

yesterday. It is because constitutional law is a process rather than a static set of rules that a commentary can no longer encompass it. This appears to have driven Professor Schwartz to describing to the best of his ability that which is, or was, at the moment of writing, and then to amend history to demonstrate that this was always so. Thus, he may well be right in suggesting that the federalism that once called for division of sovereign power between nation and states (and the people, if you will) has disappeared. It is different, however, to say that it disappeared and to say that it never existed.

Having said all that, I would say one thing more. The book is not without merit. Most of its propositions of law are accurate. A student cramming for a typical state bar examination would probably find in here all he possibly need know of the subject. He will not have an accurate picture of how the current rules developed or what the process is that is likely to transmute them into something different in the future. But bar examiners are not interested in those things. Neither, I suspect, are most students, most lawyers, most professors. For these, and for the political science market to which I already alluded, the volumes will fill a longfelt need. Professor Schwartz may prefer the solace of royalties to the fulsome praise of critics. I expect that there will be much more of the former than the latter.

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The Geography of Intellect. By NATHANIEL WEYL and STEFAN POSSONY. Chicago: Henry Regnery Co., 1963. Pp. xiii, 299. \$7.95.

Race is today in the forefront of those social and scientific issues where the search for truth is obstructed by partisan politics. Because feelings on racial issues are so intense, intelligence often takes a back seat to ideology. What passes for blocks of scientific truth are gathered not to build an intellectual edifice, but to hurl at our political opponents. A person's interpretation of scientific or historical data respecting race can be inferred with considerable accuracy from his position on the fluoridation of water. Consequently practically everything published for popular consumption and concerned with race, including *The Geography of Intellect*, is special pleading and is to be identified with one or another political syndrome.¹ The liberal syndrome is often as obnoxious to the search for

¹ It is certainly true that there is no necessary identity between views on race and politics, see, e.g., Sharp, *The Conservative Fellow Traveler*, 30 U. CHI. L. REV. 704 (1963), but it is a rare economic liberal who is not also liberal on civil rights; and

truth as the racist; a point that those of liberal inclination, among whom I would place myself, are inclined to overlook.² If we are interested in the truth of the matter, we cannot reject certain arguments out of hand by "considering the source," since all are more or less tainted by politics.

Evidence of the difficulty that even the most objective people are likely to have in separating politics from race was provided quite recently by the American Association for the Advancement of Science. While attacking the author of *Race and Reason*,³ the Association stated:

The alleged evidence [of racial inferiority] is being used to challenge a principle fundamental to our political system, and to influence the outcome of the present crisis in relations between racial groups. . . . The use of purported "scientific evidence" to justify noncompliance with the Constitution debases both science and the human conscience.⁴

What would have been the Association's position had the authors presented their data without comment on social policy, or had they advocated a government policy on Dutch Elm disease? Is the objection that the evidence is "alleged" and "purported" (scientifically wrong or weak), that it is used in opposition to a favored political position or that it is used at all by scientists in political debate? If the Association's real objection is the first, it should have said so more clearly, for of the three, that is the only valid objection. That the latter two are indefensible can be easily determined by trying to apply them to the scientific studies done for or used by the N.A.A.C.P. in civil rights cases.⁵ Another objection to the Association's position, at least as represented by this quotation, is that the Association assumes the answer to the constitutional question posed by such works as *Race and Reason* and *The Geography of Intellect*: Does the Constitution either require or permit racial distinctions, presuming the "purported 'scientific evidence'" is true? This question is central in assessing the impact such books will have on the racial situation in America. Before reaching this question, I will describe the

on the far right the liberals see their inverted reflection. *Goldwater 4 President?*, a four-page folder published by the National States' Rights Party, says Goldwater is "a loyal member . . . [of] the communist-fronting NAACP," and, elsewhere, that "he refuses to discuss . . . sound money"

² See, e.g., KONVITZ, *A CENTURY OF CIVIL RIGHTS* (1961), a book that seems to attribute to Southern whites a disinterested malice that would do credit to Mephistopheles.

³ PUTNAM, *RACE AND REASON* (1961).

