Is *1069* a Name?

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I. INTRODUCTION

Suppose someone wanted to exchange a traditional name for a number. May a court order a change to a number? If not, why not? Because a number is not a proper name? Because the law does not contemplate numerals as names? Because the concept of a number as a name is dehumanizing or otherwise offensive? Merely to pose the hypothetical suggests questions that generate more questions faster than answers.

But the hypothetical became real when Michael Herbert Dengler decided to become known as 1069. He was not, however, motivated by interest in the parlor games of onomastic scholars nor the musings of legal theorists. For him, the number 1069 symbolized his relationship to nature, time, the universe, and essence. In a personal sense, *1069* was not merely a more desirable name, it represented his authentic identity. 1069 became enmeshed in thorny questions of onomastic theory and legal rights only because his employer asked him to get a court order changing his name. Thanks to his efforts, the fascinating hypothetical became a vital issue—the subject of this article—and produced decisions from five courts dealing with his request.[1] The litigation reveals judges making legal-onomastic decisions without the benefit of guidance from onomastic scholars and resting denials of 1069's request on comfortable and complacent assessments of custom and legislative intent. In short, the courts failed to pay serious attention to the classic question "what is a name" and the theories generated by it.

The following section, Part II, presents a survey of selected onomastic

*The authors wish to acknowledge their special gratitude to research assistant Kathryn Urbonya, a second-year law student at the University of North Dakota. Without her research and editorial assistance, this paper would be more flawed and perhaps never finished.

[1]Not only did the district and supreme courts of North Dakota and Minnesota deny Dengler's petition, but the Supreme Court of the United States did also. Although the writers of this article, Thomas Lockney, one of the attorneys representing 1069 in the Minnesota and the United States Supreme Court litigation, and Karl Ames, believe that the denial of the name change was unjustified, an attempt will be made to present in some detail both sides of the argument.

literature as a preface to Part III, a detailed description of 1069's experience with the judicial system. The works surveyed in Part II foreshadow the difficulties confronting the courts as they attempted to define proper names and explain the processes of legal name changing. Part III presents a chronological history of 1069's legal efforts, beginning with the first judicial rejection in Fargo, North Dakota, and ending with the dismissal of 1069's appeal to the United States Supreme Court. The exposition of the struggle in each of five courts raises many issues but resolves few. Part IV discusses those issues and, while not resolving them, more directly expresses the authors' opinions.

II. SURVEY OF LITERATURE

The most effective and pertinent review of court procedures is an article by Robert Rennick.[2] This article summarizes various state practices, noting the almost universal acknowledgment of the right to take a new name in common law and the fact that statutes "are designed not to hinder or place restrictions upon man's inherent common law rights but to facilitate his exercise thereof."[3] A good number of Rennick's examples deal with name changing of minors, divorcees, aliens, and naturalized citizens, and they do not directly concern us. Likewise, the listing of reasons for the courts' rejections of certain names—concealment of religion or nationality, business efficacy, difficulties in spelling or pronunciation—scarcely apply to 1069.[4] The cases cited do not give the main reason for the change of name proffered by 1069—that his new name, a number, best suits his personality and philosophy. Some cases reviewed by Rennick, however, do parallel the courts' questioning of 1069, asking whether the proposed name might be detrimental to the petitioner or subject him or his family to ridicule.

Instead of considering the family, one may focus on the rights of an individual by examining the relevance of the so-called "pursuit of happiness" cases. When the Finkelsteins asked for a change to Ferris, some Ferrises intervened to have the change of name request denied. Justice McGeehan ruled:

> although the name Finkelstein is an ancient and honorable name, if the petitioner in the pursuit of happiness which is a right conferred upon all Americans

[2]Robert M. Rennick, "Judicial Procedures for a Change-of-Name in the United States," *Names*, 13 (1965), pp. 145–168.

[3]Rennick, p. 146.

[4]However, one judge, as will be noted, asked whether the varied pronunciations of *1069* would be an obstacle to its use, as if he were unaware of the many well-established surnames that could be objected to on similar grounds. 1069 prefers the pronunciation "one-zero-six-nine."

like the ancestors of the . . . Ferris family, forsake his original name for another name, that is permissible under our system of jurisprudence.[5]

Many other examples show that lenient as American courts are, the right to change one's name is not absolute, although once a request is found to be "an honest one" with "no conscious intention to defraud," the request is usually granted.[6] "Other than these criteria there are no universal grounds upon which a judgment can be made."[7] As so many cases attest, judges' personal views or "prejudices" have often led to denials especially on ethnic or cultural grounds. Consequently, "many legal theorists have advocated serious study of this lack of uniformity in the name-changing statutes of the various states."[8] Although Rennick addresses the issue of court procedures, thereby documenting the need for redress, he does not deal with a major question for the case of *1069*: "Can a numeral be a name?"

Preceding the litigation raising that question in a legal context was Robert Landau's "Name or Number—Which Shall It Be?"[9] Like the judges, Landau asked, "In a symbolic sense are we today a name or a number?"[10] In so many transactions "with ease and fewer characters," persons as numbers can be identified both manually and by machine.[11] This brief discussion of personal names suggests that there are comparatively few "unique surnames."[12] Alphabetical classification, because of difficulties like transliterated names and oriental names, is not fully standardized. Yet, the alpha numeric code, which assigns numbers to letters, is a way, with limitations, to standardize most listings of personal names. In fact, numbers have already played an important role in "look-ups" and in new automated processes.[13] Landau does not deal with the question of definition, whether numerals can be regarded as legal names.

Ralph B. Long does attempt to define proper names.[14] Although numerals as names are not mentioned, the various tests of what constitutes a name —unique meaning, rejection of certain modifiers, the occurrence in possessive forms—all appear *not* to exclude number names.[15] In his short review of

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[5]Rennick, p. 163.
[6]Rennick, p. 153.
[7]Rennick, p. 153.
[8]Rennick, p. 168.
[9]Robert M. Andau, "Name or Number—Which Shall It Be?" *Names*, 15 (1967), pp. 12–20.
[10]Landau, p. 12.
[11]Landau, p. 12.
[12]Landau, p. 16.
[13]Landau, p. 17.
[14]Ralph B. Long, "The Grammar of English Proper Names," *Names*, 17 (1969), pp. 107–126.
[15]For example, the verbalization of *1069* as "one-zero-six-nine" distinguishes Dengler from the

the treatment of proper names in English grammars between 1951 and 1966, Long concludes that almost nothing is said about proper names. "People's names are increasingly standardized now—and even more standardized numbers are replacing them in more and more situations."[16]

More detailed attempts at definition in recent years appear in fine monographs by Ernst Pulgram and John Algeo.[17] Pulgram's survey of the many categories from which names are derived does not include numbers as a source; but 1069's inspiration surely fits one of Pulgram's sources—"philosophical belief."[18] Pulgram "found no names which ultimately and basically are not part of the current lexicon of a language. Names made up of nonsense syllables or a random sequence of sounds . . . are rare and can be accounted for as exceptions or oddities."[19] Perhaps this is one way to categorize 1069. But is a number really an oddity in the naming process? And if so, does that necessarily mean that a person may not use a number as name?

In yet another review of John Stuart Mill's famous discussion of names (meaningless marks that merely distinguish one person from another) Pulgram says:

> . . . a particular man is provided with a personal name which, consequently, fulfills no more and no less than the function of a label, a mark, a condensed formula, a number, for a great many particulars conglomerated in a very complex manner, in one specimen. It is quite feasible, though not always practical, that people be identified and called by numbers, as indeed they are when they join a body in which their individuality becomes, perforce or perchance, diminished in importance and of less interest, as, for example, in prison, in military units, or on the time clock of a workshop.[20]

This notion of identification by numbers certainly applies to the individual who calls himself 1069, with the marked exception that his individuality is not "diminished" as a member of any group. Indeed, both 1069 and his name are distinguished from others. Pulgram concludes that proper names should be defined "in terms of function, not of form," and while he does not list numbers as names, he clearly suggests that numbers are proper name identifiers.[21]

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number 1,069; the appellative *1069* when it appears with the article *the* signifies that there are other persons referred to as 1069, as in "the 1069 that I know lives in Minnesota"; and *1069* can form the possessive 1069's.

[16]Long, pp. 119–120.

[17]Ernst Pulgram, *Theory of Names* (Berkeley: American Name Society, 1954); John Algeo, *On Defining the Proper Name* (Gainesville: University of Florida Press, 1973).

[18]Pulgram, p. 12.

[19]Pulgram, p. 19.

[20]Pulgram, p. 32.

[21]Pulgram, p. 49.

In John Algeo's excellent review of definitions, he says "the traditional view of proper names as words for unique individuals cannot be maintained, or can be maintained only at a very high cost."[22] He notes that the traditional view meant that uniqueness was possible only "within any given discourse" wherein a particular individuasl could be readily singled out by his name.[23] Listed among recognizable "bynames" are "code names" like "M" and "007."[24] After attempting to define names according to their orthographic, phonological, morphosyntactic, and semantic characteristics, Algeo concludes on the semantic level only, stating that "A name is therefore a word people use to call someone or something by. . . . [W]hat a man is called is, after all, what a name is."[25]

In a 1978 article Allen Walker Read limits the presentation of personal names to those derived from numbers.[26] In a balanced, reasonable, historical account, Read notes the increasing use of numbers for identification in our society and records some of the favorable and often unfavorable responses to this trend. Giving a number to every child born in Wisconsin after 1939 has value "as a means of identification and record linkage."[27]

In one example, a family, instead of asking for a number name, as in our case, refused on religious grounds to use Social Security numbers. Taken off welfare for this reason, they were restored to the government's rolls, since, as the judge said, their reasons were sincere, and "A religious belief can appear to every other member of the human race preposterous, yet merit the protection of the Bill of Rights."[28] Although the *refusal* to use numbers was upheld in this case, the judge's arguments in support of the family's right to do so, especially his comment that deviation from such a government regulation would not have "deleterious effects" on government business,[29] might well have been pertinent on behalf of 1069. Professor Read summarizes the case of 1069 briefly, and offers further examples of the continuing effort to give numerals to everyone for statistical and identifying convenience. Number names have a kind of "purity," but opposition to their use can be vehement.

