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## **THE EMERGING AMERICAN POLICE STATE: THE PROBLEM IS NOT WITH THE POLICE, BUT HIGHER UP**

*William E. Nelson\**

### **I. INTRODUCTION**

Recent police shootings have focused public attention on the role of police in American society.<sup>1</sup> There is much talk about the need to reform police practices and thereby control the misuse of police power.<sup>2</sup>

This article argues that concern with reforming the police will not fully deter the emergence of an American police state or significantly reduce the misuse power of by law enforcement agencies. The police are not the problem; the problem is higher up. Undoubtedly, there are rogue police officers who commit heinous acts, up to and including murder. There are rogues in every occupation. Steps are needed to minimize the number of rogues, although they can never be entirely eliminated. It is far more important to pay close attention, not to occasional rogue police

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\*Edward Weinfeld Professor, New York University School of Law. The author is indebted to R.B. Bernstein, Bernard Freeman, Robert Kaczorowski, Frank Stewart, and Larry Zacharias for their comments and suggestions. The author is especially indebted to his attorney, Peter Carrozzo, who discussed this article while it was in draft and read and commented on the final version. Together Carrozzo and the author stood by in astonishment at actions of the Parking and Traffic Violations Agency, sometimes laughed as officials of the agency provided material for this article, but always worried what impact the actions of those officials would have had on us if we were poor people or people of color. This article was written in the winter and spring of 2016, when the author anticipated that Hillary Clinton would be the next president of the United States and would lead an administration committed to protecting the environment and the rights of minorities. The article will have greater utility when such an administration comes into power.

<sup>1</sup> Christopher E. Smith, *The U.S. Supreme Court and The Nation's Post-Ferguson Controversies*, 6 U. MIAMI RACE & SOC. JUST. L. REV. 53, 54-56 (2016); Jeffery T. Wennar, *The United States Is Not a Police State; There Needs To Be Restoration Of The Criminal Justice System Through Adjustment In Order To Alleviate Discontent Expressed By The American Public*, 6 WAKE FOREST L.J. & POL'Y 371, 381-82 (2016).

<sup>2</sup> Ian Loader, *In Search of Policing: Recasting The 'Peelian' Principles*, 10 CRIM. L. & PHIL. 427, 432 (2016).

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.

On February 21, 2015, while driving my car, I was apprehended by a police officer and given a summons for failing to stop at a stop sign. The officer, who happened to be African-American, was businesslike, polite, and efficiently doing her job. Because I believed that the particular stop sign I was charged with passing is illegal and that the enormous proliferation, in general, of stop signs in my locality is also illegal, I entered a plea of not guilty.

Over the course of a long and complex proceeding resulting from my not guilty plea, I observed conduct on the part of lawyers and judges that I found improper, and even authoritarian. Throughout my career, I have written legal history and refrained from writing about my personal experiences with the law. My experience in this particular proceeding is trivial in comparison with negative experiences that others have suffered with law enforcement authorities. But I believe my experience and observations in this proceeding potentially offer insights into why the law enforcement system, though not necessarily police officers themselves, increasingly appears to function like an authoritarian police state and why many Americans, especially Americans of color and other minority groups, increasingly find the legal system unfair, unjust, and oppressive. I hope my report of my experience will help readers to identify why this is so as well as to define what differentiates an authoritarian police state from a polity governed by the rule of law.

In this article, I plan to describe the conduct I observed in detail and leave it to readers to agree or disagree with my judgment about its improper and authoritarian quality, as well as to speculate as to why the conduct occurred. I bear no malice toward any of the individuals involved; indeed, I owe them a debt of gratitude for providing me with data about what I believe to be serious flaws in the system of law enforcement. Accordingly, I will do my best to leave individuals unidentified and will not offer my conclusions why each of them acted as they did. But I do have hypotheses about why they so acted. I will offer those hypotheses now so readers can keep them in mind as they read my narrative of the facts.

My first hypothesis is that the actors I observed are not as skillful as one ideally might want them to be. More importantly, the institutional structures in which they function do not enable them to pool their skills and work together toward reaching sound results. Legal practice, if it is

to be performed well, requires joint analysis and discussion, and it is unclear whether the individuals considering my case had anyone with whom to talk, think, and strategize. My hypothesis is that typically they were acting alone. As a result, I am not sure how well they understood the legal claims and issues I was presenting to them.

The second hypothesis is that the actors I observed are overworked and burned out. They are burdened with a tremendous workload, they worked hard to obtain the offices they now hold, and most are in the final years of their careers. My hypothesis is that they have no further ambition except to close the office and go home at 5 p.m.

The third hypothesis is that the actors I observed are enthralled by the power they hold and understand that it needs to be used to control lawbreakers who threaten, if they are not controlled, to undermine the stability of society. They do not see the defendants who appear before them as equal citizens entitled to fair treatment and respect. Under this hypothesis, there is no tolerance for disagreement, for difference of opinion, or for the possibility that the actions of those in power might be mistaken and that the opinions of those they coerce might be right; there is no possibility of compromise, of discussion, of pluralism -- of live and let live.

My fourth hypothesis is that the actors I observed have a different conception than I have of the institution in which they work and of their role as officials of that institution. I want to understand them as judges and public servants. I want to understand judges as neutral arbiters bound by law and charged with making impartial judgments about the facts, arguments, and issues presented to them, and other government officials as officers of the law striving to achieve justice and the public good. My hypothesis is that they see themselves as cogs in a bureaucracy charged with raising as much revenue for state and local government as possible at the lowest possible cost and with the least possible expenditure of bureaucratic energy. Their job, under this hypothesis, is simply to raise ever-increasing revenue so that their political bosses have sufficient funds to support government and to continue to claim that they did not raise taxes.

My third and fourth hypotheses arguably combine into a fifth and final one. This final hypothesis is that the structure of local government, together with the general structure of American politics, favors insiders and discriminates against outsiders. Local governments are controlled by local residents, legislate in the interest of those residents, and ignore

the concerns of outsiders, who cannot even participate in local governmental processes. At the national level as well as local levels, people of color and other minorities do not participate in politics and, at times, are prevented from participating at the same level of engagement at which insiders participate. According to this hypothesis, the judges and other officials who administer and enforce the law, who are chosen through the political process and responsible to controlling political forces, simply cannot be the sort of impartial arbiters striving for the public good that I imagine them to be. They must do the bidding of the political forces that made skewed law and granted them offices to enforce it.

## II. THE UNDERLYING SUBSTANTIVE ISSUES

### A. The Basic Facts

I received my summons for a stop-sign violation in Cedarhurst, Nassau County, New York, a small municipality, less than one square mile in size with a population according to the 2010 census of 6,592.<sup>3</sup> It has fewer than 150 intersections and either a traffic light or at least one stop sign at over 130 of those intersections. Approximately 45 intersections have all-way stop signs that require drivers who approach the intersection from any direction to stop. I received the summons at one of the many all-way stop-sign intersections. The usual penalty if a defendant pleads guilty to a stop-sign violation is a fine of \$233 plus three points on his or her license;<sup>4</sup> if a motorist receives an excessive number of points over a period specified by statute, his or her license is suspended.<sup>5</sup> Points can also result in an increase in insurance premiums.<sup>6</sup>

A motorist who pleads not guilty, however, is directed to attend a plea bargaining conference with an official from the Nassau County Traffic and Parking Violations Agency. Hundreds of ticketed motorists

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<sup>3</sup> *Census 2010 Total Population Cedarhurst Village, New York*, THE UNITED STATES CENSUS BUREAU, [http://factfinder.census.gov/faces/nav/jsf/pages/community\\_facts.xhtml](http://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml) (last visited Sept. 28, 2016).

<sup>4</sup> *Fine Assessment*, NASSAU COUNTY LONG ISLAND, NEW YORK, <https://www.nassaucountyny.gov/1939/Fine-Assessment> (last visited Sept. 28, 2016).

