



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
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Touro Law Review

Volume 33 | Number 3

Article 5

2017

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Recommended Citation

Subotnik, Dan (2017) "The Simple Meaning of Stop Signs: A Response to Professor William Nelson," *Touro Law Review*. Vol. 33: No. 3, Article 5.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol33/iss3/5>

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THE SIMPLE MEANING OF STOP SIGNS: A RESPONSE TO PROFESSOR WILLIAM NELSON

*It was such a police state that I confronted when
I acted on the basis of my economic and environmental
concerns after receiving a traffic ticket.*

*Dan Subotnik**

Most of us, I would bet, have gotten a ticket for rolling past a stop sign. Paying the fine and interacting with the court bureaucracy was surely unpleasant, but we got over it. Not so Professor William Nelson. A single traffic ticket in the village of Cedarhurst, a New York City suburb, continuously upsets Nelson's equilibrium because of the political and social questions that it raises.¹ He shares them with us in "The Emerging American Police State."

Happily, I cannot conclude that an incipient police state exists in Cedarhurst. Unlike Nelson, I bring peace and harmony.

In the internet age, a writer cannot assume that a reader will glide from a law review article to a response. Many readers will have come directly to my piece on line. A little background on Nelson's essay is therefore required.

Nelson failed to stop at an "all-way," i.e., four corner, stop sign. Offering no excuse for the lapse, he nevertheless believes that the law is on his side. Perhaps only a law professor with time on his hands could do what he did next. Refusing to pay a reduced \$180 fine with no points and plead guilty, he files a motion to dismiss against the village and goes to battle.

*Dan Subotnik thanks his Research Assistant Alyssa Regina, his colleague Rena C. Sepowitz, and his *Law Review* editor Elizabeth Sy.

¹ See William Nelson, *The Emerging Police State*, 33 *TOURO L. REV.* 709 (2017). Nelson does raise a few constitutional questions, but I do not deem them important enough in this context to warrant attention here.

Since Nelson himself begins the discussion with the socio-political implications of this case, I do so as well. Nelson's primary thesis in this respect is that Americans should be concerned less about police misconduct per se than about our political system that is skewed in favor of small groups and against the general public.² The police are simply responding to the self-serving realities of political life.

While it is a relief not to worry about police misconduct, that is not what makes Nelson's piece worthy of a response, which is, rather, how a professor of jurisprudence assesses the action of the municipality in relation to the burdens placed on residents of other municipalities in this case. Cedarhurst needs money to operate, but does not want to alienate resident voters by raising taxes. Well-placed stop signs can generate ticket income and help solve such money problems. Greatly inconveniencing drivers, especially Nelson, the municipality proceeds to put stop signs up on 90% of its local streets.³ For Nelson, one might say, Cedarhurst is like a speed trap set to extort a few hundred dollars from dazed Northeast motorists driving to Florida for the winter who get off interstate I-95 to stretch and get a cup of coffee.

But does this conflation of stop signs and speed traps compute? Cedarhurst is no pirate community holding innocent, non-local motorists for ransom. Stop signs restrain all drivers, including local residents. Indeed, because locals cannot avoid the stop signs, they should be far more financially burdened and otherwise inconvenienced by having to stop at every corner. Nelson offers no evidence that this is not the case.

Are stop signs tied to safety concerns? Nelson rejects the idea. But these signs are not erected as monuments to the village's leadership. They are the products of individual and group petitions. Why would residents demand stop signs if not for safety concerns? Whether Cedarhurst suffers more accidents than other jurisdictions or whether its stop signs are more pervasive than those of other jurisdictions would require a study that Nelson does not provide. Suffice it to imagine here that Cedarhurst has more children and

² "It is far more important to pay close attention, not to occasional rogue police officers, but to the institutional structures and institutional actors other than police on the beat who support, engage in, and indeed, strive to legitimate roguish law enforcement behavior." *Id.* at 709-10.

³ *Id.* at 717.

senior citizens who need protection. Or perhaps its residents value children and senior citizens more than Nelson does.