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[22]Algeo, p. 46.

[23]Algeo, p. 46.

[24]Algeo, p. 77.

[25]Algeo, p. 87.

[26]Allen Walker Read, "The Numerical Naming of People," *The Fourth Lacus Forum*, ed. M. Paradis (Columbia, S.C.: Hornbeam Press, 1978), pp. 615–624.

[27]Read, p. 619, quoting Paul Weis' "Notes on Vital Registration," in *Wisconsin State Board of Health Quarterly Bulletin*, VIII (1949), pp. 471–72.

[28]Read, p. 620, quoting Robert Metz' "Taxes by the Numbers: Link with Social Security Expected to Round Up Many Delinquents in U.S.," in New York *Times*, Oct. 2, 1961, p. 47, Cols. 5–6; and, "Every Taxpayer to Get a Number," *ibid.* 8 Oct. 1962, col. 2.

[29]As quoted by Read, p. 620.

He concludes by stating that we still need to answer the question of "whether a number used as a designation can be called a proper name."[30]

Although *The Guiness Book of Names* is a general text concerned with a variety of names,[31] it manages to say a great deal about number names. Historically, numbers have been used as first and last names,[32] and Dunkling offers recent evidence of such names: "A man can be expressed in figures, as in the trade name *4711*, . . . [and] something that is identified as ZT434 is named just as surely as if it were called Harry. Both names can be written and spoken easily."[33] The volume even has additional pages on "Number Names."[34] While not fully approving numerals for personal names, the author clearly indicates the efficacy of such a system. In an excellent list of advantages, Dunkling says that number names identify precisely, are convenient in form, can be "recognized internationally," supply "sequential information," and "follow a regular, simple pattern of formation readily understood."[35] Of course, Dunkling is not talking about a random selection of a numeral name like 1069, yet much of what he says in defense of such names could support 1069's plea. As will be shown, a good part of the courts' argument against the use of a numeral was that such a custom is dehumanizing. Dunkling speaks to that point:

> A frequent complaint is that numbers have no meaning, that they are 'soulless.' This is not true of some numbers. Seven, thirteen, twenty-one and the like have a great deal of 'meaning' for countless people. For those who are numerologically inclined there is of course a 'meaning' in every number.[36]

"Its use [4711] for the eau de Cologne, has shown that a number can be given all the 'soul' or 'meaning' that a normal name is said to have."[37] Even when discussing place names, the same idea occurs: "There is a group of such place names [that is, number names], and they show that such names can be as evocative as any other names."[38] Even trade names like Seven Up, Vat 69, and the 57 of Heinz illustrate how numbers can acquire individuality. "Number names are certain to come into their own before long, given the

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[30]Read, p. 622.

[31]Leslie Dunkling, *The Guinness Book of Names* (London: Guinness Superlatives, Ltd., 1974).

[32]See, for example, P. H. Reaney's *The Origin of English Surnames* (Boston: Routledge and Kegan Paul, 1979), pp. 250–251.

[33]Dunkling, pp. 32, 37.

[34]Dunkling, pp. 39–41.

[35]Dunkling, p. 39.

[36]Dunkling, p. 39.

[37]Dunkling, p. 41.

[38]Dunkling, pp. 149–150.

general situation of dwindling supplies of other names and ever-pressing needs.''[39]

A recent article by Professor Slovenko comments on numerical naming.[40] While Slovenko, a lawyer, and law teacher with psychoanalytic training, is hardly to be relied upon for onomastic information,[41] he does make some observations relevant to the case of 1069. ''The current issue is whether or not a free choice of name is an inherent natural right essential to liberty.''[42] He contrasts the leniency of American and British courts and statutes in naming and change of name procedures with the practices in certain European countries. Yet, there are proposals designed to regulate names, especially to make sure the naming is in the best interests of children. Such legislation, the author believes, would come within the power of the individual states.[43] Judges have much power, for ''generally, [they] have no clear standard in reaching a decision but are vested with great discretion whether or not to allow the proposed change.''[44] That is, many reasons for change are not uniformly or automatically accepted. Slovenko briefly discusses the courts' rejections of 1069's petition, and concludes his article by stating ''We seem to be at a crossroads. Registrars balk at long names, which are not dehumanizing, and courts balk at numbers, which are, they say. But is a common name any different than a number?[45]

This mere sampling of recent articles and pamphlets, attempting to define names or discussing the problem of number names, reveals facets of naming that were either unknown to the courts which heard 1069's plea or ignored by the learned judges. The courts, certainly, drew upon other legal cases of name changing, but for purposes of definition they only consulted general dictionaries. As a result, the exposition of 1069's case invites judges and scholars of onomastics to consider the significance of onomastics in the legal inquiry.

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[39]Dunkling, p. 207.

[40]Ralph Slovenko, ''On Naming,'' *American Journal of Psychotherapy*, 34 (1980), 208–219. (Another article, John Campbell, ''Hello, My Name is 1069,'' *The Futurist*, 14, No. 5 (1980), 45–47, merely uses the case of *1069* as a springboard for an amusing, tongue-in-cheek plea for greater use of ''nambers''—a combination of name and number.)

[41]For a number of assorted names, or changes, like Cabotsky to Cabot, no source is given; and the ghost of non-existent Ura Hogg rises again.

[42]Slovenko, p. 210.

[43]Slovenko, p. 212.

[44]Slovenko, p. 214.

[45]Slovenko, p. 218.

III. HISTORY OF THE 1069 LITIGATION

In the District Court, Fargo, North Dakota. The story of this unusual litigation began with Michael Herbert Dengler, then a high school teacher, filing a petition in the state district court in Fargo, North Dakota, to obtain a court order recognizing his name as "1069." He was urged to do so by a Fargo school official. After a hearing before the court, his request was denied. 1069 gave reasons for believing that these numbers best described his individuality. Among other sources for his identity with a numeral, 1069 referred to Lewis Carroll's *Symbolic Logic and the Game of Logic*, especially the first three chapters culminating in chapter four, "Names."[46]

The transcript of the proceedings in the district court of North Dakota is a fascinating document, revealing the court's effort to find the designation 1069 impractical and objectionable. The court asked the petitioner to sign his name using the numerals and also elicited the pronunciation used by 1069—"one-zero-six-nine." Although the petitioner wanted to be called simply "one-zero-six-nine," he agreed with the court's comment that his students called him "Mr. 1069." Asked if he had a first, middle and last name, 1069 replied that he regarded his name as a single appellation.

> The Court: If you continued your education and received a doctor's degree, would you be known as Dr. 1069?
> The Witness: If that is how it would be conferred.
> The Court: You wouldn't be called Dr. 9?
> The Witness: I don't think so in the traditional sense.[47]

A further exchange of questions and answers revealed that 1069 had been called "ten-sixty-nine," which the court again suggested was a combination of first and last name. The witness, not intimidated, said some people called him by the nickname "Niner" and one friend jokingly called him "Zero."

Then, the judge, not neglecting any possible connotation in the numeral, asked if the witness was "aware of the aberrant sex connotations of the expression 69." 1069, although admitting awareness, insisted that he expected no scorn or ridicule to be attached to his name.

In what appears to us a reductio ad absurdum, the court raised further possibilities.

> The Court: Well, if you should meet the girl of your dreams tomorrow, is there some possibility that she would have an adverse feeling toward such a bizarre name as 1069?

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[46](New York: Dover Publications, 1955) pp. 1–5.

[47]Trial transcript, p. 12.

The Witness: Well, I don't consider it bizarre.

The Court: I am not saying you do. Obviously you don't or you wouldn't be in court. But I think you have to concede that most others would consider it extremely bizarre?[48]

The witness said no such problem had arisen with a woman who knew him only as 1069. Further questions of this kind dealt with 1069's conjectural marriage and the matter of naming potential children. Sensibly, 1069 thought that understanding parents and children could resolve the problem of naming.[49]

In addition, 1069 denied that he had posed for a picture accompanying an article about him in the Fargo newspaper, declaring that he had requested and wanted no publicity.[50] In a different approach the court sought to show the inconvenience or impracticality of alphabetizing such a numeral, of using 1069 in purchasing real estate, or in having a bank account. The witness and his lawyer said that such matters had been or would be easily resolved.

As the hearing ended, 1069 was asked to explain once more the reasoning or philosophy that led him to believe the number was particularly right for him, the judge professing that he was still perplexed by previous accounts. The judge then seized upon the possibility that the reasoning leading to the selection of 1069 might turn out to be faulty and therefore the court might be asked at a later date to approve a new set of numbers. The petitioner insisted that although others might find fault with his reasoning, he would always retain 1069.

Mr. Feder, 1069's attorney at the hearing, offered examples of names like Fook Ng, and even Judge Maxwell's name in Hebrew, as difficult and as pronounceable only to those familiar with the foreign languages. His argu-

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[48]Trial transcript, p. 14.

[49]Naming children, however, has also presented problems. Courts have applied different standards to determine when to grant a name change even though a parent objects. In a 1974 Minnesota case, Robinson v. Hansel, 223 N.W.2d 138, the court looked at the father's actions or lack thereof: only if he defiled the family's surname or if he evinced total indifference to his children would he lose his power to veto the proposed new surname, even if the new name was to be changed by adding the mother's surname. Seven years later, In The Matter of Application of Saxon, 309, N.W.2d 298 (1981), the Minnesota Supreme Court declared a different factor to be significant: the parents' original selection of the child's name. Whether the original name was the maternal, paternal or some combination of the parents' surnames, the court would deny a name change unless informed of compelling circumstances. In contrast, the California Supreme Court in 1980, abolished the rule that the father had the primary right to have children bear his surname, but also declared that the sole consideration was the best interests of the children, which was thus no longer interpreted as consisting only of the link in names between father and the offspring. In re the Marriage of Schiffman, 169 Cal. Rptr. 918, 620 P.2d 579. See also, Note, "The Controversy Over Children's Surnames: Familial Autonomy, Equal Protection and the Child's Best Interests," *Utah Law Review*, 1979, pp. 303–34.

