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FROM CARDOZO TO DWORKIN: SOME VARIATIONS ON PROFESSOR NELSON'S THEME

LOUIS H. POLLAK*

I want to express my thanks for the opportunity to participate in this very important conference and, in particular, to comment on the remarkable paper Professor Nelson has given us. I think I am an accidental participant in the sense that my role as commentator today relates to the fact that Professor Nelson has found it useful—maybe just as a rhetorical device—to look to an article I wrote long ago, way back in 1959, as a bridge from the age of Cardozo to the age of Ronald Dworkin.

The central issues that bring us together today are the same issues that were posed for our country one hundred years ago. W.E.B. DuBois told us then that "the problem of the Twentieth Century [was] the problem of the color-line."[1] We enter the Twenty-first Century with that problem unresolved.

The problem of the color line, and how American constitutional law was undertaking to address that problem half a century ago, was the central focus of my 1959 article to which Professor Nelson referred—*Racial Discrimination and Judicial Integrity*: *A Reply to Professor Wechsler*.[2] It may be useful for me to explain the setting that gave rise to the writing of the article.

In the 1950s, I was one of a group of young lawyers (both law teachers and lawyers in practice) privileged to assist Thurgood Marshall and his NAACP Legal Defense Fund colleagues—Robert Carter, Constance Baker Motley, and Jack Greenberg (whom we will be hearing from later today)—with the campaign of *Brown v. Board of Education*[3] and subsequent cases.[4] My article

* Louis H. Pollak currently serves as Judge of the United States District Court for the Eastern District of Pennsylvania. In the past, Judge Pollak served as Dean of both the Yale and University of Pennsylvania law faculties. From 1950 until he became a judge in 1978, he was associated, first as a volunteer lawyer and later as a board member and vice-president, with the NAACP Legal Defense Fund. This essay is taken from remarks made by Judge Pollak on October 10, 2003 in response to Professor William E. Nelson's lecture.

1. W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 34 (David W. Blight & Robert Gooding-Williams eds., Bedford Books 1997) (1903).

2. Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

3. 347 U.S. 483 (1954); *see* Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Bd. of Educ., 349 U.S. 294 (1955).

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was written in the summer of 1959, a few months after Herbert Wechsler delivered his famous Holmes lecture, *Toward Neutral Principles of Constitutional Law*, in which he expressed doubt that the Supreme Court's recent major civil rights decisions, particularly *Brown*, were soundly anchored in defensibly neutral principles of constitutional law.[5] Jack Greenberg, and I, and others committed to the correctness of *Brown* were much concerned by Wechsler's challenge to *Brown* and felt that a prompt reply was imperative.

What was the reason for our concern? Was Professor Wechsler the first critic of *Brown*? Of course not. Professor Nelson has pointed out that criticism was common, but it was largely from expected sources—the Eastlands and the Talmadges and their fellow travelers. But criticism from Herbert Wechsler was quite another matter. Wechsler was, after all, a person of liberal persuasion who fully subscribed to the precepts of equality that undergirded *Brown*. More importantly, Wechsler was a lawyer and a scholar at the pinnacle of achievement and influence in our profession. As Judge Posner, himself a figure of commanding professional status, put it in 1995 in *Overcoming Law*: "[T]here is no longer anyone in the legal profession who has the kind of stature that a Wechsler achieved . . . ."[6]

My article was written when I was a very junior law teacher at Yale, and I was tilting at a great and revered figure. Was it an effective riposte to Wechsler? At the time, some kind things were said about the article in some quarters. Moreover, not long after the article's publication, my elders and betters on the Yale Law School faculty did vote that I should be promoted to tenured rank—which I, in my self-interested way, felt to be an agreeable outcome. But principles of full disclosure require me to acknowledge that, in recent years, more rigorous scholarly standards have been brought to bear that suggest that Yale's 1950s Good Housekeeping seal of approval was a currency of marginal value. Judge Posner observed that "[t]here was some scholarly dissent from Wechsler's thesis. It came primarily, as one would expect, from professors at the Yale Law School, the heirs of legal realism."[7] Judge Posner mentioned, dismissively, an article by Charles E. Clark, the eminent Judge of the Second Circuit and former Yale dean.[8] Next, he characterized Charles Black's celebrated article, *The Lawfulness of the Segregation Decisions*,[9] as

4. *See generally* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994).

5. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 21-22 (1959).

6. RICHARD A. POSNER, OVERCOMING LAW 77 (1995).

7. *Id.* at 78 (footnote omitted).

8. *Id.* (citing Charles E. Clark, *A Plea for the Unprincipled Decision*, 49 VA. L. REV. 660 (1963).

9. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1959).

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"[t]he most eloquent scholarly defense of *Brown*," but one ultimately dependent on "formalisms" which, apparently, Judge Posner found unpersuasive.[10] And as for Pollak? Judge Posner was underwhelmed:

> Louis Pollak rose to Wechsler's bait and wrote an alternative opinion in support of the result in *Brown*. To avoid having to examine the consequences of public school segregation, Pollak resorted to the unedifying lawyer's tactic of shifting the burden of proof—requiring the school districts to prove that segregation was *not* stigmatizing and then finding that they had not carried the burden. Of course not; they didn't know they *had* such a burden.[11]

So much for Pollak. So I thought that 1959 article was buried until today, when Professor Nelson has disinterred it and said what appear to be nice things about it. Suddenly, I find myself a link between Cardozo and Dworkin and all good things like that, and now for the first time I realize how smart I was in 1959. I feel like the hero of Molière's *Le Bourgeois Gentilhomme*, who inflates with self-importance when he learns that he has, unbeknownst to himself, been speaking prose all his life.[12]

In my article, as Professor Nelson points out, I said a word in favor of the propriety of judicial invocation of philosophic convictions as an ingredient of constitutional analysis and decision. I wrote that "judicial neutrality"—to which I subscribed—"does not preclude the disciplined exercise by a Supreme Court Justice of that Justice's individual and strongly held philosophy."[13] Professor Nelson argues that there is an antithesis between the Cardozo view, which looks to "sociology" rather than "philosophy," and the Dworkin view, which draws very heavily on philosophy as appropriate and indeed obligatory. As Professor Nelson says, "Cardozo insisted that judges supplement the professional sources of law with an objectively verifiable analysis of societal needs and values. Dworkin, on the other hand, would ultimately have judges work from their disparate views of proper political morality."[14] Professor Nelson finds that my 1959 acquiescence in the deployment of a judge's "individual and strongly held philosophy" constituted a shift away from Cardozo's limiting "objectively verifiable analysis of societal needs" and towards the expansive "political morality" which Dworkin was to explicate in subsequent decades.[15] Curiously, however, the prime example that I gave in my article of a judge properly drawing on his own philosophy was Cardozo,

10. POSNER, *supra* note 6, at 78.

11. *Id.* (footnote omitted).

12. JEAN BAPTISTE POQUELIN MOLIÈRE, LE BOURGEOIS GENTILHOMME 51 (Yves Hucher ed., Librairie Larousse 1964) (1670), *translated in* TARTUFFE & THE WOULD-BE GENTLEMAN 114 (H. Baker & J. Miller trans., The Heritage Press 1963).

13. Pollak, *supra* note 2, at 33.

14. William E. Nelson, Brown v. Board of Education *and the Jurisprudence of Legal Realism*, 48 ST. LOUIS U. L.J. [insert page #], [insert pinpoint (12 in manuscript)] (2004).

15. *Id*. at [insert pinpoint (45-47 in manuscript)].

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announcing for the Court in *Palko v. Connecticut* that "freedom of thought and speech. . . . is the matrix, the indispensable condition, of nearly every other form of freedom."[16] That would seem to be a philosophic pronouncement of very considerable constitutional consequence.

