at 32.

93. 44 F. Supp. 405 (E.D. Pa. 1942).

94. *Id.* at 410 (noting that "the abbreviation of the trademark which the public has used and adopted as designating the product of the complainant is equally as much to be protected as the trademark itself").

95. See U.S. Trademark Application Serial No. 77711827 (filed Apr. 10, 2009) (application for trademark for entertainment services); U.S. Trademark Application Serial No. 77711852 (filed Apr. 10, 2009) (application for trademark for clothing and diapers). An application by an unrelated entity to register "Octomom" for a variety of products was rejected by the trademark examiner under sections 2(a) and 2(d) as likely to suggest a connection to or cause confusion with Ms. Suleman; a response to that rejection is still pending as of this writing. See Office Action, U.S. Trademark Application Serial No. 77689864 (filed May 14, 2009) (denying Super Happy Fun Fun, Inc.'s application for the OCTOMOM mark because "the general public has come to recognize and associate the name OCTOMOM with a particular individual, Nadya Suleman").

96. See Michael Atkins, *Are Anti-Genericism Ads Effective?*, SEATTLE TRADEMARK LAW. (Oct. 25, 2007, 21:32 PST), <http://seattletrademarklawyer.com>.

97. See, e.g., *Genesis* 2:19 (King James) ("And out of the ground the LORD God formed every beast of the field, and every fowl of the air; and brought *them* unto Adam, to see what he would call them: and whatsoever Adam called every living creature, that *was* the name thereof."). The idea that naming and trademarks are both about source and authority aligns with Jessica Silbey's theory of intellectual property as "origin myth." See generally Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319 (2008).

power and naming are often related.<sup>98</sup> The government has historically exerted naming power, often in ways designed to create social hierarchies. As Michael Adams has written, “[t]he power to name and to name so as to diminish, to frame the named as subordinate to the executive and thus to the state, is not a self-sufficient power, but is one among many potentially useful instruments of power exercised from a unitary position.”<sup>99</sup> In the United States, for example, slaves had names assigned to them by their owners as a means of dehumanization, solidifying their status as property, and would often adopt new names after escaping or acquiring freedom in order to signify a new identity.<sup>100</sup> Immigrants arriving at Ellis Island or other ports would occasionally have new surnames assigned to them by immigration officials or by those compiling the ship’s manifest, often due to carelessness, unfamiliarity with foreign languages, or semi-literacy on the part of the officials.<sup>101</sup>

Thus, although use is the qualifying event, government involvement in the naming process confers a certain measure of authority. Today, in the United States, that authority is largely seen as desirable; accordingly, governmental registration is often sought both for trademarks and for name changes so as to accrue the benefits—both legal and psychological—that come with an official imprimatur. Federal registration of a trademark provides nationwide notice of a claim of rights and constitutes prima facie evidence of the validity of the mark, the ownership of

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98. See, e.g., ALGEO, *supra* note 15, at 73 (noting that naming requires a specific act of bestowal); FRIEDRICH NIETZSCHE, *THE GENEALOGY OF MORALS* 11 (Dover Publications 2003) (1887) (“The masters’ right of giving names goes so far that it is permissible to look upon language itself as the expression of the power of the masters: they say ‘this *is* that, and that,’ they seal finally every object and every event with a sound, and thereby at the same time take possession of it.” (emphasis in original)); Omi [Morgenstern Leissner], *The Problem That Has No Name*, 4 *CARDOZO WOMEN’S L.J.* 321, 329 (1998) (“To be named by someone else means that the naming person exerts some measure of control over the named person’s existence.”).

99. Michael Adams, *Nicknames, Interpellation, and Dubya’s Theory of the State*, 56 *NAMES* 206, 214 (2008); see also *id.* at 212 (describing former President George W. Bush’s skill at “imagining subordinate places for people and putting them in those places by means of a name”). Groups in Europe that were compelled by government order to take or abandon particular names include the Irish in England in the late 1400s, see *In re Snook*, 2 *Hilt.* 566, 570–71 (N.Y. Ct. Com. Pl. 1859), and the Jews in Prussia and Bavaria starting in the early 1800s, see SMITH, *supra* note 11, at 161; Scott et al., *supra* note 27, at 17 (“When Germany implemented the Final Solution, the closed list of Jewish patronyms made the task of genocide terrifyingly simple.”).

100. SMITH, *supra* note 11, at 110–16; LIEBERSON, *supra* note 37, at 202 (describing how white slave owners “often gave their slaves the kinds of names they gave their farm animals”). Elizabeth Cady Stanton invoked this practice when criticizing the tendency for women to take their husbands’ names upon marriage. See 1 *HISTORY OF WOMAN SUFFRAGE* 80 (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., 2d ed. 1889).

101. Petersen, *supra* note 48, at 316; see also Susan Cotts Watkins & Andrew S. London, *Personal Names and Cultural Change: A Study of the Naming Patterns of Italians and Jews in the United States in 1910*, 18 *SOC. SCI. HIST.* 169, 191 (1994) (describing name changes in school conferred both by other children and by teachers, the latter perhaps in support of an “Americanization agenda of the school”).

the mark, and the registrant's exclusive right to use the mark in commerce in connection with the goods or services indicated in the registration.<sup>102</sup> Similarly, state registration of a personal name change provides a presumption of the "official" nature of the change, in contrast to "the early, casual, common law practice of changing one's name at will," which "would have resulted in confusion and uncertainty as our American society moved steadily toward complexity and urbanization."<sup>103</sup> It is not surprising, therefore, that individuals desiring to make a name change permanent seek governmental approval of the change.<sup>104</sup> The frequency with which passports, driver's licenses, and other forms of government-issued identification are requested counsels in favor of making one's name change "official."<sup>105</sup>

Official status for a desired name is not, however, guaranteed. Despite the claim by several courts that the government's role in adjudicating name choices is simply to create an official record of the exercise of the common law right and not to

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102. 15 U.S.C. § 1057(b) (2006).

103. *In re Reben*, 342 A.2d 699, 690–91 (Me. 1975); see also Op. Att'y Gen. Cal. 00-205 (2000), at 3 ("The statutory process provides an official document by which the change of name is definitely and specifically established and easily proved even after the death of all contemporaneous witnesses. Conversely, the inability to establish one's name for purposes of life's daily transactions, although perhaps only occasionally resulting when sole reliance is placed on the common law method, can be a substantial inconvenience when it occurs.").

104. Although at least one court has found influential, though not dispositive, Supreme Court holdings to the effect that "freedom of personal choice in matters of family life" and "[p]arents' claim to authority in their own household to direct the rearing of their children" as important in resolving the issue of one's freedom to choose one's own name or the name of one's child, *Sec'y of the Commonwealth v. City Clerk of Lowell*, 366 N.E.2d 717, 723 (Mass. 1977) (citing *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977), and *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (Powell, J., concurring)), attempts to frame a denial of a name change petition as a constitutional issue have largely failed. See, e.g., *Brown v. Cooke*, No. 06-cv-01092-MSK-CBS, 2009 WL 641301, at \*5 (D. Colo. 2009) ("[A] considerable body of caselaw recognizes that the Government is under no obligation to conform its own records to acknowledge an individual's decision to change his name, particularly where that change was effected under the common-law method of simple use."); cf., e.g., *Jech v. Burch*, 466 F. Supp. 714, 721 (D. Haw. 1979) (holding that parents "have a [c]onstitutionally protected right to give their own child any surname they choose" at birth). A different result may obtain when the government requires an individual to adopt a particular name. Compare, e.g., *Masjid Muhammad-D.C.C. v. Keve*, 479 F. Supp. 1311, 1324 (D. Del. 1979) (holding that absent a compelling state interest, a state may not require an inmate to identify himself by a "religiously offensive name" in order to obtain a significant privilege), with *Azeez v. Fairman*, 795 F.2d 1296, 1302 (7th Cir. 1986) (holding that it was not clearly unconstitutional for a prison to refuse to recognize prisoner's name change).

105. *In re Reben*, 342 A.2d at 691 (suggesting that state's name change statute was intended to reduce uncertainty and suspicion of fraud "as our social structure became more urban and more transient"). The Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 302, which dictates certain requirements for state identification documents, is but one of the influences on "official" name changes. As Elizabeth Emens points out, however, women typically do not have to seek court approval if their choice is to change their surname to that of their husband. Emens, *supra* note 16, at 818–19.

convey government approval of the choice,<sup>106</sup> the fact remains that certain names have been rejected by the courts or government agencies as inappropriate, either because they are ontologically deficient, convey inappropriate messages, dilute the distinctiveness of famous names, or are confusingly similar to names already in existence—the same bases that are used to reject some trademark choices.<sup>107</sup> As with the use inquiry, each of these determinations rests on what is essentially a causal theory of naming; they, too, focus on the robustness of the denotative link between name and referent.

### B. Ontology

The ontological question can be stated simply: Is it enough that a chosen name has the ability to function as a reference? Or is there a reason to deem certain names illegitimate even if they serve this function?

The key ontological case in trademark law is the Supreme Court's 1995 decision in *Qualitex Co. v. Jacobson Products Co.*,<sup>108</sup> in which the plaintiff, the holder of a registered trademark in the green-gold color of its dry cleaning press pads, brought suit against a competitor that had used a similar color for its press pads. Although the plaintiff won at trial, its victory was reversed on appeal when the Ninth Circuit, like other courts before it, held that color alone could not serve as a trademark.<sup>109</sup> The Supreme Court reversed, holding that it is the function of the claimed trademark, not its genus, that determines whether it is eligible for protection. As the

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106. See, e.g., *In re Ross*, 67 P.2d 94, 95 (Cal. 1937) (“The common law recognizes the right to change one’s personal name without the necessity of legal proceedings, and the purpose of the statutory procedure is simply to have, wherever possible, a record of the change.”).

107. Corporate name changes in most states are governed by statute, at least at a general level. 6 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2414.10 (perm. ed., rev. vol. 2009) (citing MODEL BUS. CORP. ACT § 4.02 (1984)). While state assumed name statutes prohibit transaction of business in the state under an assumed name other than the real names of the person or persons engaged in such business unless the fictitious name is registered with the state, see, e.g., FLA. STAT. § 865.09 (2000 & Supp. 2010), such statutes do not typically limit the types of names that can be chosen for a corporation, save for prohibiting names that are confusingly similar to names already in use. See, e.g., ALA. CODE § 10-2B-4.01(b) (1999 & Supp. 2009) (generally providing that a corporation may not register a name with the Secretary of State that is “the same as, or deceptively similar to” the corporate name of another in the state); CONN. GEN. STAT. § 33-655 (2005) (requiring corporate name to be distinguishable from those of other corporations authorized to transact business in the state). But see, e.g., N.Y. BUS. CORP. LAW § 301(a)(9) (2003) (prohibiting several categories of business names including names that are “indecent or obscene, or shall ridicule or degrade any person, group, belief, business or agency of government, or indicate or imply any unlawful activity”); *Harvard Bus. Services, Inc. v. Coyle*, No. 96M-10-013-RRC, 1997 Del. Super. LEXIS 70 (Jan. 10, 1997), at \*25 n.8 (stating that Secretary of State has implicit discretion to refuse filing in which proposed corporate name included “obscene or libelous language” or “consisted of five hundred words”). Many thanks to Brad Bartels for compiling the information in this footnote.

108. 514 U.S. 159 (1995).

109. *Id.* at 161.

Court noted, the language of the Lanham Act—which defines a trademark as including “any word, name, symbol, or device, or any combination thereof”<sup>110</sup>—contains no restrictions on what can serve as a trademark.<sup>111</sup> So long as the thing at issue is capable of functioning as a trademark by indicating source, its “ontological status as color, shape, fragrance, word, or sign” is irrelevant.<sup>112</sup> Consistent with this view, the U.S. Patent and Trademark Office has registered sounds, fragrances, and tactile items as trademarks.<sup>113</sup>

On the personal name side, courts have also considered the ontological question (albeit without citing *Qualitex*); like the Ninth Circuit in *Qualitex*, they initially held that the law imposes certain restrictions on what constitutes an appropriate name. For example, a Minnesota court in 1979 rejected a petitioner’s request to change his name to the number “1069,” concluding that a number could not possibly serve as a name,<sup>114</sup> and a California appellate court affirmed a lower court’s denial of a petitioner’s request to change his name to the roman numeral “III,” holding that a roman numeral, by itself, could not constitute a name.<sup>115</sup> Similarly, a Pennsylvania court in 2000 affirmed a lower court’s rejection of a woman’s request to change her surname to the letter “R” in lieu of her ex-husband’s surname, Ravitch.<sup>116</sup> The court concluded that a surname consisting of a single letter “is so bizarre that it would likely be met with repeated suspicion and distrust in both business and social settings,” particularly given that a single-letter surname “has traditionally been used to preserve one’s anonymity in various contexts.”<sup>117</sup> In addition, the court noted, if petitions to change to initialized

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110. 15 U.S.C. § 1127 (2006).

111. *Qualitex*, 514 U.S. at 162.

112. *Id.* at 164. This statement is subject to the exclusions for generic words and functional elements, which cannot serve as valid trademarks even if consumers associate them with a particular source. *See, e.g.*, *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29 (2001).

113. *See, e.g.*, *Qualitex*, 514 U.S. at 162 (citing Registration No. 696,147 (shape of a Coca-Cola bottle); Registration Nos. 523,616 and 916,522 (sound of NBC’s three chimes); and *In re Clarke*, 17 U.S.P.Q.2D (BNA) 1238, 1240 (T.T.A.B. 1990) (scent of plumeria blossoms on sewing thread)).

114. *In re Dengler*, 287 N.W.2d 637, 639 (Minn. 1979) (“It is reasonable to assume that if it had been faced with the question at the time of adoption, the legislature would have rejected the proposal for pragmatic reasons, our social and economic system being geared as it is to identifying individuals by letters rather than by numbers.”). The same petitioner had been similarly rebuffed by the North Dakota Supreme Court three years earlier. *In re Dengler*, 246 N.W.2d 758, 764 (N.D. 1976). For commentary on the cases, see Thomas M. Lockney & Karl Ames, *Is 1069 a Name?*, 19 NAMES 1 (1981).

115. *In re Ritchie*, 206 Cal. Rptr. 239, 241 (Ct. App. 1984) (noting that it is “common knowledge that words do not consist solely of numbers or symbols”).

116. *In re Ravitch*, 754 A.2d 1287, 1288 (Pa. Super. Ct. 2000).