[50]Jan Jelleberg, "His Name Not Just Another Number," *The Forum*, 13 Nov. 1975, Sec. 1, p. 1, col. 1.

ment was that 1069 did not present any more difficulty than such names, that there was no fraudulent intent, and that therefore the court did not have the discretion to deny the petition. Judge Maxwell, evidently aroused by the asserted lack of judicial discretion when a name change was neither fraudulent nor bizarre, gave possible examples to refute the asserted lack of power. If someone appeared before him with a philosophy and personality calling for a change of name to "I Am God," would the judge have to approve? Would the judge *have* to approve a request or a change of name to the symbol for a parallelogram? What about a request for an obscene word or for a name with fifteen hundred separate digits? Mr. Feder reluctantly conceded that a judge could rule such requests as not being made in good faith or not workable "within the bureaucratic framework" of the country—none of which applies to 1069.

The judge concluded the hearing with a final question:

> The Court: Aren't we establishing a precedent if we take four numerals? Aren't we obliged to take 15 or 1500 numbers then?
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> Mr. Feder: I don't think that the Court should be afraid of precedents. Somebody had to make a last name sometime. We didn't have last names in Europe until the fourteenth century. God changed Abraham's name in Genesis. . . .[51]

Judge Maxwell later issued a memorandum explaining his decision to reject the requested name change. The essence of his decision seemed to be his opinion that "1069" consists of a series of symbols, not words, and thus could not be recognized as a name:

> I am not disposed a launch a policy of sanctioning symbols in place of words for the identification of members of society. Symbols, signs, figures, marks, characters, designs, diagrams, emblems and insignia are simply not suited for use as names. If the Court indulges the present request of a philosophy enthusiast to use numerical symbols as a legal name, it could hardly deny use of other symbols to subsequent petitioners. A musician, for example, might seek an inimitable grouping of eighth notes as his name. A mathematician might want a particular equation, a financier the dollar sign, an astrologer the symbol for Sagittarius. It is easy to visualize the confusions and complexities such a system of personal identification would breed.[52]

Judge Maxwell was not content to rest his decision on such policy reasons alone nor on insight derived only from *Black's Law Dictionary* and *Webster's*

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[51]Trial Transcript, p. 42.

[52]In the Matter of the Petition of Michael Herbert Dengler to Change His Name to 1069, Unnumbered, Memorandum (First Judicial District of North Dakota, January 8, 1976), p. 203.

Third Unabridged. Without benefit (and perhaps also awareness) of technical linguistic and onomastic expertise, he went on to find that "a group of numerals is not a 'name' as that term is contemplated by the North Dakota Name Change Statute,"[53] and that "designating oneself by a series of digits or numerals is not a method of individual identification recognized or sanctioned by the common law."[54]

The Appeal to the North Dakota Supreme Court. On appeal to the North Dakota Supreme Court, 1069 represented himself with the aid of a friend, Craig Hunter, then a law student at the University of North Dakota. He filed a five-page brief contending that the choice of a name is an exercise of free speech; that 1069 can be a name; and that no compelling reason exists for denying the name change since numbers are distinguishable from other, potentially inconvenient, symbols.[55] His free speech argument referred only to the "self-evident" protection and presumed application of the first amendment to the United States Constitution.[56] Because of the asserted constitutional protection for his choice of name, 1069 argued that only a compelling reason could justify the state's refusal, acting through its district judge, to permit the requested name change.[57]

The North Dakota Supreme Court disagreed. In an opinion by Justice Sand, the Court disposed of the asserted constitutional issue in two sentences.

> In the instant case petitioner relied upon the First Amendment to the United States Constitution for the name change claiming under the freedom of speech provision he had a right to change his name. Petitioner, however, failed to give any convincing reason in support of his argument, and we are not aware of any.[58]

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[53]The North Dakota statute, N.D. Cent. Code § 32-28-02 states:

Any person desiring to change his or her name may file a petition in the district court of the county in which such person may be a resident, setting forth:

1. That the petitioner has been a bona fide resident of such county for at least six months prior to the filing of the petition.
2. The cause for which the change of the petitioner's name is sought.
3. The name asked for.

The judge of the district court, upon being duly satisfied by proof in open court of the truth of the allegations set forth in the petition and that there exists proper and reasonable cause for changing the name of the petitioner and that thirty days' previous notice of the intended application has been given in some newspaper printed in such district, shall order a change of name of such petitioner and direct that such order be entered by the clerk in the journal of the court. The court, however, may waive publication of the notice herein before required when the proposed change related only to a first or given name as distinguished from a surname.

[54]Memorandum, p. 3.

[55]Brief for the Appellant, In Re Dengler, 246 N.W. 2d 758 (N.D. 1976).

[56]Brief, p. 3.

[57]Brief, p. 4.

[58]In re Dengler, 246 N.W.2d 758, 761 (N.D. 1976).

After thus giving 1069's unvarnished constitutional argument the back of its collective judicial hand, the Court proceeded to agree with the district court that the North Dakota Name Change Statute, since it requires assertion of a "proper and reasonable cause" for a change of name, vested sufficient discretionary power in the lower court to justify the refusal.[59] The issue of societal rights vis-à-vis individual rights was raised by the Court in the following fashion:

> Innovative ideas, even though bordering on the bizarre, are frequently encouraged and may be protected by the law and the courts, but to use the court or law to impose or force a number in lieu of a name upon society is another matter. The law may permit a person to use a number but will not force its acceptance. Therein lies the significant difference.
>
> We are satisfied that the Legislature in giving authority to the courts to change a name had in mind a name as understood and defined by common law and did not include change from a name to a number.
>
> If § 32-28-02, NDCC [the North Dakota Name Change Statute], were amended by either the Legislature or by the initiative process so as to provide for a name change to a number we would have a different situation.
>
> For the foregoing reasons, we do not believe that the trial court abused its discretion, and the order of the trial court is in all things affirmed.[60]

Although this language fully encapsulates the Court's conclusions, it was curiously preceded by lengthy discussion regarding 1069's asserted reasons for wanting the name 1069, a collection of dictionary and judicial definitions of the word *name*, and some miscellaneous confusions about verbalization or pronunciation ("would it be 'one thousand sixty nine,' 'one aught six nine,' 'one zero six nine,' or would it be 'ten sixty-nine'?").[61] The Court also mentioned the possibility of common law name changes, but one would be hard pressed to read the North Dakota Supreme Court's opinion as clarifying whether 1069 could or could not acquire the name 1069 by the common law method in North Dakota. Although the Court could have argued that the common law contemplation of "traditional" names would preclude the use of a number as a name, with or without judicial sanction via the legislatively created procedure, instead, readers must find their own sense in the following discussion by the North Dakota Court of the common law procedure:

> Several courts have held that the statute prescribing a method for changing a name does not abrogate the common law right of an individual to change his

[59] In re Dengler, p. 764.
[60] In re Dengler, p. 764.
[61] In re Dengler, p. 759–62.

name without application to the courts. *See* 65 C.J.S. *Names* § 11(2), page 32. A different result is reached where the statute provides the exclusive method of changing a name. We do not consider the North Dakota law to be exclusive, but we need not resolve this question here. It is only when the statute is not exclusive that common law in the absence of fraud or other like evasion of obligations permits the free use of any name a person may choose.[62]

In the Fourth Judicial District of Hennepin County, Minnesota. In 1976, 1069 moved to Minneapolis, Minnesota. After the decision by the North Dakota Supreme Court, he contacted the attorney-author to obtain legal advice about what he might do next to change his name legally. Since he was then well on his way to acquiring residency in Minneapolis, he was advised to wait until the required year elapsed for legal residency, and then to file a new petition in the Minnesota courts. Local Minnesota counsel, Timothy Geck, was associated, and in due course a new petition was filed. A hearing was held on November 28, 1977, before the Honorable Donald Barbeau, a District Judge for the Fourth Judicial District, Hennepin County. At the hearing, 1069 testified to his sincere desire for the name change and to show that his name change would not fall within the sole statutory ground for refusal of a name change in Minnesota, intent to defraud.[63] In addition, a computer expert testified that modern record keeping systems could easily accommodate numbers as names.

After nearly three months, Judge Barbeau issued a memorandum opinion explaining his decision to deny the requested name change. Although convinced that the application was not the product of a fraudulent motive and that 1069 was guided by the highest motives and honesty, Judge Barbeau found that reasons of practicality and common sense militated against the name change.[64] In addition, the change of name to the number 1069 would, as Judge Barbeau viewed it, involve the imposition of numbers upon people and

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[62]In re Dengler, p. 762. Case citations are omitted.

[63]The 1978 Minnesota statute, section 259.10, reads:

A person who shall have resided in any county for one year may apply to the district court thereof to have his name, the names of his minor children, if any, and the name of his spouse, if the spouse joins in the application, changed in the manner herein specified. He shall state in his application the name and age of his spouse and each of his children, if any, and shall describe all lands in the state in our upon which he, his children and his spouse if their names are also to be changed by the application, claim any interest or lien, and shall appear personally before the court and prove his identity by at least two witnesses. If he be a minor, the application shall be made by his guaradian or next of kin. Every person who, with intent to defraud, shall make a false statement in any such application shall be guilty of a misdeameanor provided, however, that no minor child's name may be changed without both of his parents having notice of the pending of the application for change of name, whenever practicable, as determined by the court.

