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# The Name of the Rose

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## THE NAME OF THE ROSE

At a recent conference, Martha Minow presented a paper in which she discussed the significance of the fact that lawyers refer to cases by a shorthand: The last names of the litigants stand for the entire case and what it means for the lawyers. This shorthand obliterates the human dimensions of the case, which, Minow argued, demonstrates something interesting about the way in which lawyers think about the law.<sup>1</sup>

On hearing the paper presented, I noted that the shorthand Minow identified is not universal, and I wondered whether there might be some significant pattern beyond the one she was concerned with. What follows is a brief sketch of a completely informal investigation of how cases are named.

First, there is *Tarble*, who has a whole *Case* named after him. There is also *Hayburn*, who is in the peculiar position that he lost his *Case* largely because, as it turned out, it wasn't his after all. Second, there are the cases which appear as *Cases* in the Supreme Court Reports: *Passenger*, *License*, *Slaughterhouse*, *Civil Rights*, *Selective Draft Law*, *Employers' Liability*, *Second Employers' Liability*, and *Penn Central Merger*. Third, there are the cases that have received a shorthand designation that serves as an alternate unofficial name: the Insular cases, the Pentagon Papers case, the Steel Seizure case, the desegregation cases, the abortion cases, the school prayer cases.

Consider some explanations for the second and third categories. What about law-and-economics? Calling something a *Case* serves the end of efficiency when several individual names of the litigants would create an excessively long citation in the standard "A v. B" form. This explanation is inadequate, however, because many cases with long names are reported as A v. B in the standard form, some single name cases combine only two cases, and many opinions are given the name of a single case even though several cases are decided together.<sup>2</sup>

What about critical legal studies? Calling something a *Case* often appears to identify it as dealing in some way with aspects of

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1. For a casebook that insists on identifying the first name of everyone who is mentioned in a case, see R. COVER, O. FISS, & J. RESNIK, *PROCEDURE* (1988).

2. If *Brown v. Board of Education* won't count, consider *Miranda v. Arizona*.

subordination, as in *Slaughterhouse* and *Civil Rights*.<sup>3</sup> This practice might result from the Court's need to drive from its consciousness the fact that it is an instrument of power in a society riven with unjustified hierarchy. This explanation is inadequate, however, because it fails to explain why this particular subset of cases dealing with subordination is treated in this way, and because not every *Case* deals with subordination.

What about doctrinal analysis? Calling something a *Case* might seem to identify it as both controversial and the foundation of significant later developments. This explanation is inadequate, however. It does not explain why this subset of controversial and foundational cases receives special treatment (consider *Miranda*). Also, not every *Case* is controversial and foundational.

Finally, we might notice *Roe v. Wade*, in which no one appears on either side of the "versus." The identity of Roe is obliterated by the anonymous name proceeding, and, although there is a real person named Henry Wade, he plainly is not the person/entity whose interests stand adverse to Roe's in the litigation. We might note here the impact that the film "The Silent Screem" had on anti-choice propaganda, as an indication that obliterating identities through case names does not have any necessary political tilt.

Doubtless there is more to be said about the practices of naming cases in various ways. Further research is desperately needed.

Mark Tushnet<sup>4</sup>

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3. I would defend the proposition that this is true of *Passenger* and *License* as well, given the relation between the doctrinal points at issue in those cases and the issue of slavery.

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