117. *Id.* at 1289; *see also In re Douglas*, 304 N.Y.S.2d 558, 561 (Sup. Ct. 1969) (“The judicial approval of the use of a single name would be retrogression to antiquity, cause havoc and chaos in the proper identification and location of persons in this modern day and era, cause serious disruption of official records and lead to all kinds of complications in our economy, largely dependent on credit of easily identifiable persons. The judicial sanction of single names is as extinct as the Dodo bird.”); *cf.*, *e.g.*, Arnold, *supra* note 31, at 228 (noting

surnames were routinely granted, courts “would invite surname replication at an exponential rate, greatly in excess of what is currently experienced with common surnames, so as to make informal identification burdensome at best.”<sup>118</sup> To take one more example, a New York court in 1994 denied a woman’s request to change her name to the single name “Sena,” a name that, she claimed, held spiritual and religious meaning to her.<sup>119</sup> The use of a single name, the court held, would be “fraught with unusual potential for public confusion and private concern,” cause “disruption of official and business records,” and “wreak havoc in an economy that is largely dependent on credit of easily identifiable persons,” particularly given the existence of a number of people in the New York City area with the last name of Sena.<sup>120</sup>

But courts have more recently accepted unusual name change requests, paralleling the Supreme Court’s treatment of color as a trademark in *Qualitex*. For example, a New Mexico appellate court in 2004 reversed a lower court’s denial of a petitioner’s request to change his name to the word “Variable,” holding that the record did not reflect any fraudulent purpose and that the name “Variable” was not “obviously offensive.”<sup>121</sup> A California appellate court, in an unpublished opinion in 2006, reversed a lower court’s denial of a petitioner’s request to change his name to include an exclamation point, holding that the lower court did not justify why an exclamation point should result in automatic denial when other types of punctuation marks, such as hyphens and apostrophes, are often used in names.<sup>122</sup> A New York court in 2008, to take another example, reversed a denial of a petition seeking a change to the single name “Zea,” noting that “[t]here exists no authority to support the opinion that the use of a single name will create confusion, disrupt official and business records or wreak havoc in the credit industries.”<sup>123</sup> Indeed, as a New Jersey court noted, the “rationale that a name change to a single name is too confusing because it hinders individual identification would also support denying a name change to an extremely common name such as John Smith or William Jones.”<sup>124</sup> Thus, while there is not unanimity in their rulings, courts now tend to

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that many courts had once held that “while a vowel, being a complete sound in itself, was sufficient to constitute a name, a consonant, representing only part of a compound sound, could not so act”); *Swedish Couple Continue to Fight for Right to Name Their Son Q*, THE LOCAL, May 5, 2009, available at <http://www.thelocal.se/19254/20090505> (describing Swedish court’s consideration of whether the country’s naming laws permitted the use of a single letter as a first name).

118. *In re Ravitch*, 754 A.2d at 1289.

119. *In re Miller*, 617 N.Y.S.2d 1024, 1025 (Civ. Ct. N.Y. Cnty. 1994).

120. *Id.* at 1025–26 (quoting *In re Application of Douglas*, 304 N.Y.S.2d 558 (Sup. Ct. N.Y. Cnty. 1969) (internal quotation marks omitted); see also *id.* at 1026 (noting that “our complex and populous society is based on the use of at least one given name and a surname . . . because of the need to identify different people accurately as the population increased”).

121. *In re Mokiligon*, 106 P.3d 584, 586 (N.M. Ct. App. 2004). The petitioner’s former name, Snaphappy Fishsuit Mokiligon, was, one might assume, also the result of a name change.

122. *Bean v. Superior Court*, No. D048645, 2006 WL 3425000, at \*3 (Cal. Ct. App. Nov. 28, 2006).

123. *In re Cortes*, 858 N.Y.S.2d 500, 501 (App. Term 2008).

124. *In re Ferner*, 685 A.2d 78, 83 (N.J. Super. Ct. Law Div. 1996).



hold that so long as a personal name serves the purpose of denoting an individual, its ontological status is of no import.

### C. Connotation

One exception to the general provision that a name is legally permissible so long as it is actually used to denote an individual is for names that are deemed offensive. Thus, while the use and ontology questions concern the proposed name's denotative effect, the cases here focus on the name's connotative effect. The same exception exists for trademarks, residing in section 2(a) of the Lanham Act, which provides that the U.S. Patent and Trademark Office may refuse registration of a mark (and a court may order cancellation) if, *inter alia*, the mark is deemed to consist of "immoral" or "scandalous" matter or "may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute."<sup>125</sup> Although commentators disagree on the purpose behind section 2(a), many conclude that it stems from a desire to avoid attaching the government's imprimatur to such marks or, relatedly, a desire not to spend government funds on reviewing and approving such marks.<sup>126</sup> The courts and the Trademark Trial and Appeal Board (TTAB), however, have not readily adopted the imprimatur rationale, with appellate courts rejecting district courts' reliance on the rationale as a basis for refusing to enforce a mark.<sup>127</sup> Despite these assertions, the imprimatur

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125. 15 U.S.C. § 1052(a) (2006). Notwithstanding this provision, the U.S. Patent and Trademark Office has registered several trademarks that incorporate racial and ethnic stereotypes; of course, lack of registration is not a bar to use. For many examples of such trademarks, see HAL MORGAN, *SYMBOLS OF AMERICA* 52–63 (1986).

126. See, e.g., Baird, *supra* note 91, at 663 ("Section 2(a) prevents the government from placing its imprimatur on [scandalous or immoral] marks and denies the statutory benefits that would otherwise result from their federal registration."); Bruce C. Kelber, "Scalping the Redskins: Can Trademark Law Start Athletic Teams Bearing Native American Nicknames and Images on the Road to Racial Reform?", 17 *HAMLIN L. REV.* 533, 560–61 (1994); see also *Coty, Inc. v. Perfumes Habana, S.A.*, 190 F.2d 91, 95 (C.C.P.A. 1951).

127. See *U.S. Jaycees v. Philadelphia Jaycees*, 490 F. Supp. 688, 696–98 (E.D. Pa. 1979) (refusing to enjoin a Jaycees chapter from using the Jaycees name when the basis for the requested injunction was that the chapter had admitted women into the organization), *rev'd*, 639 F.2d 134, 145 (3d Cir. 1981) ("The exclusion of women is wholly independent of the protection provided by the Lanham Act to trademarks."); *In re McGinley*, 206 U.S.P.Q. (BNA) 753, 756 (T.T.A.B. 1979) (denying registration for a mark consisting of a nude man and woman kissing on the grounds that the mark was immoral and scandalous and noting that although the denial of registration would not affect the applicant's ability to use the mark in commerce, such use would proceed "without the implied approval . . . that would result from Federal registrations"), *rev'd*, 660 F.2d 481, 487 n.13 (C.C.P.A. 1981) ("The issue is not whether the act of registration would create a scandal insofar as the relationship between the PTO and the public is concerned, but whether the mark comprises scandalous matter based on the ordinary and common meaning of 'scandalous.' Whether the PTO would be considered to have placed its imprimatur on the mark . . . is not relevant."). The TTAB took a similar view in 1993:

In this case, as in others where the issue has been whether a mark is scandalous, we have detected an undercurrent of concern that the issuance of a trademark

rationale still has some resonance. It would, as the case law suggests, be overstating matters to assert that a trademark registration connotes approval of the mark being registered or that denial of registration under section 2(a) conveys the Patent and Trademark Office's view on the mark, rather than its legal conclusion that it falls within a statutory exception to registration. But the very inclusion of section 2(a) in the Lanham Act seems to represent Congress's (if not the Patent and Trademark Office's) view that certain marks should not receive the benefits of government registration due to the connotations suggested by those marks rather than any potential for fraud or deception.<sup>128</sup>

The imprimatur rationale resonates more strongly, however, with state courts considering personal name change requests; some courts have explicitly relied on an endorsement or imprimatur rationale as the basis for denying such petitions.<sup>129</sup> The North Dakota Supreme Court, for example, noted that while an individual was free to adopt an unusual name of his own accord, "to use the court or law to impose or force [such a name] upon society is another matter."<sup>130</sup> Thus, a California court affirmed a lower court's denial of a petitioner's request to change his name to a racial epithet because, in part, it concluded that granting the request would be seen as "promoting racial disharmony."<sup>131</sup> Similarly, a New Mexico court affirming a lower court's denial of a petitioner's request to change his name to "[F\*\*\*] Censorship!" cited the imprimatur rationale as a basis for the denial.<sup>132</sup> A Minnesota court noted in dicta that while a court's discretion did not extend to saving a petitioner from a naming decision "which simply subjects [him] to

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registration for applicant's mark amounts to the awarding of the U.S. Government's "imprimatur" to the mark. Such a notion is, of course, erroneous. The duty of this Office under the Trademark Act in reviewing applications for registration is nothing more and nothing less than to register those marks that are functioning to identify and distinguish goods and services in the marketplace, as long as those marks do not run afoul of any statutory provision that would prohibit registration. . . . Just as the issuance of a trademark registration by this Office does not amount to a government endorsement of the quality of the goods to which the mark is applied, the act of registration is not a government imprimatur or pronouncement that the mark is a "good" one in an aesthetic, or any analogous, sense.

*In re Old Glory Condom Corp.*, 26 U.S.P.Q.2d (BNA) 1216, 1220 n.3 (T.T.A.B. 1993).

128. Many commentators have noted the dearth of legislative history regarding Congress's intent in enacting section 2(a). *See, e.g., McGinley*, 660 F.2d at 485–86; U.S. PATENT AND TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1203.01 (6th ed. 2010) [hereinafter TRADEMARK MANUAL].

129. *See, e.g., In re Wurgler*, 136 Ohio Misc. 2d 1, 2005-Ohio-7139, 844 N.E.2d 919, ¶ 10 ("Changing a name through judicial decree implies an official consideration and a judicial endorsement of the new name.").

130. *In re Dengler*, 246 N.W.2d 758, 764 (N.D. 1976) (denying petition to change name to numeral); *see also In re Ravitch*, 754 A.2d 1287, 1289 (Pa. Super. Ct. 2000) (affirming trial court's rejection of plaintiff's request to change her surname to the letter R).

131. *Lee v. Superior Court*, 11 Cal. Rptr. 2d 763, 765 (Ct. App. 1992).

132. *In re Variable for Change of Name v. Nash*, 2008-NMCA-105, ¶ 5, 190 P.3d 354 ("Petitioner may make a political statement by changing his name, but once he seeks the state's imprimatur he is subject to the court's discretion in granting the government's approval of the name.").

contempt, ridicule, and inconvenience,” a petition could be denied if the requested name was “racist, obscene, or otherwise likely to provoke violence, arouse passions, or inflame hatred.”<sup>133</sup>

In other cases, courts have denied name change petitions not because the terms sought to be used as names were themselves offensive but because the courts concluded that approval of the names, in context, would connote support of a more general social policy.<sup>134</sup> For example, a New York court denied a petitioner the right to officially change his name to “Steffi Owned Slave,” in part because “the order of the court changing a [person’s] name gives the new name an aura of propriety and official sanction and makes it a matter of public record.”<sup>135</sup> Because slavery is illegal, the court concluded that the name change petition was asking the court to “attach [its] imprimatur” to the petitioner’s “political philosophy” and therefore would be objectionable.<sup>136</sup> A New York court denied a petitioner’s request to change his name to “Chief Piankhi Akinbaloye” on the grounds that permitting the petitioner to use the word “Chief” as part of his name would be “tantamount to the bestowal of an apparent title of authority” that “would tend to confuse those members of the public who might come into contact with the petitioner.”<sup>137</sup> Another New York court denied a woman’s name change request when it concluded that she was seeking to adopt the surname of the man with whom she was engaged in an adulterous relationship.<sup>138</sup> And an Ohio court denied a petitioner’s request to change her surname so as to incorporate her same-sex partner’s surname, based on the court’s concern that granting the request would be seen as validating same-sex marriage.<sup>139</sup>

Some courts that favor the imprimatur explanation, however, exercise restraint in deciding whether to deny certain name choices. A 2005 decision by an Ohio appellate court, for example, granted the petitioner’s request to change his name to

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133. *In re Dengler*, 287 N.W.2d 637, 639 (Minn. 1979) (dicta).

134. By contrast, the Patent and Trademark Office has stated that its examiners should not consider the nature of the good or service with which a trademark is to be associated in determining whether registration should be denied under section 2(a). See TRADEMARK MANUAL, *supra* note 128, at § 1203.01 (“The prohibition in §2(a) of the Act against the registration of scandalous matter pertains only to marks that are scandalous. The authority of the Act does not extend to goods that may be scandalous.” (emphasis omitted)); *In re Madsen*, 180 U.S.P.Q. (BNA) 334, 335 (T.T.A.B. 1973) (“[T]he question of whether or not the contents of the magazine may be pornographic in nature, is not an issue to be decided by this Board.”) (reversing a section 2(a)-based denial of registration to “WEEK-END SEX” for a magazine).

135. *In re Bobrowich*, 2003 N.Y. Misc. LEXIS 52, at \*3 (N.Y.C. Civ. Ct. Jan. 6, 2003) (internal quotation marks omitted).

136. *Id.* at \*8–10.

137. *In re Thompson*, 369 N.Y.S.2d 278, 279 (Civ. Ct. N.Y. Cnty. 1975).

138. *In re Linda Ann A.*, 480 N.Y.S.2d 996, 997 (Sup. Ct. Queens Cnty. 1984).

139. The decision was reversed on appeal. See *In re Bicknell*, 96 Ohio St. 3d 76, 2002-Ohio-3615, 771 N.E.2d 846, ¶ 18; see also *In re Bacharach*, 780 A.2d 579, 585 (N.J. Super. Ct. App. Div. 2001) (“To deny the applicant a statutory change of a portion of her surname to that of her same-sex partner on the hypothesis that some members of the public may be misled about the legal status of same-sex marriages in New Jersey is farfetched and inherently discriminatory.”).

“Sacco Vandal,” after the anarchist Nicola Sacco and the Germanic tribe.<sup>140</sup> The magistrate had denied the petition on the grounds that the name change would be contrary to public policy because the requested name was “synonymous with anarchism, wanton destruction and murder.”<sup>141</sup> Despite its conclusion that “[c]hanging a name through judicial decree implies an official consideration and a judicial endorsement of the new name,”<sup>142</sup> the appellate court granted the petition:

It’s a free country. The applicant is a grownup. He can change his name to anything he wants so long as the new name is not clearly improper or unreasonable. . . . If the applicant is using the name change to make a statement to society—and most applicants do—it is a subtle one.<sup>143</sup>

A similar transformation in judicial attitudes appears to have taken place with respect to requests to change one’s name to connote a particular ethnic identity. In the early and mid-twentieth century, some courts deemed themselves arbiters of the appropriateness of such changes, both rejecting attempts to de-ethnicize names and rejecting attempts to claim ethnic ancestry by adopting new names. For example, a New York court in 1936 rejected a petitioner’s request to change his name from Morris Cohen to Louis Murray Kagan.<sup>144</sup> The petitioner claimed that the new name would help him distinguish himself in his nascent podiatry business, but the court expressed offense, noting that Cohen was a “traditionally old and honored name” and that the court would “not aid [the petitioner] in his desire to forswear his original identity by assuming another and totally different one under the circumstances set forth in the petition.”<sup>145</sup> Similarly, a New York court in 1963 denied the petitioners’ request to change their name from Filoramo to Michaels; the couple claimed that “Michaels” was easier to spell and pronounce.<sup>146</sup> The court explained that it would

not grant its approval to change his [*sic*] name to one that will conceal his racial background. . . . America is a melting pot of peoples of all

140. *In re Wurgler*, 136 Ohio Misc. 2d 1, 2005-Ohio-7139, 844 N.E.2d 919, ¶ 20.

141. *Id.* ¶ 7 (internal quotation marks omitted).

142. *Id.* ¶ 10.

143. *Id.* ¶ 16; *see also, e.g., In re Reed*, 584 S.W.2d 103, 104 (Mo. Ct. App. 1979) (reversing lower court’s denial of petitioner’s request to change his first name to Sunshine, noting that the requested name “is not particularly bizarre, obscene or offensive”).

144. *In re Cohen*, 297 N.Y.S. 905, 906 (Civ. Ct. N.Y. Cnty. 1963).

145. *Id.*; *see also, e.g., In re Cohen*, 4 Conn. Supp. 342, 342 (Super. Ct. 1936) (denying petition to change surname from Cohen to Connelly); *In re Cohen*, 255 N.Y.S. 616, 617–18 (Sup. Ct. 1932) (granting petition to change surname from Cohen to Conason but requiring that the petition delete a reference to the former surname as “un-American,” which “must be considered an affront, unintentional though it may be, to the many distinguished Americans who have borne and still bear this name, among them a former, as well as a present, justice of this very court”).