[64]In re Dengler, File No. 740628, Memorandum (Fourth Judicial District Court, Hennepin County, Minnesota, February 13, 1978), p. 5.

thus constitute an offense to human dignity.[65] Such use of numbers, he wrote, would be inherently totalitarian and thus "should be circumscribed and not stamped with the approval of a court of law."[66] Then followed a lengthy and impassioned essay on the evils of dehumanization, which the court associated with "the imposition of faceless numbers upon persons."[67] Judge Barbeau minced no words:

> To allow the use of a number instead of a name would only provide additional nourishment upon which the illness of dehumanization is able to feed and grow to the point where it is totally incurable. And with the progression of the disease, it becomes easier and less conscience-provoking to ignore or slaughter other human beings because they remain faceless ciphers.[68]

The judge relied heavily on an essay written by Norman Cousins in the *Saturday Review*, an article which was a response to a telephone call from Judge Barbeau asking him, as a person sensitive to the depersonalization of our number-prone world, for his opinion about 1069's request.[69] After a blistering attack on the bureaucrats of the world, Mr. Cousins, quoted by Judge Barbeau in his memorandum opinion, summed up his view of the case:

> In the best of all possible worlds, there might be no harm in allowing Michael Herbert Dengler to be known by a number. But in a world overrun by bureaucrats, replacing even a single human name with a number is like throwing raw meat to lions or a hanging curve to Reggie Jackson. Can canyone imagine anything riskier than fortifying the natural tendency of bureaucrats to forget faces and remember numbers?
>
> The bureaucrats are impelled by a dream of a soulless world in which everything will be known about everyone and in which digits are supreme. The individual's secrets will become as extinct as gracious letters written in artistic longhand. But secrets are precious. They have to do with human failings. They must not be entrusted to computers.
>
> Give the blasted bureaucrats more numbers to play with? Never. Michael Herbert Dengler should be consoled, and his assertion of individuality should be redirected. The court could sympathize with him if what he really wanted was to put more distance between himself and bureaucracy; but it would be a mistake to expect the law to set a precedent that could be seized upon by all those in public agencies who think computerese rather than humanese.[70]

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[65]Memorandum, p. 2.

[66]Memorandum, p. 2.

[67]Memorandum, p. 2.

[68]Memorandum, p. 3.

[69]Norman Cousins, "The Bureaucrats and Mr. 1069," *Saturday Review*, 21 Jan. 1978, p. 4. According to Mr. Cousins, "Judge Barbeau said he was consulting students of history, philosophy, and human rights because the law books offered little precedent for a case of this kind."

[70]Cousins, p. 4, and quoted in the Memorandum, p. 4.

In concluding, Judge Barbeau wrote that in his eighteen years on the bench he had never before been so deluged with free advice from hundreds of citizens. He noted that some treated the matter very seriously and others with a certain amount of frivolity, but that all the advisers were deeply interested and took strong positions on one side or the other.[71]

Arguments in the Minnesota Supreme Court. On appeal to the Minnesota Supreme Court, 1069 first argued that 1069 could, in fact and in law, be considered a name.[72] Admitting that such a name would be very unusual, given the longstanding traditions of a given name and a surname, his argument concentrated on the evidence in the record from the district court showing that his use of 1069 for years had presented no great difficulty to his friends and business acquaintasnces. The fact that a number had not yet been recognized in law as a name was argued to be an insufficient basis for saying that a number could not be a name. The possibility of numbers being used as "a more rational system for assigning personal names" was shown to the court to be recognized by name scholar Farhang Zabeeh.[73] Moreover, numbers themselves, in a series such as 1069, would be more convenient than use of a single word for a personal name, a practice found "retrogressive and chaotic" by a New York trial court which refused to allow a name change to the single word "Arindam."[74]

1069 then argued that the unusual or nontraditional nature of his chosen name should not preclude its legitimacy. A long list of unusual names was presented to the court, a repetition of which is unnecessary in this Journal.[75]

A second major line of argument underlay the practicality and definitional arguments presented above. At this deeper level, 1069 contended that the choice of a name should be recognized as a matter of self-determination significant enough to merit protection by the Constitution. If an individual's choice were so protected, the state could reject it only by showing clear and legitimate criteria such as fraud or obscenity to justify the rejection of the individual choice. The state, acting through the district court, should thus not reject his personally chosen name because of mere aesthetic and moral objections. He did not argue for an unlimited freedom, but rather recognition

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[71]Memorandum, p. 5.

[72]In the interest of economy and simplicity, specific footnote references to the briefs on appeal and the oral argument are omitted in this section, except for direct quotations.

[73]F. Zabeeh, *What is a Name? An Inquiry into the Semantics and Pragmatics of Proper Names* (The Hague: Martinus Nijhoff, 1968).

[74]In re Douglas, 60 Misc. 2d 1057, 304 N.Y.S. 2d 558 (1969), the court noted that "The judicial sanction of single names is as extinct as the Dodo bird." But, consider the name "Cher."

[75]For example, Ima Hogg, Halloween Buggage, Moon Unit Zappa, and Rev. God are actual names listed in "How Do You Like Your Name," *Family Weekly*, 8 Nov. 1977, p. 8, an excerpt from John Train's *Remarkable Names of Real People*, (New York: Clarkson N. Potter, 1977).

that restrictions on the choice must be based upon criteria susceptible to firm support in constitutional law and sufficiently clear to preclude unlimited judicial discretion.

In summary then, 1069 argued that his previous use of the name gave the lie to Judge Barbeau's conclusion that the number-name was inconsistent with common sense notions of practicality. In addition, the concept of "dehumanization," unlike criteria such as fraud or obscenity, should be insufficient to justify rejection of the name change. Most significantly, he argued that the interposition of the Judge's fear of dehumanization itself was dehumanizing in that it invaded an important sphere of individual decision-making and in effect allowed the state, in the person of the district judge, to veto the individual's choice on nothing more substantial than aesthetic judgment of bad taste.

Responding to the editorial opinion of Norman Cousins, 1069 argued that the remedy for the supposed "illness" of dehumanization cannot be another state restriction of individual choice. The principle of individual freedom, argued to support his choice, distinguishes a free society from dreaded bureaucratic tyranny. More apt, in 1069's view, were Melvin Maddock's thoughts while pondering the Judge's illness metaphor and use of the "dreadful operative word," *dehumanization*:

> But somehow the noble words leave Judge Barbeau (and the rest of us) unexpectedly playing the heavy. Michael Herbert Dengler—1069—confronts us with our presuppositions exposed. The truth is, we want him to have a name for our sake, not his. This reverse-Kafka hero wishes to be "free," wishes to be "happy" in a direction we have judged to be mistaken. And so we wring out liberal hands and cry: "We'll let you have our kind of freedom, 1069, but not yours. Why can't you be a rugged individual in the conventional way?"[76]

The State of Minnesota, supporting the district court's decision, intervened on appeal because 1069 challenged the constitutionality of the Minnesota statute. Responding forthrightly and directly to 1069's arguments, the State argued that the trial court acted reasonably in denying the requested name change because a number is not a name, because the use of a number as a name would be administratively inconvenient, and because the dehumanizing effect is provocative to members of society. Though the State recognized that the provocation concerns were difficult to categorize, it argued that they were nonetheless reasonable and deserving of consideration. The State also contended that the district judge in using the term dehumanization "had in mind both the mechanistic and demeaning connotation such usage had ac-

[76] "Is 'Dehumanization' a Civil Right?" *The Christian Science Monitor*, 9 March 1978, p. 26, col. 3.

quired today.''[77] The crux of this argument summarized the district court's determination

> . . . that the use of numbers as names is offensive to basic human dignity and generally offensive to the society at large. It is inherently totalitarian in nature and to be circumvented whenever feasible. This is not merely a question of appellant's freedom to be known as whatever he pleases, but a question of society's right to be free from the necessity of hearing or acknowledging information provocative or abhorrent to them.[78]

Also critical to the State's argument was the conception of a name as ''a verbal placard which is inescapable for those persons who must address another person or deal with his or her name.''[79] The State argued that everyone, in private or public, ''must accept the name of the person whose attention is desired'' and thus that sanction of the name 1069 by the Minnesota Supreme Court would untenably require sanction of a name repugnant to many people.[80] The State thus distinguished between 1069's common law right to choose his own name and the ''sanction'' of a name by a court in a name-change proceeding.[81]

The State of Minnesota also disputed 1069's novel claim to constitutional protection in the name change process. Neither the right to privacy nor the first amendment were admitted to be relevant to the choice of a name. The right to privacy was said to involve only governmental ''preclusion and intrusion'' and neither could be found in the decision of the district court which ''merely constitutes a withholding of judicial approval subsequent to initiation of action by . . . 1069.''[82] Likewise with respect to the claimed protection of free speech and expression, the State recognized the obvious.

> Freedom of speech is an integral part of the fabric of our culture and a necessary restraint on the powers of government. This case, however, while involving arguably expressive activity on the part of appellant, does not and cannot present the same First Amendment questions generally considered by courts or cited by appellants. It is different, not because of the importance of the name change issue, but rather because of the context in which it is presented before the Court.[83]

The difference, apart from the obvious novelty of the question, was again

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[77]Brief for Intervenor, p. 12.
[78]Brief, p. 12.
[79]Brief, p. 13.
[80]Brief, p. 13.
[81]Brief, p. 13.
[82]Brief, p. 17.
[83]Brief, p. 19.

argued to lie in the active context of 1069's seeking the change and the asserted restraint on the part of the State in refusing to grant the request. The State claimed that by preventing 1069's change, it was keeping him from forcing his expression on others. The State thus adopted the position that a court-ordered name change would require others to use the number name, arguing that "[T]he rights of individuals to refuse the philosophy or statement inherent in the use of a number is no less than appellant's right to assert it. The Court should not pick between contending philosophies."[84]

Finally, even if the rights to privacy and expression were implicated, the State concluded with its assessment that the rights, since not absolute, were outweighed by the State's interests in the definitional purity of the concept of a name, the problems of administrative feasibility incurred by the use of a single word, and the offense to society. These concerns were said to be "sufficient and compelling" and thus adequate to outweigh any interests of 1069.

