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# SOCIOLOGY, PSYCHOLOGY AND CIVIL RIGHTS

MARION A. WRIGHT\*

When on May 17, 1954, the Supreme Court handed down its decision in the *Brown*<sup>1</sup> case there were agonized cries in certain southern political quarters that the Court had been influenced in its decision by the views of Gunnar Myrdal, a sociologist, and Dr. Kenneth Clark, a psychologist. The vitriol in the attack upon the Court was not diluted by the circumstances that Myrdal is a Swede and Clark is a Negro. But nationality and race were not overplayed. The gravamen of the Court's offense was that sociology and psychology, as distinguished from pure law, had been taken into account in determining under what conditions children should be educated. Coke and Middleton, of course, but not Clark and Myrdal, were proper guides to judicial decision. If Clark and Myrdal had been on the other side of the issue it is to be doubted that reliance upon sociology and psychology would have been thus condemned. Indeed, in a later case arising in Savannah, Ga.,<sup>2</sup> and in another at Charleston, S. C.,<sup>3</sup> the defending school boards produced such testimony in their efforts to preserve segregated school systems.

*Plessy v. Ferguson*<sup>4</sup> had been at last over-ruled. Stare decisis had received a fresh thrust. This time the felony had been compounded because, it was claimed, a new and unworthy hand had guided the dagger. To be sure, the reports bulge with instances of reversal by courts of their former decisions. Judges, in common with all mortals, may err. Unless their errors fall into a special category, requiring that they shall be embalmed and preserved, courts must at times re-examine their postulates and admit their mistakes. Thus the law lives and grows—by experience, as Justice Holmes asserted. The process of recantation may be slow and

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<sup>1</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>2</sup> *Stell v. Savannah-Chatham County Bd. of Educ.*, 318 F.2d 425 (5th Cir. 1963).

<sup>3</sup> *Brown v. School Dist. 20* (E.D.S.C. Aug. 6, 1963) in *Southern School News*, Sept. 1963, p. 22, col. 1.

<sup>4</sup> 163 U.S. 537 (1896).

devious, the discredited doctrine may perish by nibbling, by curling up around the edges, by erosion, by limitation to particular facts, but perish it eventually does to the credit of the law and the benefit of society.

#### I. MEETING SOCIAL NEEDS—SOCIOLOGY AND PSYCHOLOGY

So there is nothing unique in reversal of legal doctrine. It is a familiar phenomenon of American judicial history. To be sure, it is not to be done in cavalier fashion. Men and governments have relied upon the doctrine, have assumed its continued vitality, have made investments and commitments upon such assumption. Reversal has a disturbing, possibly even disastrous, effect upon the fortunes of the few or the many adversely affected by the Court's change of mind. But these adverse effects of the moment must be weighed against the consequences to all of society, not merely at this moment but in the future. In every law suit society is more than an interested bystander; it is an avowed or unavowed party. The quest for consistency must be halted by some consideration of the social welfare. When society has a need, judicial wisdom tries to meet that need—without injury to the individual if possible but in any event if necessary.

Surely so much is elementary. The question is how best to serve the social interest. What are the social needs? What rule will promote the social welfare? The individuals who stand at the bar have but mild interest in the law's grand design. Each wants merely to win his case. But society, standing in the wings, off-stage, has an equally mild interest in *their* petty quarrel. Society is concerned with the rule of law in gestation in the womb of the case. For such a rule, grown to full stature, will issue its own directives and mandates to society.

Sociology is the science which investigates the laws or forces which regulate human society in all its grades; "the science that treats of the origin and evolution of human society and social phenomena, the progress of civilization, and the laws controlling human institution and functions."<sup>5</sup> As a science, with precise definition and limitations, it is generally regarded as having its birth in 1837 when Auguste Comte published his *Positive Philosophy*.<sup>6</sup> In that work the word "sociology" first appears.

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<sup>5</sup> BRITANNICA, DICTIONARY 1239 (1956).