146. *In re Filoramo*, 243 N.Y.S.2d 339, 340 (Civ. Ct. N.Y. Cnty. 1963).

nations and is a stronger and more fitting place to live in because of the heritage and contributions of persons of Italian extraction.<sup>147</sup>

In other cases, however, courts rejected name changes on the grounds that the proposed name changes were too ethnic, rather than not ethnic enough. In 1966, a New York court rejected a petitioner's request to change his surname from Jama to von Jama to reflect his German heritage.<sup>148</sup> After recounting Germany's actions during World War II, the court noted that it did not intend "to condemn an entire nation nor its people" but that it could not justify granting the name change.<sup>149</sup> "If a man is going to be an American at all," the court continued, "he should be so without any qualifying adjectives. True Americanism is opposed unhesitatingly to any political divisions resting on race, religion or pigmentation of skin. It frowns upon any attempt to divide our people according to origin or extraction."<sup>150</sup> And in 1969, a New York court rejected the petitioner's request to change his name from Robert Lee Middleton to Kikuga Nairobi Kikugus, a name that, the petitioner asserted, reflected his academic interest in African culture.<sup>151</sup> "The petitioner need not assume a name so unlike his own in order to teach or instruct others in African heritage," wrote the court, noting that the petitioner's given name was "a fine American name, and one which any individual should be proud to bear" and concluding that the proposed name change would "tend to mislead those he would like to instruct as to the attitudes and behavior of the African people."<sup>152</sup> Courts'

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147. *Id.* Perhaps not coincidentally, the judge's surname was Santangelo. *Id.* at 339; see also *In re Halligan*, 361 N.Y.S.2d 458, 460 n.1 (App. Div. 1974) (citing *In re Filoramo*, 243 N.Y.S.2d at 339, and *In re Cohen*, 297 N.Y.S. at 905, as "illustrative of judicial caprice"); *In re Rusconi*, 167 N.E.2d 847, 849–50 (Mass. 1960) (reversing denial of petition to change name from Rusconi to Bryan on grounds that change was "un-American," noting that "[u]nder this reasoning a person belonging to a particular national or ethnic group in the community could rarely, if ever, change his name to that of some other group"). One commentator, writing in the *Yale Law Journal* in 1911, decried the "widespread racial metamorphosis" that was ostensibly accomplished by the changing of immigrant surnames to names similar to those already in existence; whether this was the underlying motivation of the courts in these cases is unknown. Dwight, *supra* note 81, at 390, 392 (suggesting that such individuals' motives "must be . . . the desire to obtain an added prestige by assuming a designation that is not only euphonious, but is already associated in the public mind with honorable living and high endeavor" and suggesting instead that such individuals "be compelled to coin [a surname], by translation . . . or by an arbitrary assemblage of letters as cable code names are devised"). For an analysis of such decisions as a form of national identity construction, see Teresa Scassa, *National Identity, Ethnic Surnames and the State*, 11 CAN. J.L. & SOC. 167 (1996).

148. *In re Jama*, 272 N.Y.S.2d 677, 677 (Civ. Ct. N.Y. Cnty. 1966).

149. *Id.* at 678.

150. *Id.* The court also concluded that approving the addition of "von" to the petitioner's surname would be tantamount to unconstitutionally according the petitioner a title of nobility. *Id.*

151. *In re Middleton*, 304 N.Y.S.2d 145, 146 (Civ. Ct. 1969).

152. *Id.* See also, e.g., *In re Johns*, 212 N.Y.S.2d 146, 147–48 (Sup. Ct. 1961) (denying petition to change name from Warren McDonald Johns to Mikael Habte Wold-Wossen on grounds that petitioner's given name "bespeaks his American forbears and heritage" and noting that court "will not aid him in his avowed intention to forswear his original identity").

attitudes toward such changes seem to have transformed by the 1970s, perhaps aided by an awareness of similar name changes by professional athletes; witness a Colorado appellate court's 1975 grant of an inmate's request to change his name from Walter Knight to Sundiata Simba, in which the court noted, "In this day when a Lew Alcindor elects to be known as Kareem Abdul-Jabbar, and Cassius Clay opts for Muhammad Ali, the desire of Walter Knight to reflect his African heritage by adopting the name Sundiata Simba should not be dismissed lightly."<sup>153</sup>

The exclusions represented by section 2(a) of the Lanham Act and the few court decisions denying personal name changes based on the offensive nature of the names are, at first glance, difficult to square with a causal theory of naming. If the proposed name functions to identify its referent, the argument would go, it should not matter whether it carries objectionable connotations; indeed, the constitutional aspect of this argument has been explored by commentators criticizing the scope of section 2(a).<sup>154</sup> But perhaps such exclusions can be explained on the grounds that (as with "famous" names) the connotations associated with such names are so strong that they frustrate the ability of the names to serve their denotative function, either because others will be reluctant to use those names in referring to the people or products at issue or because the associated connotations will simply overwhelm any denotative power such names have. The judges in the ethnic name cases, in particular, seem to have been motivated by the connotative effect of the desired names, in that the names suggested membership in a culture that the courts believed the petitioner was not entitled to claim. Such justifications are far from compelling, however, and raise questions about whether these are determinations that the government should be empowered to make at all, particularly given that the choice of a name for its connotative effects is very much tied to issues of autonomy and self-definition.

Thus, in sum, as with trademarks, the law of personal name validity focuses largely on the denotative function of the name. If the name is actually used as an indication of identity, and is not obviously offensive, courts are inclined to deem it appropriate. As many courts have noted, however, official approval is not necessary for a name to be valid; as with trademarks, under the common law, use as an indicator of "source" is all that is required. Thus, a lack of governmental approval is no bar to developing a denotative association, although the legal presumption of validity that arises from such approval is a strong incentive to seek it. The question of validity, however, is a determination intrinsic to the name itself. The law also considers the functionality of the name with respect to the larger universe of naming choices, and it is to this consideration that I now turn.

### III. THE LAW OF NAMING: THE USE OF NAMES

As with trademarks, the ability to use a personal name, once judicial approval has been sought, is conditioned not only on a finding that the name is valid but also

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153. *In re Knight*, 537 P.2d 1085, 1086 (Colo. App. 1975). The lower court had refused the petition on the grounds that, given the petitioner's criminal history and incarceration under his given name, a name change would be improper. *Id.*

154. See, e.g., Jeffrey Lefstin, Note, *Does the First Amendment Bar Cancellation of REDSKINS?*, 52 STAN. L. REV. 665, 679-81 (2000).

on the resolution of challenges to the circumstances of its use. Some governing state statutes, for example, allow for the rejection of a proposed name if the court concludes that the use of the name is likely to deceive those engaging with the applicant, similar to the operation of the Lanham Act.<sup>155</sup> Even where the statute does not specifically afford a court such grounds, however, a court may conclude that a proposed name interferes with the use of the same name by another individual, either because the name is so famous that its use by others should be limited or because the name is likely to confuse others into thinking that the individual is or has a connection to another. These two grounds, like the ones previously discussed, rely on a causal theory of naming, in that approval of the choice of name is related to the name's denotative function. Conversely, as I will discuss, decisions relating to keeping one's name in light of changed circumstances rely on a descriptive theory of naming, in that approval of the choice of name is related to the name's connection to a defined set of characteristics of the referent.

#### A. Changing Names: Dilution

Under federal anti-dilution law, one cannot make a commercial use of the famous trademark of another in connection with goods or services if that use is likely to dilute the distinctiveness of that mark, whether by blurring or by tarnishment.<sup>156</sup> The use, for example, of "Kodak" as a trademark for hammers by an entity other than the Eastman Kodak Company may not cause source confusion (in that consumers are not likely to think that the hammers are made by the Eastman Kodak Company), but it may cause the word "Kodak" to trigger two, rather than one, responses in the consumer's mind. (In other words, the theory goes, one could no longer simply refer to "Kodak" without getting the response "Which one?") Because anti-dilution law does not depend on consumer confusion as to the source of the good or service, it is typically justified by invoking more producer-based interests, such as property or misappropriation theories, although some commentators suggest that the law can be explained in terms of consumer attention management.<sup>157</sup> As a result, the harm at the center of an anti-dilution suit is injury to the trademark *qua* trademark rather than an injury relating to the acquisition of goods or services offered under the mark.

On the personal naming side, both laws and norms restrict the uses that can be made of what Richard Alford has called "high representational capacity symbols": those names that are "restricted to a single referent and a single context."<sup>158</sup> When

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155. Compare 15 U.S.C. § 1052(d) (2006), with sources cited *supra* note 76.

156. 15 U.S.C. § 1125(c)(1) (2006) ("Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury."). State statutes may also provide a remedy for trademark dilution. See, e.g., N.Y. GEN. BUS. § 360-1 (Consol. 2010).

157. See Tushnet, *supra* note 64, at 517-27 (discussing various theories of dilution law).

158. ALFORD, *supra* note 7, at 116. The Lanham Act reflects this theory in its prohibition

such names are at issue (which is not a frequent occurrence, at least in the reported cases), courts have held that, like a famous mark, some names should be restricted to a single referent in order to cabin their denotative functionality. In other words, as in anti-dilution law, these courts are motivated by the sense that a particularly famous name cannot be used by another without diluting the distinctiveness of that name, regardless of the extent of any confusion as to identity.

For example, a probate court in Ohio denied a man's application to change his name to "Santa Robert Claus," despite a lack of fraudulent intent on the part of the petitioner, finding that the public had "a proprietary right in the identity of Santa Claus, both in the name and the persona" and that the petitioner, whose name change was motivated by his resemblance to and portrayal of Santa Claus, could not so change his name without risking misleading the children in his community.<sup>159</sup> Similarly, a Pennsylvania court denied a petitioner's request to change his name to "World Savior," despite his claim that the name change would assist him in "becoming a vehicle for 'peace in the Middle East and the rest of the world,'"<sup>160</sup> noting, in part:

We are also mindful of the fact that the majority of the human race either believes that their savior has already come (which, if true, would mean that the name would be misapplied in this instance), or that he is yet to come (which, if true, would almost certainly mean that his stature would, at that time, be certified by the sort of public acclaim which surrounded the figures we named at the outset of this opinion, and of which we see no evidence in the matter currently at bar). Those who accept either of these propositions would, of course, find the appellation under discussion to be highly offensive if bestowed upon anyone other than the One in whom they believe.<sup>161</sup>

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of marks involving national flags; as Alford points out, the religious injunction not to "use the Lord's name in vain" does the same thing from a normative perspective. *See* 15 U.S.C. § 1052(b) (2006) (prohibiting registration of a mark that "[c]onsists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof"); ALFORD, *supra* note 7, at 1.

159. *In re Handley*, 736 N.E.2d 125, 126–27 (Ohio Prob. Ct. 2000). The court's rationale thus involved concerns both as to dilution and as to deception. *But see In re Porter*, 2001 UT 70, ¶ 11, 31 P.3d 519 (finding likelihood of confusion insufficient and directing lower court to enter order changing petitioner's legal name to "Santa Claus"); *id.* ¶ 20 (Russon, J., dissenting) ("[A]llowing [petitioner] to take the name of Santa Claus and, by doing so, to take on the identity and persona of Santa Claus—an icon of our culture existing in the minds of millions of children and adults—would certainly be against public policy.").

160. *In re Bethea*, 8 Pa. D. & C. 4th 645, 646 n.2 (Ct. Com. Pl. 1991), *aff'd*, 598 A.2d 1336 (Pa. Super. Ct. 1991).

161. *Id.* at 648. The court also referenced an imprimatur-based rationale for the denial. *See id.* ("[W]e can attest with certitude that, in all of our many years on this bench, no one has ever asked us to invoke our legal authority to certify them as a savior of man."). *But see In re Phillips*, 871 A.2d 513, 513–14 (D.C. 2005) (vacating trial court order that denied name change to "Jesus Christ" on grounds "that taking the name of Jesus Christ may provoke a violent reaction or may significantly offend people" and remanding for compliance with statutory procedures (quoting *In re Phillips*, No. CA-4401, 2003 WL 21384741 (D.C. Super. Ct. June 5, 2003))); Glaberson, *supra* note 14, at A12 (reporting name change in New York



In neither case was there any real risk of confusion with the bearer of the famous name.<sup>162</sup> Rather, the courts' rationale appears to be that such names (and there may be only a few) must be reserved for only one referent, given the overwhelming strength of the associated connotations.

Other examples of personal name cases involving dilution-type arguments are, it appears, unreported; as with anti-dilution cases in trademark law, then, it may be the case that these cases are few enough to merit minimal attention,<sup>163</sup> particularly as the party in interest is unlikely to appear in court to preserve his rights. Nevertheless, as with the section 2(a) cases discussed above, the fact that such names are no less capable than others of functioning denotatively (save for the strong associations) may suggest, under a causal theory of naming, that governmental restrictions on their use can be justified only by property-type theories. In other words, it is otherwise difficult to justify the fact that "Kodak" and "Santa" should have only one referent when names such as "United" and "Delta" have several. If context will typically provide clarification when needed, it would seem that the question "Which one?" can be answered just as easily for the former pair of names as for the latter.

### B. Changing Names: Deception

Courts will also reject name choices when they conclude that the proposed names will cause confusion with respect to names already in existence. In trademark law, this restriction—that one cannot make a commercial use of the trademark of another in connection with goods or services if that use is likely to cause confusion as to the source of those goods<sup>164</sup>—is the basis of a standard infringement suit, and federal courts have developed a list of considerations that are relevant to this determination.<sup>165</sup> On the personal name side, courts embark on a similar, albeit less structured, inquiry: whether the proposed name change is likely

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court to "Jesus Christ").

162. The Ohio court did reference the risk of confusing children in the community in discussing the petitioner's request to change his name to "Santa Robert Claus," *Handley*, 736 N.E.2d at 126–27, but it is unclear how this risk would come to fruition, given that a child is likely to believe that whichever Santa he or she is speaking with at the time is the "real" Santa.

163. Cf. McKenna, *supra* note 45, at 66–67 (contending that commentators' "focus on dilution and other modern doctrines is hugely disproportionate to the practical significance of those doctrines").

164. 15 U.S.C. § 1114(1)(a) (2006) (prohibiting use in commerce of "any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive"); 15 U.S.C. § 1125(a)(1)(A) (2006) (prohibiting use in commerce of mark that "is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person").

165. See, e.g., *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–49 (9th Cir. 1979), *abrogated in part on other grounds by* *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

to (or is intended to) defraud or confuse others given an already existing use of the name.<sup>166</sup>

As with trademarks, an individual's decision to adopt the name of another is likely to be motivated by that name's existing denotative and/or connotative effects.<sup>167</sup> The relevant question, however, is whether the use interferes with the name's denotative function—in other words, whether others will encounter the name of the second individual and believe it to refer to the first individual in a particular context.<sup>168</sup> Thus, for example, one petitioner's request to change his name to "Peter Lorie" was denied in light of evidence that he had held himself out to be the son of the actor Peter Lorre and had been seeking a career in the entertainment industry.<sup>169</sup> "[T]he appearance in the entertainment industry of an actor bearing the name Peter Lorie," the court noted, "would confuse the public in that advertising and publicity for a performance of Peter Lorie would draw members of the public expecting to see a performance of Peter Lorre."<sup>170</sup> A New York court, also motivated by the risk of confusion, denied the petition of two actresses both desiring to assume the name "Nancy Clark-Sheppard" as part of a theatrical partnership (purportedly so as to eliminate "petty jealousies over career" and to "share and share alike in publicity").<sup>171</sup> By contrast, a federal district court in Wisconsin in 2007 found no likelihood of confusion when a man changed his name to "Andrew Griffith" and subsequently ran for sheriff using the name "Andy Griffith."<sup>172</sup> The court reached this conclusion even though the name change was

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166. See, e.g., *Sec'y of the Commonwealth v. City Clerk of Lowell*, 366 N.E.2d 717, 719 (Mass. 1977); *Moskowitz v. Moskowitz*, 385 A.2d 120, 122 (N.H. 1978); *Egner v. Egner*, 337 A.2d 46, 48 (N.J. Super. Ct. App. Div. 1975) ("At common law any adult or emancipated person was at liberty to adopt any name as his legal name except for fraudulent or criminal purpose, without resort to any court."); *In re Handley*, 736 N.E.2d 125, 126 (Ohio Prob. Ct. 2000) ("The primary reason for denying a requested name change application is the potential for fraud, particularly where it could lead to financial abuse or misrepresentations in society."); see generally 65 C.J.S. *Names* § 22 (2009).