The Decision of the Minnesota Supreme Court. On December 28, 1979, the Supreme Court of Minnesota reviewed the district court's decision and affirmed. Although considering the interests asserted by 1069 and the State, the Court based its holding on a different decisive ground. The Court stated that dehumanization was not as strong a factor as Judge Barbeau thought it was. It tersely said:

> While we tend to agree with the court's assessment of the use of numerals to identify human beings, we are of the opinion that to the extent the dehumanization consequences of adopting a number of a name are self imposing, the discretion of the court to deny such application is limited.[85]

Even though the Court rejected dehumanization as an implicit ground for denial of the petition, it nonetheless discovered other implicit factors beyond the explicit ground of "intent to defraud or mislead." These discerned factors deal with society's rights, more specifically, its responses, rather than the individual's rights. If the name is "likely to provoke violence, arouse passions, or inflame hatred," the Court has authority to deny the change, just as it would were the name racist or obscene.[86] The Court, however, did not find that 1069's name would have such an impact. Although the Court rejected the dehumanization argument, it described in positive terms society's rights and in negative terms 1069's rights: society has a right to be free

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[84]Brief, p. 21.

[85]In the Matter of the Application of Michael Herbert Dengler for Change of Name to 1069 (hereinafter referred to as Application of Dengler), No. 49052 (Supreme Court of Minnesota, December 28, 1979), 287 N.W.2d 637, 638.

[86]Ibid., p. 639.

from an "undesirable impact" caused by a name, and 1069 has a right "to adopt a name which simply subjects *himself* to contempt, ridicule, and inconvenience" (emphasis supplied).[87]

Because the Court cast the discerned rights in such contrasting connotations, it created for itself a tidy rhetorical transition for disposing of 1069's constitutional rights in three, brief paragraphs. Since the right to subject himself to contempt, ridicule, and inconvenience is insignificant, the Court told 1069 that it would consider his constitutional rights when he is "subjected to something more than trivial self-inflicted inconvenience by adopting '1069' as his name."[88] The Court therefore ignored 1069's free expression and privacy argument based on the first, third, fourth, fifth, ninth, and fourteenth amendments. These asserted rights, the Court promised, would warrant legal protection when 1069 would be denied a substantial right because of "the mode of identification he has selected for himself," in other words, because of his "name."[89] The Court did not believe that the denial of 1069's petition was a substantial right and disagreed that the state, acting through the judicial branch, had interfered with 1069's rights: "The state has taken no action to prevent appellant from using '1069' as his official name. The refusal of the court to act on his application denies him none of the common law rights he now enjoys."[90]

The Court thus made an unusual semantic distinction between 1069's "official" name and his "legal" name, the former being 1069, the latter, Michael Herbert Dengler. To explain this distinction the Court cited other cases to clarify; yet, these cases did not clear away the semantic fog. Though the 1869 case of *Du Boublay v. Du Boublay* suggests that 1069 "cannot compel others to address him or designate him by the new name"[91] (the suggested "others" in this case are Minnesota Gas Company and the Drivers' License Division, which refused to deal with someone named "1069"), the other case, *In re Merolvitz*, similar to recent cases, suggests that an honest purpose is sufficient ground for a name change and that the legal system is in "*aid* of the common law and does not abrogate it"[92] (emphasis supplied). Perhaps the latter case was intended to support the Court's statement that 1069 would have both a common law and statutory right to change his name

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[87]Ibid., p. 639.

[88]Ibid., p. 639.

[89]Ibid., p. 639.

[90]Ibid., p. 639.

[91]L.R. 2 P.C. 430, cited above, p. 639.

[92]320 Mass. 448, 450, 70 N.E.2d 249, 250 (1946), cited above, p. 639. Recent cases to the same effect are Traugott v. Petit, 404 A.2d 77 (R.I. 1974), and Simmons v. O'Brien, 201 Neb. 778, 272 N.W.2d 273 (1978).

to an identification that subjects himself to contempt, ridicule, inconvenience, absent other factors such as racism and obscenity.

But the Court ignored the resolution of these conflicting issues, that is, whether 1069 could compel others to recognize "1069" as his name and whether honesty is the dominant criterion prompting the legal system to put its judicial stamp of approval on the common law name; instead, it based its decision on one factor—its interpretation of legislative intent. The Court believed that when the legislature adopted the Name Change Statute, it did not grant the Court the authority to change "an alphabetical name," a "word historically and traditionally understood," to a numeral, "for such change would constitute a radical departure."[93] Moreover, the Court said, if the legislature had contemplated the present case, it would have rejected 1069's effort because "our social and economic system . . . is geared . . . to identify individuals by letters rather than numbers."[94] Although the Court did mention the social system as well as the economic system, the emphasis was largely on the latter because the Court declared that nothing would prevent 1069 from changing his name to "One Zero Six Nine." Thus, it does not matter if 1069 is orally addressed or aurally perceived as "1069," as long as in writing this identification is in letters, not numerals. The dehumanization argument of Judge Barbeau and of Cousins was therefore discarded. The Court explained its reasoning using the example of "Juan Nyen," which is phonetically similar to "One Nine."[95] This dichotomy between speech and writing thus signified for the Court a legislative intent to further administrative convenience. For example, because computer cards have an area to blacken letters, not numbers, for indicating identity, this written, mechanical difficulty, not the oral attachment of a number to a person, describes the foundation upon which the Supreme Court of Minnesota built its decision.

It is not clear whether this decision upheld the state's asserted right to maintain "definitional purity of the concept of a name,"[96] since the District and Supreme Courts furnished different viewpoints with respect to a person being known by a number. But what is clear is the court's definition of a permissible name under the name change statute —any written combination of letters that is not racist, obscene, or likely to provoke others.

The Jurisdictional Statement to the United States Supreme Court. Unsuccessful in both the district court and supreme court of Minnesota, 1069 next sought as an audience the Supreme Court of the United States, hoping that it

[93]Application of Dengler, p. 639.
[94]Ibid., p. 639.
[95]Ibid., p. 639.
[96]Brief for Intervenor, p. 21.

would listen to his argument based on the Constitution. The district court did not address the constitutional issues; similarly, the state supreme court noted, but adroitly avoided, 1069's constitutional arguments by interpreting the statutory word *name* narrowly, and by claiming that 1069 was denied no rights in refusing his application for a change of name since he retained all of his common law name-change rights. Dissatisfied with the perceived lack of concern for his constitutional rights, 1069 filed a jurisdictional statement.

The purpose of this statement was to convince the Court that "the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral arguments, for their resolution."[97] Though Minnesota courts were deaf to 1069's pronouncement that his constitutional rights needed to be considered, 1069 still appealed because "the failure of the state court to pass upon the federal claim is not conclusive. Only if the nonfederal ground is adequate will review be declined."[98] Because 1069 did clearly raise his federal constitutional rights at issue under the state statutes in the district court and in the Minnesota Supreme Court, he had the right to expound on these federal issues, that is, to make a federal case.[99]

To advocate that there are substantial federal questions, 1069's argument began with a case highlighting the problem that first confronted him—the sacrifice of his personal choice for a new name because of the personal distaste of a series of state judges:[100] "The phenomenon of uncontrolled discretion is not new. For example, in 1936, a New York state court denied the petition of one Murray Cohen to change his name to Louis Murray Kagen. Mr. Cohen argued that the new name would assist him in his career because of its euphony, distinction, and relative infrequency in the telephone directory. The trial court, however, rejected Mr. Cohen's request and paternalistically determined that the 25 year old petitioner was immature, disrespectful of his roots, and insufficiently aware that 'he bears a traditionally old and honored name. . . .' Thus, it 'would not aid him in his desire to forswear his

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[97]Harold B. Willey, "Jurisdictional Statements on Appeals to U.S. Supreme Court," *American Bar Association Journal* No. 24 (1945), p. 240.

[98]Wood v. Chesborough, 228 U.S. 672, 676–680 (1913); West Chicago St. R. Co. v. Illinois ex rel. Chicago, 201 U.S. 506, 519–520 (1905); Chicago, B. & Q. R. Co. v. Illinois ex rel. Com'rs., 200 U.S. 561, 580–581 (1905).

[99]Wiener declares in his article, "Wanna Make a Federal Case Out of It?" "unless you build the record in your state litigation so that you *do* make a federal case out of it, you not only do not have a rosy chance of review, you don't have a chance at all." *American Bar Association Journal*, No. 48 (1962), p. 62.

[100]Because co-author Thomas Lockney wrote the Jurisdictional Statement filed with the Supreme Court of the United States on March 19, 1980, a substantial portion of the Jurisdictional Statement is included as text in this paper. The parts included are marked by quotations only and have been edited for conciseness and clarity with respect to this article. 1069 is therefore also referred to as the appellant or the petitioner.

original identity by assuming another and totally different one from the circumstances set forth in the petition.' "[101]

"Unlike petitioner Cohen, however, appellant [1069] has throughout this case invoked the protection of the United States Constitution. But since the state courts in this case have ignored or avoided discussion of the appellant's constitutional rights, unless this Court undertakes to recognize the constitutional dimensions of an individual's right to choose a name free of unjustified governmental restriction, judges throughout the country will continue to feel free to impose idiosyncratic restrictions on serious individuals like Mr. Cohen and appellant in their choice of names. Surely forty years of first amendment and privacy law, coupled with knowledge of other societies that have placed severe restrictions on the range of individual choice in personal names,[102] must now result in increased sensitivity to the issues in this type of case. In 1980 appellant and others seeking a name change should be free from unrestricted discretion of the sort visited on Mr. Cohen in 1936. It is up to this Court to focus attention on the constitutional liberty interests involved in choosing a personal name."[103]

With this as a prelude, the argument proceeded to accentuate the core of the case, stressing three predominant issues. "First, the choice of a name is a matter of personal expression and an important and intimate decision which should be independent of unjustified governmental restriction. Appellant should be entitled, as a matter of self-determination in shaping his personal identity, to choose any name he wishes, when that name is not utilized to defraud and is not so bizarre as to fall within the category of unprotected speech such as obscenity. This right is based upon fundamental constitutional doctrines of freedom of expression and privacy guaranteed by the first, fifth, ninth and fourteenth amendments to the Constitution.[104] An individual's name has great personal significance.[105] Appellant's case raises very directly the questions of individual choice and freedom from unjustified governmental restrictions on such a choice.