<sup>6</sup> COMTE, THE POSITIVE PHILOSOPHY OF AUGUSTE COMTE (Martineau transl. 1854).

Of course, from earliest times the wisest judges sought to frame their decrees so as best to serve the public interest. But there was necessarily much fumbling and groping in the dark, much reliance upon intuition, upon private beliefs of the judge, unaided and unilluminated by scientific studies. The development of the new and significant field of sociology gave the judge an additional and valuable tool with which to work. His intuitions could now be tested, confirmed or overruled, by precise and verified data.

Certainly no court may intelligently frame its decrees so as best to serve the interests of society in the absence of some knowledge of that science. It could as well be asked to make wise decrees affecting the human body without some knowledge of anatomy or physiology. To assert that there is something novel or unique, even reprehensible, in the Court's giving heed to the lessons of sociology is to ignore much of judicial history. In 1921 one of the wisest of our jurists, Justice Cardozo, recognized and acclaimed sociology as the dominant factor in the judicial process when he stated during his famous lectures at Yale:<sup>7</sup>

[W]hen the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends.

From history and philosophy and custom, we pass, therefore, to the force which in our day and generation is becoming the greatest of them all, the power of social justice which finds its outlet and expression in the method of sociology.<sup>8</sup>

In 1881, forty years before the Cardozo lectures at Yale, Justice Holmes in one memorable paragraph had listed "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious,"<sup>9</sup> as among the factors which "have had a good deal more to do than the syllogism in determining the rules by which men should be governed."<sup>10</sup> The "felt necessities of the time" and "intuitions of public policy" refer, obviously, to the judge's feelings and the judge's intuitions. Feelings and intuitions may have their place in the judicial process. They have greater value when they are subjected to the discipline of sociological knowledge.

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<sup>7</sup> CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

<sup>8</sup> *Id.* at 65-66.

<sup>9</sup> HOLMES, *THE COMMON LAW* 1 (1881).

<sup>10</sup> *Ibid.*

So the "Warren Court," as it is sometimes sneeringly called, would have had to reject this new aid in their deliberations; instead, they would have had to rely only upon their own fallible convictions as to the social consequences of maintaining segregated school systems if they were to have given no heed to the scientific views of Myrdal and Clark. With all the light they can get courts may still err. But surely the cause of ascertaining truth and meting out justice requires the employment of every aid which human knowledge can provide. Thereby is the probability of error reduced.

Psychology, of course, is a much older branch of knowledge than sociology. Plato and Aristotle speculated upon it. But, in the purely modern sense, it begins with Thomas Hobbes in the 1600's—coming into full flower in the nineteenth century. Before its laws and principles were formulated courts went about their tasks in relative ignorance of the mental processes, the limitations of the conscious and the vast unplumbed depths of the sub-conscious. They could only act upon their intuitions, "play their hunches," so to speak, in assessing the effect of law or custom upon personality and in forecasting the subtler consequence of their decrees. Surely only the medieval mind would wish to reject the insights and perceptions which psychology affords.

When the wisest of judges, King Solomon, held a babe in one hand and a sword in the other and announced that he would dismember the child and divide it between the real and the pretensive mother, he was applying psychology to the solution of a judicial problem. So was Justice Vinson in a highly significant law school case from Texas<sup>11</sup> when he wrote of "those qualities which are incapable of objective measurement but which make for greatness in a law school."<sup>12</sup> Similarly, in *McLaurin v. Oklahoma State Regents*<sup>13</sup> he dealt with a Negro graduate student who was required to sit in a special row in classrooms, eat at a special table and use designated space in the library. "Such restrictions," wrote Justice Vinson, "impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."<sup>14</sup> This pronouncement was a judicial finding of the effect of certain practices upon mental processes and upon the total personality. It was applied psychology.

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<sup>11</sup> *Sweatt v. Painter*, 339 U.S. 629 (1950).

<sup>12</sup> *Id.* at 634.

<sup>13</sup> 339 U.S. 637 (1950).

