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## Justice Advanced: Comments on William Nelson's *Brown v. Board of Education* and the Jurisprudence of Legal Realism

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**JUSTICE ADVANCED: COMMENTS ON WILLIAM NELSON'S  
*BROWN v. BOARD OF EDUCATION* AND THE JURISPRUDENCE OF  
LEGAL REALISM**

ROBERT J. COTTROL\*

The approaching fiftieth anniversary of the Supreme Court's landmark school desegregation decision in *Brown v. Board of Education*<sup>1</sup> should be, and indeed is, a time for considerable national reflection. *Brown* invites us to take a long look—sometimes hopeful, often painful—at our nation's racial history. That look brings us face-to-face with the world of race, law, and caste before the landmark decision and how the world has changed and not changed in the decision's wake. *Brown* also provides an enduring invitation to examine the Supreme Court and indeed the judiciary more broadly, and to ask questions about the proper role of Hamilton's "least dangerous branch" in our national governance.<sup>2</sup> The latter look might be even more difficult and problematic than the former. For those of us who have come of intellectual age since 1954 and who have since then received university training and pursued careers in law, history, political science, and kindred subjects, *Brown* has imbued the courts with a patina of enlightenment that I believe is scarcely deserved—or perhaps better, ill deserved—in light of the broader history of the judiciary in American life. *Brown* has contributed to a kind of historical amnesia. It has helped push to the periphery of our collective consciousness the Supreme Court's many constitutional lapses, *Dred Scott v. Sandford*,<sup>3</sup> *United States v. Cruikshank*,<sup>4</sup> *Plessy v. Ferguson*,<sup>5</sup> *Lochner v. New York*,<sup>6</sup> and *Korematsu v. United States*,<sup>7</sup> to name but a small fraction. These are cases we in the legal academy often quickly pass over in our Constitutional Law courses as we move on to modern equal protection or fundamental rights analysis. Even

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1. 347 U. S. 483 (1954).
2. THE FEDERALIST NO. 78, at 483 (Alexander Hamilton) (H. Lodge ed., 1888).
3. 60 U.S. (19 How.) 393 (1857).
4. 92 U.S. (2 Otto) 542 (1875).
5. 163 U.S. 537 (1896).
6. 198 U.S. 45 (1905).
7. 323 U.S. 214 (1944).

worse, these discussions are frequently relegated to optional legal history courses, taken only by the relatively small percentage of our students who have a curiosity concerning the law's past. But *Brown* has contributed to a view that the courts are perhaps best equipped to handle the difficult issues, the Gordian Knots that often vex the body politic.<sup>8</sup> Whether that view, which many in the legal academy heartily endorse, will prove to be good law or good policy in the long run remains to be seen, but nonetheless it reflects two journeys that American society and the courts took in the early decades of the Twentieth Century. The jurisprudential odyssey that took the Court from its previous position as a body indifferent—and more often than not hostile—to minority rights and the Civil War Amendments designed to protect them to *Brown* is a complex story. It is a story that can tell us a good deal about the evolution of race and the culture of race in the first half of the Twentieth Century. It is a story that also has much to tell us about the evolution of styles of legal reasoning in the same time period.

It is this latter task that William Nelson ably performs in his article *Brown v. Board of Education and the Jurisprudence of Legal Realism*.<sup>9</sup> As his title suggests, William Nelson is viewing the *Brown* decision through the lens of legal realism, telling us how an important shift in the style of judicial reasoning in the Twentieth Century explicitly and implicitly played a role in bringing about the decision in *Brown*. *Brown* naturally enough invites us to consider the impact of the legal history of race in the Court's decision-making. Few would discuss the landmark desegregation decision without at least a passing reference to the history of the NAACP and the organization's heroic struggle against Jim Crow, lynching, and disenfranchisement.<sup>10</sup> Certainly, Charles Hamilton Houston's reforms at the Howard Law School and his transformation of that institution into a cutting edge training ground for civil rights litigators is an inevitable part of any history that takes us from *Plessy* to *Brown*.<sup>11</sup> Similarly, Thurgood Marshall—his early efforts at civil rights litigation, and particularly his and Charles Houston's decision to go after the politically less-sensitive target of segregation in state professional schools instead of the more emotionally charged issue of separate elementary and secondary schools—is

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8. See, e.g., ROBERT J. COTTROL, RAYMOND T. DIAMOND, & LELAND B. WARE, *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* 208-33 (2003).