⁴ Quoted in an editorial, approving the Association's position, in the *Chicago Daily News*, Nov. 22, 1963, p. 12, col. 1.

⁵ The most familiar example is, of course, *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 n.11 (1954).

book generally and review the evidence respecting racial differences in intellectual ability.

We can expect that, if mentioned at all in liberal and academic circles, *The Geography of Intellect* will be uniformly dispraised or briefly dismissed; its circulation will be among those seeking intellectual justification for their prejudice. I chose to discuss this book because we are likely to find similar material being made use of in the courts to give color of scientific support to anti-integration arguments,⁶ because there is the possibility that at least some of the authors' contentions respecting race may be correct and hence the constitutional issue may eventually have to be faced, and because, should the authors turn out to be even partly right in their evaluation of the evidence of racial differences, many in the liberal community will be faced with an intellectual and emotional crisis.⁷

The Geography of Intellect is not, on the surface, primarily concerned with racial problems in the United States. The argument is that intelligence, a rare enough commodity at any time, is particularly necessary in a world made interdependent by the progress of technology, transportation and communication—certainly an innocent enough suggestion. All progress, according to the authors, is produced by a small minority of superior persons. When their ranks are decimated, civilization wanes; correspondingly when society is organized to detect and mobilize the gene pools of the intelligent, we can expect cultural advance. (It is by increased reproduction among the intelligent, rather than by elimination of the less competent, that the authors propose to solve the problem of an inadequate intellectual work force.) In a word, the authors are taking up the old eugenic cudgel of Francis Galton.⁸ The point of

⁶ This has already occurred in *Stell v. Savannah-Chatham County Bd. of Educ.*, 220 F. Supp. 667 (S.D. Ga.), *rev'd*, 318 F.2d 425 (5th Cir. 1963). Scarlett, the district judge, heard in a proceeding to enjoin defendant from operating a biracial school system, evidence respecting the I.Q.'s of white and Negro students in the system and heard expert testimony respecting the possibility of developing a curriculum adequate for such allegedly intellectually disparate groups, and took judicial notice of a great deal of literature in the field. This subject was raised by white children who were allowed to interplead. Plaintiffs submitted no evidence, arguing that *Brown v. Board of Educ.*, 347 U.S. 483 (1954), made it a matter of law that separation was unequal and that all that was necessary for injunction was proof of segregation. Judge Scarlett held that the issue of harm to the Negro children was a question of fact, that the evidence presented indicated that an end to separation would be harmful and therefore dismissed the action. Among his specific findings was that the differential I.Q. was biologically determined. The circuit court reversed, accepting plaintiff's reasoning, and issued an injunction on behalf of the district court rather than remanding.

⁷ Where effort could be made to allay this possibility by open consideration of the chance that there are differences in intelligence, the question is usually sidestepped, as in *CONANT, SLUMS AND SUBURBS* (1961).

⁸ GALTON, *HEREDITARY GENIUS* (1869).

the title is that the book is concerned with locating pools of desirable genes, by geographic and racial identity, and then determining the forces that encourage or discourage their proliferation.

A secondary but very important thesis in *Geography* is that there are racial differences in intelligence. A large portion of the book is an assembly from primary sources of the data, scientific and speculative, that would argue for such differences. By and large, the data is presented in a highly objective manner; a footnote, for example, carefully explains that miscegenation is a scientifically neutral term. The amassing of evidence in a book that is, with the exception of one chapter, well written and apparently disinterested, will provide the opponents of racial integration with considerable ammunition, for as might be expected, it turns out that Negroes are at the bottom of the heap. And the apparent disinterest is the more convincing because the authors conclude that American Orientals and Western Jews are the equals of, or superior to, native white Americans. In this manner, the authors give the appearance of dissociating themselves from the syndrome with which the reader would otherwise expect them to be identified.

But though *The Geography of Intellect* is global in its concerns, its real impact will be on the American race problem. With respect to the larger genetic problem posed, it at best points a finger and heaves a sigh; no solutions are proposed. With respect to the racial conflict in America, however, there is no need to propose solutions. Because the evidence the authors offer on racial difference will have immediate value to some people, we can expect that such evidence will soon turn up as a minor premise for many a crackpot suggestion from the radical right. I turn now to the evidence of racial difference in intelligence.