Assuming I am right that locals do not target outsiders, surely they are the best positioned to determine safety concerns. They know where the risks are. And if they come to find that the conditions they have set for themselves are not tolerable, they can vote to remove the signs. It is telling that Nelson can point to no petition in Cedarhurst to remove a stop sign.

In more formal terms, Nelson wants to regulate villages' general police powers in relation to traffic. Nelson's political point is that the sign policy is oppressive to those in adjoining jurisdictions who, while subject to Cedarhurst traffic rules, are not permitted to vote on them. But should they be allowed to? Do we want New York City to determine traffic rules—or maybe bus routes—in adjoining Westchester County? In addition to vastly complicating voting matters, voters in the next jurisdiction over might well not care about safety matters in Cedarhurst and, favoring flow of traffic, may oppose all stop signs.

Cedarhurst's stop sign use, according to Nelson, is even more sinister than I have presented so far. I come back to this at the end.

This brings us to the legal side of Cedarhurst's actions.⁴ In 2007 Congress adopted legislation whose purpose was to develop “greater energy independence and security. . . [and] to protect consumers.”⁵ This would be accomplished through “improved motor vehicle efficiency.”⁶ Yet the stop signs at every corner, Nelson's personal experiment reveals, more than doubles the amount of gas used for a given distance, from 12.1 to 25.9 miles per gallon.⁷ By removing stop signs, the “demand for gasoline would decline, and so would the price. . . carbon emissions might decline, and global warming might slow.”⁸ Building on this base, Nelson cites *Geier v. American Honda*⁹ for the proposition that federal law preempts state law where there is a conflict.

⁴ Nelson points to a range of these including whether a municipal ordinance allowing stop signs is required. Because Nelson labels this and some related matters “minor,” I exploit the opportunity to skip them. *Id.* at 713.

⁵ Energy Independence and Security Act of 2007, 42 U.S.C. § 17001 (2007).

⁶ General Motors Corp. v. National Highway Traffic Safety Admin., 898 F.2d 165, 167 (D.C. Cir. 1990).

⁷ Nelson, *supra* note 1, at 717.

⁸ Nelson, *supra* note 1, at 717.

⁹ 529 U.S. 861 (2000).

The problem for Nelson lies in the facts in *Geier*, a case of an injured party suing a car manufacturer for failure to install an airbag. Absolutely nothing in *Geier* suggests that the federal government wanted to interfere with local traffic regulation. Nelson even seems to admit the point when acknowledging that he did not expect to win.¹⁰

Nelson next cites the Federal Highway Administration which has enacted traffic control guidelines that “States must adopt. . . as their legal State standard.”¹¹ Under this standard, “all way” stop signs are forbidden unless an engineering study shows that the vehicular traffic on the more major street averages 300 vehicles per hour.¹² Nelson reports that no traffic study was performed on the intersection of Washington and Summit Avenues, where he ran the stop sign. Even if one had been performed, Nelson could not win the case, he himself acknowledges, since he concedes on the strength of *Byrne v. City of New York* that the guidelines are just that, guidelines, and not binding.¹³

Nelson then goes on to vent his frustration at his treatment by the court system. We can mostly agree with him but because he is so tendentious, it is hard to rely on his judgment. To be sure, certain required procedures were not followed, but they do not sound serious to this reader. More important, the Traffic Agency judge ends up dismissing the case against him. This decision leaves him deeply unsatisfied because the judge failed to identify the basis for his decision, which Nelson requested. “Poor people and people of color lost when the prosecution against me was dismissed for some unknown reason,” he concludes his argument about “authoritarian police state” tactics. “I lost as well. We all did.”¹⁴

This leads right into my most important critique—Nelson’s invocation of race and class. Cedarhurst, Nelson reports, is 87% white.¹⁵ It is also wealthy with a median household income of

¹⁰ See Nelson, *supra* note 1, at 716.

¹¹ See Nelson, *supra* note 1, at 722 (citing Energy Independence and Security Act, 42 U.S.C. § 6201 (2007)).