9. William E. Nelson, *Brown v. Board of Education and the Jurisprudence of Legal Realism*, 48 ST. LOUIS U. L.J. 795 (2004).

10. Certainly these themes have been discussed in most of the works tracing the history of *Brown*. See, e.g., COTTROL, DIAMOND & WARE, *supra* note 8, at 34-48; RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 84-125 (1975); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001).

11. COTTROL, DIAMOND & WARE, *supra* note 8, at 56-57.

an important part of the history.<sup>12</sup> Similarly, shifting racial mores played a key role in taking the Court on the road to *Brown*. Works in the social sciences like the 1944 publication of Swedish economist and sociologist Gunnar Myrdal's *An American Dilemma: The Negro Problem And Modern Democracy* went a long way toward convincing many educated Americans of the contradictions between the nation's professed egalitarianism and the practice of segregation and discrimination.<sup>13</sup> The horrors of Hitler's final solution went even further in convincing many that the strident racism that was so prevalent in the nation at the beginning of the century contradicted both basic Americanism and basic decency.<sup>14</sup>

I think it is fair to say that most people with a decent sense of constitutional history have a good appreciation for how the nation's evolution in racial thinking contributed to the Court's decision in *Brown*. But I think William Nelson's article invites us to visit somewhat less-traveled precincts. Nelson's article properly directs our attention not simply to the larger odyssey of the nation's racial evolution but more narrowly and deeply to the legal profession, particularly the elite bar and bench, the changes in the profession's methodology, and the impact those changes had on the 1954 decision. We in the legal academy tend not to use the term methodology as frequently as our counterparts in the social sciences and yet, of course, there are significant methodological issues both in the craft of lawyering or presenting a case and equally in the craft of judicial decision-making. Certainly, methodological issues have been part of the enduring controversy surrounding *Brown*.<sup>15</sup> Why did the Warren decision give such short shrift to the intentions of the framers?<sup>16</sup> Should social science—Kenneth Clark's experiment with dolls or Gunnar Myrdal's *American Dilemma*—have played any role in the decision?<sup>17</sup> Could the companion case *Bolling v. Sharpe*,<sup>18</sup> outlawing school segregation in the District of Columbia, be legitimate? *Bolling* was grounded in the Fifth Amendment, which was written by slaveholders. The Fifth Amendment was certainly not originally intended to provide equal treatment of people of different races, much less require the integration of schools or indeed anything

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12. See *Pearson v. Murray*, 182 A. 590 (Md. 1936).

13. GUNNAR MYRDAL ET AL., *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

14. COTTROL, DIAMOND & WARE, *supra* note 8, at 97.

15. *Id.* at 220-25.

16. *Id.*

17. *Id.* at 214. Dennis Hutchinson's research indicates that, despite the frequent criticism of the social science evidence in footnote 11 in *Brown*, the evidence probably played only a minor, if any, role in the actual decision-making. See Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1 (1979).