"The longstanding common law right to self-appellation should be recognized as constitutionally grounded and applicable to legislatively designed procedures such as in the Minnesota Statute.[106] The roots of the right inhere

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[101]Petition of Cohen, 163 Misc. 695, 297 N.Y.S. 905, 906 (City Ct., N.Y. Co. 1936).

[102]See, for example, Comment, "The Right to Choose a Name," *American Journal of Comparative Law*, No. 8 (1959), pp. 502–507.

[103]Jurisdictional Statement, pp. 6–7.

[104]See generally, L. Tribe, *American Constitutional Law* (Mineola, New York: Foundation Press, Inc., 1978), pp. 564–736, 886–990.

[105]Priscilla L. Rider, "Legal Protection of the Manifestations of Individual Personality—The Identity—Indicia," *Southern California Law Review*, 33 (1959), pp. 31–34.

[106]Sections 259.10 and 259.11 (1978).

in the basic constitutional protection afforded to personal autonomy, regarding intimate aspects of self-determination and the expression of one's identity, self-respect, and privacy.[107] The choice of a name constitutes action within a sphere of individual autonomy, is one of the most personal of life's choices, and thus should be protected by the Constitution from governmental interferences except for the most compelling of reasons.[108]

"Recent decisions have recognized the privacy interest in the choice of a name for one's offspring: *Jech v. Burch* and *Secretary of Commonwealth v. City Clerk of Lowell, Mass.*[109] The instant case involves the corresponding privacy interest in choosing one's own name. The Massachusetts case cited *Forbush v. Wallace*, for the proposition that an adult woman's freedom of choice is not compelled by the Constitution.[110] *Forbush*, however, involved not a change of name, but rather a woman's right to use a name different from that of her husband on her Alabama driver's license. Furthermore, the case was treated primarily as a sex discrimination case, and the only opinion, that of the federal district court, applied minimal level of scrutiny that is clearly inconsistent with this Court's more recent sex discrimination cases.[111]

"In *Forbush*, the administrative convenience of the Alabama Department of Public Safety and perpetuation of the long standing custom of using the husband's name in marriage so as to promote uniformity among the states were accepted as rational state interests. In view of recent sex discrimination cases such interests would not be sufficient, at least without additional evidence, to establish the substantial relationship to an important state interest now required.

"Of primary importance [in] the *Forbush* opinion was the fact that women could readily use the state's simple statutory name change procedure: 'In balancing these interests, this Court notes that the State of Alabama has

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[107]See Roe v. Wade, 410 U.S. 113 (1973).

[108]See Tribe, *American Constitutional Law*, pp. 886–990; Tribe, "Toward a Model of Roles in the Due Process of Life and Law," *Harvard Law Review*, No. 87 (1973), pp. 11–314; Comment, "Roe and Paris: Does Privacy Have a Principle?" *Stanford Law Review*, No. 26 (1974), pp. 1161–1189; but compare, Whalen v. Roe, 429 U.S. 589 (1977).

[109]For example, Hawaii's requirement that children born in wedlock be given as a family name either the father's surname or hyphenated combination of parents' surnames violated Alena Jech and Adolf Befurt's right to name their son "Adrian Jebef," Jech v. Burch, 466 F. Supp. 714 (D. Hawaii 1979). Supporting the right to hyphenate children's names, rather than to use only the father's surname, was the decision in Secretary of Commonwealth et al. v. City Court of Lowell et al., 366 N.E.2d 717 (Mass. 1977).

[110]341 F. Supp. 217 (M.D. Ala. 1971), aff'd, 405 U.S. 970 (1972).

[111]For example, Frontiero v. Richardson, 411 U.S. 677 (1973); Craig v. Boren, 429 U.S. 190 (1976); Califano v. Westcott, 443 U.S. 76 (1979). These cases, though they did not ask the state for a compelling reason to justify the law, demanded that the state have more than a mere rational purpose, thus suggesting an intermediate level of scrutiny.

afforded a simple, inexpensive means by which any person, and this includes married women, can on application to a probate court, change his or her name.[112]

"This statutory procedure was viewed as a simple, unrestricted method available to the party complaining of Alabama's common law, customary requirement that the woman acquire the name of her husband. Because it preceded cases requiring a higher standard of review in the area of women's rights; because it involved different considerations of administrative convenience; and because it did not directly raise the underlying constitutional right to pick one's own name, since the district court noted the woman had an unrestricted statutory right to change her name (thus assuming the very right at issue in this case), *Forbush* is not controlling in this case. It is precisely because of Minnesota's unsupported restrictions on appellant's use of the statutory procedure that he is appealing to this court.

"Although no cases in this Court are directly controlling, appellant's interests are certainly as important to him as those recognized in *Jech* and *Secretary of the Commonwealth*, involving the choice of a name for one's child. In that regard, appellant submits that one's identity interests are akin to and as compelling and deserving of protection as those recognized to be constitutionally protected: the right to contraceptives; the right to express oneself by wearing, in a court house, a jacket bearing a common four letter word usually considered vulgar and offensive; and the right to wear an expressive armband to school.[113]

"More recently, this Court has observed that the protection of freedom of thought under the first amendment includes both the right to speak freely and the right to refrain from speaking at all. In *Wooley v. Maynard* the Court recognized a 'broader concept of individual freedom of mind'[114] and held that New Hampshire could not require an individual to participate in the dissemination of an ideological message, the state motto, on his automobile license plates. Forcing an individual to become an instrument for fostering public adherence to an ideological point of view he finds unacceptable, invades the sphere of intellect and spirit protected from official control by the Constitution. Likewise, the Minnesota courts cannot require appellant to forego using

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[112]341 F. Supp. p. 222. The statutory citation is omitted.

[113]Griswold v. Connecticut, 381 U.S. 479 (1965); Cohen v. California, 403 U.S. 479 (1965); Tinker v. Des Moines School District, 393 U.S. 503 (1969).

[114]In Wooley v. Maynard, 430 U.S. 705 (1977), the Court quoted West Virginia State Board of Education v. Barnette, a case deciding that Jehovah Witness children could not be expelled for refusing to salute the flag, 319 U.S. 624 (1943).

the official procedure for expression of an important aspect of his identity through a change of name.''[115]

After defining the various components of 1069's constitutional rights—the right of freedom of expression and the right to privacy—the focus then shifted to an examination of Minnesota's interest, its nature and its merit.

''Secondly, to justify a restriction on the right to change names the state may act only to further an important, clearly identified interest supported by convincing evidence. Appellant has not claimed an absolute right to change his name to whatever he pleases. The state may assert and protect important and legitimate interests. However, the record in this case discloses no countervailing state interest to justify refusing appellant his chosen name. Fraud, the paradigmatic countervailing interest, and the only interest recognized explicitly in the Minnesota statute as sufficient to offset an individual's choice of a new name, is not an issue in this case. Both lower courts recognized appellant's sincerity and lack of fraudulent intent. The Minnesota Supreme Court also found that no category of inherent judicial authority (which might justify preventing a choice that is racist, obscene, or otherwise likely to provoke violence, arouse passions, or inflame hatred) was presented by this case. Thus, there is no basis for refusal of his name change.

''The Minnesota Court's reliance on perceived legislative intent is misplaced. That court is of course the ultimate interpreter of Minnesota statutes. However, in the face of a claim of constitutional right, speculation about what the legislature might have thought about appellant's unusual name should not suffice to avoid the issues. The legislature vested decision-making authority in the Minnesota courts. In exercising that authority, the courts cannot avoid constitutional issues by guessing how the legislature might have reacted to questions not presented to it, or by imagining evidence neither submitted to nor considered by the legislature or the courts.

''The only evidence admitted in this case indicated that appellant's chosen name would present no pragmatic difficulties for Minnesota's social or economic systems. If judicial notice is the unspecified basis for the court's judgment, the propriety and constitutionality of such a questionable procedure should be faced directly, not under the guise of fictionalized legislative intent.''[116]

After detailing both 1069's and the state's interests, the jurisdictional statement claimed that the Supreme Court of Minnesota had shut the door on 1069, by denying him equal access to use of the statutory procedure.

''Thirdly, appellant is entitled to equal access to state procedures to

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[115]Jurisdictional Statement, pp. 8–11.

[116]Jurisdictional Statement, pp. 12–13.

accomplish his name change. The lower court misconceives the nature of appellant's motives. He is not arguing that he has a 'right' to force others to utilize his unusual name. He expects no more from the name change procedure than any other Minnesotan using the same procedure. He does not claim the right to go to court to force private individuals to recognize his name. Instead, he seeks equal access to the state-created procedures for a simple, authoritative record of his name change. Statutory name changes should be encouraged because of the advantages to both the individual and the state. The policies were well stated by the Supreme Judicial Court of Massachusetts in the *Petition of Buyarksy*:

> We think that it is not only [not] inconsistent with but also desirable in the public interest that the fact that one has commonly used a name for a number of years should be fixed and established by a public record showing that the name adopted has become his legal name.[117]

"Petitioner asserts a right to fix and establish a public record showing that the name he has adopted has become has legal name. He wishes to use the procedure available to others changing their names. But he has been denied equal access to that procedure. Perhaps the defect in the approach of the Minnesota Supreme Court is best demonstrated by analogy to another important area of individual choice—the choice of a spouse. In some states, marriages through either an informal common law method or an official procedure are available.[118] One could readily predict this Court's reaction to an argument by a state with a prohibition of interracial marriages that would justify refusal to issue a marriage license or allow a marriage ceremony on the theory that the parties remain free to live together as common law spouses. Similar illogic is inherent in the reasoning of the court below.

"Since appellant argues that he has a constitutional interest in his choice of a name, the courts of Minnesota should not be able to avoid consideration of that interest by relegating him to subsequent case-by-case enforcement of his constitutional rights. This is particularly so because the refusal of the courts to consider his constitutional rights in the first place contributes substantially to his inability to obtain recognition of his new name. Finally, appellant urges that the serious lack of judicial economy implicit in the Minnesota Supreme Court's invitation to subsequent litigation is inconsistent with the purposes of the name change procedure itself:

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[117]322 Mass. 335, 77 N.E.2d 216 (1948). See also In re Knight, stating that applications under the statute should be encouraged since they are more advantageous to the state, 537 P.2d 1085, 1086 (Colo. Ct. App. 1975).