<sup>14</sup> *Id.* at 641.

The two cases last mentioned effectively foretold the ultimate reversal of the "separate but equal" doctrine laid down in *Plessy* and the epochal decision in the *Brown* case. In that case the Court dealt with damage to personality flowing from racial segregation in education. But, though dealing only with education, the rationale is of universal application. Studied humiliation produces a mental trauma as real and serious in its consequences as a blow with a cudgel. Such humiliation is inherent in racial segregation. It is a needless penalty upon the human spirit which society will no longer tolerate. If neither voluntary, executive, or legislative action terminates the evil—then the courts will.

The Court's task always involves some degree of self-analysis. How much have early conditioning, association and education influenced the disposition and bent of mind of the judges? How much have such factors roiled or polluted the well-springs of the subconscious? The task involves also some analysis of the society upon which the judgment will have effect. What is the history of the condition or custom or law under review? How has it operated upon the men and women who have lived under it? Would they live richer and fuller lives if the condition or custom or law fell under judicial interdict? Some knowledge of psychology and sociology must be part of the court's mental arsenal if the issue is to be correctly resolved.

In knowledge there are no absolutes. There are only conclusions at which men have arrived. But a conclusion, as has been observed, is merely a point at which someone became tired of thinking. Later, perhaps, another, not tired, a fresh thinker, will push the quest for truth a little farther and arrive at a new and wiser conclusion. Thus, there is no authoritative fund of wisdom upon which a court may draw for solution of its perplexities, secure in the knowledge that it has the final and perfect answer. In time no doubt psychology and sociology, indeed all science, will be rewritten. But surely the best tool now available should not be discarded because of the reasonable expectation that better tools will be later devised. We did not refuse to use the wheelbarrow because the automobile was in the future. The collective wisdom of thinkers and scholars in any field is a safer guide to judicial action than the beliefs and intuitions of a judge, however inspired he may be. Since judicial decisions have impact upon individuals and

society, those who would wisely declare the law will increasingly turn to the sciences which treat of both.

Many matters now lie entirely beyond the reach of judicial competence. In assessing conduct what weight shall be assigned to heredity and what to environment? That ancient question remains unanswered. The effect of seasons and climate upon behavior is hardly better understood now than when Leffingwell wrote of it in 1892. Painfully the antiquated definitions of insanity as a defense to a criminal charge undergo modernization, as does the treatment of the insane. The proper attitude of the law toward sexual irregularities and abnormalities is now ripe for reconsideration. The social consequences of presenting certain television shows and publishing certain magazines are matters of conjecture. What constitutes cruel and inhuman punishment may turn out to be the normal callous prison routine rather than occasional lashes with a leather belt. In passing upon matters such as these courts will increasingly rely upon the psychologist and sociologist.

The Court, as sociologist and psychologist, tends ever to move society to new heights, to a reconsideration of man's duty to man. Even when a judge's opinion is a lone dissent,<sup>15</sup> if it accords with reason and morality, and castigates the passion of the moment, it becomes a component of the socially educative process which will later bear fruit.

In the long sweep of history, psychology and sociology, as sciences, are in their infancy. There is much more which they may tell the courts. The wise court will heed them, appropriating to its own use whatever truths they may utter; as it will, indeed, assimilate and utilize every accretion to knowledge.

It should be noted that these twin sciences were not unaided in their conversion of the nation to its present generous and liberal mood. Science is fairly cold and impersonal. It touches reason rather than emotion. The emotional response is also crucial. Here literature—Walt Whitman's "barbaric yawp," Carl Sandburg, Lillian Smith, and an imposing galaxy of writers—did their part. And religion, preferably unformalized into a creed, disturbed the national conscience. There has been an unplanned mobilization of philosophy, drama, even athletics, and every other redemptive social force to polarize the nation toward its nobler yearnings.

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<sup>15</sup> As was Justice Harlan's in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896).