167. Cf. *Raubar v. Raubar*, 718 A.2d 705, 713 n.16 (N.J. Super. Ct. Law Div. 1998) ("Names bearing unique or intrinsic appeal or value, such as, for example, Francis Albert Sinatra or Bob Dylan, may properly be scrutinized by the court with greater caution than less famous—or infamous—names.")

168. *In re Falcucci*, 50 A.2d 200, 202 (Pa. 1947); see also, e.g., *Patronymics*, *supra* note 80, at 8 (reporting on request by municipal subway employee to change his name to that of the judge hearing the petition; the petition was denied).

169. *Weingand v. Lorre*, 41 Cal. Rptr. 778, 781–82 (Ct. App. 1964).

170. *Id.* at 782. In light of the common law right to use whichever name one chooses, however, the court modified the lower court's order enjoining the petitioner from ever using "Peter Lorie" for any purpose without prior written permission of the actor. "[T]he common law recognizes the right of a person to change his name without the necessity of legal proceedings," noted the court; accordingly, the jurisdiction of the lower court was limited to either issuing an order directing the name change or denying the application. *Id.*; cf. *Chaplin v. Amador*, 269 P. 544, 544 (Cal. Ct. App. 1928) (affirming order enjoining defendant from, *inter alia*, using the name "Charlie Aplin" in connection with motion pictures "likely to deceive the public in believing that [plaintiff Charlie Chaplin] is acting the role therein").

171. *In re Clark*, 85 N.Y.S.2d 667, 667–68 (Sup. Ct. N.Y. Cnty. 1948).

172. *Griffith v. Fenrick*, 486 F. Supp. 2d 848, 853 (W.D. Wis. 2007).

motivated by the goal of “gaining an attention grabbing advantage in the election” as a result of the name’s evocation of the actor Andy Griffith, who was well known for playing a sheriff on the television program *The Andy Griffith Show*.<sup>173</sup>

As the Wisconsin case suggests, just as the mere similarity of trademarks is not, on its own, evidence of confusion (“Delta” can be used for both airline services and faucets, for example), the fact that a proposed personal name is identical to that of another is not, on its own, a reason to deny the petition.<sup>174</sup> In an 1869 English case, for example, the son of a former slave to the Du Boulay family, long-time residents of Saint Lucia, adopted the surname Du Boulay in his late teens, as his mother had done before he was born and for twenty-three years before her death.<sup>175</sup> He used the surname from that point forward, including in public announcements of a business bearing the name.<sup>176</sup> The family wrote to the son, requesting that he stop using the name; the son declined, noting that he did not claim to be related to the family. The family then filed suit, seeking an injunction requiring the son to stop using the surname Du Boulay.<sup>177</sup> In denying the family’s request, Lord Chelmsford noted that, under the circumstances, the court could not enjoin the use of the name:

In this Country we do not recognise the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a Stranger. . . . [T]he mere assumption of a name, which is the patronymic of a family, by a Stranger who had never before been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our Law offers no redress.<sup>178</sup>

Other courts have reached similar results, holding that where there was no evidence of fraud, the mere similarity between a proposed name and an existing name was not a sufficient basis upon which to deny a name change petition.<sup>179</sup>

173. *Id.* at 852. The name change (to “Andrew Jackson Griffith”) had been approved by a Wisconsin state court one month before the defendant declared his candidacy; the federal court declined to exercise jurisdiction over the “interesting and novel issues concerning the relationship between Wisconsin’s right of privacy and name change statutes.” *Id.* at 850, 855.

174. *See, e.g., id.* at 852 (“There is no logical reason to think that having the same name as another implies sponsorship by the person with whom you share the name.”).

175. *Du Boulay v. Du Boulay*, [1869] 2 L.R.P.C. 430, 431–32.

176. *Id.* at 442.

177. *Id.* at 432.

178. *Id.* at 441–42.

179. *See, e.g., In re Useldinger*, 96 P.2d 958, 960 (Cal. Dist. Ct. App. 1939) (rejecting opposition to name change petition by individual with same name as proposed name given that there was no evidence of fraud or unfair competition); *In re Ferris*, 34 N.Y.S.2d 909, 909–10 (Sup. Ct. 1942) (denying a motion to vacate an order authorizing a husband and wife to change their surname to one similar to that of applicants where changes were not for any fraudulent or wrongful purpose); *see also Arnold, supra* note 31, at 232 (“Aside from the question of direct pecuniary interest . . . there is no remedy against a person who adopts the name of another. Abstractly, this seems unjust, for there can be a no more valuable patrimony than a good name; it is, though outside the pale of commerce, one of the most prized attributes of man.”).

Implicit in these cases, then, is a causal theory of naming. A name functions as a name if it effectively denotes its referent; the fact that an individual may benefit from the connotations associated with the name as held by another does not render the use of that name illegitimate. If this were not the case, of course, the common act of naming a child after a living relative or an admired public figure would be viewed with suspicion. Thus, as with trademarks, a mere change of personal name is not considered fraudulent, so long as it clearly denotes an individual and does not frustrate that denotative effect by creating confusion between the individual and another as to the name's referent.

### *C. Keeping Names*

The adoption of a name is not the only circumstance in which questions of denotation and connotation arise. The connection between name and identity is also an issue when a court permits or denies a name change in light of an alteration in the characteristics of the good or individual to which the name refers. These cases, in comparison to the cases discussed previously, rely more on a descriptive theory of naming than on a causal theory, in that they deem a name appropriate only if it is associated with a certain set of defined characteristics.

On the trademark side, the issue arises most definitively in connection with sellers of used or refurbished goods that retain the original trademark on the goods but face a challenge from the trademark holder, which argues that the goods, having been reconditioned or altered, can no longer be branded with the original trademark (or, put differently, that retention of the original trademark creates confusion as to the source of the altered goods).<sup>180</sup> At the heart of the issue, then, is the identification of the source to which the trademark refers. In this context, "source" refers not only to the original producer but also to a relationship between the producer and the good at issue. The trademark "Ford" on an automobile properly denotes this relationship when the car leaves the manufacturing plant and when the tires and battery are replaced but may no longer properly denote the relationship if the engine and body are replaced. The point at which this line can be drawn—in other words, which characteristics are essential to being a "Ford" and which are not—remains unclear.<sup>181</sup> Indeed, although encouraging the maintenance

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180. Although the touchstone of all of these cases is whether the defendant's activity presents a likelihood of confusion, courts do not always engage in the traditional multi-factor analysis conducted in other trademark infringement cases. Two district courts in the Fifth Circuit have added three additional factors to consider in "rebuilt product" cases: (1) "the extent and nature of changes made to the product"; (2) "the clarity and distinctiveness of the labeling on the rebuilt product"; and (3) "the degree to which any inferior qualities associated with the reconditioned product would likely be identified by the typical purchaser with the manufacturer." *Brandtjen & Kluge, Inc. v. Prudhomme*, 763 F. Supp. 1551, 1567 (N.D. Tex. 1991); *see also Neles-Jamesbury, Inc. v. Valve Dynamics, Inc.*, 974 F. Supp. 964, 970 (S.D. Tex. 1997).

181. *Societe des Produits Nestle, S.A. v. Casa Helvetia, Inc.*, 982 F.2d 633, 636 (1st Cir. 1992) ("Every product is composed of a bundle of special characteristics. The consumer who purchases what he believes is the same product expects to receive those special characteristics on every occasion. Congress enacted the Lanham Trade-Mark Act to realize

of a consistent level of quality is often given as a benefit of trademark law,<sup>182</sup> producers can vary the nature of the goods or services sold under a particular mark (“under new management,” “now with strawberry flavor”) without being required to abandon the mark.

As a preliminary matter, courts seem to agree (pursuant to a theory of “trademark exhaustion”)<sup>183</sup> that the manufacturer’s authorization is not such an essential characteristic. In *H.L. Hayden Co. v. Siemens Medical Systems, Inc.*,<sup>184</sup> for example, Hayden sold Siemens’s x-ray equipment via discount mail order without Siemens’s approval. Siemens claimed that such sales constituted trademark infringement because the products were advertised as Siemens products without being installed by an authorized dealer—in other words, “that its product [was] not what it manufactures but, rather, what it manufactures and its authorized dealers install.”<sup>185</sup> The court rejected this argument, noting that the Siemens’s customers were “well aware that what they purchase from Schein D.E. [Hayden’s codefendant] is simply the manufactured product and not its installation. So long as this is understood, and it clearly is, the customers are not being misled.”<sup>186</sup> Similarly, in *Sunbeam Corp. v. Wentling*,<sup>187</sup> the plaintiff, a razor manufacturer, argued that the defendant’s discount sales of its razors constituted trademark infringement. The court rejected this argument, noting that the defendant was not engaging in any deceptive activity:

Sunbeam says that if Wentling wants to sell its razors below the established price he should take off the identifying trade-mark. Suppose he did. He certainly could not put on his own mark and sell Sunbeam razors as his, Wentling’s. And if he sold them with no mark at all but just as “good electric razors” could not Sunbeam, on the very argument it makes here, complain that Wentling was interfering with its trade-

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this expectation with regard to goods bearing a particular trademark.”); see also Steven Davis, *A Conceptual Analysis of Identity*, in *LESSONS FROM THE IDENTITY TRAIL: ANONYMITY, PRIVACY AND IDENTITY IN A NETWORKED SOCIETY* 213, 214–16 (Ian Kerr, Valerie Steeves & Carole Lucock eds., 2009) (using the term “individual essence” to describe the properties that are “necessary and sufficient” for something to be a particular object or for someone to be a particular individual).

182. See, e.g., *Bretford Mfg. v. Smith Sys. Mfg. Corp.*, 419 F.3d 576, 579 (7th Cir. 2005) (noting that trademark law “helps sellers obtain rewards from producing goods of consistent quality”).

183. See 4 MCCARTHY, *supra* note 12, § 25:41 (“[I]t is only where the goods are resold without change that the ‘first’ sale or ‘exhaustion’ rule applies to cut off the trademark owner’s rights.”).

184. 672 F. Supp. 724 (S.D.N.Y. 1987).

185. *Id.* at 748.

186. *Id.*; see also *id.* at 749 (“Although [the plaintiff] may not want [the defendant] to be advertising or selling its goods, so long as [the defendant] is selling a genuine product, the use of the [plaintiff’s] name in advertising is not improper.”); *Monte Carlo Shirt, Inc. v. Daewoo Int’l (Am.) Corp.*, 707 F.2d 1054, 1058 (9th Cir. 1983) (finding no trademark infringement where defendant sold genuine goods of plaintiff but without authorization).

187. 192 F.2d 7 (3d Cir. 1951).

mark by not allowing the customer to know that the good razor which he buys from Wentling is in fact made by Sunbeam?<sup>188</sup>

As the *Sunbeam* court suggests, then, the focus is on the nature of the good itself—in particular, whether the defendant has altered the good’s essential qualities such that the trademark, under a descriptive theory of naming, can no longer be said to denote the same good. That is not to say that courts do not exercise some flexibility with respect to the threshold question, however. For example, although the allegation by the trademark holder with respect to “gray (market) goods” or “parallel importation” is fundamentally the same as that asserted in *Sunbeam*—that the defendant is selling a good legitimately bearing the plaintiff’s trademark but under conditions not authorized by the trademark holder—courts have used the existence of separate markets (pursuant to principles of territoriality) to characterize the imported good as a “different” product from the domestic good.<sup>189</sup> Thus, even when the two goods were produced by the same manufacturer, differ only in minor ways, and bear the same trademark, the trademark denotes a different good because, as one court concluded, “a trademark has a separate legal existence under each country’s laws, and [thus] its proper lawful function is not necessarily to specify the origin or manufacture of a good (although it may incidentally do that), but rather to symbolize the domestic goodwill of the domestic markholder.”<sup>190</sup>

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188. *Id.* at 8–9. The argument is similar to that set forth by the Supreme Court in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, in which Fox contended that Dastar’s branded distribution of videos containing material produced by Fox constituted reverse passing off. *See* 539 U.S. 23, 36 (2003) (“On the one hand, they would face Lanham Act liability for *failing* to credit the creator of a work on which their lawful copies are based; and on the other hand they could face Lanham Act liability for *crediting* the creator if that should be regarded as implying the creator’s ‘sponsorship or approval’ of the copy.” (citation omitted)).

189. Some courts have held that trademark infringement exists only when there is a material difference between the good authorized for sale domestically and the unauthorized import. *See, e.g., Societe des Produits Nestle, S.A. v. Casa Helvetia, Inc.*, 982 F.2d 633, 638 (1st Cir. 1992); *cf. Weil Ceramics & Glass, Inc. v. Dash*, 878 F.2d 659, 672 (3d Cir. 1989) (finding no infringement where imported good was identical to domestic good and in light of corporate relationship between domestic producer and importer). But much will depend, of course, on whether the court characterizes any differences between the products as minor or as material. *See, e.g., Societe des Produits Nestle*, 982 F.2d at 639 n.7 (dictum) (“We think the appropriate test should not be strictly limited to physical differences. Other sorts of differences—differences in, say, warranty protection or service commitments—may well render products non-identical in the relevant Lanham Trade-Mark Act sense”); *Original Appalachian Artworks, Inc. v. Granada Elecs., Inc.*, 816 F.2d 68, 73 (2d Cir. 1987) (finding dolls sold in United States and those sold abroad were materially different because “adoption papers” and “birth certificate[s]” accompanying the latter were in Spanish and not authorized for processing in the United States). If, as these courts suggest, the trademark owner’s refusal to offer warranty protection or other services can render an imported good materially different from its domestic counterpart, then the analysis collapses into whether the trademark owner has authorized the sale of the imported good.

190. *Osawa & Co. v. B & H Photo*, 589 F. Supp. 1163, 1171–72 (S.D.N.Y. 1984); *see also Societe des Produits Nestle*, 982 F.2d at 641 (“[W]hen dealing with the importation of gray goods, a reviewing court must necessarily be concerned with subtle differences, for it is

Consistent with the theory that accords consumers the primary role in the creation of trademark meaning, this characterization of the source of the good focuses on the market as the essential characteristic that the trademark represents.<sup>191</sup>

Even assuming that courts are focused on a good's physical characteristics, the amount of change that is permissible depends greatly on the circumstances.<sup>192</sup> For example, in *Champion Spark Plug Co. v. Sanders*,<sup>193</sup> the defendants prepared, reconditioned, and resold the plaintiff's spark plugs, retaining the plaintiff's trademark, "Champion," on the reconditioned products. Champion brought suit, claiming that the defendants' practice constituted trademark infringement.<sup>194</sup> The Supreme Court rejected this argument, noting that if it constituted trademark infringement simply to sell used or refurbished goods under the original trademark, no one could ever sell used goods. The question, accordingly, was at what point the "reconditioning or repair would be so extensive or so basic that it would be a misnomer to call the article by its original name, even though the words 'used' or 'repaired' were added."<sup>195</sup> Here, however, the Court concluded that the reconditioning of the spark plugs simply restored them to their original condition as much as possible; the fact that the reconditioned spark plugs would be inferior to the originals was an expected feature in secondhand articles.<sup>196</sup> So long as the

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by subtle differences that consumers are most easily confused."); *cf.*, *e.g.*, *Neles-Jamesbury, Inc. v. Valve Dynamics, Inc.*, 974 F. Supp. 964, 971–72 (S.D. Tex. 1997) ("If Neles-Jamesbury has as strong a reputation as it claims it has for producing high quality valves, then such evidence, that Defendants' reconditioned valves are so clearly inferior to factory new valves, creates a fact issue as to whether the parties' valves are similar enough to confuse buyers, or whether they are instead so distinct that potential buyers would be likely to know that Defendants' valves did not come directly from the manufacturer.").