18. 347 U.S. 497 (1954).

else.<sup>19</sup> The critiques of the Warren decision on methodological grounds have persisted, generating a debate that has had a much longer life than that initially offered by defenders of racial segregation.<sup>20</sup>

And yet to understand the Warren Court's methodology we must, as Nelson reminds us, learn how legal reasoning and legal argumentation would change in the first decades of the Twentieth Century. The growth of the legal realist movement and its influence on the bar, the judiciary, and legal education has, of course, been a well-explored topic in the legal and historical literature.<sup>21</sup> Yet how do we link that familiar story with the story of the nation's racial evolution in the Twentieth Century? How do these two histories merge to produce *Brown*, or at least the historic *Brown* and not some alternative history that we might envision?<sup>22</sup> To understand this, we have to come to gain an appreciation of the history of legal realism. What are the common threads of legal realism as a movement? How did it go from a posture in the early Twentieth Century of urging judicial deference to legislative initiatives to the view later in the Twentieth Century, highlighted by *Brown*, that the courts could play a leading role as vehicles for legal and social change, essentially Nelson's metaphor of shifting from caboose to engine, if you will? This is a difficult task. As someone who is not a student of legal realism per se, I am not sure that the boundaries between the realists and their predecessors are as clearly defined as some would have it. I tend to agree with Morton Horwitz that "defining [l]egal [r]ealism with precision is not all that easy."<sup>23</sup> Horwitz also noted that "[l]egal [r]ealism was neither a coherent intellectual movement nor a consistent or systematic jurisprudence. It expressed more an intellectual mood than a clear body of tenets, more a set of sometimes contradictory tendencies than a rigorous set of methodologies or propositions about legal theory."<sup>24</sup>

Should legal realism be defined largely as an intellectual movement that flourished at the law schools at Yale and Columbia, and that formed in opposition to the spare, deductive, Langdellian case method that began at

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19. This was part of the late Raoul Berger's critique of the Supreme Court's desegregation jurisprudence. See RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 210 n.66 (1977).

20. COTTROL, DIAMOND & WARE, *supra* note 8, at 212-33.

21. See, e.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992); LAURA KALMAN, LEGAL REALISM AT YALE 1927-1960 (1986).

22. For an important set of writings detailing alternative ways the *Brown* opinion might have been written, see WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001).

23. HORWITZ, *supra* note 21, at 169.

24. *Id.*

Harvard and would ultimately come to dominate American legal education?<sup>25</sup> That is probably a good start, but it does not really flesh out the full contours of the realist movement nor, of course, our concern for the implications of realism for *Brown*. Is the realist movement best described by its protagonists who emphasized the role of indeterminacy, rationalization, and perhaps plain whimsy in determining judicial decision-making?<sup>26</sup> I think the realists were on to something more.

Probably the best way to approach the realists, certainly from the point of view of understanding their ultimate contribution to the decision in *Brown*, is to view them as advocates of a more policy-oriented, or at least, aware jurisprudence, a policy-sensitive jurisprudence informed by some of the newer developments in such social or behavioral science fields as sociology, psychology, anthropology, and institutional economics, among others.<sup>27</sup> But even here our division between the realists and their Nineteenth Century forbearers is not all that sharp. Certainly, policy considerations have never really been far from judicial decision-making. Morton Horwitz and William Nelson have informed us in other contexts of the critical role policy concerns played in re-fashioning the received common law into an American common law for the early Nineteenth Century.<sup>28</sup> Nor can the application of social science, or at least the forerunners of social science, to jurisprudence be considered an innovation of Twentieth Century realists. For example, it would be impossible to discuss the changes in contract doctrine that were occurring in the Anglo-American world after the American Revolution without reference to classical liberal economic theory.<sup>29</sup> Justice Matthews's opinion in *Yick Wo v. Hopkins* indicates a willingness on the part of the Supreme Court to allow empirical evidence, admittedly of a simple and overwhelming sort, to play a decisive role in equal protection jurisprudence as early as the 1880s.<sup>30</sup>

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25. See *id.* at 170-72; KALMAN, *supra* note 21, at 67-97.

26. See KALMAN, *supra* note 21, at 8-10; N.E.H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange Over Legal Realism*, 1989 DUKE L.J. 1302, 1302 (1989).