In the field of civil rights, though, a case may be made that the burgeoning sciences of sociology and psychology have left their pug marks on the law's trail. Too many factors influence the minds of judges to permit firm conclusions in favor of one or the other as being decisive or even significant. The *post hoc* argument may be pushed too far. But it is at least worthy of examination.

## II. EARLY CIVIL RIGHTS CASES

At the end of the Civil War Congress enacted five laws<sup>16</sup> and successfully proposed three constitutional amendments<sup>17</sup> to strengthen the freedom of the recently liberated Negroes. The congressional intent and effort were to elevate the Negro to full status as an American citizen. That effort was effectively thwarted by the Supreme Court in its early decisions interpreting the amendments.

In the *Slaughter-House Cases*,<sup>18</sup> decided in 1873, the "privileges and immunities" clauses were held to apply only to federal citizenship as distinguished from citizenship of a particular state (in this case Louisiana), so that where the citizen was the victim of state law alone, he had no redress under the federal constitution. Eleven years later in *Hurtado v. California*,<sup>19</sup> the "due process" clause was construed not to apply to a state constitutional provision permitting prosecution by either information or indictment.

There was a spate of similar decisions which emasculated the national effort to guarantee the newly enfranchised citizens all rights under law.<sup>20</sup> In view of the present day consuming interest in the public accommodations aspect of the civil rights issue, the Supreme Court's early treatment of that issue, as reported by Berger<sup>21</sup> is here in part reproduced:

The Fourteenth Amendment contains a third clause of great significance for minorities, that forbidding a state to "deny any person within its jurisdiction the equal protection of the laws." A series of decisions beginning in 1877 limited the value of this clause for minority groups, especially Negroes, by permitting some types of classifications which have had the effect of limiting

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<sup>16</sup> BERGER, *EQUALITY BY STATUTE* 8 (1952).

<sup>17</sup> *Ibid.*

<sup>18</sup> 83 U.S. (16 Wall.) 36 (1873).

<sup>19</sup> 110 U.S. 516 (1884).

<sup>20</sup> See generally BERGER, *op. cit. supra* note 16, at 42-51.

<sup>21</sup> BERGER, *op. cit. supra* note 16. The footnotes in the following quotation are not part of the original.

their rights. The equal protection clause has not restrained the states from requiring segregated, and generally inferior, facilities for Negroes.

The *Civil Rights Cases*<sup>22</sup> of 1883 led to one of the most important opinions with respect to the equal protection clause. On the authority of the Civil Rights Act of 1875<sup>23</sup> the federal government sought to convict persons who denied to Negroes the accommodations of an inn or hotel, admission to a theatre, and a seat in the ladies' car of a railroad train. The court, by eight to one, through Justice Bradley, invalidated the statute on several grounds. First, it was not within the congressional power under the Fourteenth Amendment to deal with "individual invasions of individual rights,"<sup>24</sup> since that Amendment restrained the states, not private persons. Second, the act went too far to be authorized by the Thirteenth Amendment. A Negro's inability to enter an inn, a public carrier, or a place of amusement because an individual operator refused to admit him, the Court held, was not a badge of slavery. Thus the Court ruled that the Fourteenth Amendment gave Congress the power to prohibit discrimination, but only if practiced by a state, not by individuals. The Thirteenth Amendment, according to this opinion, does permit Congress to restrain the actions of individuals, but it does not cover the particular actions which the Civil Rights Act of 1875 sought to prohibit.

The decision in the *Civil Rights Cases* still prevails, though not unchallenged. Its reasoning was forcibly disputed in a famous dissent by Justice Harlan.<sup>25</sup> "I cannot resist the conclusion," he said, "that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism."<sup>26</sup> In reply to the majority view that the Fourteenth Amendment was a restraint only upon the states, he further insisted that it grants full United States citizenship to a former slave group, and empowers Congress, by the last clause, to enforce "by appropriate legislation"<sup>27</sup> all other provisions of the Amendment. Congress might thus not only prohibit the states from certain acts, but might also directly restrain private persons who violate the civil rights of others.<sup>28</sup>

The result of the majority opinion in the *Civil Rights Cases* was that individuals who excluded Negroes or discriminated against

<sup>22</sup> 109 U.S. 3 (1883).