191. Similarly, when a legitimate domestic good is sold through an unauthorized domestic market, minor changes that render the trademark holder purportedly unable to control quality has been held sufficient to hold the defendant liable for trademark infringement. *See, e.g.*, *Zino Davidoff v. CVS Corp.*, 571 F.3d 238, 243 (2d Cir. 2009) (holding that removal of UPC codes from product packaging infringed trademark). Presumably, the alteration is what makes such cases different in courts' minds from the cases cited *supra* notes 183–88, in which the defendant lacked authorization to sell the plaintiff's products at a discount.

192. In *Karl Storz Endoscopy-America, Inc. v. Surgical Technologies, Inc.*, 285 F.3d 848 (9th Cir. 2002), the court outlined a number of factors to consider in determining whether the repair or reconstruction of a trademarked good constitutes a significant enough alteration to render the retention of the original trademark an act of infringement:

[T]he nature and extent of the alterations, the nature of the device and how it is designed (whether some components have a shorter useful life than the whole), whether a market has developed for service and spare parts, and, most importantly, whether end users of the product are likely to be misled as to the party responsible for the composition of the product.

*Id.* at 856–57 (citation omitted).

193. 331 U.S. 125 (1947).

194. The appellate court had not required the defendants to remove the trademark from the reconditioned spark plugs, but it did require that the word "REPAIRED" or "USED" be stamped on each plug in a contrasting color and that the defendants place a notice as to the spark plugs' condition on the packaging. *Id.* at 127–28.

195. *Id.* at 129.

196. *Id.* at 129–30.

reconditioned product was “clearly and distinctly sold as repaired or reconditioned rather than as new,” the consumer experienced no fraud or deception—indeed, the consumer presumably benefited by acquiring the reconditioned or used article at a lower price.<sup>197</sup> Thus, the Court’s analysis involved recognizing that there are two conceptual (if not actual) marks at issue: the original manufacturer’s mark, which is associated with the product’s essential characteristics, and the reseller’s mark, which is associated with the refurbishment.<sup>198</sup> A Champion spark plug that has been reconditioned is still a Champion and yet is not; it is *of* Champion but not entirely *from* Champion.<sup>199</sup>

In several cases involving luxury watches, by contrast, the court was concerned that the defendant’s alterations to the watch did not constitute modifications or repairs but rather resulted in a different product such that it was no longer legitimate to retain the plaintiff’s trademark on the watch. For example, in *Cartier, Inc. v. Symbolix, Inc.*,<sup>200</sup> the court preliminarily enjoined the defendant from selling stainless steel Cartier watches altered to make them look like more expensive gold Cartier models. In so doing, the court held, the defendant “transform[ed] the original stainless steel Cartier watches into different products altogether”<sup>201</sup>—significantly, without informing consumers of the modification, thus deceiving consumers into thinking that the defendant’s product was the higher-end Cartier model.<sup>202</sup> In *Rolex Watch, U.S.A., Inc. v. Michel Co.*,<sup>203</sup> the court held that the

197. *Id.* at 130.

198. *See id.* (“[T]he second-hand dealer get some advantage from the trade mark. But . . . that is wholly permissible so long as the manufacturer is not identified with the inferior qualities of the product resulting from wear and tear or the reconditioning by the dealer. Full disclosure gives the manufacturer all the protection to which he is entitled.”); *see also, e.g.*, *Nitro Leisure Prods., L.L.C. v. Acushnet Co.*, 341 F.3d 1356, 1363 (Fed. Cir. 2003) (holding that it was “not a misnomer” to reapply the original trademark to refinished golf balls); *Cutler-Hammer, Inc. v. Standard Relay Corp.*, 328 F. Supp. 868, 881–82 (S.D.N.Y. 1970) (requiring defendant seller of plaintiff’s surplus goods to mark those goods as surplus). *But see Nitro*, 341 F.3d at 1368 (Newman, J., dissenting) (noting that because the refurbished golf balls “did not have the characteristics of the original,” the goods had “lost their identity and their quality” and therefore could not properly bear the original trademark). Contrast these cases with *Intel Corp. v. Terabyte Int’l, Inc.*, 6 F.3d 614 (9th Cir. 1993), in which the defendant sold processors manufactured by the plaintiff but with incorrect markings as to their capacity. Consumers purchasing the mismarked processors thus were deceived in that they were not purchasing as much computing power as they expected. *Id.* at 620 (“When the chip genuinely from Intel was marked with a speed designation Intel would not have given it, the chip became a counterfeit Intel [chip]. . . . Intel did make the chip but it was no longer the source of the *product* which was being sold, except in the most ethereal of senses.” (emphasis in original)).

199. The same might be said of the “true fake”—the unauthorized overrun of, for example, the luxury handbag, which is sold at a lower price than the authorized good. *See* Richard Boudreaux, *In Italy, It’s Survival of the Fakest: Illegal Counterfeits Yield \$1.5 Billion Annually in Leather Goods Alone*, L.A. TIMES, Oct. 6, 2000, at E1; Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 832 (2010) (“The overriding issue in such cases is not what the good is, but how it is perceived.”).

200. 386 F. Supp. 2d 354 (S.D.N.Y. 2005).

201. *Id.* at 359.

202. *Id.* at 360.



defendant's alterations to the used Rolex watches he sold—replacement of the bezel, dial, and bracelet and the insertion of diamonds into the dial<sup>204</sup>—resulted in a new product, such that it was no longer legitimate to retain the Rolex trademark on those watches.<sup>205</sup> The court therefore reversed the lower court's order allowing the defendant to continue selling the watches so long as he put his own trademark on the non-Rolex parts and provided a written disclosure, holding that the district court should have enjoined the use of Rolex's trademarks on the altered watches completely.<sup>206</sup> Thus, these cases, like the refurbishment cases, also focus on the “necessary and integral” characteristics of the good at issue as determinative of whether the attached trademark is used appropriately.<sup>207</sup>

The same analysis takes place in the trademark realm even when people, rather than parts, are at issue. For example, a musical group that has lost one of its members might face a trademark battle with the departing musician, either because the musician is challenging the group's right to retain the band's name or because the departing musician wishes to use the name for a new endeavor. In such cases, the goal of the court is similar to that of the refurbishment cases: to identify the party embodying the “key creative force” that consumers associate with the band's name—creativity being, apparently, the essential quality of a musical group.<sup>208</sup>

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203. 179 F.3d 704 (9th Cir. 1999).

204. *Id.* at 707.

205. *Id.* at 710.

206. *Id.*

207. *Id.*; *see also, e.g.*, *Rolex Watch USA, Inc. v. Meece*, 158 F.3d 816, 825 (5th Cir. 1998) (“[T]he bezel on a Rolex watch is a necessary and integral part of the watch and serves a water-proofing function. Obviously, bracelets and dials are also necessary, integral parts: a watch cannot be worn without a bracelet; and, the watch cannot serve its purpose of timekeeping without a dial.”); *Bulova Watch Co. v. Allerton Co.*, 328 F.2d 20, 23 (7th Cir. 1964) (“The case of a wrist watch is a necessary and integral part of the complete product. The substitution of a different crown and case by defendants results in a different product.”). It is difficult to imagine, given these analyses, a part of a watch that would not be deemed “necessary and integral.”

Consumers' attempts to target such practices via state fraud laws have not been successful. *See, e.g.*, *Szajna v. Gen. Motors Corp.*, 503 N.E.2d 760 (Ill. 1986) (rejecting claim that trademark “1976 Pontiac Ventura” alone constituted an express warranty as to nature of car's components and thus that the sale of a new Ventura with a Chevette transmission was unlawful); *Jordan v. Nissan N. Am., Inc.*, 853 A.2d 40 (Vt. 2004) (affirming jury verdict for defendants on plaintiffs' claim that the sale of a Nissan minivan as an import was deceptive because the vehicle was assembled in the United States through a joint venture with Ford). A different result was obtained by a manufacturer of electronic paper towel dispensers, which brought suit against a manufacturer of replacement paper towels for, *inter alia*, contributory trademark infringement. The court, in vacating a grant of summary judgment for the defendant, cited surveys showing that consumers expected the toweling being dispensed to be of the same brand as the dispenser. *See Ga. Pac. Consumer Prods. v. Von Drehle Corp.*, Nos. 09-1942, 09-2054, 2010 U.S. App. LEXIS 16498, at \*33 (4th Cir. Aug. 10, 2010).

208. Mark Traphagen & Robert D. Litowitz, *The Song Remains the Same—But Not Necessarily the Name*, 39 AM. U. L. REV. 975, 990 (1990) (“[C]ourts generally uphold the rights of former members to use the name of the groups with which they once played when those members were spotlighted as the key creative force.”); *see Robi v. Reed*, 173 F.3d 736, 740 (9th Cir. 1999) (“[A] person who remains continuously involved with the group and is in

Outside of the trademark realm, the determination of whether a name continues to denote its referent despite changes to the referent's characteristics depends, likewise, on whether the essential quality of the referent has changed.<sup>209</sup> As John Stuart Mill suggested, the town of Dartmouth might originally have been so named because it was at the mouth of the Dart River, but if that river were to dry up or diverge, we would still call the town Dartmouth because the existence of the river is not an essential quality of the town.<sup>210</sup> The philosopher Saul Kripke, to give another example, asks us to imagine that the definition of "tiger" in the dictionary reads, *inter alia*, that a tiger is a "large carnivorous quadrupedal feline, tawny yellow in color with blackish transverse stripes and white belly."<sup>211</sup> If one were later to encounter a tiger that had lost one of its hind legs, one would not conclude that this creature, having only three legs and therefore not "quadrupedal," could not, as a result, be considered a tiger; having four legs is not an essential quality of tigerhood.<sup>212</sup>

What, then, is the essential quality of an individual, such that it would be improper, under a descriptive theory of naming, to retain a particular name? The area in which the law has addressed this question for individuals most directly appears to be when a transgender or transsexual individual seeks a change of name that reflects his or her true gender identity, a change with important signaling

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a position to control the quality of its services retains the right to use of the mark . . . ."); *HEC Enters., Ltd. v. Deep Purple, Inc.*, 213 U.S.P.Q. (BNA) 991, 994–95 (C.D. Cal. 1980) (enjoining former member of Deep Purple from using band name for new group when former band members continued to perform under that name); *Kingsmen v. K-Tel Int'l Ltd.*, 557 F. Supp. 178, 182 (S.D.N.Y. 1983) ("No one member of the group [could] be singled out as representing the essence of The Kingsmen's performing style."). As one court put it:

Imagine, for example, a group which lawfully acquires the "Beatles" trademark and performs without one or more of John, Paul, George or Ringo or "Jimmy Dorsey's Orchestra" without Jimmy Dorsey. Could the corporate owner of the "Rolling Stones" mark replace the present members of the group and continue to sell out Madison Square Garden? In short, can the public consciousness of and secondary meaning acquired by a performing group's trade name survive personnel changes?

*Rare Earth, Inc. v. Hoorelbeke*, 401 F. Supp. 26, 37 n.19 (S.D.N.Y. 1975).

A different issue would likely pertain if the name of the musical group included a specific reference to the lead singer. *See, e.g.*, *Noone v. Banner Talent Assocs.*, 398 F. Supp. 260, 263 (S.D.N.Y. 1975) ("If the name 'Herman's Hermits' has acquired a sufficient secondary meaning to imply, even now, that plaintiff is the lead singer of the group, then the use of the word 'Herman's' [when plaintiff was no longer with the group] would be misleading and give rise to an action under Section 43(a) as a false description.") (denying motion to dismiss).

209. *See* JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 167 (1970) ("Even for those people who would want to assert that de Gaulle could turn into a tree or horse and still be de Gaulle, there must be some identity criterion. De Gaulle could not turn into anything whatever, e.g., a prime number, and still remain de Gaulle, and to say this is to say that some term or range of terms is analytically tied to the name 'de Gaulle.'").

210. MILL, *supra* note 48, ch. 2, § 5.

211. KRIPKE, *supra* note 64, at 119.

212. *Id.* at 119–21; *see also id.* at 51 ("[I]f various parts of a table are replaced, is it the same object?").

effects.<sup>213</sup> Here, the courts, in the earlier decisions, similarly adopted a descriptive theory of naming, identifying biological gender as the essential characteristic that gave a name its denotative validity. In a 1992 case, for example, a New York court denied a petition to change the petitioner's name from William to Veronica without further evidence that the petitioner's biology supported the name change.<sup>214</sup> The court held that without this evidence, a change to an "obvious female name" would be "fraught with danger of deception and confusion and contrary to the public interest."<sup>215</sup> Put differently, the court concluded that it would be more appropriate for the petitioner to keep his traditionally male name of William because the essential elements that made him "William" had not been altered.<sup>216</sup> Similarly, in a 1968 case, a New York court granted the petitioner's request for a male-to-female name change given that the petitioner had undergone sex-reassignment surgery:

Where there is disharmony between the psychological sex and the anatomical sex, the social sex or gender of the individual will be determined by the anatomical sex. Where, however, with or without medical intervention, the psychological sex and the anatomical sex are harmonized, then the social sex or gender of the individual should be made to conform to the harmonized status of the individual and, if such conformity requires changes of a statistical nature, then such changes should be made. Of course, such changes should be made only in those cases where physiological orientation is complete.<sup>217</sup>

Other courts, along the same lines, declined requests for pre-reassignment name changes absent psychiatric or other types of evidence indicating a commitment to a different gender, thus reflecting the courts' concern that the new name bear a descriptive relationship to the new gender.<sup>218</sup>

213. See, e.g., Glaberson, *supra* note 14, at A12 ("[M]any who have gone through the switch say a name change sends an important message to the world, a message solidified and made official with a court's approval.")

214. *In re Anonymous*, 587 N.Y.S.2d 548, 548 (Civ. Ct. 1992). The petitioner filed a new petition with supporting documentation before a different judge two years later; this time, the petition was granted "solely upon the condition that petitioner may *not* use or rely upon this order as any evidence whatsoever or judicial determination that the sex of petitioner has in fact been changed anatomically." *In re Rivera*, 627 N.Y.S.2d 241, 244 (Civ. Ct. 1995) (emphasis in original).

215. *In re Anonymous*, 587 N.Y.S.2d at 549.

216. See also *In re Richardson*, 23 Pa. D. & C.3d 199, 201 (Ct. Com. Pl. 1982) (denying request of male petitioner to change his name to "Diane Diane" when he had not undergone gender reassignment surgery). The court noted:

We can think of nothing which might be more deceptive to the public than to allow a male to use a female name. . . . [W]e are being asked to lend the dignity of the court and the sanctity of the law to this freakish rechristening. To place a female name on a male is to combine incompatibles, and to do so legally is to pervert the judicial process, which is supposed to act in a rational manner.

*Id.*

217. *In re Anonymous*, 293 N.Y.S.2d 834, 837 (Civ. Ct. 1968).

218. See, e.g., *In re Anonymous*, 582 N.Y.S.2d 941, 942 (Civ. Ct. 1992) (denying

More recently, however, courts have distanced themselves from a requirement that medical proof be presented,<sup>219</sup> recognizing, as a New York court noted in 2003, that a change in name is not the same as a change in gender<sup>220</sup> and apparently abandoning any attempt to condition name changing on gender identity. These courts, then, have moved from a descriptive theory of naming to a causal theory of naming in that their focus is on whether the name is used to denote the individual rather than on whether it relates to any set of essential characteristics. This is the right result; after all, if a parent can name a male child Jennifer or a female child Robert at birth,<sup>221</sup> there is no justification beyond bias for disallowing such name selection as an adult. But does this then mean that the descriptive theory of naming that explains the refurbishment cases has no parallel in personal naming law? It is here that I return to the issue of attribution and the connection between names and identity.

