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BROWN AND THE IDEA OF PROGRESS IN AMERICAN LEGAL HISTORY: A COMMENT ON WILLIAM NELSON

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One characteristic of the scholarship on *Brown*[1]—wonderful and rich as it is—is that the scholarship often isolates *Brown* and civil rights history from other aspects of American and world history.[2] If we isolate *Brown* from the rest of history, it not only narrows our understanding of those other historiographic questions, it also leaves us unable to fully understand *Brown* itself. One of the important contributions of William Nelson's very rich and provocative article is that he sets *Brown* in a broader context, asking the sort of questions that we can only ask by stepping back from the intricacies of *Brown*.

Nelson's focus is on the role of *Brown* in the history of American legal thought. At the heart of Nelson's story is a vision of history. Nelson equates history with progress. "[M]ost people who look back on the Twentieth Century," he suggests, "tend to think of the Twentieth Century as a time of progress."[3] Because, in this vision, history inevitably moves us toward a better world, if law follows along behind society, then law is inevitably "progressive." In invoking the idea of progress, Nelson taps into a central American narrative. For example, as David Brion Davis has demonstrated, the idea of progress has framed debates about race in American history. Slavery was a form of progress, its proponents argued, and later, abolitionists argued that emancipation would aid human progress.[4] Ideas of progress have informed political movements, from early Twentieth Century "Progressives,"[5] to contemporary, more loosely defined "progressives."

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1. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

2. For criticisms of this tendency, see, for example, BRENDA GAYLE PLUMMER, RISING WIND: BLACK AMERICANS AND U.S. FOREIGN AFFAIRS, 1935–1960 (1996) (arguing that African-American history and United States diplomatic history should not be isolated from each other); Mary L. Dudziak, *Brown as a Cold War Case*, J. AMER. HIST. (forthcoming 2004) (arguing that *Brown*'s Cold War context is an important part of its history).

3. William E. Nelson, Brown v. Board of Education *and the Jurisprudence of Legal Realism*, 43 ST. LOUIS U. L.J. 795, 832 (2004).

4. *See generally* DAVID BRION DAVIS, SLAVERY AND HUMAN PROGRESS (1984).

5. On the Progressive Movement, see MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920 (2003).

For Nelson, "progress" is not a perspective brought to history. Instead, it is an element of history. In his view, society progresses toward a more just future. Law, however, is not inevitably progressive. Nelson's central concern is with the relationship between law and society.[6] He argues that, during the first half of the Twentieth Century, the Supreme Court hewed to a vision of law and society that is characteristic of Justice Benjamin Cardozo's jurisprudence.[7] Law and legal thought did not *direct* society in a particular direction. Rather, the Court worked with the idea of law as following along behind society.[8] Using the metaphor of a train, Nelson sees society as the train, and law as the caboose following behind.[9] The proper role of judges in this conceptualization was to keep the caboose lined up; they could keep law from derailing the societal train.[10]

Nelson argues that *Brown* upset this law/society relationship. After *Brown*, courts came to embrace an idea of judging that Nelson identifies with Ronald Dworkin.[11] Under this approach, law does not follow behind society, but leads the way. Law is an engine, taking society in whatever direction the Dworkinian (or Rhenquistian) engineer wishes to go.[12] Because, for Nelson, society moves in a progressive direction, law remains progressive when fastened carefully behind society. This is why Nelson sees a departure from Cardozo's law-as-a-caboose position as a move away from a more predictably progressive legal method. When law is uncoupled from society's directive force, law is open to an array of progressive and anti-progressive impulses. Law has then lost its inevitably progressive character.[13] The particular irony in this story, of course, is that it is a progressive ruling—*Brown*—that set the stage for this unraveling.

The optimism in Nelson's vision of history is appealing. However, any chance of sustaining that vision surely disintegrated into dust along with the

6. The question of the relationship between law and society has been an important question in legal historiography. For a discussion, see Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

7. Nelson, *supra* note 3, at 804.

8. *See id.* at 799.

9. *Id.*

10. *See id.*

11. *Id*. at 799-800, 803.