<sup>23</sup> Ch. 114, 18 Stat. 335.

<sup>24</sup> 109 U.S. at 11.

<sup>25</sup> 109 U.S. at 26.

<sup>26</sup> *Ibid.*

<sup>27</sup> 109 U.S. at 36.

<sup>28</sup> BERGER, *op. cit. supra* note 16, at 48-49.

them in commercial or business establishments could not be punished under federal law. As demonstrated, the minorities issue in these cases was caught up in the separate issue of the limits of federal power—the Court hesitating to go so far as Congress went in the expansion of national power during the Reconstruction Period.

Of course the most noted of the decisions of the period is *Plessy v. Ferguson*,<sup>29</sup> decided in 1896, which gave judicial expression to the separate but equal doctrine. While relating only to transportation, its rationale applied to any form of racial segregation. Without intending the result, for half a century this decision was a cloak for the grossest discrimination in that facilities, while separate, were never equal. For example, throughout the states of the Confederacy per capita expenditures for the Negro pupil were far below those for the white. In all other areas involving public funds or services there was an equally shameful performance.

As a loose generalization, the judicial history of the Supreme Court for some five decades after the adoption of the post-war amendments and passage of the first civil rights act is a record of narrow and strict interpretation which bolstered and preserved racial discrimination in the South. This is a fact often overlooked by those who have lived only during the later and more liberal period of the Court's annals.

### III. THE COURT'S LIBERAL PERIOD

The liberal period insofar as civil rights are concerned, began about 1937 and has continued, with minor deviations, to the present. There has been a re-interpretation of the privileges and immunities, due process and equal protection clauses of the fourteenth amendment with a great increase in their protective value to minority groups. In voting,<sup>30</sup> transportation,<sup>31</sup> education,<sup>32</sup> jury service<sup>33</sup> and many other areas of legally enforced racial discrimination, there has been an imposing series of liberal decisions. Many of the earlier strict pronouncements have been flatly reversed or greatly narrowed in scope.

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<sup>29</sup> 163 U.S. 537 (1896).

<sup>30</sup> *United States v. Classic*, 313 U.S. 299 (1941).

<sup>31</sup> *Morgan v. Virginia*, 328 U.S. 373 (1946).

<sup>32</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>33</sup> *Norris v. Alabama*, 294 U.S. 587 (1935).

We may assume that equally scholarly and equally conscientious judges rendered both series of decisions—those pronouncements of the late nineteenth century which tended to preserve a social caste system and those of the mid-twentieth century which tend to bring that system to an end. Both sets of judges had access to the same precedents. They were interpreting the same Constitution. They strove with the same zeal to discharge their delicate duties. Then why? Why the completely different responses they gave to precisely the same questions?

#### A. *Judicial Background*

A partial answer seems to lie in the backgrounds of the judges themselves. The post-war judges had been part of a society which, in the southern states, tolerated slavery, and, elsewhere in the nation, viewed with complacency the relegation of Negroes to an inferior position. Tradition and custom combined to create the belief, expressed or sub-conscious, that the recently emancipated black folk were not really entitled to be regarded as full citizens. Much is revealed from the opinion in the *Plessy* decision. The Court there stated that "in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."<sup>34</sup> Then further it concluded that "if one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."<sup>35</sup>

Many of the post-war judges, however deep their scholarship, in dealing with newly emancipated folk, could not emancipate themselves from their conditioning. Justice Cardozo, in the Yale lectures frankly recognized this limitation upon complete judicial objectivity. "Deep below consciousness," he said, "are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge."<sup>36</sup>

Without laboring the point, the judges of recent decades have entered upon their duties relatively unencumbered by the latent racial loyalties and antipathies of their predecessors. To be sure, they have

<sup>34</sup> 163 U.S. at 544.

<sup>35</sup> 163 U.S. at 552.