[118]See Homer H. Clark, *Law of Domestic Relations* (St. Paul, Minnesota: West Publishing Co., 1968), pp. 32–143.

> To say, as have some lower courts, that the petitioner may still change his name at common law, simply by using another name consistently over a period of time without intent to deceive or avoid obligations previously incurred, even though the court will not approve his application for a judicial name change, is to skirt the issue. These cases seem to involve themselves in extra-legal sermonizing when they use their discretion to prevent speedy, judicial name changes on the basis of the proposed names' unfamiliarity, the unconventional use of a one-word name, the unproven necessity to change one's name when one adopts a new religion, and the pride petitioners should have in their original American names, while suggesting the common law remedy if petitioners still want to change their names. In other words, the courts seem reluctant to grant name changes for what they deem silly or sufficient reasons. However, to deny the statutory remedy seems to promote even greater confusion than the confusion the court sought to eliminate by rejecting the application."[119]

The desire for that statutory remedy thus motivated 1069 to proclaim that his federal constitutional rights must be recognized: his right to freedom of expression, to privacy, and to equal protection.

The State's Motion to Dismiss or Affirm. The State, however, did not agree that the courts had infringed upon any of 1069's constitutional rights: "The question of the existence of . . . a constitutional right is not presented by this appeal. Appellant is not challenging any state statute, common law rule, or administrative action that precludes him from using the "name" of his choice."[120]

The State also declared that 1069 was not denied equal access since if he was denied any substantial right, the doors of the court would open:

> The state court properly declined to rule on the question of the existence of constitutional rights that would prohibit . . . state action, noting that the courts are available to appellant "to assert any substantial right which may be arbitrarily refused him because of the mode of identification he has selected for himself."[121]

By asserting that the lower court had not infringed upon 1069's constitutional

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[119]E. Bander, *Change of Names and Law of Names* (New York: Oceana Publications, 1973) p. 23. The discussion of the third issue is from the Jurisdictional Statement, pp. 12–17.

[120]Motion to Dismiss or Affirm, No. 79-1513 (The Supreme Court of the United States, October Term, 1979), p. 4.

[121]These rights are the ones the Supreme Court of Minnesota said it would enforce, 287 N.W.2d 637. In addition, the State averred that "the proper forum in which to balance appellant's asserted interests against the legitimate interests of the State would be in a direct challenge to such restrictive government action. Thus, the issue would be presented in an adversary setting in which the competing interests could be properly weighed," footnote 3, p. 5.

rights, but in theory still recognizing his right to legal protection against others, the state declared that the decisive issue is that which the Supreme Court of Minnesota thought dispositive—the intent of the legislature in adopting the statute. The State alleged that the legislature did not authorize the courts to change Roman or Latin alphabetic characters to "Arabic numerals, a foreign alphabet, or the Morse Code."[122]

The State concluded by emphasizing the tradition of using Roman letters. Because 1069 could legally be recognized as "One Zero Six Nine," the State claimed that the ruling of the Supreme Court of Minnesota "is not only reasonable, but is such a *de minimus* limitation on the rights asserted by the appellant as not to raise any substantial questions for this Court's consideration."[123]

The Decision of the United States Supreme Court. On May 19, 1980, the Supreme Court dismissed the appeal "for want of a substantial federal question."[124] The significance of such a dismissal merits a brief comment. The summary manner in which the Court presently disposes of most cases is largely a function not of the substance of the cases, but rather of the sheer number of cases presented for review.[125] The dismissal of 1069's case has practically no precedential value.[126] What commands full consideration by the Supreme Court is presentation of a "substantially" substantial federal question.

IV. DISCUSSION

Although Michael Herbert Dengler was unsuccessful in his quest to obtain a court order changing his name to 1069, in a broader sense he was successful: the unusual nature of his chosen appellation forces jurists and name scholars to examine more seriously the concept of a name and its legal boundaries in a way that less exotic litigation never could. This case is a unique event in the literature of names, one meriting analysis of its consequences for 1069 and its effect on study in the law of names.

At first glance, it might appear that in Minnesota and North Dakota, 1069 is blocked from an official change of his name to his chosen numerals, and that an assertion that his constitutional rights were infringed will not remove

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[122]Motion, pp. 5–6.

[123]Motion, p. 6

[124]Dengler v. Attorney General of Minnesota, 446 U.S. 949 (1980).

[125]To illustrate, even though review is granted when four justices agree, if five justices remain adamant about their opposition, summary dismissal results. Ortwein v. Schwab, 410 U.S. 656, 661 (dissent); Lippitt v. Cipollone, 404 U.S. 1032, 1034 (dissent).

[126]Archibald Cox, "The Supreme Court 1979 Term," *Harvard Law Review*, 94, No. 1 (1980), p. 292.

the official barrier. Even so, 1069 might optimistically, if naively, read the Minnesota Supreme Court opinion as encouragement to the Minnesota Legislature to amend the name change statute to permit number names. Another route suggested by Minnesota's court is to change his name to the words "One Zero Six Nine" or, as a bad judicial pun, to substitute "Juan" for "One."

Both states' supreme courts, however, also suggested that he may still use the informal, so-called common law method to change his name. Their discussions of the common law route were perhaps intended to provide solace for 1069. In theory, the change through continued use of the numeral-name makes it just as "legal" as if it were his court-ordered name. That solace is likely to be short lived, however, when he suffers repetition of the inconveniences that first motivated his trip to the courthouse. 1069 has, in effect, already followed the common law method and for that reason has been appropriately referred to throughout this paper as 1069. It is an unfortunate fact of 1069's life that many people will not recognize his number-name unless he is able to produce a court order "proving" the legitimacy of his name. In short, the court said "go ahead and use the numeral-name," while others say "don't use the numeral-name until a court gives the 'legal' go ahead."[127]

Perhaps 1069 should carry a copy of the Minnesota Supreme Court opinion to display as authority when a dispute arises about his common law right. Yet, 1069's realy remedy lies in a future lawsuit of the short seemingly envisioned if not *encouraged* by the Minnesota Supreme Court's observation that the state of Minnesota had not prevented him from using his name:

> It is time enough to consider the question of appellant's constitutional rights when he can demonstrate that he had [sic] been subjected to something more than trivial and self-inflicted inconvenience by adopting the numeral "1069" as his name. He has available to him the resources of the courts to assert any substantial right which may arbitrarily be refused him because of the mode of identification he has selected for himself.[128]

Such implied judicial encouragement of future litigation is rare. Perhaps a better interpretation of (or justification for) the text is to assume that the Court did not intend to discourage 1069 from using the name but rather to encourage, with veiled exhortation, the bureaucrats of Minnesota to recognize his common law name change and thus follow its example of avoiding a difficult constitutional dispute. This interpretation derives ostensible support from the

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[127]While his case was working its way to the United States Supreme Court, 1069 and his fiancee futilely struggled with the county clerk who refused to issue a marriage license to 1069.

[128]Application of Dengler, 287 N.W.2d 637, 639 (Minn. 1979).

Minnesota Supreme Court's recognition that Judge Barbeau had exceeded the limits of his discretion in rejecting the name choice as "dehumanizing." Furthermore, the Court observed that 1069's motives did not fall within the prohibited, explicit statutory categories of "intent to defraud and mislead" as appropriate grounds for rejection of a name change, or within the implicit categories of seeking a racist, obscene, or provocative name, that is, one likely to arouse passions or inflame hatred.

With 1069's motive declared acceptable, but not legally sufficient, one could then interpret the Minnesota decision as a tour de circular force or a masterful shell game. The opinion has something appearing to satisfy everyone, but decides as little as possible, casting the burden of further action and decision on others. The State and its presumably nervous judges ("If 1069 is ok, what will they try next week?") have the benefit of an apparent judicial victory and a precedent avoiding an influx of offbeat (if numerical) name change petitions. If numbers are to be required fare for Minnesota's judges, the wound will not be self-inflicted, since the Court shifted the burden to the legislature to clearly indicate whether it intends the word *names* to include numerals. If people will not recognize 1069's common law right to use the numeral name "1069," then he may seek a compromise by getting a court order stating his name in letters as "One Zero Six Nine." Whether the name in letters is synonymous with the name is numbers is a question to be resolved by 1069 and scholars of onomastics. In the fictional world of court divination of legislative intent, however, this requirement of letters rather than numerals was something that the legislators presumably did intend.

The Minnesota opinion thus sets up dichotomies that seem to dispose of the issue neatly: use letters, not numbers, for a legal change; or use the informal common law method, not the formal, secure court-ordered procedure; and if any problems occur, the court will recognize substantial deprivations, not insubstantial ones. Although these dichotomies seem to be the Minnesota Court's guiding principles, the Court fails to discern its circularity, which is perhaps best portrayed by the riddle formula—"When is a name not a name?" The paradoxical answer, in terms of the result of the Minnesota litigation, is that a name may be a name at common law, but at the same time it is not and need not be recognized by the legislature or the courts. More dramatically, a name is not a name when judges find it too unusual (albeit neither fraudulent, obscene, nor too offensive) to contemplate as within the legislature's ken as fit for judicial approval.

In light of the paradoxical nature of the Minnesota decision, it is perhaps easy to understand the United States Supreme Court's decision to affirm the Minnesota Supreme Court's decision. Because of its excessive case load, and its necessity-induced role as determiner of questions of broad national import

rather than as the "righter of all wrongs," it may have read the Minnesota decision as efficiently avoiding questions better left to a less unusual context.

The constitutional questions raised by 1069 in his statement to the high Court, however, merit consideration, not deferment; 1069 claimed that by relegating him to the common law or informal method, he was being denied equal access to the statutory process. In other words, because of his particular name choice, not subject to rejection on sure-fire grounds such as fraud, obscenity and the like, he could not utilize the process designed to provide a quick, official, state-sanctioned record of his name choice. That result, he argued, discriminated against him on the basis of his fundamental right to pick a name, a right deserving protection under the Constitutional doctrines of free expression, privacy, and liberty.