<sup>5</sup> *About the NYS Driver Point System*, NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, <https://dmv.ny.gov/tickets/about-nys-driver-point-system> (last visited Sept. 28, 2016).

<sup>6</sup> *How Driving Record Points Affect Car Insurance Rates*, DMV.ORG <http://www.dmv.org/insurance/how-driving-record-points-affect-auto-insurance-rates.php> (last visited Sept. 27, 2016).

and over ten agency officials are in the conference room at each session. There is no bargaining and no conferring. One of the officials on duty simply offers to reduce each charge to a lesser violation, in my case jay-walking with a \$180 fine and no points in return for a plea of guilty.<sup>7</sup> It is a generous deal for motorists, who avoid potential license suspensions and increases in insurance premiums. The government also gets most of its money. A standard Pareto-improvement. But one has to wonder how effective the deal is in accomplishing the safety goal of the point-system established by the legislature -- namely, getting drivers who persistently violate traffic regulations off the road.

My conference occurred on May 27, 2015. It was the first occasion on which I had appeared at any official location or had any contact with any judicial or agency official. I rejected the proffered deal and stated that I wanted my summons dismissed. The official, without any discussion, told me to file a motion to dismiss promptly. In fact, the New York Criminal Procedure Law requires that motions to dismiss be filed within 45 days of arraignment.<sup>8</sup> I filed my motion on June 16, 22 days after my initial appearance -- what I understood to be my arraignment. I offered three grounds in support of the motion.

### **B. The Minor Issues**

The first ground grew out of a FOIA request I submitted to the Village of Cedarhurst, the municipality in which I was ticketed. I asked the municipality to produce copies of any records in its possession, including records of Village Board meetings and traffic engineer reports, in connection with the placement of stop signs at the intersection in question. The municipality's clerk responded that the "record of which this agency is legal custodian cannot be found." An old decision of the New York Court of Appeals, *Lee v. City Brewing Corp.*,<sup>9</sup> holds that, in the absence of a municipal ordinance authorizing the placement of stop signs, there is "no evidence . . . that failure to stop, if there was any such failure, was in violation of any ordinance."<sup>10</sup> The court continued that, "since no ordinance was proven nor did it appear by what authority the

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<sup>7</sup> These statements in the text are based on personal observation.

<sup>8</sup> N.Y. CRIM. PROC. LAW § 255.20 (McKinney 2016).

<sup>9</sup> 18 N.E.2d 628 (N. Y. 1939).

<sup>10</sup> *Lee*, 18 N.E.2d at 631; *Accord*, *People v. Fenton*, 259 N.Y.S. 913, 917 (Cnty. Ct. 1932); *People v. Yerman*, 246 N.Y.S. 665 (Cnty. Ct. 1930) *cf.* *People v. Guthrie*, 30 N.E.3d 880, 883 (N.Y. 2015) (stating that there was no prosecution permitted for passing parking field stop sign that is not properly registered).

sign was erected,” no basis existed for finding that the defendant had violated the law.<sup>11</sup> In my case, *Lee* would mean that, because I had violated no law, the prosecution would have to be dismissed.

The third ground of my motion grew out of the deposition I requested when I returned my summons with a plea of not guilty. New York law requires a police officer to provide a supporting deposition if a defendant requests one, and I requested one.<sup>12</sup> Such a supporting deposition must contain “factual allegations of an evidentiary character which support or tend to support the charge or charges asserted in the simplified traffic information,”<sup>13</sup> and which are sufficient to “apprise the defendant of the specific acts and occurrences which constitute the offense in his particular case.”<sup>14</sup> “A supporting deposition is, therefore, often vital to a defendant in order to prevent surprise at the time of trial and to enable him to prepare his defense.”<sup>15</sup> A supporting deposition also “should distinguish the charge against the defendant sufficiently so that no subsequent charge will be made for the same offense.”<sup>16</sup> “Otherwise, . . . a defendant’s due process rights might be violated.”<sup>17</sup> A Uniform Traffic Ticket does not serve either purpose because it is “invariably a bare statement of the offense charged.”<sup>18</sup>

In my case, the traffic ticket charged me as follows:<sup>19</sup>

THE PERSON DESCRIBED ABOVE IS CHARGED  
AS FOLLOWS

Time	Date of Offense	In Violation of
1:46 p.m.	02/21/15	NYS V and T Law
Description of Violation		
Fld to Stop @ Stop Sign		
Place of Occurrence		
Washington Ave/Summit Ave		
C/T/V Name	County	
Cedarhurst	Nassau	

<sup>11</sup> *Lee*, 18 N.E.2d at 631-32.

<sup>12</sup> N.Y. CRIM. PROC. LAW § 100.25 (McKinney 1996).

<sup>13</sup> *People v. Born*, 634 N.Y.S.2d 915, 916 (Just. Ct. 1995).

<sup>14</sup> *People v. Hust*, 346 N.Y.S.2d 303 (Broome Cnty. Ct. 1973).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

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

<sup>18</sup> *Id.*

<sup>19</sup> Traffic Ticket (on file with author).

The ticket then gave some coded information and directions about how to plead.

The deposition<sup>20</sup> I received was a printed form, with blank spaces for the police officer to fill in. I reproduce the relevant parts here, with the material in the blank spaces underlined. The deposition stated that the individual who signed it was

a police officer and the complainant in the captioned proceeding, and I further allege on my personal knowledge and observation the following facts that provide reasonable cause to believe that the defendant committed the offence(s) charged.

The traffic violation was committed by the defendant on the 21st day of February, 2015 at 1:46 p.m. at the location of Washington Ave/Summit Ave. in the village of Cedarhurst Nassau County, New York did violate 1172A of the VTL State of New York

To Wit: I did observe the above defendant William Nelson operating a 2014 Honda NY registration DJF4792 on a public highway, violating the below statute:

FO1000CQG8 - 1172A - failed to stop at a stop sign.

I argued that the deposition contained no factual allegations of an evidentiary character and added nothing to the bare statement of the offense charged in the Traffic Ticket.

In particular, I argued that the deposition did not identify which of the four stop signs at the intersection of Washington Ave. and Summit Ave. I allegedly failed to stop at. Presumably, I was being charged in the alternative with failing to stop at one or another or another or another of the four; not with failing to stop at all four at the same time. According to *People v. Quentin*:<sup>21</sup>

Obviously it is improper to charge alternatives in an information. A defendant may not be accused of having done one thing or another. Therefore . . . one or

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<sup>20</sup> Deposition (on file with author)

<sup>21</sup> *People v. Quentin*, 296 N.Y.S.2d 443 (N.Y. Dist. Ct. 1968).



the other should be pled, not both, unless the defendant is accused of doing both prohibited acts, in which case ‘and’ . . . should be used.<sup>22</sup>

I then noted that rules requiring proper allegation of facts in a criminal information, such as the one in the *Quentin* case, also apply to traffic tickets and supporting depositions.<sup>23</sup> Thus, it was improper to charge me in the alternative and not to identify at which one of the four stop signs at the intersection of Washington Avenue and Summit Avenue I had allegedly failed to stop.

I concluded that a deposition that discloses no evidentiary facts whatsoever and merely reiterates the allegations made in the Uniform Traffic Ticket is the equivalent of no deposition at all. A prosecution must be dismissed for lack of jurisdiction when no deposition is provided in a timely fashion,<sup>24</sup> and should also be dismissed when a deposition is a bare form disclosing only what has already been contained in the traffic ticket. I cited several cases.<sup>25</sup>

If my motion to dismiss had been granted on either of these grounds, the case would not have made significant new law. If those grounds had been the only issues present, I probably would have accepted the \$180 deal and pleaded guilty to jay-walking. As I would painfully learn, it simply is not worth the trouble of litigating on unimportant issues on which the government is clearly wrong. It is easier simply to pay tribute.