<sup>36</sup> CARDOZO, *op. cit. supra* note 7, at 167.

their own loyalties and antipathies—no one ever entirely rids himself of them, try as he will—but, where present, they exist in other fields than race relations, or, at least, in that field, tug with ever weakening force upon the judicial resolution.

### B. Social Pressure

But equally as important as the personalities of the judges is the state of the society at the time of decision. If we would get at why judgments are rendered we must know not only by whom but when. All judges feel upon themselves, the "total push and pressure of the cosmos."<sup>37</sup> We shall hardly know why they function as they do without some attention to the nature of the cosmos which exerts the pressure.

Judges do not function in a vacuum. They do not perform in the realm of pure reason. There is a reciprocal relation between them and the enveloping society. Their decisions have impact upon society; society has impact upon their decisions.<sup>38</sup>

I can do no more than hint at some of the vast differences—economic, social, cultural—between the worlds of the nineteenth and twentieth centuries. In the post-Civil War period, the country was largely rural in orientation; there were few, if any, hard surface roads; the automobile, radio and television were mere ideas in the brains of crack-pots. There was none of the present day instantaneous diffusion of ideas and opinions across state lines. The great mass of the recently liberated Negro people were illiterate and, hence, poorly qualified to discharge the duties of citizenship. That was the kind of world which had cradled the judges of that day, which was ever in their consciousness, which exerted its "push and pressure" upon them, and, for the ordering and regulation of which, they were forced to fashion their judgments.

Small wonder it is, then, that so many of these judgments tended to give effect to state, rather than national, policy, and to consign the Negro to an inferior status in our society.

Commencing with the days of Franklin D. Roosevelt the Court has begun to function in a relatively modern world—however primitive it may seem five decades from now. It is the world of Henry Ford, MacAdam and Marconi. It is a world of mobility, men and goods moving at will from one end of the country to the

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<sup>37</sup> *Id.* at 12 (quoting William James).

<sup>38</sup> MACIVER, *THE MORE PERFECT UNION* 169 (1882).

other, and news, information and thought flashing electronically from one mind to another. Steel rails, wires, cement and air waves have developed a national consciousness in which local mores and boundary lines have lost significance. The nation, throughout this period, has slowly become the dominating unit of government. Moreover, the Negro, fresh from defending democracy in two world wars and with the advantage of some generations of education, has begun to demand his rights and the nation has in turn paid heed. The Supreme Court has become the effective organ through which the newer national consciousness and morality is expressed.

As noted previously, fortunately for the Court and the nation, the twin sciences of psychology and sociology had undergone profound development. Such men as Sigmund Freud and William James, in the one field, and Frederic Le Play and John Stuart Mill, in the other, had revolutionized knowledge of the subjects. Even the layman had some smattering of information about them and talked learnedly of ids, egos, suppressions, the sub-conscious, motivations and cultural lags. Clark and Myrdal built upon these sure foundations.

Thus the Court in *Brown* was upon solid ground in holding that segregation per se was damaging to the personality of the child and to society. The first Justice Harlan's contention that segregation was "a badge of servitude"<sup>39</sup> had at last become a part of the national creed.

### C. Law and Morals

Justice Warren recently coined an interesting phrase when he said: "Law floats in a sea of morals." Certainly the law seeks to be consistent with sound morality. Moral imperatives in time tend to become legal mandates. For example, from the legal point of view that one may do what he pleased with his own property or business, even though the purpose is to cause loss to another, we have advanced to the view that one may never do anything with his property or business for the purpose of injuring another without reasonable and just excuse. Certainly the latter view was reached as being in accord with what men believe to be right. Ethical considerations helped to modify the earlier and harsher rule.

The effect of changes in social conditions also speeded up the

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<sup>39</sup> Civil Rights Cases, 109 U.S. 3, 43 (1893).

process. The rule which was adequate to regulate relations between individuals in a simple or homogeneous society was found to yield grotesque results under more complex conditions. We swap liberty for civilization. In other words, the courts properly and consciously have attempted to devise a rule to meet social needs. To that extent they were sociologists.