27. See, e.g., HORWITZ, *supra* note 21, at 182-83; KALMAN, *supra* note 21, at 17-20; Gregory S. Alexander, *Comparing the Two Legal Realisms—American and Scandinavian*, 50 AM. J. COMP. L. 131, 138-42 (2002). Laura Kalman's research indicates the often considerable tension between scholars in the social sciences who regard legal realist scholars as untutored amateurs and realists who regard the social sciences as being too underdeveloped to aid in the formulation of law and policy. KALMAN, *supra* note 21, at 42.

28. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780–1860* (1977); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830* (1975).

29. See, e.g., P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT*, 292-323 (1979).

30. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

I would also argue that Justice Harlan, the great dissenter in *Plessy v. Ferguson*,<sup>31</sup> is under-appreciated as a legal realist. Certainly, his opinions in the two great civil rights cases of his tenure, the *Civil Rights Cases*<sup>32</sup> and *Plessy*, illustrate Harlan's ability to look beyond the formal legal logic presented in those cases and to instead draw upon his own experiences and insights as a man of the South and indeed a former slaveholder. These gave Harlan an ability to see the realities of stigma and subordination inherent in the emerging Jim Crow world of the redeemed South in ways that escaped his more formalistically minded colleagues. Harlan's realist jurisprudence did not end there. The early anti-trust case *United States v. E.C. Knight*, provided another occasion for Harlan to display his realist temperament in dissent.<sup>33</sup> Harlan's ability in *E.C. Knight* to look past traditional definitions, and to consider commerce in light of the actual impact of manufacturing in the economy of his 1890s, and not the framers' 1790s, anticipated the Court's realist jurisprudence with its acquiescence to the New Deal by four decades.<sup>34</sup>

Harlan, of course, was not the only realist on the Court at the start of the Twentieth Century. Justice Oliver Wendell Holmes is more widely acknowledged as one of the pioneer realists; he was an early critic of Langdellian formalism and a forthright advocate of the application of scientific learning to judicial problem-solving.<sup>35</sup> I think Holmes's career actually gets us closer to our concerns with *Brown* and perhaps to Nelson's concern of whether or not a realist jurisprudence causes the law to act like society's caboose or engine. Holmes has been celebrated by modern legal scholars for his deferential opinion in *Lochner v. New York*<sup>36</sup> and condemned for his endorsement of eugenics in *Buck v. Bell*.<sup>37</sup> In both cases Holmes was arguing for a broad deference to state authorities based, at least in part, on his own perceptions of good public policy. Holmes would also show this policy-based willingness to defer in cases involving racial discrimination. Despite his Boston background and his service with Union forces during the Civil War, Oliver Wendell Holmes, like the majority of the Court before the first World War, could be counted on as a reasonably reliable vote to sustain southern

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31. 163 U.S. 537 (1896).

32. 109 U.S. 3, 33-57 (1883) (Harlan, J., dissenting).

33. *United States v. E.C. Knight Co.*, 156 U.S. 1, 18-46 (1895) (Harlan, J., dissenting).

34. For a critical discussion of Chief Justice Fuller's majority opinion as an example of the formalist approach, see Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1089-1097 (2000).

35. See generally O.W. HOLMES, JR., *THE COMMON LAW* (1881); O.W. Holmes, Jr., Book Review, 14 AM. L. REV. 233 (1880) (reviewing C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS, WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES* (2d ed. 1879)).

36. 198 U.S. 45 (1905).