Having offered Cardozo's *Palko* formulation as a proposition that lies in the realm of what Cardozo termed "philosophy" rather than in the realm that Cardozo termed "sociology," am I undertaking to conflate Dworkin and Cardozo, and thus to say that their approaches to constitutional adjudication are not significantly different? Not at all. The *Palko* pronouncement is political philosophy. What Dworkin wants judges to harness is moral philosophy. The divergence between the two is substantial, and the constitutional jurisprudence of Holmes, whom Cardozo regarded as in major respects his teacher, offers examples of that divergence. Said Holmes, in explaining law to law students in 1891: "[N]othing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law."[17] And in 1918, in *Hammer v. Dagenhart*, dissenting from the Court's invalidation of a 1916 federal statute barring the shipment in interstate commerce of products of child labor, Holmes said:

> But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and that this Court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this Court to pronounce when prohibition is necessary to regulation if it may ever be necessary—to say that it is permissible as against strong drink but not as against the product of ruined lives.[18]

With this let us contrast the way in which Holmes, the soldier-turned-judge, ruminated about the greatness of the greatest of his predecessors. On February 4, 1901, the centennial of the day that John Marshall was sworn in as the fourth Chief Justice of the United States, Holmes said:

> A great man represents a great ganglion in the nerves of society, or, to vary the figure, a strategic point in the campaign of history, and part of his greatness consists of his being *there*. I no more can separate John Marshall from the fortunate circumstance that the appointment of Chief Justice fell to John Adams, instead of to Jefferson a month later, and so gave it to a Federalist and loose constructionist to start the working of the Constitution, than I can separate the black line through which he sent his electric fire at Fort Wagner from Colonel Shaw. When we celebrate Marshall we celebrate at the same

16. Palko v. Connecticut, 302 U.S. 319, 326-27 (1937).

17. OLIVER WENDELL HOLMES, JR., *The Path of the Law*, *reprinted in* THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS 74 (Max Lerner ed., 1943) [hereinafter THE MIND AND FAITH OF JUSTICE HOLMES].

18. Hammer v. Dagenhart, 247 U.S. 251, 280 (1918) (Holmes, J., dissenting).

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> time and indivisibly the inevitable fact that the oneness of the nation and the supremacy of the national Constitution were declared to govern the dealings of man with man by the judgments and decrees of the most august of courts.
>
> . . . .
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> . . . We live by symbols, and what shall be symbolized by any image of the sight depends upon the mind of him who sees it. The setting aside of this day in honor of a great judge may stand to a Virginian for the glory of his glorious State; to a patriot for the fact that time has been on Marshall's side, and that the theory for which Hamilton argued, and he decided, and Webster spoke, and Grant fought, and Lincoln died, is now our corner-stone.[19]

That cornerstone was an artifact of Holmes's philosophy—his political philosophy—informed by Holmes's view of his nation's history, which he had lived and helped to shape.

Was the Holmes who venerated "the theory for which Hamilton argued, and [Marshall] decided, and Webster spoke, and Grant fought, and Lincoln died," nevertheless right in contending that "nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution"? In my view, the jury is still out on whether Holmes was right. Holmes has, of course, formidable contemporary support. Here again we may look to Judge Posner—this time to his 1998 essay, *The Problematics of Moral and Legal Theory*: "I shall argue that moral theory does not provide a solid basis for moral judgments, let alone for legal ones."[20] The argument that powerful advocate then advanced was framed in compelling terms. But of course, there are compelling counter-arguments, and not only from Ronald Dworkin. With respect to that controversy I am not, today, prepared to enter summary judgment either way, but I do offer this

19. OLIVER WENDELL HOLMES, JR., *John Marshall*, *in* THE MIND AND FAITH OF JUSTICE HOLMES, *supra* note 17, at 383-85 (commenting on Chief Justice John Marshall).

20. Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1638 (1998). In *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), Judge Posner's view received authoritative reinforcement. The Court observed:

> It must be acknowledged, of course, that the Court in *Bowers* [*v. Hardwick*, 478 U.S. 186 (1986)] was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code."

Id. at 2480 (alteration added) (quoting Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 850 (1992)).

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preliminary and intermediate submission: Whether moral philosophy can offer guidance for the resolution of major issues of constitutional law may find its most demanding test in the context of the legal issues surrounding the problem of race—the problem that DuBois, a century ago, insisted we confront.