At the heart of the matter is the credence to be given the consistently poor records of Negroes on I.Q. tests. The facts are reported in *The Geography of Intellect* as they are, with only slight differences in emphasis and interpretation, in almost all of the literature on either side of the issue. Nor do the authors ignore the famous studies, carried out in the Chicago public schools in the thirties, that found twenty-six Negro students with I.Q.'s of one hundred and forty, eighteen over one hundred and sixty, and one over two hundred.⁹ The argument, then, is not that there are no gifted Negroes, but that (1) the median or average I.Q. among Negroes is lower than that among whites, and (2) the gifted will occur less frequently among Negroes and the deficient more frequently. The authors suggest a factor of six—one-sixth as many gifted and six times

⁹ See, e.g., Witty & Jenkins, *The Educational Achievement of a Group of Gifted Negro Children*, 25 J. EDUCATIONAL PSYCHOLOGY 585 (1934); Witty & Jenkins, *The Case of "B"—A Gifted Negro Girl*, 6 J. SOCIAL PSYCHOLOGY 117 (1935).

as many deficient.¹⁰ Reported differences in median or average I.Q. vary widely; for example, the authors mention seventeen tests in which "the Negro groups had average I.Q.'s ranging from 72 to 89."¹¹

Those who do not accept the conclusion drawn from such evidence by Possony and Weyl and others—that Negroes are inherently inferior in intellectual capacity—raise at least five points respecting the validity and meaning of these results.

The most common response of equalitarians is that the difference, here admitted to exist, is not innate but culturally determined. This is one aspect of the "nature or nurture"¹² argument that has entertained generations past and will doubtless entertain more in the future. There is considerable evidence to indicate that environment does affect the ability to do well on intelligence tests; Weyl and Possony so indicate,¹³ though they never directly admit the possibility with respect to Negroes. Dunn and Dobzhansky, summarizing evidence from studies of separately raised identical twins, suggest that from sixty-five percent to eighty percent of intelligence differential can be attributed to biology, and the balance to environment.¹⁴ The intelligence tests given all soldiers during the First and Second World Wars showed Northern Negroes doing better than Southern Negroes, and sometimes better than Southern whites. While it may be argued that these results demonstrate the effect of improved environment, it may be as plausibly argued that the difference is to be attributed to the selective process of migration. It is equally possible to plausibly explain away the unfavorable results of tests in which Negro and white testees are matched for social and economic status; no such matching can possibly take into consideration the one outstanding environmental influence upon Negroes—that of being a Negro in a white world.¹⁵

¹⁰ Intelligence distributions are illustrated by bell-shaped curves, the highest points of which normally show the median score. A reduction in median score moves the whole curve to the left, thus simultaneously decreasing the superior and increasing the deficient elements.

¹¹ P. 175. An I.Q. of 100 is considered normal; that is, mental age and physical age are equal. The difference between test results may arise from different factors; the adequacy of the sample size, the use of different test forms, testing conditions and so on.

¹² I use quotation marks as a way of denying responsibility for the phrase. It appears with unwarranted frequency in the popular literature of anthropology.

¹³ E.g., they report a study in which Indian children placed in foster homes are reported to have had an average I.Q. of 102, as compared with a reported I.Q. for those remaining on the reservation of 87.5. P. 174.

¹⁴ DUNN & DOBZHANSKY, *HEREDITY, RACE AND SOCIETY* 19-22 (1946). See also the more detailed report on the twin study method of detecting the influence of heredity on behavior in McClearn, *The Inheritance of Behavior*, in *PSYCHOLOGY IN THE MAKING* 144, 192-201 (Postman ed. 1963).