37. 274 U.S. 200 (1927). See Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833 (1986).

measures mandating Jim Crow and disenfranchisement. He voted with the majority in *Berea College v. Kentucky* to sustain a state statute mandating segregation in private colleges.<sup>38</sup> He also authored the Court's opinion in *Giles v. Harris* denying equitable relief to black applicants who were effectively disenfranchised by registrars of voters in Alabama.<sup>39</sup>

Holmes's racial conservatism matched that of the Court more broadly and I think needs to be brought into our conversation about race and realism. If realism incorporates Cardozo's notion that there must be a sociological component to the judicial enterprise—that the felt needs of society, perhaps as reflected by the better scholarship in the social sciences, should be reflected in judicial opinions—then the racial conservatism of the *Berea* and *Giles* courts and other opinions of the era should be numbered in the realist corpus. If the Court was willing to eviscerate the Fourteenth and Fifteenth Amendments, it was willing to do so not because a formalistic logic demanded such—indeed *Giles* and its companion case required heroic exertions to avoid the clear demands of the Fifteenth Amendment—but because the justices thought disenfranchisement was at least a reasonable policy option.<sup>40</sup> In doing so, the

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38. *Berea College v. Kentucky*, 211 U.S. 45, 58 (1908).

39. *Giles v. Harris*, 189 U.S. 475, 486 (1903). For a discussion of this case, see COTTROL, DIAMOND & WARE, *supra* note 8, at 46.

40. See COTTROL, DIAMOND & WARE, *supra* note 8, at 45-47 for a discussion of *Giles*, 189 U.S. 475 and *Giles v. Teasley*, 193 U.S. 146 (1904). It illustrates the ability of the Court in the early Twentieth Century to effectively nullify the Fifteenth Amendment:

Another major constitutional issue facing the Court in the first decades of the twentieth century was the increasing disenfranchisement of black voters in the southern states. The Fifteenth Amendment prevented the states from directly limiting the vote to whites, as had been the case before the Civil War. Nonetheless, a number of southern state governments had found what they hoped would be a series of legal loopholes around the constitutional requirement that black and white have equal access to the ballot box. A case that arose in Alabama in 1902 can illustrate how these loopholes worked. A new provision of the Alabama Constitution called for a new registration of voters. All voters registered in 1902 were to be registered for life. Those who registered in 1902 were required to take a relatively easy test to demonstrate their literacy and qualifications to be electors. After 1902 the literacy test was made considerably more difficult. In 1902 in Montgomery, Alabama, the registrar of voters simply refused to register black men, making them ineligible for registration under the easier standards. This brought about the case of *Giles v. Harris* (1903). Giles, a black man, filed on his behalf and on the behalf of [5,000] other Afro-American men denied the right to register in 1902. Giles sought equitable relief, asking the courts to compel the registrar to register him and the other men.

The case was decided by the Supreme Court in 1903. In a majority opinion written by Justice Oliver Wendell Holmes, the Court denied Giles requested relief. The grounds for doing so was that the requested relief was equitable relief. The Holmes opinion indicated that the Court would be reluctant to give Giles an equitable remedy that would, in effect, require the Court to supervise the activities of state voting officials. Holmes expressed the view that this would be beyond the prerogatives of the Court and would



Court was following the sociological wisdom of the day. The leading lights in the biological and social sciences were proclaiming the superiority of the Nordic races and the Darwinian debacle that would surely follow if the inferior races were not allowed, indeed encouraged, to die out as presumably nature intended.<sup>41</sup>

The historical profession went even further. The Fourteenth and Fifteenth Amendments were mistakes, unfortunate products of Reconstruction, “a tragic era” in which sectional rivalries had caused a vengeful North to unwisely impose Negro rule on the defeated South. This view, put forward by Columbia University historian William A. Dunning and his disciples, was the prevailing view on the part of the historical profession—and indeed the general public—on the Reconstruction era for the first half of the Twentieth Century and beyond.<sup>42</sup> It had an inevitable effect on the Court’s unwillingness to provide robust enforcement for the Fourteenth and Fifteenth Amendments before the Second World War. It also helped shape the opinion in *Brown*. I think we have to realize that one of the reasons the Warren opinion is reluctant to engage the Fourteenth Amendment’s history is precisely because Warren and the other members of the *Brown* Court came of age at a time when the Dunning school view of Reconstruction was largely uncontested.<sup>43</sup> That they

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heavily involve the Court in the political process of the state of Alabama. The Holmes opinion suggested that Giles’s remedy was more likely to be a legal remedy—monetary damages for deprivation of his civil rights.