12. No matter how creative the engineer, a train must follow pre-set tracks, so perhaps the better metaphor here would be law as a Humvee, a.k.a. "Hummer," barreling across the terrain, unfettered by roadways or sign posts, wreaking environmental damage along the way. *See* MICHAEL GREEN, HUMMER: THE NEXT GENERATION (1995); *The Hummer Network*, *at* www.humvee.net (last visited Dec. 30, 2003); *The Hummerdinger*, *at* www.sierraclubmedia.net (last visited Dec. 30, 2003).

13. *See* Nelson, *supra* note 3, at 799.

World Trade Center towers as a new century uncomfortably began.[14] In the aftermath of September 11, 2001, we are forced to confront the reality that all that is inevitable about history is that we are forever catapulted forward through time. Whether we can perceive history as progressive or not depends on which arbitrary moment on the timeline we look backwards from. And it depends on which pair of eyes we view history through.

We can see this at work in the Twentieth Century and in American jurisprudence and politics at the time of *Brown*. Nelson's necessarily brief history of Twentieth Century jurisprudence is like an express train. We will see the scenery better, however, if we take the local train, making stops in the Cold War years. What we see on the slow train is not a progressive vision of law, and not an inevitably progressive vision of history.[15]

I suggest that we make a stop in 1951. That year, the Court decided *Dennis v. United States*, upholding the conviction of Communist Party members for such crimes as reading Marx and Engels and talking about them.[16] As Nelson describes it, the case followed the Cardozo vision. The Court modified its developing First Amendment jurisprudence to expand government power in the face of a perceived threat, thereby keeping the train firmly on the tracks directed by society through the McCarthy era. Here, Justice Felix Frankfurter plays a particularly interesting role. There was no clear evidence of harm in the *Dennis* case. To keep the train on the tracks, the Court could look outside the record, he argued. The Court could simply take "judicial notice" of the dangers of communism that justified the Court's ruling.[17] Frankfurter did cite to authority; it was to a *New York Times Magazine* essay by George Kennan, the architect of containment.[18]

Kennan provided more than just evidence of the dangers of communism to support the Court's judgment. Kennan provided a window through which members of the Court, President Truman, and American policymakers could

14. *See generally* RICHARD BERNSTEIN ET AL., OUT OF THE BLUE: THE STORY OF SEPTEMBER 11, 2001, FROM JIHAD TO GROUND ZERO (2002); STEPHEN BRILL, AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA (2003); SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT? (Mary L. Dudziak ed., 2003) [hereinafter SEPTEMBER 11 IN HISTORY]; *The September 11 Digital Archive*, *at* http://911digitalarchive.org (last visited Dec. 30, 2003).

15. The legal history of the 1940s and 1950s is well-documented. *See, e.g.*, EDWARD SAMUEL CORWIN, TOTAL WAR AND THE CONSTITUTION (1970); PAUL L. MURPHY, THE CONSTITUTION IN CRISIS TIMES 1918–1969 (1972).

16. Dennis v. United States, 341 U.S. 494 (1951). On the *Dennis* case, see MICHAL R. BELKNAP, COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES (1977).

17. *Dennis*, 341 U.S. at 547 (Frankfurter, J., concurring).

18. *Id.* at 554. Frankfurter quoted from George F. Kennan, *Where Do You Stand on Communism?*, N.Y. TIMES MAGAZINE, May 27, 1951, at 7. On Kennan, see WILSON D. MISCAMBLE, GEORGE F. KENNAN AND THE MAKING OF AMERICAN FOREIGN POLICY, 1947–1950 (1992).

view their world. A window both opens a line of vision and also structures it. The court was in the caboose, after all, not at the front of the train, and Frankfurter was sitting on one side. Looking through the window of Cold War fears, he saw in the American Communist Party a dangerous fifth column that threatened the American way of life.[19] On the other side, the dissenters were Justices Douglas and Black, who looked through a different window. In Douglas's dissent, he saw a different image of the American Communist Party. The Party was not a threat, he argued. Instead, "they are miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful."[20] The threat he saw was not to national security but to liberty and freedom of speech.[21]

From this episode we can see that keeping law on track in the direction society is going requires an act of interpretation. The Court has to "read" what societal needs are. And their perception of society is necessarily structured by the available ideas of their age. They can only view the world through the windows available to them. There is no perfect measure of societal needs available to courts. There are only historically contingent patterns of perception.