### C. The Major Environmental Issue

But my case involved an important issue. I expected to lose on the issue, but I thought the issue important enough to be worth litigating in order to raise awareness and eventually bring it to public attention. The importance of the issue is one reason for writing this essay. The other, more important reason is what the bureaucracy’s reaction to my raising questions about an important issue reveals about the increasingly authoritarian nature of the American state.

The issue I sought to raise is both an economic and an environmental one. Starting up a car after stopping at a stop sign hugely

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<sup>22</sup> *Id.* at 447.

<sup>23</sup> *See* *People v. Kramer*, 285 N.Y.S.2d 763, 765 (Ct. Spec. Sess. 1967).

<sup>24</sup> *People v. Nuccio*, 575 N.E.2d 111, 112 (N.Y. 1991).

<sup>25</sup> *See* *People v. Zappula*, 970 N.Y.S.2d 440 (Muttontown J. Ct. 2013); *People v. Brady*, 768 N.Y.S.2d 157 (N.Y. Dist. Ct. 2003); *Born*, 634 N.Y.S.2d 915; *Hust*, 346 N.Y.S.2d 303.

increases fuel consumption. My 2014 Honda tells me how many miles per gallon I am getting from my gasoline as I drive. So, I decided to conduct an experiment.

Many streets in Cedarhurst have stop signs at every intersection, Washington Avenue being one of them. I started up at one .4 mile section of Washington Avenue, made a complete stop at three intersections with stop signs, attained a maximum speed of 30 mph., and had mileage of 12.1 miles per gallon. I conducted the same experiment on a similar road with no stop signs, and had mileage of 25.9 miles per gallon. In short, the presence of stop signs on Washington Avenue more than doubled my consumption of gasoline. At \$40 per tank, it is worth getting caught every few months and paying the \$180 tribute demanded by the police state.

But this is only the beginning. I am not alone in needing twice as much gasoline to traverse Washington Avenue. Everyone else also needs to double their consumption. Without the proliferation of stop signs in Cedarhurst and numerous other municipalities,<sup>26</sup> motorists would use somewhat less gasoline, the demand for gasoline would decline, and so would the price. More important, carbon emissions might decline, and global warming might slow. I do not know how great the impact on gasoline prices and global warming would be if all stop signs in the United States not needed for safety were removed, and I do not know how often other municipalities copy the Cedarhurst practice of putting signs at ninety percent of intersections. But the practice is not unusual. What I do know is that the practice must not be permitted to expand and, indeed, it must be rolled back.

Federal law and policy support my concern that gasoline must be conserved and carbon emissions reduced. In 1975, Congress enacted the Energy Policy and Conservation Act,<sup>27</sup> recently amended by the Energy Independence and Security Act of 2007.<sup>28</sup> Congress's goal, as stated in the preamble to the 2007 act, is "[t]o move the United States toward greater energy independence and security . . . [and] to protect consumers."<sup>29</sup> Congress aimed to achieve that goal through "a major

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<sup>26</sup> William E. Geist, *Trying to Put the Brakes on Stop Signs*, N.Y. TIMES (Feb. 15, 1981), <http://www.nytimes.com/1981/02/15/weekinreview/trying-to-put-the-brakes-on-stop-signs.html>.

<sup>27</sup> Energy Policy and Conservation Act, 42 U.S.C. § 6201 (1975).

<sup>28</sup> Energy Independence and Security Act of 2007, 42 U.S.C. § 17001 (2007).

<sup>29</sup> *Id.*

program to bring about improved motor vehicle fuel efficiency.”<sup>30</sup> At the time of the writing of this article, the United States, at a summit in Paris, had signed an international agreement to reduce carbon emissions and global warming, which would have obtained legal force through executive orders and the enactment of federal regulations.<sup>31</sup>

Federal law is the supreme law of the land and often preempts state law,<sup>32</sup> even if, as is true with the 1975 act, Congress has not specifically legislated preemption.<sup>33</sup> The controlling case is *Geier v. American Honda Motor Co.*,<sup>34</sup> where the Supreme Court repeated the basic test that applies when Congress has not explicitly provided for preemption.<sup>35</sup> The *Geier* test calls for “pre-empting state law that ‘under the circumstances of th[e] particular case . . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”<sup>36</sup> The general issue I sought to present by pleading not guilty was whether and to what extent federal law regulating energy markets and protecting the environment preempts state law controlling the flow of traffic when that state law obstructs the attainment of Congress’s regulatory and environmental ends.

It is not a simple issue. Municipalities need power to place stop signs at intersections where a high risk of collision exists if a vehicle enters an intersection without stopping and observing that it is safe to cross. “The purpose of a ‘Stop’ sign,” according to New York’s Appellate Division, “is to require a vehicle approaching an intersection to stop at the corner . . . where visibility is adequate to assure safety in undertaking the crossing.”<sup>37</sup>

Many stop signs, however, are installed for reasons other than safety. Of the more than 140 intersections in Cedarhurst, only thirteen do not have either a traffic light, of which there are fewer than 25, or at least one stop sign.<sup>38</sup> How did Cedarhurst manage to obtain so many

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<sup>30</sup> *General Motors Corp. v. National Highway Traffic Safety Admin.*, 898 F.2d 165, 167 (D.C. Cir. 1990).

<sup>31</sup> Coral Davenport, *Nations Approve Landmark Climate Accord in Paris*, N.Y. TIMES (Dec. 15, 2015), [http://www.nytimes.com/2015/12/13/world/europe/climate-change-accord-paris.html?\\_r=0](http://www.nytimes.com/2015/12/13/world/europe/climate-change-accord-paris.html?_r=0).

<sup>32</sup> *See McCulloch v. State of Maryland*, 17 U.S. 316, 326-27, 360-61 (1819).

<sup>33</sup> *Id.* at 328, 330, 344, 353, 356-57, 360-61.

<sup>34</sup> 529 U.S. 861, 867 (2000).

<sup>35</sup> *Id.* at 867.

<sup>36</sup> *Id.* at 861.

<sup>37</sup> *McLean v. McKinley*, N.Y.S.2d 154, 156 (App. Div. 1st Dep’t 1953), *rev’d on other grounds*, 120 N.E.2d 842 (N.Y. 1954).

<sup>38</sup> N.Y. COMP. CODES R. & REGS. tit. 15, § 2328.68 (McKinney 2016).

stop signs -- at least one on nearly every corner -- that often appear to have no safety function?

The Village Administrator explained it. Past practice in Cedarhurst was that, when a resident requested the installation of stop signs at an intersection near his or her home, the Village Board, after giving due notice to the residents of Cedarhurst, would hold a public hearing.<sup>39</sup> If most of the residents present at the hearing supported the installation of a sign or signs, out of a feeling, which was typically unsupported by evidence from an engineering study, that their street corner would be safer, the Village would make the installation.<sup>40</sup> The

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<sup>39</sup> Interview with Salvatore Evola, Cedarhurst Village Administrator, in Cedarhurst, N.Y. (2016).

<sup>40</sup> In the Town of Hempstead, which like Cedarhurst is a municipality in Nassau County, the process for the installation of stop signs, in essence, is the same. It typically begins with a written request by a local resident for signs, followed by a public hearing and then by a vote of the town board to install the signs. But there is one additional step. Before the public hearing, the town's Department of General Services conducts a traffic survey. Unfortunately, the department ignores the *Manual on Uniform Traffic Control Devices* ("MUTCD"), as is apparent in connection with the installation of several new stop signs during the past year in the Cedarhurst vicinity. *Manual on Uniform Traffic Control Devices (MUTCD)*, U.S. DEP'T OF TRANSP. FEDERAL HIGHWAY ADMIN., <http://mutcd.fhwa.dot.gov> (last modified July 1, 2016).