The next year the Court heard a case directly on that issue. Giles was back in the case of *Giles v. Teasley* (1904). This time Giles was asking for monetary damages in the amount of \$5,000 for the refusal of the Montgomery County Board of Registrars to register him. The opinion of the Court, this time authored by Justice William Rufus Day, was something of a masterpiece of judicial double-talk. The Day opinion sustained the ruling of the Alabama Supreme Court. That court had said in effect that either the provisions of the Alabama Constitution under which the registrars operated were repugnant to the Fourteenth and Fifteenth Amendments, in which case they had no legal effect and hence no damages were owed Giles, or they were not repugnant to the Constitution, in which case the registrars were operating within the scope of their authority and no damages were owed Giles. The Giles cases left the Fifteenth Amendment a constitutional right without any effective remedy.

41. COTTROL, *DIAMOND & WARE*, *supra* note 8, at 81-82.

42. *See, e.g.*, CLAUDE G. BOWERS, *THE TRAGIC ERA: THE REVOLUTION AFTER LINCOLN* (1929); PAUL H. BUCK, *THE ROAD TO REUNION 1865-1900* (1937); WILLIAM ARCHIBALD DUNNING, *RECONSTRUCTION: POLITICAL AND ECONOMIC 1865-1877* (1907). The basic tenets of the Dunning school were also put forward in the popular culture before the second World War. Thomas Dixon’s virulently racist novel, *The Clansman*, helped popularize the “tragic era” view of Reconstruction (*see* THOMAS DIXON, JR., *THE CLANSMAN: AN HISTORICAL ROMANCE OF THE KUKLUX KLAN* (1905)) as did D.W. Griffith’s 1915 film, *Birth of a Nation*, derived from Dixon’s novel. The view was also put forward, in a somewhat softened version, in the 1939 hit movie, *Gone with the Wind*.

43. For the major study in opposition to the Dunning school before World War II, see W.E.B. DuBois, *BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE*

would believe that the history of the Reconstruction-era Thirty-ninth Congress, which sent the Fourteenth Amendment to the states for ratification, would provide little support for a robustly egalitarian interpretation of the Amendment is hardly surprising.<sup>44</sup> So if *Berea* or *Giles* might also be included in the realist tradition, how does realism help us get from *Plessy* to *Brown* and beyond, and can it help us with that vexing question of whether law is ultimately leading or following social change? I think the answer lies partly in the question of what kind of nonlegal information is informing judicial decision-making. It is probably too simplistic to think of judges as either leading or following society, simply ratifying and solidifying social change that has occurred, or being the engine pulling society along to their vision of a more just social order. Instead, I think it might be more accurate to view judicial opinion-making as part of an ongoing symbiotic dialogue between jurists and other select intellectual and cultural elites. Jurists have always been expected to understand the basic frames of reference of educated elites. In the Twentieth Century, increasingly that understanding came to presuppose at least a nodding acquaintance with the social sciences. I would like to, in this regard, nominate Langdell as having made a largely unheralded contribution to the growth of legal realism. It was Langdell who developed the American model of legal education, which among other things called for the relatively unique feature of an undergraduate degree in a subject other than law to be followed by a legal education following the Langdellian case method.<sup>45</sup> This

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PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880 (1935). DuBois's work was quite an achievement and anticipated the work of such later historians of Reconstruction as Kenneth Stampp and Eric Foner. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 (1988); KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION 1865–1877 (1965). DuBois's study certainly did not, at the time, have the impact on the national perception of Reconstruction that Dunning and his disciples did. It would have been impossible for a black scholar at the time to have successfully challenged the consensus of the historical establishment.