#### *D. Results*

What remains is, of course, to apply all these general principles to particular situations; to extend declared rules by analogy to related circumstances. Society, we say, tries to protect the citizen from injury needlessly inflicted by others. Thus one person may not erect a "spite" fence on his property in order to deprive another of access to view. The psychologist tells us that enjoyment of the amenities is as essential to personality as enjoyment of view. Society protects the customer against a foreign substance in his slice of apple pie. The psychologist tells us that mental trauma is as real a malady as stomach ache and may be caused by humiliation resulting from exclusion from a place of public accommodation. The law now gives an adjoining land owner the right of lateral support from his neighbor, so that excavation inflicts no damage. Personality, as well as soil, may need some shoring up.

#### IV. THE POSITION OF THE JUDGE: DUTY-MOLDER OF OPINION

One qualification must be made as to the pressure of society upon the judge. This situation arises, as demonstrated by the civil rights situation, where the highest court in the land has declared a certain rule of law that effects some segments of our society adversely. Certainly the wise judge is conscious and sensitive to adverse public opinion. We gain nothing by pretending that it does not exist—by assuming that the surge of forces which moves all other men leaves the judge untouched. Sometimes these forces—whether deriving from passion or prejudice or reason—accord precisely with his own personal and judicial views, in which case his task is simple. If he does no violence to legal principles, he merely gives effect to the prevailing mood. At other times he may be quite convinced that the prevailing mood is evil or that it conflicts with legal principles. His duty is more difficult but no less clear. He must resist and rebuke the mood. Certainly his duty as judge is not merely to take readings of public sentiment and give effect to

the will of the majority. He is no seismograph registering shock waves.

The civil rights issue, perhaps more than any other in the nation's history, has presented southern judges with the dilemma arising from the congeries of their personal views, the declared law and the passions of the community. Peltason's *Fifty-Eight Lonely Men*<sup>40</sup> is a chronicle of how southern judges faced and resolved that dilemma in the years since the *Brown* case was decided. The lack of uniformity in their decisions reflects the degree to which they yielded to or resisted the mass pressures which beat upon them.

Where the pressure, as in the southern resistance to declared law, is merely a reflection of community prejudice, and the judge, as he should, rebukes it, he not merely properly obeys his oath of office; he performs another and an equally important function. His decision, far from being a creation, becomes a creator of public opinion. He asserts the proper moral position of the community. He is, at the moment, in advance of the present moral position. But his assertion, particularly if vigorous and militant, pricks the community conscience and causes men to think. When they begin to think, they begin to move toward the moral plane occupied by the enlightened judge.

#### V. INCREASING FEDERAL CONCERN

One prediction seems fairly safe. The concern of the federal courts with civil rights and civil liberties will steadily grow. This is in response to the diminishing significance of state and local boundary lines and the increasing stress upon national, rather than state, citizenship. Victims of repression have a right to expect protection and redress from the national government. They may properly invoke their status as American citizens, entitled in Mississippi or Alabama to exercise rights enjoyed by citizens of California or Wisconsin. The court which protects the child against the harmful effects of segregated education may be called upon to protect him against instruction that there is such a thing as racial superiority or inferiority or that United Nations is an agency created to enslave him.

The national problem, not one for the courts alone, is to develop methods by which minimal national standards of decency and rectitude may prevail in all states. We have long been familiar with the

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<sup>40</sup> PELTASON, *FIFTY-EIGHT LONELY MEN* (1961).

distribution in one state of surplus electric power generated in another. The Federal Reserve Banking system and the Federal Deposit Insurance Corporation make the assets of all banks available to weak members without regard to state lines. It should not be too great a tax upon our ingenuity to find means by which the intellectual and moral strength of the entire nation shall permeate our wastelands. The country at large constitutes a cultural reservoir. No mere state lines should prevent some siphoning of its contents into our more arid regions.