One new installation occurred two blocks northeast of Cedarhurst on Central Ave., a main thoroughfare and bus route, where a person who remains anonymous requested all-way stop signs at the intersection with Linden St. The department wrote:

As a result, surveys conducted various days at various times of the day found the request for additional stop signs warranted. There is a "school" located on the corner of Linden St. and Central Ave. Also, there is a lot of pick-up and drop-off activity at different times of the day where there are high volumes of traffic using this street as a cut-through with few stops. High approach speeds were also observed. The additional stop signs at this location will enhance public safety for motorists and pedestrians as well.

The above recommendation is vague and inconsistent with the guidelines of the *MUTCD*. No school is visible on the corner of Linden St. and Central Ave.; only single-family houses can be seen. Perhaps a child is being home-schooled? But is that a reason to install a stop sign for the next 30 or more years? Traffic volumes are high, but are they consistently high enough to meet *MUTCD* standards? Speeds are also high, but the *MUTCD* explicitly states that stop signs should not be used to control speed. *Manual on Uniform Traffic Control Devices (MUTCD)*, U.S. DEP'T OF TRANSP. FEDERAL HIGHWAY ADMIN., <http://mutcd.fhwa.dot.gov> (last modified July 1, 2016).

A second set of all-way stop signs was anonymously requested at the intersection of Sturl Ave. and Harris Ave., about a mile distant from Cedarhurst. All the traffic survey recommendation said is that, "after numerous traffic surveys, this department recommends additional stop controls at this location for public safety. The area in question has many children and is used as a cut-through from Peninsula Blvd. to Broadway in Hewlett." There is no mention of any of the *MUTCD* guidelines.

A third set of all-way stop signs was anonymously requested at the intersection of East Broadway and Ocean Ave. in Woodmere, which is midway between Cedarhurst and

process was a highly democratic one, in which the people of the polity decided what they wanted and the polity obeyed. Expertise played no role.

But note the one-sided nature of this democratic process. It respected the sentiments of local residents who received notice of and attended the hearing, but it gave no weight to the costs, economic and environmental, that stop signs imposed on outsiders, who did not even have notice that a law detrimental to their interests was being adopted. Drivers along Cedarhurst's streets from outside the village later found their gasoline mileage cut in half and occasionally got ticketed and fined when they failed to stop at signs. Those drivers were thus subjected to real monetary costs. But they had neither a forum in which to oppose the law nor notice that the law was under consideration; they were simply excluded from the democratic process.

Similarly excluded were people like the Inuit of Alaska and the residents of Battery Park City in lower Manhattan. Global warming -- arguably a product of increased carbon emissions produced by policies like Cedarhurst's proliferation of stop signs -- has led to the flooding of their communities.<sup>41</sup> The environment inevitably suffers when people

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Hewlett. According to the Department of General Services, "several surveys conducted various days at various times of each day found the request for additional stop signs warranted in that road geometry and high volumes of traffic during the day may create sight distance issues for motorists egressing onto East Broadway from Ocean Ave." There was already a stop sign warning motorists on Ocean Ave. not to egress onto East Broadway, which is a straight road for a considerable distance, without first stopping and checking that it was safe to egress. Apparently, additional signs were needed on East Broadway to make it more convenient for drivers on Ocean Ave. to egress. But the *MUTCD* contains no guideline in reference to such convenience, and convenience seems entitled to little weight in comparison with the reasons of the federal government for conserving gasoline.

A final set of signs was placed approximately one-half mile northeast of Ocean Ave., where East Broadway makes a sixty degree turn to the left and becomes Franklin Ave. No other streets intersect with the single roadway at the point of the bend. Some anonymous person, however, contacted this office prior to case being assigned to the writer for a stop sign installation at the intersection of East Broadway and Franklin Ave. in Hewlett. As a result, it is the opinion of this department that stop signs are warranted for "public safety." This is a highly trafficked roadway with limited sight distance and it was also observed that this was not a curve in the roadway but a turn where stop controls should be placed. Again, one wonders what happened to the *MUTCD*.

<sup>41</sup> Laurel Andrews & Jerzy Shedlock, *Flooding Continues in Galena, Alaska*, ALASKA DISPATCH (May 30, 2013), <http://www.rcinet.ca/eye-on-the-arctic/2013/05/30/flooding-continues-in-galena-alaska/>; Joe Weisenthal, *Several Inches Of Flooding Already On Battery Park Boardwalk In Manhattan*, BUSINESS INSIDER (Oct. 28, 2012 9:43AM), <http://www.businessinsider.com/hurricane-sandy-flooding-battery-park-in-manhattan-2012-10>; Joe Weisenthal, *Stunning Images of Manhattan Underwater*, BUSINESS INSIDER (Oct. 29, 2012, 7:40 PM), <http://www.businessinsider.com/battery-park-flooding-2012-10>; See also *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1189-

like the residents of Cedarhurst adopt short-sighted policies that appear to bring them immediate advantages without taking into account long-term environmental consequences to others. Local democratic processes rarely provide effective mechanisms for weighing the externalities that local decisions will impose on the environment at large.

Finally, political processes such as Cedarhurst's have disturbing distributional consequences. Cedarhurst is a relatively wealthy community. According to the 2010 census, its residents have a median household income of \$87,353 compared to \$51,144 for the nation and \$55,712 for New York state as a whole.<sup>42</sup> Nonresidents driving through Cedarhurst must spend extra money on gasoline or get ticketed for passing stop signs so as to improve the comfort level and perhaps the property values of Cedarhurst residents, who believe that stop signs at nearly every intersection make their streets safer. This constitutes a disturbingly regressive redistribution of wealth and well-being from poorer to richer people.

Given that the poor are disproportionately people of color, Cedarhurst's proliferation of stop signs also has troubling racial consequences. Cedarhurst's residents, according to the census, are 87.8 percent white, and only 2.2 percent African American, 3.6 percent Asian American, and 1.8 percent Latino from Mexico, Puerto Rico, or Cuba;<sup>43</sup> the nonresidents who drive through Cedarhurst, to the extent they reflect national averages, are significantly less likely to be white and more likely to be people of color.<sup>44</sup> This means that wealth and well-being are being redistributed from people of color to white people. This redistribution does not occur because the people of Cedarhurst are racist; nearly all of them, I believe, are not. But one need not be a racist to harm racial minorities. Often, the only step that white people need to take is to pursue their own self-interest in a political process like that of Cedarhurst from which minorities, because they are in this instance nonresidents, are excluded. Minorities will thereby be abused not by racist whites but by an arguably racist system. And, they will be angered.

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91 (9th Cir. 2008) (giving citations to further sources discussing the causes of global warming).

<sup>42</sup> *Quick Facts*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/3613233> (last visited Sept. 29, 2016).

<sup>43</sup> *Community Facts*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> (search "Cedarhurst Village, N.Y." and then select "Race and Hispanic or Latino Origin" from the "2010 Census" menu) (last visited Sept. 27, 2016).

<sup>44</sup> *Quick Facts*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/3613233> (last visited Sept. 29, 2016).

Because there are good reasons why local sentiment should not always govern the placement of stop signs, I needed to know whether such sentiment had governed the placement of the signs at the intersection of Washington Ave. and Summit Ave. It was for that reason that I asked the Village of Cedarhurst for records concerning the placement of the signs at that intersection. I needed to identify what genuine safety concerns, if any, had justified the village's action. When the village failed to locate any records and thereby identify any safety concerns, I turned to another source so as to speculate on whether possible legitimate concerns might exist.