¹⁵ Unfortunately, or perhaps fortunately, this line of argument puts the problem

From all I have been able to discover, no more satisfactory evidence exists on actual differences among Negroes resulting from environment.¹⁶ The lack is probably not surprising, in view of the difficulties that inhere in testing such a phenomenon. The strongest conclusion tenable is that environment can and does affect the ability measured by I.Q. tests. It therefore almost certainly affects results among Negroes. What we know or can surmise of the influence of various environmental factors would suggest that, for most Negroes, the influence of environment would be detrimental. It is conceivable that, were environmental factors equalized, Negroes would be superior to whites. It is also conceivable that the neutralization of environment would not completely eliminate the present trend of the differences. Even the most respectably liberal authorities concede, albeit reluctantly, that the question of innate differences remains open:

While anthropological outlook and anthropological researches must be kept open to the possibility that there exist differences between human populations that are significant in terms of capacities and limitations, the only scientific conclusion tenable at present is "not proven."¹⁷

It is true that science's last word has not been said even on the Negro's innate intelligence and still less on his other psychic traits. But the undermining of the basis of certitude for popular beliefs has been accomplished.¹⁸

A second response also concerns cultural difference, but uses cultural difference not to explain the tests results but to question their accuracy. An intelligence test requires the performance of certain mental operations on given data or material. Clearly, the testee for whom the data or material is unfamiliar will be handicapped,¹⁹ as he will be if the type of handling desired is outside of his experience. Intelligence tests

beyond the realm of science, at least if we follow Karl Popper's argument that the feature that distinguishes science from rational or cognitive activity is the possibility of the crucial testing of hypotheses. POPPER, *CONJECTURES AND REFUTATIONS* (1962). It may be possible, though practically difficult, to get the result by indirection; rather than directly measure the impact of a sense of Negritude, design a test situation in which the impact is eliminated.

¹⁶ For instance, apparently none of the twin studies, note 14 *supra*, involve Negroes.

¹⁷ KLUCKHOLN, *MIRROR FOR MAN* 102 (Premier ed. 1957).

¹⁸ MYRDAL, *AN AMERICAN DILEMMA* 149 (1st ed. 1949).

¹⁹ An example of the same problem arose in the experience of a friend who for a while taught in the primary grades in a public school populated primarily by lower class, recently migrated Negro children. In trying to teach them reading, he found himself greatly handicapped by the books provided. The common vegetables described were unfamiliar to the children, though they immediately recognized the vegetables that were more common in their own diets.

tend to be bound by culture and class, especially with respect to the data given; this difficulty is most serious with respect to verbal tests and less so with mathematical and maze tests. In respect of the operations to be performed, the mathematical test is likely to be more culture bound than a maze test. The authors of *Geography* deal with this objection by asserting that tests oriented to western ways of thinking are not really parochial, because Western civilization is becoming the civilization of mankind; remnants of other civilizations are anomalies bound to disappear.²⁰ That, I think, needs no comment. But it should be pointed out that the response does have implications for the "nature-nurture" issue: We may be permitted the inference that this defense of the tests may include a concession with respect to the impact of culture on certain types of intelligence.

The validity of intelligence tests may be inquired into even in their own terms—that is, as effective measures of academic ability within a middle class, Western cultural setting. Surely, most people would, if asked, conclude that creativity is an aspect of intelligence. But a strong argument has been advanced recently that intelligence tests do not measure creativity. The Getzels and Jackson study of students at the University of Chicago High School²¹ suggests that the highly creative, but not highly intelligent, did as well in school as those who appeared intelligent but not creative.²² The successful among the creative students were stigmatized by their teachers as "over achievers." The implication was that they succeeded by dronesmanship, but, as the authors cogently point out, it is impossible for a person to do more than he is capable of. This criticism goes to the heart of the claims of the I.Q. test. If they measure anything, it is the ability to succeed in academic work. If the tests fail to measure something that can be called creativity, and that something has, like the ability to do well on the more usual I.Q. test, a positive correlation with academic success, the intelligence test is obviously inadequate in its own terms and in its own cultural context.²³

²⁰ Pp. 155-56.

²¹ GETZELS & JACKSON, *CREATIVITY AND INTELLIGENCE* (1962).