There is another lesson to be learned from this stop at the Cold War station, and it relates to Nelson's central idea of history as progress. Nelson says that most people would think of the Twentieth Century as a period of progress. Most people would also think that the McCarthy era was not a heyday for individual rights.[22] When we step back from the vision of inevitable progress, and instead view historical moments and the Court's own jurisprudence, as historically contingent, it helps us to focus on an important and interesting paradox about *Brown*. The 1950s were not the apex of individual rights; they were a time of repression. How does *Brown* fit into that historical context? How did something so good happen during such a bleak era? How could the Court be so repressive of individual rights, and so expansive at the same time? Is *Brown* somehow an anomaly, standing outside of the jurisprudence of the McCarthy era, or can the case be understood as a product of its time? How do we understand *Brown*'s historical contingency?

19. *See Dennis*, 341 U.S. at 547. On Cold War fears and American culture, see STEPHEN J. WHITFIELD, THE CULTURE OF THE COLD WAR (2d ed. 1996) and H.W. BRANDS, THE DEVIL WE KNEW: AMERICANS AND THE COLD WAR (1993).

20. *Dennis*, 341 U.S. at 589 (Douglas, J., dissenting).

21. *See id*. at 590.

22. On the McCarthy Era, see, for example, MICHAL R. BELKNAP, COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES (1978); DAVID CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER (1978); VICTOR S. NAVASKY, NAMING NAMES (Hill & Wang 2003) (1980); ELLEN SHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA (1998).

We do not have to look very hard to find connections between *Brown* and the Cold War. In fact, the connections between *Brown* and the Cold War are so ubiquitous in the primary sources that it would be more difficult to explain them away as irrelevant than to find a place for them in the historical narrative. In the American press, for example, *Brown* was called a "[b]low to Communism."[23] The *Pittsburgh Courier* said that *Brown* would "stun and silence America's Communist traducers behind the Iron Curtain. It will effectively impress upon millions of colored people in Asia and Africa the fact that idealism and social morality can and do prevail in the United States, regardless of race, creed or color."[24] Sharing this concern, the *San Francisco Chronicle* suggested that the ruling's greatest impact was not on the American South, but on South America, Africa and Asia, because it would restore their faith in the justice of American government.[25]

Brown was a major international story. The decision was on the front-page in all daily newspapers in India. Under the headline "A Great Decision," the *Hindustan Times* suggested that "American democracy stands to gain in strength and prestige from the unanimous ruling . . . . The practice of racial segregation in schools . . . has been a long-standing blot on American life and civilization."[26] News coverage like this blanketed the world press.[27]

The U.S. State Department thought that it needed *Brown* in order to safeguard the position of the United States in the Cold War. Race in America was a subject of broad international interest and concern. During the Cold War, the United States argued that the world was divided between the forces of good, led by the U.S., and the forces of evil, led by the Soviet bloc. American democracy was held up as the model, and as superior to the Soviet system where individual rights were repressed.[28] Many around the world wondered how the United States could hold itself up as a model, and how the United States could lead the free world through the Cold War, when American school children were segregated by race.[29] Around the world, racism was thought to be America's Achilles heel.[30] The Soviet Union effectively exploited this weakness in anti-American propaganda.[31]

23. *The Nation's Press on Segregation Ruling*, N.Y TIMES, May 18, 1954, at 19 (reprinting several American newspapers' responses to the *Brown* ruling).

24. *Id.*

25. *Equal Rights are for All*, S.F. CHRON., May 18, 1954, at 18.

26. *A Great Decision*, HINDUSTAN TIMES, May 20, 1954, at 1.

27. *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 108-09 (2000).

28. *See id.* at 3-4.

29. *See id.* at 12, 100.

30. *See id.* at 4-6.

31. *Id.* at 12; *see also id.* at 48-49.

Relying on State Department data, the Justice Department brought this problem to the Court in its amicus brief in *Brown*.[32] The Justice Department brief argued that "[t]he existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith."[33] Secretary of State Dean Acheson concluded, in a quote in the brief, that race discrimination "jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world."[34] The brief argued that a Supreme Court ruling upholding segregation would be uniquely harmful to U.S. foreign relations.[35] The Secretary of State's argument about the harm of segregation to U.S. foreign relations was not speculative. U.S. State Department files from this period are full of reports from the field about the way racial problems in the U.S. harmed U.S. relations with particular nations and complicated U.S. Cold War objectives.[36] This brings *Brown* and the cases about McCarthyism together. Both were seen as protections against the dangers of Communism.