In its *Manual on Uniform Traffic Control Devices* (2009 ed.), which the website posting the manual declares that "States must adopt . . . as their legal State standard for traffic control devices. . . ."<sup>45</sup> the Federal Highway Administration has adopted guidelines that define what constitutes a dangerous intersection in need of control by a stop sign.<sup>46</sup> The federal guidelines are detailed and complex. In essence, they prohibit the use of any stop signs unless an engineering study shows that the combined vehicular, bicycle, and pedestrian volume entering an intersection from all approaches averages more than 2,000 units per day.<sup>47</sup> They prohibit the use of all-way stop signs, which is what exists at the intersection of Washington Ave. and Summit Ave., unless an engineering study shows that the vehicular volume on the more major street averages 300 vehicles per hour during any 8 hours of an average day and the combined vehicular, bicycle, and pedestrian volume on the lesser street averages 200 units per hour during the same 8 hours.<sup>48</sup> They further provide that "[s]top signs should not be used for speed control," and that stop signs should not be installed on the higher volume roadway of an intersection unless justified by an engineering study.<sup>49</sup> These federal guidelines, of course, are not fixed rules, but merely guidelines that may be disregarded if an engineering study, or perhaps some other

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<sup>45</sup> *Manual on Uniform Traffic Control Devices (MUTCD)*, U.S. DEP'T OF TRANSP. FEDERAL HIGHWAY ADMIN., <http://mutcd.fhwa.dot.gov> (last modified July 1, 2016).

<sup>46</sup> *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>.

<sup>47</sup> *Id.* at 50.

<sup>48</sup> *Id.* at 52.

<sup>49</sup> *Id.* at 50.

body of evidence, identifies a reason, such an obstacle to visibility, for not following them.<sup>50</sup>

Exactly how binding, however, are the guidelines? Can a stop sign be enforced if there was no engineering study, or indeed, no evidence whatever of a safety need, supporting its installation? Does it matter whether a municipality installs numerous signs with no safety justification, or only a few -- whether it routinely ignores federal law or does so only occasionally without making a proper record? If a municipality fails to install signs at an intersection where federal guidelines authorize them and a motorist, as a result, is involved in a collision and suffers serious losses, is the municipality liable in damages if the motorist who struck the injured motorist is judgment proof? Who is liable for what if two motorists both fail to stop at all-way signs that are not authorized under the federal guidelines, and a fender-bender results? Other similar issues might be framed.

These issues might seem theoretical and academic, but as a result of the 2007 case of *Byrne v. City of New York*,<sup>51</sup> they are not. In *Byrne* a motorist who was injured in a collision at an intersection on Staten Island sued New York City for negligence because it had failed to place a stop sign at the intersection.<sup>52</sup> Relying on the *Manual on Uniform Traffic Control Devices*, the city's defense was that it was not negligent because under the federal guidelines there was not enough traffic at the intersection in question to justify placing a stop sign there.<sup>53</sup> The court upheld the city's defense and ruled that the city was not negligent.<sup>54</sup>

Thus, issues about the relationship between federal guidelines and state and municipal regulatory power are very much alive. It seems clear under *Byrne* that federal guidelines have some sort of binding legal force in New York. The exact nature of that force is an important issue that one would think lawyers and judges would perceive a need to resolve. Wouldn't it be better to resolve the issue in a low-stakes case like mine rather than a major accident case in which a municipality potentially faced a large dollar verdict?

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<sup>50</sup> U.S. DEP'T OF TRANSP. & HIGHWAY ADMIN. *Manual on Uniform Traffic Control Devices (MUTCD) Knowledge Overview*, <http://mutcd.fhwa.dot.gov/> (last modified July 28, 2015).

<sup>51</sup> *Byrne v. City of N.Y.*, 851 N.Y.S.2d 56 (Sup. Ct. Richmond Co. 2007). *Cf. Ophir v. City of Boston*, 647 F. Supp. 2d 86 (D. Mass. 2009).

<sup>52</sup> *Byrne*, 851 N.Y.S.2d at 56.

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

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



### III. THE BEHAVIOR OF PROSECUTORS AND JUDGES

Accordingly, I expected the prosecutor in the Parking and Traffic Agency to file a response to my motion to dismiss, addressing the significant issues I had presented. I assumed that, because I was required to file a copy of my motion with the prosecutor, he or she would serve a copy of any response on me. Why else did the prosecutor need a copy of my motion to dismiss? Doesn't due process prohibit *ex parte* interactions between the prosecutor and the judge?<sup>55</sup> Doesn't due process give me, at the very least, a right to notice of those interactions?

I received nothing from the prosecutor. Instead, some six weeks after I had filed my motion, I received a ruling from the court, possibly on a motion of the prosecutor or at least with the knowledge and consent of the prosecutor, given without any notice to me. The entire order follows:

I have reviewed the papers submitted in support of this motion.

Defendant's motion for an order dismissing the Simplified Traffic Information(s) herein is DENIED.

Defendant's motion is untimely.

[Judge's Signature]

I was now confused. After doing further research, I learned that the Traffic and Parking Violations Agency takes the position that arraignment occurs, not at the time of a defendant's first appearance before the agency, but when a defendant returns a not guilty plea and requests a supporting deposition.<sup>56</sup> By that standard, my motion to dismiss was untimely. Of course, the Uniform Traffic Ticket contains no notice that the time of arraignment will be moved forward by several months if a defendant requests a deposition.

I was also confused about a deeper issue. What was the significance of the words, "Defendant's motion is untimely"? Had the

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<sup>55</sup> See 22 N.Y.C.R.R. § 100.3(B)(6) (McKinney 2016); *Haller v. Robbins*, 409 F.2d 857 (1st Cir. 1969).

<sup>56</sup> See *People v. Sirkin*, 553 N.Y.S.2d 593 (Arcadia J. Ct. 1990), *adopted in Nassau County*, *People v. Rose*, 794 N.Y.S.2d 630 (Dist. Ct. 2005). Both cases, especially *Rose*, involved lengthy delays by defendants, and both courts carefully analyzed the facts to explain why, as a matter of fairness, a request for a deposition should be deemed an arraignment under the facts. The Traffic agency, however, has adopted the practice of treating a request for a deposition as a fixed, unalterable, black-letter rule without any announcement; only attorneys who regularly practice before the agency can possibly know that it is a rule.

judge denied my motion because it was untimely, or had he denied it on the merits and noted, in addition, that it was untimely? Or had he denied it on both grounds? If he had denied the motion only because it was untimely, I could still present at trial the legal claims raised in the motion. Of course, I would need to call witnesses to build an evidentiary record in support of my claims, at considerable inconvenience to me, the witnesses and the trial court. But, if the judge had denied the motion on the merits, I would be precluded at trial from relitigating issues already decided, although I would be able to appeal to a higher court if the trial judge entered a judgment of conviction.<sup>57</sup>

I decided to seek clarification from the Traffic and Parking Agency. I asked a police officer at the entry to the agency where to go for clarification, stood as he directed for about a half-hour on a long line of people paying fines, and eventually spoke to a man behind the payment window. He politely tried to help, but didn't understand my confusion. He then offered to obtain someone else's help.

About ten minutes later, another man appeared and handed me a business card that identified him as the Hon. [Anonymous], the executive director of the agency. I explained my confusion. He asked me if I was an attorney. I responded that I was a retired attorney. He told me I had two choices and then asked me what those choices were. I didn't have a clue. The Hon. [Anonymous] then informed me I was in a state of bliss. I was even more confused and stood like a deer on a dark highway with headlights shined into its eyes. My bliss, according to the Hon. [Anonymous], resulted from my ignorance, because, as he added, ignorance is bliss. I then responded that he was not being very helpful. From there the conversation went further downhill. I felt increasingly intimidated, and finally I expressed an opinion that the Traffic and Parking Agency seemed more interested in collecting money than in deciding a question of law. To this the Hon. [Anonymous] responded that there would be a trial. I, of course, wanted a trial, but the Hon. [Anonymous] spoke in a fashion I found angry and threatening, not reassuring. He had made it plain that he possessed the power of knowledge and that he was not going to share it.