²² Getzels and Jackson used as measures of I.Q. various standard tests that had been previously administered by the school, converting scores on other than Stanford-Binet tests to a Stanford-Binet scale to obtain comparability. *Id.* at 198. "In general, our tests of creativity involved the ability to deal inventively with verbal and numerical symbol systems and with object-space relations. What most of these tests had in common was that the score depended not on a single predetermined correct response as is most often the case with the common intelligence test, but on the number, novelty, and variety of adaptive responses to a given stimulus task." *Id.* at 17.

²³ One of the methods adopted by Weyl and Possony—the paranoiac method—for dealing with criticisms of intelligence testing is the assertion that those who most strongly supported such tests in the first place rejected them upon discovery that their

A fourth and closely related response is that we do not know what the tests do not measure. We have no notion what a policy of eugenic selection based on intelligence tests would tend to breed out of the race. The authors admire what they take to have been the pattern of Diaspora Jews of encouraging the proliferation of the most intelligent. One of the indices offered of the effectiveness of this cultural pattern is the success of Jews in the field of music.²⁴ According to the authors, 45.9 percent of the conductors of major United States orchestras were Jewish; so were 51.1 percent of the first violins and 34.0 percent of the strings generally; on the other hand, of the brass, a scant 9.4 percent and of the woodwinds, 9.6 percent. I, for one, would be dismayed at the possibility that the type of selection recommended might result in the breeding of exclusively string orchestras. Yet that wind and breath control may have no correlation, or even a negative correlation, with intelligence is certainly plausible.²⁵

results were consistently in conflict with the liberal ideology respecting racial equality. This is, of course, not a scientifically valid criticism. The attempt to test, when a new hypothesis conflicts with one previously accepted, is the means of scientific progress. "The scientific tradition is distinguished from the pre-scientific tradition in having two layers. Like the latter, it passes on its theories; but it also passes on a critical attitude towards them. The theories are passed on, not as dogmas, but rather with the challenge to discuss them and improve upon them." POPPER, *op. cit. supra* note 15, at 50. The Weyl-Possony criticism is valid, of course, if there is no willingness to attempt to design crucial tests that will make it possible to determine whether the liberal presumption or the current method of testing intelligence is valid. Be that as it may, I think the Getzels-Jackson study is evidence that current criticism of intelligence testing does not arise solely from dissatisfaction with results that seem to show racial differences. "The American Association for Gifted Children some time ago argued that qualities other than I.Q. be included in the conception of giftedness, and defined the gifted individual as 'a person whose performance in any line of socially useful endeavor is consistently superior. This definition includes those talented in art, music, drama and mathematics, as well as those who possess mechanical and social skills and those with high abstract verbal intelligence.' Despite such calls for freeing the concept of giftedness from its one-sided attachment to the I.Q. metric and for broadening the base for examining intellectual and social excellence in children, the essential point remains: in research as in educational practice, the I.Q. metric has continued to be the predominant and often exclusive criterion of giftedness. Accordingly, we undertook to examine empirically the consequences of applying other conceptions of giftedness as well as 'high I.Q.' to the study of children." GETZELS & JACKSON, *op. cit. supra* note 21, at 8.

²⁴ P. 164.

²⁵ That the results of breeding for one characteristic may produce a variety of unexpected, and perhaps unwanted, side-effects has been dramatically demonstrated in animal experimentation. An experimenter (Tryon) succeeded by careful selection in developing from one strain of rats two strains that differed radically in their ability in maze tests. "The question remained as to whether the 'brights' were generally superior, or superior only in this specific type of situation. Searle (1949) examined this point directly by subjecting 'brights' and 'dulls' to a battery of tests which measured learning under hunger motivation, learning under escape-from-water motivation, activity and emotionality. The 'brights' learned better than the 'dulls' in the hunger-motivation problems, whereas the 'dulls' were superior to the 'brights' in the escape-