> Viewing the problem of race in moral terms is not new with Dworkin, nor, indeed, was it new when *Brown* was before the Court. In 1944—ten years before *Brown*—Gunnar Myrdal, in his magisterial study of race in America, *An American Dilemma*, wrote:
>
> > When we . . . choose to view the Negro problem as primarily a moral issue, we are in line with popular thinking. It is as a moral issue that this problem presents itself in the daily life of ordinary people; it is as a moral issue that they brood over it in their thoughtful moments. It is in terms of conflicting moral valuations that it is discussed in church and school, in the family circle, in the workshop, on the street corner, as well as in the press, over the radio, in trade union meetings, in the state legislatures, the Congress and the Supreme Court.[21]

But how does a judge translate a moral view of the problem of race into language serviceable for constitutional adjudication?

Professor Nelson has offered us a proposed example. He has drawn our attention to the contribution of Frank Michelman—who has for forty years written so wisely about the hardest questions of American public law—to the intriguing work, *What* Brown v. Board of Education *Should Have Said*.[22] In that volume, published about three years ago, nine leading constitutional scholars have each undertaken to do what I tried to do back in 1959—draft an opinion which, while reaching the result that Chief Justice Warren announced for a unanimous Court on May 17, 1954, would support that result with a stronger and more persuasive line of constitutional argument. Professor Michelman's approach to the constitutional issues diverges *ab initio* from the approach uniformly pursued by his eight academic colleagues. His colleagues, like the unanimous Warren Court, start by addressing the Fourteenth Amendment issues posed by the state cases, and then, having solved those issues, tend to treat the Fifth Amendment issues posed in *Brown's* companion case, *Bolling v. Sharpe*,[23] by the District of Columbia's segregated public schools, as essentially secondary to and derivative from the Fourteenth Amendment issues.[24] Professor Michelman challenges that approach, stating

21. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY l (1944).

22. WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID (Jack M. Balkin ed., 2001).

23. 347 U.S. 497 (1954).

24. *See* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID, *supra* note 22, at 124-25.

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that he "find[s] that mode of proceeding in these cases to be putting the cart before the horse."[25] For Professor Michelman, *Bolling* is the testing case. Addressing *Bolling*, he concludes that, "after we have taken the constitutional text and its legislative history as far as defensible legal argumentation can take them" (and Professor Nelson prefaces what follows with the observation that the "words . . . easily could have been written by Ronald Dworkin"[26]):

> [D]ecision . . . finally comes to rest on an attribution of national purpose and commitment for which no internal legal-textual or textual-historical demonstration can be found. Decision becomes a matter of attributing or not attributing to the Constitution, from its very beginnings, an overriding purpose and premise of excluding caste institutions from these shores, a premise that most Americans today doubtless would trace to the Declaration of Independence.[27]

Professor Michelman is, of course, too careful a scholar to suggest that citing the Declaration of Independence suffices to complete the analysis. He continues:

> Decision thus also becomes a matter of explaining American affairs of race during the Constitution's first seventy-five years as a visionary eclipse or occlusion. It was an occlusion consisting, while it lasted, in a refusal to envision inhabitants of African lineage as belonging at all to the civic company of one-size-fits-all civil membership—an accompaniment to the legal condonation and normalization of African slavery during those years, wrought by laws and judges of this country and of many of its states. It was lifted, if not fully cleared away, as those laws were destroyed, by the momentous events of the Civil War and its aftermath.
>
> . . . .
>
> That is a plausible construction of the United States and our history in the respects pertinent to our decisions today, perhaps on the whole the historically most persuasive one. It is nevertheless a contestable construction, and one that can hardly claim entire independence of the moral outlook of whoever presumes to make it.[28]

Professor Michelman's words—words of one who avowedly "can hardly claim . . . independence of [a] moral outlook"—are eloquent, and I would like to find them persuasive. But I do not. I find it difficult to characterize "American affairs of race during the Constitution's first seventy-five years" as merely "a visionary eclipse or occlusion." My grubbier historical perspective sees in the drafting, the ratification, the launching, and the pre-Civil War

25. *Id.* at 125.