It was clear I needed help. I asked an attorney I knew to recommend a firm that handles traffic prosecutions, followed his advice, and spoke to a lawyer at the firm. The lawyer gave some useful advice, but when I inquired whether the firm would be willing to represent me,

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<sup>57</sup> *Developments in the Law Res Judicata*, 65 HARVARD L. REV. 818 (1952).

the lawyer indicated the firm could not because it had a good relationship with the Traffic and Parking Agency that enabled it to obtain especially excellent deals on behalf of its clients. Supporting me in my adversarial conflict with the Agency would endanger that relationship. The lawyer also advised me to accept whatever deal the Agency offered since I would get no relief from what the lawyer referred to as a “Kangaroo Court.”

I did not follow that advice. I decided to petition the Agency Court for clarification and reconsideration of its order denying my motion to dismiss. I did not expect reconsideration, but I did think the motion judge would need to clarify his order so that the trial judge would know what he had decided. My petition was brief and to the point:

Defendant respectfully petitions the Court to clarify its order of July 9, 2015 to specify whether it denied the defendant’s motion to dismiss on the merits or solely on the ground of untimeliness. A copy of the order is attached. The most obvious reading of the July 9 order is that the motion was denied because it was untimely. However, the order might also be read as denying the motion on the merits and noting in addition that it was untimely. The meaning of the order will matter when the defendant seeks to introduce the substance of the material contained in the motion to dismiss as defenses at his trial.

Assuming the motion was denied solely on the ground of untimeliness, defendant also petitions the Court to reconsider its denial. Section 255.20 of the Criminal Procedure Law, which is made applicable to local courts by section 170.30, gives a court discretion to consider a motion to dismiss filed after the 45-day period, and good reason exists for so exercising discretion in this case. Defendant could not file his motion in its complete form until after the Village of Cedarhurst responded on June 12 that it could not find any of the FOIA information he had requested; he then filed the motion promptly, only four days thereafter.

More importantly, the interests of justice and efficiency of judicial administration cut in favor of

determination of the issues herein on a motion to dismiss, rather than in the midst of trial. The motion to dismiss raises serious, difficult issues about the power and duties of local municipalities, especially vis-a-vis the national government. They are issues that are not going to disappear. Defendant strove to draft the motion in a form that would enable the Court, subject to the right of both parties to appeal to a higher court, to address the issues on a clear record and with sufficient time to analyze that record. Defendant thought it would be less efficient to present the issues at what would become a lengthy trial where there would be little time to analyze them and from which the prosecution might be barred from appeal.

Accordingly, defendant urges the Court to take his motion to dismiss under consideration and to give an opportunity to the Traffic Prosecutor, as well, perhaps, as the Village Attorney of Cedarhurst, to submit whatever written arguments they may wish to submit in opposition to the motion before the Court decides the motion on the merits.

Again, I submitted my petition in duplicate, one for the court and one for the prosecutor. Again, I never received a response, which due process arguably requires, from the prosecutor. Three weeks later, I received the following from the court:

I have reviewed the documents submitted in support of the motion to reargue and find no grounds upon which to grant the motion.

Defendant's motion for an order permitting a re-argument of the original motion is DENIED.

[Judge's Signature]

Did the judge ever read the one-page Petition for Clarification and Reconsideration, to which no additional documents were attached? Did the judge realize that he had failed to decide half of what was asked of him? Or did he respond to my petition simply by mailing out one of several available preexisting, computerized forms, none of which happen

to be an appropriate response to a petition for clarification? At this point, as I confronted the emerging American police state, I could only conclude that I needed to retain counsel so as to engage in the cut-throat, hardball litigation that I foresaw coming. And I wondered what an African-American, Latino, recent Asian immigrant, or poor white person, who unlike me does not have a law degree, would conclude when confronting the same police state.

I accordingly decided to retain as counsel a former student and experienced lawyer, Peter M. Carrozzo, who does not, however, practice before the Traffic and Parking Agency. That decision, in retrospect, turned out to be one of the wisest I ever made: it saved me from suspension of my driver's license and from possible arrest. But could a poor African-American, Latino, recent Asian immigrant, or poor white who lacked the resources, knowledge, and personal contacts that I possess have made the same decision?

The case next turned into a comedy that in the absence of counsel would have been tragic for any of those people just mentioned who could not have retained an attorney. My attorney filed a notice of appearance and directed that all correspondence be sent to him. The next piece of correspondence set a trial date of December 29, 2015. But it oddly identified not me but New York University School of Law, which I had given to the Traffic and Parking Agency as my business address, as the defendant; it made no reference to me whatsoever. Fortunately, the correspondence was mailed to my attorney. But, if it had been sent to New York University School of Law without my name appearing on it, the law school administration would have had no way of knowing who the correspondence was for. It would have been buried in some circular file. And I, or someone else without an attorney, would have failed to appear for trial, would have been found guilty by default, and would have had my license revoked, and a bench warrant would have been issued for my arrest.

On December 3, my attorney, Peter Carrozzo, duly filed a motion to dismiss for the misnaming of the defendant, but the Traffic and Parking Agency failed to act before the December 29 appearance date. Counsel and I accordingly appeared on December 29 as someone had to do to avoid entry of a default judgment. When we met with an assistant prosecutor, Carrozzo argued that the case should be dismissed because a defendant should be required to make only two appearances and we already were making our second appearance due to prosecutorial error. The assistant prosecutor, however, did not grasp the argument: the

concept that the Traffic and Parking Agency might have some responsibility for its careless mistakes seemed never to have occurred to her. The assistant prosecutor could only state an agency rule that, because a motion to dismiss was pending, the case could not go to trial and would need to be postponed.

Carrozzo then asked if we could obtain clarification of the motion judge's July 9 rejection of the original motion to dismiss. He indicated that clarification would save time for everyone who would be involved in the future trial. The prosecutor was not prepared to discuss this matter, and she directed us to appear before one of the judges who was on duty to finalize the order postponing the case.

While we were waiting to appear before the judge, we overheard conferences between assistant prosecutors and other defendants. It is noteworthy that nearly all the defendants we observed were members of racial or ethnic minorities. One of the most interesting was a young Asian-American man who had received two parking tickets carrying fines over \$200. It was obvious that the young man believed that the issuance of the tickets had been erroneous and unjust. The prosecutor offered a significantly reduced fine but then added that the young man would also need to pay a driver responsibility fee of \$30 -- a euphemism for a tax that everyone appearing before the Traffic and Parking Agency must pay, even if they were in the right and they are found not guilty. The young man had a difficult time understanding why he should pay \$30 for a police officer's error, and, as I looked around the room at the apparently poor members of minority communities waiting to discuss their cases, I wondered what necessities their families would forego as those in court laid out \$30 apiece to pay for police officers' mistakes. And as I focused on the Asian-American ethnicity of the defendant in front of me, I also imagined I had been transported from the United States of America to the Peoples' Republic of China. My imagination, in turn, enabled me to understand more clearly than I had in the past the difference between China, where people know that they must respect power and dare not even question it, and America, where we like to think that power respects law.

Next counsel and I appeared before the judge. Carrozzo argued that the case should be dismissed because we should be required to make only two appearances and we were now, due to prosecutorial error, making our second appearance. He also sought to obtain clarification of the motion judge's July 9 rejection of the original motion to dismiss. The judge on the bench noted that he was not the motion judge, could not

know what the motion judge had meant by his order, and hence could not clarify it. The judge then asked the assistant prosecutor whether I had been offered a reduced plea to a charge of jaywalking, to which the assistant prosecutor responded that the offer had been made and rejected. As the judge was becoming impatient and incredulous about my rejection of the prosecutor's generosity, Carrozzo again tried to explain our argument. The judge quickly interrupted, "Give me a break. Don't waste more of my time and your client's time." I doubt that it ever occurred to the judge that what was being wasted was not my time, but my faith in the rule of law.