¹² *Manual on Uniform Traffic Control Devices (MUTCD), MUTCD with Revisions 1 and 2, May 2012*, §§ 2B.04, 2B.05 at 50-53 (2009 ed.), U.S. DEP’T OF TRANSP. FEDERAL HIGHWAY ADMIN., <http://mutcd.fhwa.dot.gov/pdfs/2009r1r2/mutcd2009r1r2edition.pdf>.

¹³ 861 N.Y.S. 2d 56 (Sup. Ct. Richmond 2007).

¹⁴ See Nelson, *supra* note 1, at 738.

¹⁵ *Id.* at 721.

\$87,000 compared to \$55,000 for New York State as a whole. Any burdens of stop signs shifted to residents of adjoining towns then will almost of necessity be placed on populations that are less well-off and disproportionately minority. For Nelson, “[t]his means that the wealth and well-being [of Cedarhurst] are being redistributed from people of color to white people.”¹⁶ It also explains “why many Americans, especially Americans of color and other minority groups, increasingly find the legal system unfair, unjust, and oppressive.”¹⁷

To which, several responses. Cedarhurst is one of the adjoining Five Towns, one with a racially mixed population and the others with mostly white populations well above average in wealth. With no data showing otherwise, one can only conclude that burdens are not being disproportionately placed on minorities. To be sure, a financially challenged Hispanic driver from another village may get a ticket for dishonoring a Cedarhurst stop sign. But should the penalty be reduced for her so she does not get jail time? Should the state just substitute jail time for fines so as to equalize the burden of criminal penalties? Nelson does not say.

There is something even more problematical about the race/class charge. Why is Nelson talking about race and class where they do not belong? The answer seems clear. Because race and class are so rhetorically potent in our society, writers will reach for them when possible. We can be sure that without the race/class angle, a story about an arguably bizarre regulatory practice in the small village of Cedarhurst would appear only in the local weekly, not in a law review.

Injecting race indiscriminately into political discourse is especially corrupting because we have allowed our identities to be so closely tied to race. This has real consequences. Michael Eric Dyson captures today’s reality when he writes that the “merchants of racial despair easily peddle their wares in a marketplace riddled by white panic and fear.”¹⁸ Nelson’s “Emerging Police State” only aggravates conditions. But we desperately need robust and honest talk on race to solve our most pressing and baffling problems, a conclusion that has been reached by a long and prominent list of analysts. In a book and numerous essays, I have written about this problem and its corollary,

¹⁶ *Id.*

¹⁷ *Id.* at 710.

¹⁸ MICHAEL ERIC DYSON, *TEARS WE CANNOT STOP: A SERMON TO WHITE AMERICA* 3 (2017).

that too much speech on this issue is fatuous and manipulative.¹⁹ I am not alone. Black writers such as Stanley Crouch, in “The All-American Skin Game, or Decoy of Race,” and Richard Thomson Ford, in “The Race Card,” have complained of the speciousness of race talk by black authors; Orlando Patterson gives no higher marks to white authors.²⁰

Two especially good illustrations of our specious discourse are the longstanding charges that African Americans are largely incarcerated on drug charges and that whites, terrified by the surge in crime, rammed the Crime Bill of 1994 down the throats of the nation in order to lock up far more minorities. But in fact, as black Yale law professor James Forman, Jr. recently pointed out, violent crime was behind more incarceration and the black community was deeply complicit in the passage of crime control legislation because it bore the burden of most crime.²¹

So I continue to ask, is it surprising under the circumstances that a strong backlash could take place? And is the best illustration not the election of Donald Trump?

¹⁹ See, e.g., DAN SUBOTNIK, TOXIC DIVERSITY: RACE, GENDER, AND LAW TALK IN AMERICA (2005); Dan Subotnik, *Tyranny of the Meritocracy?: A Disputation over Testing with Professor Lani Guinier*, 31 TOURO L. REV. 343 (2015).

²⁰ ORLANDO PATTERSON, THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA’S “RACIAL CRISIS” (1997)

²¹ JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017).