#### IV. THE LAW OF NAMING: IDENTITY AND SOURCE

The popular belief that names and identity are in a largely fixed relationship often gives rise to consternation when a formerly pseudonymous author reveals his

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petition to change male name to female name on grounds that without a “competent medical and psychiatric evaluation of the petitioner,” the court’s grant of petition risked “lend[ing] legal credence to confusing or misleading the public in its dealings with the petitioner”); *In re Harris*, 707 A.2d 225, 228 (Pa. Super Ct. 1997) (holding that pre-reassignment transsexual’s adoption of female name “would eliminate what many presently believe to be a fraud; that is, that petitioner is a man,” but requiring “competent evidence of the petitioner’s commitment to the new gender”).

219. *In re Leah Uri Winn-Ritzenberg*, No. 570442/09, 2009 N.Y. Misc. LEXIS 2850, at \*2 (N.Y. App. Term, Oct. 21, 2009) (“There is no sound basis in law or policy to engraft upon the statutory provisions an additional requirement that a transgendered-petitioner present medical substantiation for the desired name change.”) (reversing order denying transgendered petitioner’s name change request); *In re McIntyre*, 715 A.2d 400, 403 (Pa. 1998) (reversing lower court decision denying preoperative transsexual’s name change petition, noting “[t]he details surrounding Appellant’s quest for sex-reassignment surgery are not a matter of governmental concern”).

220. *In re Guido*, 771 N.Y.S.2d 789, 791 (Civ. Ct. 2003). The court noted:

Petitioner has not asked this Court to declare his sex changed from male to female, nor is such a declaration within the scope of this Court’s powers. This Court is asked only to sanction legally Petitioner’s desire for a change of name, after satisfying itself that Petitioner has no fraudulent purpose for doing so and that no other person’s rights are interfered with thereby. The Court is satisfied on those questions. The law does not distinguish between masculine and feminine names, which are a matter of social tradition. Some names are traditionally associated with one gender; some with the other; some with either. And, as pointed out by Petitioner, the gender association of some names has changed over time. Apart from the prevention of fraud or interference with the rights of others, there is no reason—and no legal basis—for the courts to appoint themselves the guardians of orthodoxy in such matters.

*Id.* (reconsidering earlier denial of petition).

221. This was not always the case in every state. *See, e.g.*, *Jech v. Burch*, 466 F. Supp. 714, 716 (D. Haw. 1979) (noting that, until 1967, Hawaii law required that children be given “a Christian name suitable to their sex” (internal quotation marks omitted)).

“true” identity or when a corporation changes its name after a spate of bad publicity.<sup>222</sup> Nevertheless, name changing still happens frequently, both informally and formally, and such changes have both denotative and connotative effects. Celebrities change their names to differentiate themselves from others,<sup>223</sup> to have a name that is more memorable or melodic, or to de-ethnicize their surnames.<sup>224</sup> Individuals may adopt a new name to reflect adherence to newly adopted religious tenets or to indicate a particular cultural heritage.<sup>225</sup> Marriage is an event that causes one or both parties (typically women) to effect changes in surnames, with many individuals viewing the choice of a woman’s name after marriage as a signaling device.<sup>226</sup>

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222. See generally MELISSA KATSOU LIS, LITERARY HOAXES: AN EYE-OPENING HISTORY OF FAMOUS FRAUDS (2009) (recounting many such examples). Authorial name revelations seem to engender more reaction than corporate name changes. See *supra* note 6.

223. See, e.g., JUSTIN KAPLAN & ANNE BERNAYS, THE LANGUAGE OF NAMES 90–102 (1997) (describing the many Hollywood personalities who have changed their names). Performers registered with Actors’ Equity, for example, cannot use the same name as another performer if such use would be likely to cause confusion, thus causing some actors to change their professional names. ACTORS’ EQUITY ASS’N, CONSTITUTION AND BY-LAWS, By-laws, art. IX, § 7(b) (Mar. 8, 1926), available at [http://www.actorsequity.org/docs/about/AEA\\_ConstitutionBylaws.pdf](http://www.actorsequity.org/docs/about/AEA_ConstitutionBylaws.pdf) (prohibiting registration of an actor under a name “which is the same as, or resembles so closely as to tend to be confused with, the name of an existing enrolled member” without consent or a finding of no likelihood of confusion or other extenuating circumstances).

224. See, e.g., Petersen, *supra* note 48, at 316 (noting that many public figures adopted new names upon applying for U.S. citizenship, as permitted by law). For a study of name change petitions by immigrants to the United States in the late nineteenth and early twentieth centuries, see Arthur Scherr, *Change-of-Name Petitions of the New York Courts: An Untapped Source in Historical Onomastics*, 34 NAMES 284 (1986).

225. *In re Cruchelow*, 926 P.2d 833, 834 n.2 (Utah 1996) (noting that the Koran “directs Muslims to adopt names that remind them of their link to and relation with Allah”); ALFORD, *supra* note 7, at 158; Finch, *supra* note 48, at 713 (describing how boxer Cassius Clay changed his name to Muhammad Ali “in order to distance himself from the history of slavery which his birth name denoted, and to embrace the identity of the Muslim faith”). *But see In re Green*, 283 N.Y.S.2d 242, 245 (City Civ. Ct. 1967) (denying petition to change name from “Earl Green” to “Merwon Abdul Salaam” to reflect Muslim faith on the grounds that petitioner “should measure himself by the American standard”).

226. See ALFORD, *supra* note 7, at 157 (“Assuming a new name encourages a woman to alter her self-concept, and others in her social world are encouraged to alter their expectations of her.”); SMITH, *supra* note 11, at 204 (describing, in 1950, the “few ardent feminists” who chose to keep their names after marriage as “bent upon exhibitionism” in an attempt to “convince their own doubting selves that they were the ‘equal of men’”); Hoffnung, *supra* note 16, at 817 (asserting that women’s marital name choices “ha[ve] been of continuing interest to researchers because the choice makes a statement about values and identity”); Rosensaft, *supra* note 16, at 186 (describing his own decision to change his surname to that of his wife); Weiner, *supra* note 14, at 1632–33 (asserting that many women view their surname as a marker of present association while many men view their surname as an immutable indication of patrilineal ancestry). It is no longer an oddity when a woman, upon marriage, chooses to retain her birth name, but it remains a significant enough act that the *New York Times* wedding announcements still typically indicate whether the bride has

Today, a writer may adopt a different name for a different genre of writing, either to keep her audiences separate, for fear of reprisal, or to separate her private life from her professional life.<sup>227</sup> Columbia University humanities professor Carolyn G. Heilbrun, for example, published numerous mystery novels under the name “Amanda Cross” because, in part, she believed that she would have been denied tenure had her colleagues known about the novels.<sup>228</sup> The Victorian novelist Walter Scott, similarly, omitted his given name from *Waverley*, writing that “[i]n truth I am not sure it would be considered quite decorous for me as a Clerk of Sessions to write novels. Judges being monks clerks are a sort of lay-brethren from whom some solemnity of walk and conduct may be expected.”<sup>229</sup> Many individuals engage in online activities under various names, either to disaggregate their various online personas or, in more nefarious situations, to create the impression of a multitude of voices when only one exists.<sup>230</sup> Alternatively, as described in the now ancient tale of LambdaMOO, many online writers can share one online identity, in a more modern version of the Stratemeyer Syndicate.<sup>231</sup>

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chosen to do so. Hoffnung, *supra* note 16, at 818 (noting that the *New York Times* began routinely printing women’s marital naming choices in the mid-1980s). Note, today, the practice in the *New York Times* and elsewhere of indicating that a bride is “keeping her name”—in other words, that her name is property that can be retained or abandoned.

227. The discussion in this paragraph is drawn from Heymann, *Authonym*, *supra* note 5, at 1398–406.

228. CAROLYN G. HEILBRUN, *WRITING A WOMAN’S LIFE* 110 (1988). Other artists have used more than one name to distinguish different creative endeavors. In 1993, the recording artist Prince changed his name to an unpronounceable symbol after a contract dispute with Warner Brothers Records, his recording label. Existing albums by “Prince” continued to be released by Warner, while new albums by the symbol were independent releases. Prince reverted to his former name when the Warner contract terminated. See Jon Pareles, *For Prince, a Resurgence Accompanied by Spirituality*, N.Y. TIMES, July 12, 2004, at E1. As Avner Falk points out, this same practice would likely be viewed with considerably more suspicion if engaged in by an individual not in the creative industries. Avner Falk, *Identity and Name Changes*, 62 PSYCHOANALYTIC REV. 647, 649 (1963) (noting that authorial pseudonyms “may be a socially sanctioned display of identity struggle not permitted other members of society, who emerge as impostors using ‘aliases’”).

229. Robert J. Griffin, *Introduction to THE FACES OF ANONYMITY: ANONYMOUS AND PSEUDONYMOUS PUBLICATION FROM THE SIXTEENTH TO THE TWENTIETH CENTURY* 1, 8 (Robert J. Griffin ed., 2003); see also Heymann, *Authonym*, *supra* note 5, at 1398–406 (discussing authorial adoption of pseudonyms).

230. See *supra* note 38 and accompanying text; see also, e.g., Heymann, *Authonym*, *supra* note 5, at 1406 n.96; David Jacobson, *Context and Cues in Cyberspace: The Pragmatics of Naming in Text-Based Virtual Realities*, 52 J. ANTHROPOLOGICAL RES. 461, 468–70 (1996) (describing naming practices in online worlds, including the use of real names to distinguish virtual from real exchanges); Beth Simone Noveck, *Trademark Law and the Social Construction of Trust: Creating the Legal Framework for Online Identity*, 83 WASH U. L.Q. 1733, 1740 (2005) (recommending borrowing from trademark law concepts “to account for the collective way [online] reputation is created”).

231. See JULIAN DIBBELL, *MY TINY LIFE: CRIME AND PASSION IN A VIRTUAL WORLD* 30 (1998); Heymann, *Authonym*, *supra* note 5, at 1408–09. The “Stratemeyer Syndicate,” a stable of ghostwriters founded by Edward Stratemeyer, was responsible for the Nancy Drew, Bobbsey Twins, and Hardy Boys series, among others, all attributed to nonexistent authors. See Patricia Leigh Brown, *A Ghostwriter and Her Sleuth: 63 Years of Smarts and Gumption*,

Corporations, likewise, may change their names and brands for a number of reasons.<sup>232</sup> The company may be going through a takeover or merger, necessitating a change in name of one of the merged entities. The company may feel that its corporate name or one of its brands has become stale or outdated. The company may be deciding to branch out into a new line of products that are significantly different from its other efforts such that the use of the same brand would cause cognitive dissonance among consumers,<sup>233</sup> or the company may wish to signal to investors a corporate rebirth or plans to take the company in a different direction.<sup>234</sup> Even noncommercial entities avail themselves of this ability, such as an underperforming middle school in Atlanta that changed its name to symbolize the start of planned educational reforms.<sup>235</sup> Perhaps more perniciously, a company that has experienced negative publicity may attempt to distance itself from history by reintroducing the company or the product under a new name.<sup>236</sup> Familiar examples include ValuJet's change to AirTran sixteen months after a 1996 crash in the Florida Everglades;<sup>237</sup> Blackwater's change to Xe in an attempt to jettison the bad

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N.Y. TIMES, May 9, 1993, at E7; Susan Chira, *Harriet Adams Dies; Nancy Drew Author Wrote 200 Novels*, N.Y. TIMES, Mar. 29, 1982, at A1; Meghan O'Rourke, *Nancy Drew's Father: The Fiction Factory of Edward Stratemeyer*, NEW YORKER, Nov. 8, 2004, at 120.

232. One firm that tracks such changes reported that 767 American companies changed their names in the first half of 1989. *Name Changes Down by 18%*, N.Y. TIMES, July 10, 1989, at D8 (citing survey by identity-consulting firm Anspach Grossman Portugal).

233. See, e.g., CHARLES J. FOMBRUN, REPUTATION: REALIZING VALUE FROM THE CORPORATE IMAGE 51 (1996) (describing how Disney released its R-rated films under the Touchstone Pictures brand "[t]o avoid diluting the Disney name"). In fact, marketing experts counsel such rebranding so as not to sully the associations of one brand with those of another. See, e.g., AAKER, *supra* note 21, at 117 ("Hidden Valley salad dressings would suffer greatly under the Clorox brand umbrella because the parent corporation is tied to bleach, which is incompatible with a food product.").

234. See Mani Subramani & Eric Walden, *The Game of the Name: A Comparison of Capital Market Reactions to Dotcom vs. Traditional Name Changes 1* (July 18, 2000) (unpublished manuscript), available at <http://misc.umn.edu/wpaper/WorkingPapers/JMRName.pdf> (citing study that reported that "a company's choice of name provides information that is significant in evaluating its future potential"); *id.* at 19 (finding that the benefit of changing to a "dotcom" name is "negligible").

235. Paul Donsky, *New Beginning; Renaming School Called Symbol of Change*, ATLANTA J.-CONST., July 24, 2003, at 3JN (discussing West Fulton Middle School's change of name to Benjamin S. Carson Honors Preparatory School). As commentators have noted, the sale of naming rights by public schools and other institutions raises interesting First Amendment and other concerns. See Ann Bartow, *Trademarks of Privilege: Naming Rights and the Physical Public Domain*, 40 U.C. DAVIS L. REV. 919, 921 (2007) (contending that naming rights work a privatization of public assets); Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 GEO. L.J. 1, 26 (2007) (noting that it is unclear whose endorsement is conveyed through naming rights—the school's or the corporate sponsor's).

236. See Note, *Badwill*, 116 HARV. L. REV. 1845 (2003).

237. On May 11, 1996, a ValuJet plane crashed in the Florida Everglades, resulting in the deaths of all 110 people aboard. Sixteen months later, after a merger with Florida-based AirTran Airways, ValuJet permanently retired its name and began operations as AirTran Airlines. At least some AirTran customers are not aware of the company's history, and one commentator has suggested that the company would not have survived without the name

publicity arising from its operations in Iraq; and Philip Morris's change to Altria in 2003 to weaken the link between its Philip Morris brand and its other brands, including Kraft.<sup>238</sup>

Just as a name can be changed despite the lack of any substantive change in any of the referent's characteristics, a name can be maintained despite nontrivial changes in the referent's characteristics. A company can effect an overhaul of its employees, including those in leadership positions, without having to change its corporate name; likewise, it can make changes in the quality of one of its branded products without having to abandon its trademarks.<sup>239</sup> The same is true of creative endeavors. Consider, for example, the syndicated advice column "Dear Abby," in which "Abigail Van Buren" has been the pen name of both mother and daughter, and the "authors" V.C. Andrews, Carolyn Keene, and Franklin Dixon, each of whom is in fact a syndicate of authors over time, all adopting a corporate style.<sup>240</sup> Similarly, if we were to confirm that the Earl of Oxford wrote *Romeo and Juliet*, we might say that "William Shakespeare" now refers to two individuals: to the author of the play (now equivalent to the Earl of Oxford) and to the individual born in Stratford-upon-Avon when the name is being used to denote the person formerly believed to have written the play.<sup>241</sup> At the very least, as some commentators suggest, "Shakespeare" would denote a different writer, although of the same

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change. *With ValuJet in Past, AirTran Soars as Others Struggle*, USA Today.com (Aug. 18, 2003), <http://www.usatoday.com/travel/news/features/2003/2003-08-18-airtran.htm>.