The end result was that the case was postponed indefinitely pending disposition of the December 3 motion. For over a month, counsel and I heard nothing. Then, in late February, Carrozzo received a notice dated January 29 scheduling a mid-March trial date; the notice again named New York University School of Law as the defendant and did not mention me at all.

Carrozzo and I immediately prepared yet another motion to dismiss, renewing all prior motions and noting, in particular, the agency rule that a matter could not go to trial while a motion, such as our December 3 motion, was pending. We planned to file the new motion on February 29, but as Carrozzo was preparing the papers for mailing, he received the following document, dated February 17, 2016 and denominated *People against "WILLIAM NELSON, New York University School of Law,"* which I quote in part:

I have reviewed the papers submitted in support of this motion.

Defendant's motion is GRANTED and the above-referenced ticket(s) is/are hereby DISMISSED.

[Judge's Signature]

Our new motion, of course, was never sent.

Although I am pleased with victory, I remain confused and troubled with the manner in which the Nassau County Traffic and Parking Violations Agency dealt with my ticket. One source of trouble is the clerical carelessness and lack of communication within the agency. New York University School of Law should never have been named as defendant; surely, after counsel and I had informed the agency of its error in our December 3 motion and at the December 29 hearing, the Law School should not have been named as defendant a second time. Nonetheless, the January 29 notice of a trial date so named it. Indeed,

given the agency's rule that a trial cannot be held while a motion is pending, the January 29 notice should never have been sent at all. Do the clerks in the office not communicate with each other?

I am even more confused and troubled by the decisions of the judge who decided all three of our motions -- the two motions to dismiss and the petition for clarification. The December 3 motion to dismiss for misnaming New York University School of Law as defendant contained no citations and offered no compelling legal argument. Why did the judge grant the motion? Why didn't he simply direct that the misnomer be corrected, that New York University School of Law be dismissed as a defendant, and that the case proceed against me?

Perhaps, the judge so acted because of the following complication. University counsel decided not to appear in court or to appoint Peter Carozzo to appear on the Law School's behalf, and Carozzo indicated in his affidavit in support of the December 3 motion that he did not represent the Law School. He thus moved to dismiss only on my behalf; no one moved to dismiss on the Law School's behalf. Could the judge have denied Carozzo's motion and still have dismissed the Law School from the case when no motion was made on its behalf? Is the law so formalist in character that it prevented the judge from doing what made sense? Did formalist considerations really require him to dismiss the entire case in order to dismiss the Law School?

Another possibility is that the judge agreed that I and my attorney should not be required to appear more than twice. The general practice of the Nassau County Traffic and Parking Violations Agency is to require no more than two appearances.<sup>58</sup> But I have been unable to locate either legislation or case law requiring that the practice be followed, and none was cited in the December 3 motion.

While I thank the judge for granting the dismissal and am satisfied that his reasons for doing so were valid ones, I remain convinced that there was even more reason to grant my earlier petition for clarification. The judge's order denying my first motion to dismiss was ambiguous, and the ambiguity had to be resolved. The issues raised by the first motion were not going away, and someone ultimately would have been required to decide whether the motion was denied as untimely or the issues therein decided on the merits. I remain puzzled why the judge granted a motion that did not need to be granted -- the motion to

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<sup>58</sup> See *Traffic & Parking Violations Agency*, NASSAUCOUNTYNY.GOV, <https://www.nassaucountyny.gov/1928/Traffic-Parking-Violations-Agency> (last visited Sept. 30, 2016).



dismiss for the misnomer, but denied a request for clarification that some judge ultimately would have had to decide.

Perhaps there was another reason for granting the December 3 motion to dismiss while denying prior ones. Might it be that when the judge saw the motion papers, he remembered the earlier motion and petition and began to see the case in its entirety? Might he have then realized that the substantive issues raised in the first motion would not go away? If so, did he then wonder how it would be possible to avoid deciding them? And didn't the December 3 motion to dismiss for a clerical error then become an easy way of disposing of the case without addressing difficult issues potentially making new law -- law that at least some people would find objectionable?

I think it would be inappropriate for me to try to speak with the motion judge, and thus I can only speculate about his reasons. I do not condemn any of them. Although I find it important to avoid deciding civil litigation on the basis of procedural formalisms, formalism may be appropriate in criminal contexts. Formalism gives defendants important protection against the state when the state comes after them: as leading scholars of New York criminal law once wrote, "justice not dispatched by tested instruments [is] vulnerable," and "proper forms" are the "grand bulwark of . . . freedom & safety."<sup>59</sup> Obviously, I think that, when mistakes on the part of government threaten to inconvenience individuals by, for instance, requiring them to appear extra times in court, the government and not the individuals ought to bear the consequences of the government's mistakes.

The final possible reason for granting the December 3 motion to dismiss is the most problematic of the three. On the one hand, legal process theorists such as Alexander Bickel argue that courts should use procedural devices to avoid deciding difficult substantive issues that can lead to the making or modification of law.<sup>60</sup> These politically salient issues, according to Bickel, should be left to politically responsive officials and institutions – Congresspeople, state and local legislators, and elected executive officials, who will resolve them to the satisfaction of the people.<sup>61</sup> Whatever the motion judge's intentions, what he accomplished by his decision to dismiss the entire case because of the

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<sup>59</sup> JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776)* xxv, 607 (1944).

<sup>60</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-99 (2d ed. 1962).

<sup>61</sup> *Id.*

misnaming of New York University School of Law as a defendant was to leave difficult issues to the political process.

The problem, however, with leaving issues to the political process is that the process may be structured in a fashion that will inescapably produce law that is skewed in favor of insiders and against those unable to participate in the relevant politics. Such is the claim I made about the highly democratic procedures followed by the Village of Cedarhurst in deciding where to install stop signs and about the proliferation of stop signs that has resulted. Doesn't it become necessary, when the structure of the political process inevitably produces bad laws, to rely on courts to rectify the law and keep the institutions of democratic government functioning fairly?

#### IV. CONCLUSION

In conclusion, I need to emphasize my positive experience with police officers. Over the years, I have known many -- as friends, as first responders helping me when I have been victimized by crime, and as adversaries at traffic stops. I have routinely found the police to be polite and professional. Of course, there are rogue cops. There are rogues in every profession. A few officers will kill, will prosecute those they know to be innocent, and will lie. But I have never met such a rogue.

Police officers necessarily exercise vast power.<sup>62</sup> As first responders to crimes that are in progress, they employ superior force, sometimes lethally.<sup>63</sup> They also make initial judgments about who is guilty and who is innocent.<sup>64</sup> If they think a person is innocent, that person is unlikely ever to be prosecuted. If they think a person guilty and set the wheels of the criminal process in motion, that person will suffer grievously, even if ultimately found innocent. As first responders to traffic accidents, the police write reports that often determine the outcome of subsequent tort litigation.<sup>65</sup> Such power on the part of first responders is both necessary and inevitable. Its existence does not create a police state.

In a polity governed by the rule of law, officials from the highest to the lowest are bound by law and by requirements of fair play.

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<sup>62</sup> John P. Gross, *Judge, Jury, and Executioner: The Excessive use of Deadly Force by Police Officers*, 21 TEX J. ON C.L. & C.R. 155, 163 (2016).

<sup>63</sup> *Id.* at 157.

<sup>64</sup> *Id.* at 180.

<sup>65</sup> *Id.* at 167.

Government is able to employ the law to achieve its policy objectives, but it also must obey the law, even when obedience impedes achievement of its objectives. In addition, government must give all societal interest groups a fair opportunity to participate in the lawmaking process. In an authoritarian police state, in contrast, government compels those in its power to obey the laws it enacts to achieve its objectives, but government is bound by no law. 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.