Unfortunately, the Court was presumably primarily impressed with the novelty of this argument, and it perhaps felt that the nascent rights being asserted could best be examined at the highest level only after they had been examined in a variety of statutory and jurisdictional contexts by a good cross-section of state and federal courts. A less acceptable interpretation of the Court's action is that it just did not consider that an individual's interest in an appropriatately unfettered choice of name was important enough to justify expenditure of its time. We regard this as a worse interpretation because of the historical fact that many other cases involving issues of no more apparent broad interest have been heard by the Court.[129] Another less than favorable reading may appeal to realists who emphasize the anomaly of a body composed of relatively homogeneous judges (all middle aged or older, male, successful in their careers) attempting to determine importance from their culturally isolated viewpoint. But because judges have the duty to protect fundamental individual rights from undue restriction by the majority, they should recognize that their evaluation of the importance of an individual's right to a court-ordered name change is likely to be a mere reflection of the majority of citizens' (including the judges') satisfaction with their own, probably not unusual, names.

Our speculations and ruminations about the basis of the Court's dismissal really lead us back to the central onomastic issues and their legal offspring. Important issues of social policy should not casually be determined by reference to a dictionary or a custom, which often amount to the same thing. In effect, two broad categories of issues are sharply raised by the 1069

[129]For example, in Wooley v. Maynard, 430 U.S. 705 (1977), the Court ruled that New Hampshire could not enforce criminal sanctions against persons who put tape over the state's motto, "Live Free or Die"; and in Kelley v. Johnson, 425 U.S. 238 (1976), the Court considered the length of a police officer's hair, finding the police department's regulation constitutional.

case—issues that will not disappear whatever the ultimate legal fate of 1069. The first category is best characterized by shortening the clichéd inquiry "What's in a name?" to the deceptively simple question "What is a name?" Can a number be a name? How do we decide? By looking to a dictionary? The courts in 1069's case assiduously avoided breaking any new ground in the legal area of onomastics, finding comfort from general dictionary definitions and the fiction of hypothetical legislative intent. When the courts considered only denotation and divined intent, the reasoning inevitably became circular: "What did the legislators mean (or what would they have meant, if they'd thought about it) by the word *name*? Let's look in the dictionary."

To step off this circular path, the courts might have considered the expert testimony of onomastic scholars. The review of the works by, for example, Algeo and Pulgram, noted earlier in this paper, suggests that the effort may have been worthwhile, although a suspicion lingers that sufficient difference of opinion among onomastic experts exists to create a new variant on the old litigation nemesis—the battle of the experts—and to leave lawyers and judges more puzzled than ever (without even the luxury or solace of their faith in the dictionary remaining).

The interaction between onomastics and law poses serious questions regarding the role of social convention and tradition in determining the appropriateness of a naming decision. Although tradition and custom are relevant, the scope of their limitation on individual choice should be made clearer. It is at this point that the second broad category of issues arises. The uniqueness of a name like 1069 is a particularly vexing problem for onomastics, and as demonstrated by the tortuous path of the litigation described above, for law also. But even if Michael Herbert Dengler had never conceived of himself as 1069, many cases have arisen and will continue to arise, raising the same important legal and political issues of individual choice and governmental limitation. With respect to the issue of individual choice, many judges mechanically restate the common law right to change one's name virtually at will, only to conclude that a governmental limitation mandates that the common law right give way.[130] It would be interesting and perhaps helpful if

[130]The fate of the common law right is indeed unclear. To illustrate, in Chaney v. Civil Commission, 85 Ill. 2d 289, 412 N.E.2d 497 (Ill. 1980), the court denied agents for the Illinois Bureau of Investigation the common law right to assume a name, one needed to obtain a liquor license for undercover work; and in Norton v. Norton, 595 S.W.2d 709 (Ark. App. 1980), the court denied a remarried, custodial mother the right to change her child's name formally and informally, though stating that she may have a "future" right to apply to the court. In contrast with the denial of the common law right is the court's permissive attitude toward aliens and refugees obtaining a court-order name change, Application of Lipchutz, 178 Misc. 113, 32 N.Y.S. 2d 264 and Matter of Novogorodskaya, 429 N.Y.S. 2d 387 (N.Y. Civ. Ct. 1980).

onomastic historians could tell us whether the liberal common law policy was the result of an early outbreak of individualism, or rather the natural result of a rigid social system in which serious deviations from customs and traditions were not lightly or perhaps at all tolerated.

Whatever the relevance of the historical and legal antecedents, 1069 raises in a straightforward way an important question, one of interest to scholars of onomastics, constitutional law, and political philosophy. When individual choice conflicts with societal mores expressed through a state official (judicial, legislative, or administrative), what are the respective interests of the nonconforming individual and the constitutionally conscientious or controlled state official and how should these interests be reconciled? 1069 and his lawyers urged an analysis under the free speech and liberty protections of the Constitution, which would characterize the individual's right as fundamental and allow a state restriction of the individual choice only when it serves a compelling state purpose.[131] Once the state's interests are deemed inapplicable, that is, the court has screened fraudulent or grossly offensive names, further discretionary refusal based upon concepts such as aesthetic distaste or an arguable hint of dehumanization seems difficult to label as "compelling" in the sense required by current constitutional theory. It is regrettable but understandable that we have received no judicial guidance in this area. Although the Minnesota Supreme Court rejected Judge Barbeau's use of dehumanization as a ground for refusing the name change, it expressly avoided the constitutional issues. It is ironic that the appellate court, through its fictional ascription of legislative intent, accomplished the same result without the necessity for thoughtful reasoning or the agony of serious reservation, both displayed by Judge Barbeau.

In any event, disputes about the constitutional limits on individual name choices will, if pressed by serious constitutional lawyers, involve adapting evolving theories of free expression and due process to the as yet unexplored context of name choice. Complicating the matter is the unclear relationship between the two generally recognized methods of name change—the statutory procedure involving the formal judicial process and the informal, so-called common law method. We think we have fairly judged that the opinions in the 1069 cases have confused rather than clarified the relationship between the two procedures. It seems inappropriate for an article co-authored by one of 1069's attorneys to attempt to develop a theory to support the situation in

[131]See Laurence Tribe's detailed discussion of these rights in *American Constitutional Law* (Mineola, New York: Foundation Press, 1978), pp. 576–736, 886–990. Tribe attempts to define these rights, disagreeing with theorists who regard the right of privacy as a name "for a bag of unrelated goodies," and the right of free expression as only an instrumental or a purposive right.

which a name may be adopted by common law when it may not be adopted through the formal procedure. We can speculate, however, for the outline one such theory might follow.

For example, the formal process could be reserved for relatively uncontroversial name changes, in light of the essentially uncontested nature of most name change proceedings. When contests do arise, they usually occur not because of the onomastic inquiry into the legitimacy of the name sought, but rather because one individual claims that fraud or other harm might result from the name change. Under this theory, then, creation of radically new names would be left to a sort of cultural sifting and winnowing process through the informal method. That is, before a name could be included in the category of formal acceptability, it would have to "prove itself in the marketplace," so to speak, by gaining sufficient or widespread social acceptance. If this theory or one similar underlay the decisions of the North Dakota or Minnesota Supreme Courts, then its underpinnings and justification were conspicuous by their absence in the written opinions.

In any event, we hope it is obvious that such a theory bears a heavy burden of persuasion to convince us that it could be more than a sophisticated way of barring distasteful social innovation from the hallowed and hidebound judicial precincts. We remain unconvinced that a test of the appropriateness of a novel name change can be the question begging, if not perfectly inconsistent, criterion of social acceptance. Such a result seems to us, as 1069 argued, no more permissible in the context of access to formal name changing than it would be to determine the permissibility of a judicially performed interracial marriage. In other words, barring the court-recognized name change but permitting a common law name change is like barring a court recognized interracial marriage but permitting a common law interracial marriage. The Bill of Rights cannot tolerate reference to the judgments of the majority to determine the scope of protection for the minority.

If, however, there is evidence, or even an argument, that unconventional names (assuming their workability—an assumption recognized in 1069's case by the Minnesota courts) are more dangerous, threatening, disquieting, or the like, than unconventional marriages, we should expect to see the evidence or argument in the judicial opinions—an expectation left unfulfilled. Our suspicion is that the only analogy the courts might profitably have pursued is the problem of aesthetic zoning.[132] However, in cases where aesthetic zoning regulations are upheld, the individual's interest in self-expression is seldom taken seriously. Thus, the analogy would be difficult to

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[132]See Williams, Subjectivity, Expression, and Privacy: Problems of Aesthetic Regulation, 62 *Minnesota Law Review* 1 (1977).

apply without a more forthright judicial investigation of the free expression component of a name choice, an investigation the courts were unwilling to undertake for 1069.

Whatever the reasons and motivations for the judicial decisions and opinions in 1069's case, we hope to have demonstrated issues in the law of names that will tantalize legal and onomastic scholars and stumulate future thought and discussion. Perhaps an era of collaborative inquiry between the readers of this journal and legal theorists will result from the current flurry of interest in name rights generated by the women's movement[133] and by the long and interesting legal journey of 1069. Our primary aim in airing the history of this case is to generate sufficient interest in and scholarly attention to the issues raised so that in some future contest between a rugged individualist whose choice of a name runs counter to current traditions and the official embodiment of those traditions, a judicial resolution of the controversy, whatever the result, will be based on premises more persuasive than the mechanical, bemused rejections afforded by the courts to 1069.

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[133]In "Women's, Men's, Children's Names: An Outline and Bibliography," *The Family Law Reporter*, 7 (1981), pp. 4013–4018, Priscilla Ruth MacDougall provides an excellent bibliography of name change litigation from the year 1859 to 1981. Ms. MacDougall has influenced the development of name changes through her skills as a lawyer and by her intense interest in names. The authors offer a special acknowledgment to her for her interest and advice in 1069's case.