Nor is this fourth objection a mere matter of taste. The authors, for instance, denigrate maze tests on the ground that the abilities they measure—variously described as “mental alertness,” “ability to plan ahead” and “practical intelligence”; to be distinguished from “intellect” and “scholastic educability”—are apparently centered in the lower and earlier developed portions of the brain, rather than in the cerebral cortex with which “intellect” is identified.²⁶ It seems a doubtful conclusion that man can live by cortex alone. In fact, the distinguishing characteristic of a successful species such as *homo sapiens* is its lack of biological specialization;²⁷ it is his versatility that has made it possible for man to conquer virtually all of the environments on earth, and to look with optimism to the possibility of conquering those beyond the earth. The emphasis placed upon intellect (with respect to which the authors have a curiously ambivalent feeling, as we shall see) suggests that, if allowed, they would engage in a process of selection that might well overspecialize and therefore spell the doom of mankind. Realistically, this argument *in terrorem* is vitiated by the difficulties of successfully carrying out any conscious eugenic policy,²⁸ but speaking in such hypothetical terms makes it possible to emphasize the point that it is now, and perhaps forever will be, impossible to determine the unintended consequences of any eugenic policy.²⁹ And, to come down to the problem at hand, today's religion of academic intelligence, honored more in the breach than in

from-water situations. Furthermore, ‘brights’ were more active in the maze but less active in rotating wheels. Other differences were found with respect to emotionality. ‘Brights’ were more ‘emotional’ in open spaces, while ‘dulls’ displayed emotional behavior with respect to certain mechanical features of the maze. The selection program had quite obviously resulted in strains which differed from each other in complex ways—not simply in ability to learn a pattern of responses in the maze. In selective breeding, characteristics other than those deliberately sought may fortuitously become associated in the developing lines. It is not possible, therefore, without further research, to determine which of the constellation of behavior differences between strains are fundamental to the principal behavior difference, and which are only incidental.” McClearn, *The Inheritance of Behavior*, in *PSYCHOLOGY IN THE MAKING* 215 (Postman ed. 1963). See also COON, *THE ORIGIN OF RACES* 22 (1962): “Sometimes it is disadvantageous for a population to eliminate its old genes completely. An old gene may possess the ability to meet an old crisis, if that crisis should return. Furthermore, the old gene and the new one with which it shares, as an alternate, its position on a chromosome may do things together that neither could do alone.”

²⁶ P. 156, quoting Porteus, *Ethnic Group Differences*, 1 *THE MANKIND QUARTERLY* 192 (1961).

²⁷ See COON, *op. cit. supra* note 25, at 28, 38-118. Certainly, intelligence, “a top-grade brain,” *id.* at 72, is essential to the success of *homo sapiens*’ adaptation. Such a brain is in itself a key to adaptability. It does not follow, however, that brain alone is sufficient, or that breeding for the development of one brain function is biologically desirable.

²⁸ DUNN & DOBZHANSKY, *op. cit. supra* note 14, at 69-76.

²⁹ See note 25 *supra*.

the observance, may be, for all we know, a biological just as it is an ethical and spiritual grotesquerie.

A fifth response to the variable test results is that there are very real problems respecting the discovery of the limits of the groups with which the results are to be correlated. The concept of race, especially in respect to mankind, is of very limited utility. Normally, members of a biological race will be incapable of procreating or producing fertile offspring with those of another race of the same species. There is no evidence that any human "racial" crosses are either impossible or infertile. Moreover, there is no agreement on how many races there are, nor on their distinguishing characteristics. Thus, though they rely on Carleton Coon's theory that racial differences appeared in the genus *homo* before the appearance of *homo sapiens*,³⁰ the authors of *Geography of Intellect* do not seem to follow his division of Africans into two races, Capoid and Congoid.³¹ Other researchers have concluded that there are not three, four or five races, but tens, twenties and thirties.³²

Today, it is generally agreed that the only meaningful way of distinguishing humans into biologically distinct groups is in terms of gene pools, a concept most easily grasped in relation to a human group isolated from the rest of mankind, such as the Bhutanese. The characteristics of future Bhutanese, since foreigners are not admitted to Bhutan, can only be derived, either normally or by mutation, from genes already present among Bhutanese. In such a situation, the development of biologically distinguishing characteristics, and their perpetuation, is not only possible but likely. There are gene pools within gene pools. There is an American gene pool, and there are many smaller gene pools within the United States that have significance to the degree that persons within the group are more likely than not to marry others in the group. The continuity of such pools will sharply vary as foreign genes are allowed to enter. The greater the frequency with which genes are exchanged

³⁰ COON, *op. cit. supra* note 25, at 33. "In the case of man, the subspecies of *Homo sapiens* are probably of different ages, depending on the times at which regional populations of *Homo erectus*, in one way or another, crossed the *sapiens* threshold." The notion is that *Homo erectus* in different environments developed different characteristics corresponding to present day racial characteristics, and that these racial stocks developed independently, but in a more or less parallel manner, toward and across the sapient threshold; Coon defines that threshold in terms of cranial capacity and suggests 1250-1300 cc. as the line. *Id.* at 337-41.