238. See, e.g., *Sorry, Don't Know Anyone by That Name*, NEWSWEEK, Mar. 2, 2009, at 9 (noting that Philip Morris's rebranding was the result of "[c]lass-action suits linking smoking to cancer," that the Blackwater name became "an albatross after a series of civilian shootings in Iraq," and that Andersen Consulting's name was "[l]inked to Arthur Andersen and its conviction for [a] shady Enron audit"). In light of the difficulty consumers are likely to have in connecting a trademark to its corporate entity, Lynn LoPucki has proposed extending tort liability to trademark owners. Lynn M. LoPucki, *Toward a Trademark-Based Liability System*, 49 UCLA L. REV. 1099, 1110–14 (2002).

239. Cf. 3 MCCARTHY, *supra* note 12, § 17:24 (noting that while "a substantial change in the nature or quality of the goods sold under a mark may so change the nature of the thing symbolized that the mark becomes fraudulent and/or that the original rights are abandoned," consumers expect minor changes); Bartow, *supra* note 235, at 932 n.48 ("Because trademarks can be bought, sold, or changed without notice to the consumer, there are limitations upon how useful to consumers trademarks actually are . . .").

240. V.C. Andrews, who died in 1986, is the "author" not only of the novel *Flowers in the Attic* (1979), but of nearly forty novels written after her death; Carolyn Keene and Franklin Dixon are the "authors" of the Nancy Drew series and Hardy Boys series, respectively. For a general discussion of this phenomenon, see Heymann, *Authornym*, *supra* note 5, at 1406–08; see also RICHARD A. POSNER, *LAW AND LITERATURE* 258 (rev. ed. 1998) ("Law clerks often prepare for their job by reading a bunch of their boss's old opinions (sometimes he tells them to do this), and they model their own style on that of the opinions they read. By this process a chambers style, not perhaps very distinctive but distinctive enough to be recognizable, evolves. All that this shows is that style, like intention, can be a corporate attribute." (emphasis omitted)).

241. One study has suggested a cultural aspect of this phenomenon, finding that the Western participants were more likely than the East Asian participants "to have intuitions that fall in line with causal-historical accounts of reference," perhaps deriving from a preference for "holistic thought" among East Asians and a preference for "analytic thought" among Westerners. See Machery et al., *supra* note 42, at B5, B8.



works. Sidney Zink, for example, has noted that if it were discovered that the individual now known as William Shakespeare did not write the plays attributed to him,

it would not be open to us to decide whether we should continue to give “Shakespeare” as the name of the author of these plays. Whatever fuss it caused printers and students of literature, we should now say that “Shakespeare” was a different person from the author of the set of plays we have called “Shakespearean.”<sup>242</sup>

In each of these cases, the product continues to be attributed to the same name despite the fact that different hands have guided its production.

All of these examples—both name changes and name retentions—could be characterized as a form of deception or, at the very least, a form of increased search costs. In some cases, the referent may be actively attempting to conceal its history or the actual origin of its goods (as with certain outsourcing scenarios); in other cases, the intent may be a more subtle signaling effect;<sup>243</sup> in still other cases, the name change or retention may simply make it more difficult to determine genealogical information. Yet despite these effects—harms that traditionally, in trademark law, warrant intervention—the law does not view these choices as impermissible.<sup>244</sup> The reason, I submit, is naming law’s implicit reliance on the causal and descriptive theories of naming. A name—whether a personal name, a

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242. Zink, *supra* note 48, at 493; *see also* Michel Foucault, *What Is an Author?*, in *TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM* 141, 146 (Josué V. Harari ed., 1979) (“If [a man named] Pierre Dupont does not have blue eyes, or was not born in Paris, or is not a doctor, the name Pierre Dupont will still always refer to the same person; such things do not modify the link of designation. . . . But if we proved that Shakespeare did not write those sonnets which pass for his, that would constitute a significant change and affect the manner in which the author’s name functions.”).

243. *Cf.* ALFORD, *supra* note 7, at 85 (“Assuming a new name encourages a person to regard himself or herself as a new, or substantially changed, person, and others are encouraged to see this person as changed and to alter their expectations accordingly.”); SMITH, *supra* note 11, at 188 (noting that when a member of a tribe “has had what he regards as a run of ill luck, he will likely change his name, feeling that thereby his destiny can be changed”); Finch, *supra* note 48, at 712 (“[O]ne could argue that the possession of the same name throughout life provides a continuity in one’s public persona which contributes to a stable sense of the self. . . . Conversely, a change of name denotes a ‘passage’ in the life course which is part of the creative construction of a personal narrative.”).

244. As one commentator described the common law of England as it was carried over to the United States, “a man was entitled to adopt a new name for himself as one changes a coat.” Dwight, *supra* note 81, at 387; *cf.* *Minot v. Curtis*, 7 Mass. 441, 443 (1811) (noting that there is no reason “why corporations may not be known by several names, as well as individuals”); SCHECHTER, *supra* note 20, at 122 (noting that “[t]he modern manufacturer may use a mark or several marks or no mark just as he pleases”). *But see* *Applications of Greenfield*, 322 N.Y.S.2d 276, 277 (City Civ. Ct. 1970) (“This Court will not allow the petitioner to discard one name and assume another as easily as he would a suit of clothes.”) (rejecting petition to change surname from “Greenfield” to “Anders” in order to travel to the Middle East when petitioner had requested change from “Kelly” to “Greenfield” seven years earlier “for business purposes”).

corporate name, or a trademark—functions when it is used consistently and clearly to denote its referent in a particular context at a particular time. This functionality is not disrupted by the name’s ontological status or recent vintage; it is disrupted when a concurrent use causes confusion as to reference or when the referent changes so substantially that a new reference is needed.

We can see evidence of these theories in the various cases, both on the corporate side and on the personal name side, in which a party has contended that an entity or individual’s failure to disclose a prior name change should invalidate a contract or some other action taken under the new name. For example, a New York court, writing in 1859, rejected an attempt to invalidate a contract on the grounds that the signatory used a name other than his birth name.<sup>245</sup> “All that the law looks to,” the court concluded, “is the identity of the individual, and when that is clearly established the act will be binding upon him and upon others.”<sup>246</sup> Similarly, when a man named Truman Day McCleas left his family, moved from New York to Pennsylvania, changed his name to J. D. McUlta, did business under that name, and later filed for bankruptcy, the court found that he engaged in no deceptive act, despite the claim by creditors that he obtained goods by fraud by not informing his creditors of his given name.<sup>247</sup> “Credit in this case was given to the man—not the name,” the court declared, “and that man was J. D. McUlta.”<sup>248</sup> We can see the same phenomenon in courts’ willingness to allow parties to litigate using pseudonyms. The naming of either the plaintiff or the defendant using initials or as “John Doe”—and the later substitution of a defendant’s true name when it becomes

245. *In re Snook*, 2 Hilt. 566 (N.Y. Ct. Com. Pl. 1859).

246. *Id.* at 575.

247. *In re McUlta*, 189 F. 250, 252 (M.D. Pa. 1911) (“A name is used merely to designate a person or thing. It is the mark or indicia to distinguish him from other persons, and that is as far as the law looks.”) (adopting order of referee).

248. *Id.* at 252; *see also, e.g.*, *Worm World, Inc. v. Ironwood Prods., Inc.*, 917 So. 2d 274, 275 (Fla. Dist. Ct. App. 2005) (“[T]he failure to comply with the registration requirements does not impair the validity of any contract entered into by the party conducting business under an unregistered fictitious name.”); *Aronovitz v. Stein Props.*, 322 So. 2d 74, 75 (Fla. Dist. Ct. App. 1975) (finding that failure of a party to register fictitious name with state “does not prevent the trial court from taking jurisdiction of the cause, but it does act as an inhibition against allowing appellees to prosecute their complaint until the requirements of the statute are met”); *Cohen v. Lerman*, 96 N.E.2d 528, 529 (Ill. 1951) (rejecting claim that judgment against guarantor should be set aside because opposing party had failed to register assumed name with county clerk); *Romans v. State*, 16 A.2d 642, 646 (Md. 1940) (“[A] name is the designation or appellation which is used to distinguish one person from another. Since the identity is the essential thing, if that is certain a variance in the name is often immaterial. . . . The crime is individual, and its prosecution is personal.”). Similar cases arose under English common law. *See, e.g.*, *Williams v. Bryant*, (1839) 151 Eng. Rep. (Exch.) 189, 192; 5 M & W 447, 454–55 (“[I]t is certain that a person may at this time sue, or be sued, not merely by his true name of baptism, but by any first name which he has acquired by usage or reputation . . . and not only is this the established practice, but the doctrine is promulgated in very ancient times.”); *R v. Billingshurst Inhabitants*, (1814) 105 Eng. Rep. 603, 606; 3 M & S 250, 259 (holding that “marriage banns” published in the names by which a party is currently known are not invalid, absent evidence of fraud, “whether that be the true Christian or surname of the party or not”).

known—does not change the identity of either of the parties or their ability to participate in the case; all that changes is their appellation.<sup>249</sup> In each of these instances, then, courts hold that the fact that a person or entity holds different names at different times is not deceptive, so long as others can determine at any particular time a name's referent. Relatedly, so long as the essential qualities of the referent remain consistent, it is not deceptive to make alterations to a person or entity, whether physical or otherwise, and retain the same name. This is why the norms of some sources of creative production—the authorial syndicates and the judge's chambers, to take two examples—permit the attribution of output to a single authorial name despite a change in the personnel who put fingers to keyboard. The style is the “essential quality” of the product, and so long as that is maintained, neither consumers nor the law should much care.

Synthesizing the law of naming in this way leads to three conclusions. First, despite the amount of personal expression and identity associated with one's choice of name, a name is essentially like a trademark in its denotative function. While a name or trademark may carry certain connotations, those connotations are not what enable a name or trademark to function as such, and a decision to change one's name, abandon those connotations, and start anew should not be the law's concern. (A name or trademark's connotations may be relevant to the intent of that entity or another in adopting the same name—that is, to take advantage of those connotations—but they do not go to the validity of the name itself.) Thus, to the extent a personal name can serve this function with respect to a communicative good, its validity can be assessed using principles similar to those used for trademarks.

Likewise, the use of the same name in different contexts is not necessarily impermissible, provided that those names are fulfilling different denotative functions. For example, an individual who has started a business under his or her name might sell that business, including the name-as-trademark, to another firm.<sup>250</sup> The individual would then be prohibited from using his or her name as a mark if that use would be likely to confuse consumers as to the source of his or her goods or services, but he or she would not be restricted from using his or her name as a personal name (that is, to refer to the individual rather than to the former business). For example, in *JA Apparel Corp. v. Abboud*,<sup>251</sup> the court rejected the plaintiff's argument that its agreement with the designer Joseph Abboud, conveying various “names” and “trademarks” to the plaintiff, unambiguously allowed the plaintiff to prevent Abboud from using his name (as a personal name) in connection with a new venture.<sup>252</sup> “[T]he fact that [the plaintiff] paid a large price for the Joseph Abboud brand (and existing licensing agreements),” the court noted, “does not

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249. See, e.g., *Esco v. State* 179 So. 2d 766, 767, 769 (Ala. Ct. App. 1965) (holding statute unconstitutional that criminalized change of name “to conceal [one's] identity,” noting that “[e]ven this court itself, from earliest to recent times, has recognized the propriety of concealing the identity of parties to a cause”).

250. See, e.g., *Goldwyn Pictures Corp. v. Goldwyn*, 296 F. 391, 397 (2d Cir. 1924) (“We have no doubt that one by contract may deprive himself of his exclusive right to use his name in industry.”).

251. 568 F.3d 390 (2d Cir. 2009).

252. *Id.* at 399.

necessarily mean that [the plaintiff] purchased the right to prohibit Abboud from using his name to refer to himself in a non-trademark sense.”<sup>253</sup>

Second, focusing on denotation rather than connotation helps to frame the debate as to the appropriate scope of naming law, whether as applied to trademarks or as applied to personal names. Accurate denotation is of benefit both to those who are named and to those who engage with them. Legal intervention thus seems appropriate when the link between name (or trademark) and referent has been disrupted—in other words, when others are confused into thinking that the individual or entity and another are the same or related, or when the individual or good has been altered so significantly that the denotation is no longer accurate. But legal intervention into issues of connotation, in which there is no denotative difficulty, seems to provide many fewer benefits while potentially frustrating autonomy in naming choices. The consumer encountering Kodak hammers is well aware that this is not the same Kodak as the company that manufactures cameras; the individual encountering the man named “Santa Claus” understands that the man’s residence is not the North Pole; and one can probably assume that the baby named Infiniti is not sponsored by the automobile manufacturer.<sup>254</sup> The fact that such names may call to mind certain connotations does not seem to be a reason to prohibit their use by others, even if those uses render certain names less “special” and thus less valuable.<sup>255</sup>

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253. *Id.* at 398 (remanding for further consideration). On remand, the *Abboud* district court concluded that the reference to the word “name” as one of the subjects of the sales agreement encompassed only the use of Abboud’s name as a trademark, and that certain proposed uses of Abboud’s name in that context would be likely to cause confusion among consumers. *JA Apparel Corp. v. Abboud*, 682 F. Supp. 2d 294, 308, 315–16 (S.D.N.Y. 2010). Further demonstrating the possible multiple denotations of personal names, the court also rejected the designer’s claim that the company’s advertising campaigns—which included lines such as “Hey Joseph, What Should I Wear?”—constituted a violation of his right of publicity on the grounds that Abboud had presented no evidence that “Joseph” referred to him. *Id.* at 319–20. *See also, e.g., Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 611 (6th Cir. 2009) (advertising describing individual’s association with new company as product designer does not constitute infringement of trademark consisting of individual’s last name).

254. *See US Babies Get Global Brand Names*, BBC NEWS (Nov. 13, 2003), <http://news.bbc.co.uk/2/hi/3268161.stm> (discussing survey of U.S. Social Security records for 2000 showing twenty-two girls with the name “Infiniti” and fifty-five boys with the name “Chevy”); Stephanie Kang, *Naming the Baby: Parents Brand Their Tot with What’s Hot*, WALL ST. J., Dec. 26, 2003, at B1 (describing trend of naming babies after brand names). *But see* Matthew Purdy, *A Boy Named Soup?*, N.Y. TIMES, Aug. 1, 2001, at B1 (describing a Mount Kisco, N.Y., couple who offered to sell naming rights for their newborn son). The couple, who ended up with no takers, named their son Zane. Joseph P. Fried, *Following Up*, N.Y. TIMES, Nov. 11, 2001, at A39.

255. The connection between lack of variation in name choices and consistency in reference is the same characteristic that, some commentators have suggested, makes names ineligible for copyright protection. *See, e.g., McGowan, supra* note 41, at 249 (“To grant exclusive rights is to encourage variation in expression. Variation lessens the usefulness of the convention of naming. . . . We don’t want to encourage the multiplying of names to avoid [copyright] infringement, so we avoid the problem by not extending protection in the first place.”). Arguably, the *Abercrombie* hierarchy, *see supra* note 25, rewards creativity in

Identifying the preservation of denotative function as the core principle of naming law is not a complete answer, however; we must know what is being denoted. As suggested earlier, referring to trademarks and names as “source indicating” creates some uncertainty around the concept, particularly in light of the anonymous source doctrine and modern outsourcing practices. As Mark McKenna has described, trademark law already had to reconceive its theory of source in order to embrace the practice of licensing. Without expanding the reach of the law in this way, a licensor could be characterized as engaging in “the same type of deception as the accused infringer,” in that it would no longer be (if it ever was) the actual producer of the good at issue.<sup>256</sup> As a result, courts “redefin[ed] what it meant to be the source of a product: even when a mark owner did not actually produce the products bearing its mark, courts began to hold, it could still be considered the legal source of those products if it exercised sufficient control over their quality.”<sup>257</sup> Thus, a name or a trademark denotes a particular set of core characteristics in a particular context (for which some, often anonymous, company is responsible) rather than a “source” as such.<sup>258</sup> This is not to say, however, that the same set of characteristics can bear only one name—otherwise product rebranding and changing one’s name would be impermissible. But a change in name is typically relevant only to the connotations associated with the name and not to its ability to denote entity X (“entity X” being defined as “the entity with the core characteristics of entity X”).<sup>259</sup>

Third, the fact that name changes are permissible so long as they do not interfere with the denotative process (and regardless of their effect on the connotative process) focuses our attention on the scope of the harm at issue. A company can attempt to divest itself of “badwill” by adopting a new denotation, thereby shedding previous adverse connotations, or by creating multiple brands to avoid infecting one with the connotations of the others, all without risking suit for fraud.<sup>260</sup> An

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trademark creation to some extent by deeming more inventive trademarks to be “stronger.”