The Nassau County Traffic and Parking Violations Bureau has displayed itself as a paradigmatic example of an emerging American police state in the following seven respects:

First, it refused to obey law initially formulated to assist government when that law impeded achievement of its objectives. In spite of *Byrne*,<sup>66</sup> where a state Supreme Court justice ruled that the city could rely on federal law to avoid the installation of a stop sign and thus to avoid the payment of damages for negligence when the lack of a sign may have contributed to an accident,<sup>67</sup> the Nassau Traffic and Parking Agency has so far avoided addressing the important issue of whether federal law binds municipalities as well as providing them with an excuse in connection with the placement of stop signs.<sup>68</sup> Whether the traffic agency does not see the issue, is too burned out to address it, is so confident of the right answer that it finds no explanation necessary, or sees itself as a collection agency rather than a court, I do not know.

Second, there is my suspicion that the Agency tolerates *ex parte* communications. I was required to submit my papers to opposing counsel as well as to the court. Presumably counsel wanted a copy of my papers so that he or she could act in some fashion in response to the submission, but counsel never revealed his or her action to me or submitted any papers to me. Knowledge is power, and opposing counsel's knowledge of my interactions with the court, without disclosing whether he or she had any interactions, and, if so, what they were, conferred power on government that government did not permit me to share. *Ex parte* communications are inconsistent with due process of law.

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<sup>66</sup> *Byrne*, 851 N.Y.S.2d 56.

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

<sup>68</sup> For a case holding federal standards to be binding, see *People v. Sheridan*, 105 Misc. 2d 317, 320 (Just. Ct. 1980).

Third, there is the black box of judicial decision-making. The motion judge assigned to my case disposed of my initial motion to dismiss by denying it, either on the merits or on the basis of a rule about timeliness that no one without knowledge of the inner workings of the court could have anticipated. I assume the judge knew what he decided, but when I asked him for clarification, he declined to give it. Knowledge is power, and the judge's refusal to let me know what he had decided conferred power on government that government did not permit me to share.

Fourth, there is the law firm of traffic lawyers that I asked to represent me. The legal profession, as I understand it, has a duty to provide representation to defendants so as to give them power in the litigation process as equal as possible to that of the prosecutor. The lawyer's duty is not to cozy up to the prosecutor to help the latter achieve the result -- guilt -- that the prosecutor wants. Of course, a law firm that builds a good relationship with prosecutors does to some extent increase the power of defendants by obtaining better deals than defendants could obtain by themselves. Nonetheless, in doing so, the law firm makes itself part of the police state system.

Fifth, there is the behavior of Hon. [Anonymous] when I came before him to seek advice. He had every right to tell me he could not provide advice. But that is not what he did. Instead, he intimidated me. Perhaps that was not the purpose of his behavior, but it was the result. Any law professor knows that he or she cannot begin an effective Socratic dialogue by asking a student an open-ended question, like what are the two things you can do. One answer is stay in the room; another is to leave. A law professor who asks such a question either has not thought through how to conduct a class, or is trying to intimidate a student by making him or her look stupid -- like a deer on a dark highway with headlights shining in its eyes.

Sixth, there is the clerical carelessness of the staff of the Traffic and Parking Agency. That carelessness imposes costs on others. If I like most defendants had not been represented by counsel, the carelessness would have resulted in suspension of my license and possible jail time. It did cost time. As a tenured professor who attended court during a break in classes, I did not lose salary as a result of having to spend a morning in court. But I suspect that many of the defendants in court with me that morning did lose pay -- money they desperately need to provide necessities for their families.

Seventh, there is the failure of the judges, lawyers, and others who work at the Nassau County Traffic and Parking Violations Agency to listen to the community they are sworn to serve and to appreciate how it views the Agency's behavior. I asked the Agency, which is part of the Nassau County District Court and is staffed by District Court judges, to address a serious legal issue about the interplay of federal law grounded in environmental, economic, and foreign policy concerns, on the one hand, and state law enacted to protect automobile and pedestrian safety, on the other. I presented that issue as clearly in my motion papers as I have tried to present it in this article. But no one at the Traffic and Parking Agency heard what I had to say. Nor do they seem to know what the thousands of people who appear before them, most of whom are members of racial or ethnic minorities, think about the nature of the American state. From conversations I have had with some of those people, they do not see Nassau County as a polity governed by the rule of law. They see it as a police state where men with uniforms, badges, and guns oppress them. I engaged in this litigation -- I have written this essay -- in an effort to change, even if only slowly and marginally, the behavior of the Nassau County Traffic and Parking Violations Agency and other institutions like it so that I and others can see those institutions as agencies of a government of laws, not of power.

Thus the police typically are not the problem. The problem begins with legislatures, which enact laws or fail to enact them, often on behalf of narrow interest groups. Legislatures often ignore limits on their own or the police's power or otherwise put the police in untenable situations. The proliferation of stop signs in my locality is one example. The failure to keep guns out of the hands of dangerous criminals is another. Such legislative behavior obliges police to enforce laws they should not be enforcing and to use excessive force that they should avoid using. The behavior makes the police -- the government entity that citizens see on the ground -- look bad. But it is the legislature that is at fault.

Then there are the lawyers and judges in entities such as the Nassau County Traffic Agency. Collectively, whatever their intentions, the lawyers and judges with whom I dealt in Nassau County have created an institution that has the effect of intimidating those who appear before it and coercing them to pay tribute to government at the lowest possible cost to government in collecting it. It is not a fair adjudicatory body committed to doing justice, but the key cog in an emerging police state that subordinates the people who come into contact with it, grabs money

from them, and helps to keep them in their subordinate place. I have enough power and resources to fight it. But people of color and other minorities do not. No wonder, they feel abused.

Of course, Nassau County may be an aberration, although I doubt it. Assuming Nassau is typical, American society deludes itself in thinking that reforming the police will resolve the crisis that exists in relations between government and minority communities and the poor. The problem is higher up, with legislatures that enact laws promoting the concerns of narrow, special interests and with bureaucratic institutions, largely staffed by judges and lawyers, that enforce those laws through coercion and intimidation.

Ultimately the problem lies with voters, such as the residents of Cedarhurst at the intersection of Washington Ave. and Summit Ave. who want stop signs that will reduce traffic speeds near their houses, who do not appreciate or care about the signs' negative impact on others, and who either are ignorant about or supportive of the coercive, intimidating character of law enforcement agencies. There also is a problem in that the structure of the American polity facilitates special interest legislation and impedes the flow of information about how government functions. Thus, if we really want to avert the emergence of a police state, we need to reform governmental structures, ranging from village boards of trustees and traffic and parking violation agencies to Congress and the federal entities that enforce its will. Above all, we need to better educate citizens to vote for the common, public interest rather than their own self-interest -- to recognize, that is, that we as a community will rise or fall as one and that a few people voting to promote their narrow interests cannot in the long run manipulate everyone else consistently with the maintenance of a democratic polity.

Until voters recognize the need to be part of a larger community that takes all interests equally into account, we will continue to live in the legal world that my proceeding before the Nassau County Traffic and Parking Violations Agency exemplifies. In that world, people like me with knowledge, resources, and connections face no significant costs in resisting the commands of the police state: if we resist long enough, we may win, and we know that, at worst, we can go to court, plead guilty to jaywalking, and pay tribute in an amount lower than what we saved on gasoline by ignoring stop signs. Poor people and people of color, in contrast, must capitulate; paying a fine is much more costly to them than to me, and an effort to resist can lead to disaster, as mine almost did when

the Traffic Agency misnamed the defendant and, but for the presence of my lawyer, would have mismailed the notice of trial.

No wonder poor people and minorities are angry. They see entities like the Nassau County Traffic and Parking Violations Agency transferring their limited wealth and well-being to people like me, who do not need it and, in many instances, do not even know they are obtaining it. Worst of all, they see the system manipulating procedures so that people who attempt to use law to facilitate change, as I did in this proceeding, find themselves banging their heads against an impregnable wall fortifying existing legal and political structures.

Poor people and people of color lost when the prosecution against me was dismissed for some unknown reason. I lost as well. We all did.