44. One interesting feature of the judicial deliberations in *Brown* is that Frankfurter appears to have believed that some attention to then-prevailing views of Reconstruction was necessary. Frankfurter's clerk, Alexander Bickel, spent a good deal of the summer of 1953 researching the legislative history of the Fourteenth Amendment. Part of the reason that Frankfurter had assigned Bickel this task was because the then-prevailing study of the history of the Fourteenth Amendment had tended to view the Amendment more in cynical political terms along Dunning lines, and less as an important grant of judicially enforceable rights. See HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908). Frankfurter appears, in part, to have hoped that Bickel could come up with a somewhat more hopeful view of the Amendment. The view that the history was "inconclusive" was in Bickel's memo to Frankfurter and of course found its way into the ultimate Warren opinion. In light of the then-prevailing view of Reconstruction, "inconclusive" probably represented something of a step forward for advocates of desegregation. COTTROL, DIAMOND & WARE, *supra* note 8, at 166-68.

45. ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 36-37 (1983). I have noted the uniqueness of the undergraduate degree requirement

undergraduate education had unintended consequences, or at least consequences that I think were probably unintended by Langdell. It gave prospective lawyers, particularly those who were graduates of elite colleges and law schools, at least a constructive knowledge of what was going on in the social sciences. If the undergraduate experience did not usually produce full-fledged anthropologists, economists, psychologists, or sociologists among those who planned careers in the law, it at least produced an awareness of those disciplines in their university incarnations. It also produced an expectation. An educated attorney was one who was aware of these disciplines and recognized their importance. An educated lawyer or jurist kept up with the great or seemingly great thinkers in these fields. And an educated attorney or jurist would consult experts in these fields to help resolve the difficult social issues that came before the courts. This process started before Louis Brandeis's brief in *Muller v. Oregon*.<sup>46</sup> It would grow during the course of the Twentieth Century with the growth of the role of the social sciences in undergraduate education.

*Brown* occurred in 1954 and not 1904 in part because of profound changes in thinking about race on the part of educated elites. The efforts of Franz Boas and his disciples to vanquish scientific racism and replace it with culturally based explanations of group differences<sup>47</sup> did not immediately eradicate bigotry among university-educated elites. But increasingly, his work and others like it were making the kind of raw racism that was the conventional wisdom at the beginning of the Twentieth Century less and less respectable. By the post-war era, spurred on by the horrors of the Nazi atrocities, the dialogue on race and science had shifted even further. Social critics like T.W. Adorno and Gordon Allport were even discussing racism as a kind of social pathology.<sup>48</sup> I think it is impossible to explain how we got to *Brown* without acknowledging the profound changes in scientific thinking about race that occurred in the first half of the Twentieth Century. The *Brown* Court followed and ratified, to a large extent, changes in thinking that had already occurred among the nation's intellectual and cultural pace-setters.<sup>49</sup> The 1954 desegregation decision also probably contributed to the long-run decline in

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and its significance for American lawyering and judging elsewhere. See Robert J. Cottrol, *Creative Uncertainty*, 81 TEX. L. REV. 627, 648 (2002) (reviewing LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY (2002)).

46. 208 U.S. 412 (1908).

47. See FRANZ BOAS, THE MIND OF PRIMITIVE MAN (1963).

48. See T.W. ADORNO ET. AL., THE AUTHORITARIAN PERSONALITY (1950); GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954).

49. It should also be stressed that the Court was also ratifying changes in racial attitudes that had occurred among a good many ordinary white Americans as well. See generally COTTRIL, DIAMOND & WARE, *supra* note 8, at 77-100.

overt racism among both the nation's elites and indeed ordinary citizens, but the Court has to be considered overall a follower, not a leader, in this area.