256. McKenna, *supra* note 45, at 80.

257. *Id.*; see also 15 U.S.C. § 1055 (2006) (deeming use by “related companies” to be use by the trademark owner).

258. See POSNER, *supra* note 5, at 30–31 (“The pretense of a single author operates like a trademark, which often functions as a warrant of uniform quality rather than an identifier of a unique source. Coca-Cola is produced in many different bottling plants, but the trademark warrants that the product is nevertheless uniform.”); Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 425 n.52 (2010) (“[I]n modern terms, the legal source of a product is not necessarily the actual producer of a product but instead the entity exercising control over the quality of products bearing a particular mark. That entity might be related to the actual producer only by contract.”).

259. Cf. ALGEO, *supra* note 15, at 85 (“The necessary and sufficient condition for a proper name is that its definition be of the form ‘entity called X’ . . . .”); Bertrand Russell, *On Denoting*, 14 MIND 479, 488 (1905) (“[I]f ‘C’ is a denoting phrase, it may happen that there is one entity *x* (there cannot be more than one) for which the proposition ‘*x* is identical with C’ is true. . . . We may then say that the entity *x* is the denotation of the phrase ‘C.’ Thus Scott is the denotation of ‘the author of *Waverley*.’”).

260. Steven Tadelis, *What’s in a Name? Reputation as a Tradeable Asset*, 89 AM. ECON. REV. 548, 549 (1999) (“[P]oor past performance will cause a firm’s name to lose value. Once the value falls enough, it will be worthwhile to discontinue the firm’s name and start with a ‘clean’ record, taking advantage of the ignorance of consumers as to who exactly is behind

individual, likewise, can obtain court approval to change his name in order to get a fresh start after bankruptcy or a prison sentence,<sup>261</sup> and he can write or perform under various names without disclosing his “true” identity. Thus, just as the law does not stop ValuJet from rebranding itself as AirTran, even if that act makes it more difficult for consumers to link the airline with its past safety record, the law generally does not prevent individuals from rebranding themselves, even when that rebranding emanates from a desire to shed the connotations associated with the prior name. Name or trademark changes that make it more difficult for others to retrieve information about the person or entity are not legally prohibited, even though such changes can result in increased search costs, and even though others may have been induced to act in a way in which they would not have acted if they had known about the person’s or the company’s history.<sup>262</sup> The consumer who wanted, in 2002, to avoid buying macaroni-and-cheese from a company that also made cigarettes had a harder time doing so given that the Philip Morris Companies branded the first as “Kraft” and the second as “Marlboro”; she had a more difficult time still in 2003, when Philip Morris changed its name to Altria.<sup>263</sup> So, too, the individual who has dealt with “John Smith” for many years will now have to learn that Mr. Smith is now called “Bob Anderson.” In short, despite more expansive

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the different names.”); Note, *supra* note 236, at 1846 (proposing statutory and regulatory changes “that would limit producers’ ability to shed their marks’ badwill”). Some believe that consumers are savvy about such changes in any event. See Simon Brooke, *Pitfalls of Rebranding*, FIN. TIMES (London), Oct. 3, 2002, at 15 (“[Consumers] will allow companies to change names if the attributes or formula of the brand have changed—but if a product name change has no apparent reason or explanation they are very s[k]eptical.” (quoting Professor Lesley de Chernatony, University of Birmingham Business School)).

261. *In re Ross*, 67 P.2d 94, 95 (Cal. 1937) (noting that in light of the common law right to adopt a different name, granting a petition for an official name change would provide a record that would aid future creditors in determining prior bankruptcies); *In re Stempler*, 441 N.Y.S.2d 800, 801 (Sup. Ct. 1981) (“[I]f it be urged that there is some guilt or impropriety in petitioner’s conduct as a result of such adjudication, the answer is that bankruptcy statutes were designed to relieve the honest debtor of his obligation and enable him to make a fresh start.” (emphasis omitted)) (granting petition for name change despite petitioner’s prior bankruptcy proceeding); *In re Mees*, 465 N.W.2d 172, 173–74 (N.D. 1991) (remanding denial of name change petition for further factual findings despite admission by petitioner that he sought name change to achieve “a new start in life” after his incarceration); *id.* at 174–75 (Levine, J., concurring) (“If [the district court] concluded that a convict’s pursuit of a fresh start via a change of name is impermissible as a matter of law, I am skeptical.”). *But see In re Erickson*, 547 S.W.2d 357, 359–60 (Tex. Civ. App. 1977) (dicta) (“A change of name may be considered inappropriate if desired for the purpose of concealing an adverse credit rating, a criminal record, or to otherwise work a fraud.”).

262. See Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721, 732 (2004) (asserting that use of multiple brands by one company could be “intended to confuse consumers, rather than protect or inform them”). Some name changes—such as Coca-Cola’s eventual adoption of the mark “Coke” or a married individual’s change of surname—might be said, by contrast, to reduce search costs (by, for example, conveying that two individuals are part of the same family). Thanks to David Simon for this point.

263. Altria made the decision to spin off the Kraft unit in 2007; interestingly, the view of investors was that the Kraft unit was dragging down Altria’s reputation as a producer of cigarettes. See Andrew Martin, *Stigma Aside, Wall St. Finds a Lot to Like About Tobacco*, N.Y. TIMES, Jan. 31, 2007, at A1.

statements to the contrary in the trademark literature, both trademark law and the law of personal names care about only one type of effect on search costs: confusion as between sources, not deception as to a single source.<sup>264</sup>

Indeed, the Supreme Court has suggested that the ability to rebrand oneself has a constitutional dimension. In *McIntyre v. Ohio Elections Commission*,<sup>265</sup> the Court considered whether the State of Ohio could require the author of a handbill protesting a local tax to identify herself on the leaflet. It found a First Amendment right to anonymity not because the writer feared retribution or hewed to a politically unpopular position, although that might have been true. Rather, the Court held that an author's name is simply content that the government could not constitutionally compel an individual to publish by asserting an interest in providing others with relevant information.<sup>266</sup> Thus, the author was free to publish

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264. See *In re Golden*, 867 N.Y.S.2d 767, 768 (App. Div. 2008) (reversing denial of petition by transgendered individual to change name to Elisabeth, noting that potential for confusion among others as to nature of change “is not, standing alone, a basis to deny a petition inasmuch as confusion is a normal concomitant of any name change” (internal quotation marks omitted)).

It should be noted that another portion of the Lanham Act—the provisions dealing with false advertising—focuses on consumer deception. 15 U.S.C. § 1125(a)(1)(B) (2006). Indeed, the consumer interest at stake here, if not for the fact that federal false advertising law grants standing only to competitors, might be better addressed by this doctrine. For a discussion of how certain trademark infringement claims should be regulated instead by false advertising law (particularly regarding the requirement that the misrepresentation be material to consumers), see Lemley & McKenna, *supra* note 258.

265. 514 U.S. 334 (1995).

266. *Id.* at 342 (“[A]n author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.”); *id.* at 348 (“Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think the identity of the speaker is no different from other components of the document’s content that the author is free to include or exclude.”). The Court also rejected the asserted state interest in preventing fraud. *Id.* at 349–51. Arguably, the Court has retreated from this position in more recent cases, at least with respect to corporate political speech. See, e.g., *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 916 (2010) (noting that the compelled disclosure of the names of corporate political speakers “enables the electorate to make informed decisions and give proper weight to different speakers and messages”). But see *id.* at 980 (Thomas, J., concurring in part and dissenting in part) (“Congress may not abridge the right to anonymous speech based on the simple interest in providing voters with additional relevant information.” (quoting *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 276 (2003) (Thomas, J., concurring in part, concurring in judgment in part, and dissenting in part)) (internal quotation marks omitted)); *McIntyre*, 514 U.S. at 354–56 (distinguishing dicta in *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and *Buckley v. Valeo*, 424 U.S. 1 (1976), in regards to the “prophylactic effect” of disclosure); *ACLU v. Heller*, 378 F.3d 979, 994 (9th Cir. 2004) (“[I]n many instances, requiring publishers to include the names of business or social organizations or legal entities responsible for publishing an election-related communication is unlikely to supply much useful information. As the Court noted in *McConnell* [*v. FEC*, 540 U.S. 93 (2003)], individuals and entities interested in funding election-related speech often join together in ad hoc organizations with creative but

her handbill under a pseudonym—to pretend to be other than herself (and even to pretend to be an association of individuals), so long as she did not take on the identity of an existing person or group.<sup>267</sup> She was free to attempt to acquire the goodwill that might come from using the same pseudonym repeatedly or to abandon her choice of name on the next handbill and start again with another representation of identity. And her readers were free to attempt to discover her “true” identity or to discredit her views because they were presented pseudonymously,<sup>268</sup> but the law was not going to intervene to reduce the costs associated with doing so.<sup>269</sup>

All of this might lead us to question the proper role of naming law in protecting consumer or audience interests.<sup>270</sup> If naming law were concerned with providing others the information they need in order to make purchasing, hiring, or other reputation-based decisions, the ability to rename, rebrand, or create sub-brands (and to do so without having to issue a notification) would seem to run counter to that goal. On the other hand, if the law were primarily focused on the preservation of the goodwill or reputation associated with a name or mark, one might expect the law to provide better guidance as to what is considered an essential characteristic or quality so as to delineate the ways in which goods can be altered or creators can be substituted while maintaining the associated name or mark.<sup>271</sup> (Indeed, a

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misleading names.”).

267. Ms. McIntyre used the pseudonym “Concerned Parents and Tax Payers” as the author of the leaflet in question. *McIntyre*, 514 U.S. at 337.

268. *Cf.*, e.g., *People v. Duryea*, 351 N.Y.S.2d 978, 996 (Sup. Ct. 1974) (“Don’t underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is ‘responsible,’ what is valuable, and what is truth.”); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1020–21 (2003) (disagreeing with the “common argument” that using initials or pseudonyms “erodes the credibility” of journalism).

269. As Rebecca Tushnet has suggested to me, to the extent information about individuals is increasingly preserved, aggregated, and searchable electronically, the law’s tolerance of “reinvention” may be viewed as tacit acquiescence toward self-help efforts, provided that one is willing to abandon the goodwill associated with one’s name along with less favorable associations.

270. Of course, much of trademark law’s history and current state cannot be explained by consumer-related interests. *See McKenna*, *supra* note 45, at 69 (“Courts in the mid- to late-twentieth century reasonably understood trademark doctrine as producer-oriented, and they shaped doctrine explicitly in response to producer-oriented arguments. As time went on, however, the consumer interest narrative gained traction, and courts and commentators increasingly layered consumer search cost rhetoric on top of the producer-oriented doctrine.”); Bone, *supra* note 18, at 549 (“Goodwill protection has nothing directly to do with facilitating consumer choice or safeguarding the quality of market information.”); *id.* at 556 (contending that “[t]rademark law’s core doctrines . . . reflect the influence of the information transmission model” of trademarks).

271. This may be an impossible task. *See SEARLE*, *supra* note 209, at 172 (“[T]he uniqueness and immense pragmatic convenience of proper names in our language lies precisely in the fact that they enable us to refer publicly to objects without being forced to raise issues and come to an agreement as to which descriptive characteristics exactly



comprehensive approach would define precisely what trademark doctrine means when it refers to “goodwill.”<sup>272</sup> In this vein, the law might incorporate the fact that trademark law excludes noncommercial activity from its scope, even though that activity can risk the same disruption to the mark’s denotative function. For example, nothing stops an individual from retaining the logo on the trunk of her car, even if she has made substantial modifications to the engine or exterior appearance.<sup>273</sup>

In the end, the cases seem to suggest a limited role for naming law, whether personal or trademark: to declare names as names. To be a name, a word must be actually used by the claimant (and by others) to refer to a person or thing and it must denote a single referent, given appropriate context, identified by having the core characteristics associated with the name. In this way, naming law incorporates both the causal and the descriptive theories of naming: names are legally valid when the relevant community’s recognition of their denotative effect is undisrupted (the causal theory) and cease to be valid when the essential qualities of the referent no longer exist (the descriptive theory). Indeed, this framework also helps explain genericism, in that a generic term no longer has a single referent, even given context. In neither event, however, is a person or entity prohibited from changing one’s name, despite arguments as to deception; all this means is that the denotative link between name and referent must be established anew. This important but limited function of naming law achieves a balance between respecting the autonomy of individuals and entities to choose the names with which they represent themselves to the public and ensuring that such choices do not significantly frustrate the flow of information that allows the public to engage in decision making.

#### CONCLUSION

The connection between name and identity is both more robust and more tenuous than conventional wisdom would suggest. For both personal names and trademarks, names do not have inherent meaning in and of themselves but acquire associations through use, context, and social agreement—they are, in other words, “pegs on which to hang descriptions.”<sup>274</sup> Neither requires governmental registration to serve as an effective denotation, although such registration does provide a certain measure of authenticity that may be required as a matter of practice in a modern society, if not required as a matter of law. But both personal names and trademarks ultimately serve the same function: to identify a person or thing, to distinguish that

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constitute the identity of the object.”).

272. See, e.g., Bone, *supra* note 18, at 551–52 (describing various definitions of goodwill).

273. See *Karl Storz Endoscopy-America, Inc. v. Surgical Techs., Inc.*, 285 F.3d 848, 856 (9th Cir. 2002) (“We do, however, recognize the right of property owners to repair or alter trademarked goods without implicating the Lanham Act. For example, if the owner chooses to buy aftermarket spare parts and do the repairs himself, there is no sale of a trademarked good in commerce, and hence no trademark infringement.”).

274. SEARLE, *supra* note 209, at 172; see also ALGEO, *supra* note 15, at 87 (“A name is . . . a word people use to call someone or something by. . . . [W]hat a man is called is, after all, what a name is.”).

person or thing from others, and, relatedly, to act as a vehicle for certain intended or unintended associations about the individual, company, good, or service. A personal name, then, is not our identity; it is an indicator of our identity at a particular time.<sup>275</sup> Except in limited circumstances, we can change our names and keep our identities the same or change our identities and keep our names the same. As with trademarks, it is only in limited circumstances that such activity weakens or destroys the referential link; it is largely when this link ceases to be robust that the law interferes. This is not to say that the sentiment that there is something special about a personal name, including its link to one's identity, is illegitimate. But it is to suggest that in matters of branding and attribution—whether the good is a nail or a novel and whether the source is a corporation or a creator—naming law accords this sentiment relatively little weight.

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275. *Cf. Crump v. Forbes*, 542 Va. Cir. 52, 55 (2000) (“It is the association of [a] name with a particular person in a specific context that gives the name both its practical significance and determines the scope of its legal protection under [Virginia’s right of publicity statute].”) (treating plaintiff’s first initial and last name as used in URL (“dcrump”) as a “name” for purposes of right of publicity statute).