Professor Nelson draws upon this history to illustrate the ways *Brown* was in keeping with broader societal needs. This move in the paper is important, and is a departure from most legal scholarship on *Brown* that isolates the case from its Cold War context. Here, and in his discussion of the affirmative action case *Grutter v. Bollinger*,[37] Nelson sets American jurisprudence in a global context—something the Court itself was doing at the time of *Brown*,[38] but a perspective usually absent from Twentieth Century constitutional history. This is not a new move for Nelson, for he also sets American legal ideas in a global context, relating the legal history of New York to the history of the

32. Brief for the United States as Amicus Curiae at 2-8, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (Nos. 8 et al.); *see* DUDZIAK, *supra* note 27, at 80-81. *See generally* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

33. Brief for the United States as Amicus Curiae at 6, *Brown*, 347 U.S. 483 (Nos. 8 et al.).

34. *Id.* at 8.

35. *See id.* at 4-8.

36. Thousands of records on this topic can be found in the State Department files, Decimal File number 811.411, Record Group 59, National Archives, College Park, Maryland. *See generally* THOMAS BORSTELMANN, THE COLD WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA (2001); DUDZIAK, *supra* note 27.

37. 123 S. Ct. 2325 (2003). *See* Nelson, *supra* note 3, at 833-834.

38. Chief Justice Earl Warren traveled widely, promoting comparative constitutional law. Records on this can be found in Warren's travel files at the Library of Congress. *See* Papers of Earl Warren, Foreign File, Personal File, Manuscript Division, Library of Congress, Washington, D.C. *Cf.* Mary L. Dudziak, *The Supreme Court's History of Indifference to the Opinions of Other Countries' Courts*, HIST. NEWS NETWORK, *at* http://hnn.us/articles/1693.html (Sept. 22, 2003). Other members of the Court regularly traveled overseas as well. *See, e.g.*, WILLIAM O. DOUGLAS, STRANGE LANDS AND FRIENDLY PEOPLE (1951).

United Nations in his important book: *The Legalist Reformation*.[39] This is, I think, exactly the sort of direction American legal history should be taking. But, in exploring the relationship between law and society in a global context, we are brought right back to the problem of how we "read" our surroundings.

David Campbell, in *Writing Security: United States Foreign Policy and the Politics of Identity*, argues that we construct who we are as a nation in response to an "other" against whom we define ourselves.[40] During the Cold War, for example, the U.S. defined itself in relation to its opponent, the Soviet Union. Problems of war and aggression are of course "real" in the world, but we place these threats in a narrative. We interpret them; we give them meaning. Perhaps we can see this in our own context: September 11, we are told, was not a horrendous crime, but was part of a "new kind of war."[41] Identifying it as an act of war was a narrative move. It was an act of interpretation with profound and continuing consequences. In response to threats, we construct narratives of national identity and national imperatives. These become the "societal needs" to which courts and other conform their actions.

In conclusion, my reaction to Professor Nelson's rich and important paper is to celebrate its incorporation of a global vision, while stressing historical contingency rather than inevitable progress, and the inescapable problem of how we interpret our world. Attending to these issues does not drive us away from a progressive jurisprudence, casting the court open to conservative ideology. Instead, I would argue that faith in the inevitability of progress can generate complacency. Understanding the contingency—and the importance of perspective—in the act of judging keeps us vigilant about one of the most contingent of judicial variables. In *Brown*, in *Grutter*, in *Bush v. Gore*,[42] it matters not only what one is able to see out the window—how one's vision is historically contingent—but which judges happen to be on the train.

39. WILLIAM E. NELSON, THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920–1980 (2001).

40. DAVID CAMPBELL, WRITING SECURITY: UNITED STATES FOREIGN POLICY AND THE POLITICS OF IDENTITY *passim* (1992).

41. *See* Elaine Tyler May, *Echoes of the Cold War: The Aftermath of September 11 at Home*, *in* SEPTEMBER 11 IN HISTORY, *supra* note 14, at 35-54.

42. 531 U.S. 98 (2000).