26. Nelson, *supra* note 14, at [insert page # (51 in typescript)].

27. WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID, *supra* note 22, at 130 (footnote omitted).

28. *Id*. at 130-31.

implementation of the Constitution a deliberate readiness, at the national level, to protect the institution of slavery while that institution continued to be of value to the slave states. I think Thurgood Marshall had the history right:

> For a sense of the evolving nature of the Constitution we need look no further than the first three words of the document's preamble: "We the People." When the Founding Fathers used this phrase in 1787, they did not have in mind the majority of America's citizens. "We the People" included, in the words of the framers, "the whole Number of free Persons." On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes—at three-fifths each. Women did not gain the right to vote for over a hundred and thirty years.
>
> These omissions were intentional. The record of the framers' debates on the slave question is especially clear: the Southern states acceded to the demands of the New England states for giving Congress broad power to regulate commerce, in exchange for the right to continue the slave trade. The economic interests of the regions coalesced: New Englanders engaged in the "carrying trade" would profit from transporting slaves from Africa as well as goods produced in America by slave labor. The perpetuation of slavery ensured the primary source of wealth in the Southern states.
>
> Despite this clear understanding of the role slavery would play in the new republic, use of the words "slaves" and "slavery" was carefully avoided in the original document. Political representation in the lower House of Congress was to be based on the population of "free Persons" in each state, plus three-fifths of all "other Persons." Moral principles against slavery, for those who had them, were compromised, with no explanation of the conflicting principles for which the American Revolutionary War had ostensibly been fought: the self-evident truths "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."
>
> It was not the first such compromise. Even these ringing phrases from the Declaration of Independence are filled with irony, for an early draft of what became that declaration assailed the King of England for suppressing legislative attempts to end the slave trade and for encouraging slave rebellions. The final draft adopted in 1776 did not contain this criticism. And so again at the Constitutional Convention eloquent objections to the institution of slavery went unheeded, and its opponents eventually consented to a document which laid a foundation for the tragic events that were to follow.[29]

29. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2-3 (1987) (footnotes omitted). Justice Marshall's assessment of our constitutional beginnings was presented in an address given in 1987, the bicentennial of the Constitution. It is instructive to compare certain observations of Chief Justice Jay in his opinion in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), in which the majority of the Court, over Justice Iredell's dissent, concluded that Georgia, one of the sovereign states constituting the

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If Justice Marshall was correct in his assessment of the Constitution's regression from the principles announced in the Declaration of Independence, I am unpersuaded that the Fifth Amendment—prior to what may be termed its enhancement by the post-Civil War amendments—can properly be found to be sufficiently freighted with values of equality to support the result arrived at in *Bolling v. Sharpe*. My non-concurrence in Professor Michelman's eloquent and elegant opinion stems from a view of our history from 1787 to 1860 that is less upbeat than his. Professor Michelman acknowledges that his "construction of the United States and our history in the respects pertinent to our decisions" is "contestable."[30] So is mine. Professor Michelman also acknowledges that his "construction" is "one that can hardly claim entire independence of [his] moral outlook."[31] There is no admixture of moral outlook in my construction of the pertinent history. I wonder whether that explains our differing constitutional conclusions.

United States, was suable in a federal court by a citizen of another state. As was the custom in those pre-John Marshall days, each of the Justices wrote a separate opinion. In developing his position, Chief Justice Jay found it useful to contrast the notion of sovereignty in England, vested in the person of the ruler, suability of whom in the crown's own courts was unthinkable, with the notion of sovereignty in America, where the people rule—but, as of 1793, as a parenthesis in the Chief Justice's opinion discloses, not all the people:

> It will be sufficient to observe briefly, that the sovereignties in Europe, and particularly in England, exist on feudal principles. That system considers the Prince as the sovereign, and the people as his subjects; it regards his person as the object of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a Court of Justice or elsewhere. That system contemplates him as being the fountain of honor and authority; and from his grace and grant derives all franchises, immunities and privileges; it is easy to perceive that such a sovereign could not be amendable to a Court of Justice, or subjected to judicial control and actual constraint. It was of necessity, therefore, that suability became incompatible with such sovereignty. Besides, the Prince having all the Executive powers, the judgment of the Courts would, in fact, be only monitory, not mandatory to him, and a capacity to be advised, is a distinct thing from a capacity to be sued. The same feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the Prince and the subject. No such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African slaves among us may be so called) and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty.

Id. at 471-72.

30. WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID, *supra* note 22, at 131.

31. *Id.*