All of which brings us back to Nelson's metaphor of the caboose and the engine. Let me submit that even post-*Brown* the Court has played more the role of caboose than engine in cases involving racial inequality. This stands in marked contrast to the Court's role as engine in the sexual privacy cases, *Griswold* and beyond.<sup>50</sup> In this area the Court has imposed the views of those of its members who believed that the Constitution should be read to protect an expanded zone of sexual privacy, ultimately not really derived from either the text or history of the Constitution, nor even from the initial *Griswold* precedent.<sup>51</sup> This jurisprudence is a response to shifting mores regarding sexual activity among the nation's cultural and intellectual pace-setters. Here, the Court has been imposing the new thinking on frequently reluctant local and perhaps national majorities.

But the Court's jurisprudence with respect to racial inequality since the 1954 desegregation decision has been far more conservative. The major cases have involved passing on measures enacted by the political branches of the state and federal governments. Whether we are discussing the Court's sustaining of the public accommodations provision of the 1964 Civil Rights Act in *Heart of Atlanta Motel, Inc. v. United States*<sup>52</sup> or Justice O'Connor's opinion sustaining an affirmative action program in *Grutter v. Bollinger*,<sup>53</sup> we are talking about a body of jurisprudence that probably bears more resemblance to the earlier legal realism—one that deferred to legislative initiatives rather than to the work of the Court in *Brown* or in the privacy cases. Indeed the Court has largely resisted innovative decision-making in cases involving racial inequality. The Court's refusal, for example, to require desegregation across municipal lines in the 1974 case *Milliken v. Bradley*<sup>54</sup> effectively limited the effectiveness of the earlier desegregation decision in *Brown*. The affirmative action cases, I think, particularly illustrate Nelson's distinction between Cardozo's "method of sociology," which is progressive but never radical in its quest to conform law to the needs and values of society, and Dworkin's approach, which empowers the judiciary to act as engines of social change. This might be seen with the *Bakke* Court's adoption of Justice Powell's diversity rationale as a constitutional justification for race-based affirmative action programs in university admissions,<sup>55</sup> rather than the remedial rationale urged by Justices Brennan, White, Marshall, and

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50. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

51. It should be noted that *Griswold* emphasized that the decision was being made within the scope of the marriage relationship. *See id.* at 485-86.

52. 379 U.S. 241, 243 (1964).

53. 123 S.Ct. 2325, 2347 (2003).

54. 418 U.S. 717, 745 (1974).

55. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-14 (1978).

Blackmun.<sup>56</sup> The diversity rationale stresses the pedagogical value of admitting under-represented minorities to universities. Presumably the principal beneficiaries would be the universities themselves and white students who are in the majority. Compensation for the effects of past, and indeed present, discrimination are not considered constitutionally sufficient to justify racially based affirmative action programs. Similarly, Justice O'Connor's opinion in *Grutter* found affirmative action constitutionally sustainable, again not on a compensatory rationale but because affirmative action contributed to the larger society's needs, including its military and commercial operations.<sup>57</sup> I am less worried than William Nelson about affirmative action or civil rights justifications rooted in self-interest rationales. Racial justice, as a matter of law and public policy, is more likely to survive over the long run if all or at least most Americans perceive that they have a stake in eradicating racial inequality. The O'Connor opinion, like that of Powell before her, and the briefs of the United States government supporting desegregation in *Brown*<sup>58</sup> are examples of enlightened self-interest at work, a force that I think, in the long run, will have more staying power than either benevolence, guilt, or a sense of justice.<sup>59</sup> A perception that racially ameliorative measures only benefit designated minorities instead of the society at large can only fuel political and social opposition and be destructive of those measures, as indeed they almost were in *Bakke* and *Grutter*. *Brown* made a difference precisely because the advocates urging desegregation and the Court that accepted their arguments tapped into the changed mood and needs of the nation. In doing so they proved that they had learned the realist lesson well.

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56. *Id.* at 362 (Brennan, J., concurring in part and dissenting in part).

57. *Grutter*, 123 S. Ct. at 2340.

58. See Brief for the United States as Amicus Curiae, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 8 et al.).

59. See generally COTTROL, DIAMOND & WARE, *supra* note 8, at 114; MARY L. DUDIZK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).