³¹ At least I recall no such distinction and find neither in the index, while Negro is represented there with numerous references. For Coon, Negroes and pygmies are Congoid, while Bushmen and their relatives are Capoid.

³² "The extent of present confusion is indicated by the fact that the numbers of races distinguished by competent students range from two to two hundred." KLUCK-HOLN, *op. cit. supra* note 17, at 82.

between pools, the less significance can be attached with respect to any individual to his having been born within a given gene pool.

If racial designations, considered as shorthand descriptives for relatively distinctive gene pools, are broad and few in number, they tell little about any individual member, because of the genetic exchanges that have gone on over the centuries. Correspondingly, data derived from small samples identified with the gene pool, for example, in respect to intelligence, are very doubtful indicators for the group as a whole. The more detailed one attempts to become in listing races, and hence the more accurate in making deductions from group to individual characteristics, and vice versa, the more difficulty there is in deciding the proper limits of the relevant groups. And in the name of accuracy this process could be carried to the point where the human energy involved in the classification might just as well be expended on dealing with persons as individuals.

Of the five issues raised, three question, from one or another point of view, the adequacy of the measuring process or the nature of the dimension measured and are relevant with respect to any individual tested. The fourth questions the value judgment normally placed on the measure. The fifth questions the validity of correlations drawn from the testing of individuals. In asking whether characteristics can be identified with groups, where group boundaries are so nebulous, we come directly to the constitutional question of racial classification for legislative purposes.

When all is said and done, it must be conceded that what passes for proof on either side of the question of racial differences in intelligence is not very satisfying. There is, however, no apparent reason why the technical obstacles that have so far prevented convincing scientific conclusions cannot eventually be overcome. Should they be, there is the possibility that genetic differences with respect to a variety of capabilities will be found to be correlated to some degree with race and geography (gene pools).

It is strange that Americans, long used to the notion that unequal ability has nothing to do with equality before the law, should be shaken by the possibility that there may be proven to exist differences in ability that can be correlated with race or ethnicity. I am disturbed by the impression left, after discussing *The Geography of Intellect* with many friends, that were such differences proven, their faith in a liberal attitude on racial issues would be badly shaken. I conclude from this a general unwillingness to face up to the possibility, an unwillingness illustrated recently in the public domain by Conant's treatment of the question in *Slums and Suburbs*. He concludes his discussion: "[U]ntil the evidence

is available, I suggest the only assumption to use as a working hypothesis is that there is no genetic difference as far as aptitude for schoolwork is concerned between large numbers of Negroes in the United States and large numbers of other children."³³ It is as if the word equal in the Declaration of Independence were being read by many modern liberals with simple minded literalness. The Declaration cannot be read to mean "those who are not equal are not men"; it can only be read to mean "those who are men are therefore equal and entitled to the blessings of liberty." It makes no difference that Mr. Chief Justice Taney's interpretation of the authors' use of the word "men" might have been correct.³⁴ That is historically interesting; but the fourteenth amendment has required us to include Negro within the concept of man,³⁵ an anthropologically inescapable conclusion,³⁶ and having done so, we cannot avoid

³³ CONANT, *op. cit. supra* note 7, at 18-19.

³⁴ "The general words above quoted ['all men are created equal'] would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included . . . for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted . . ." *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 410 (1857).

³⁵ It is argued by Frank & Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM. L. REV. 131, 136-38 (1950), that the phrase "equal protection of the laws" in the fourteenth amendment was an intended extrapolation from the phrase in the Declaration of Independence, "all men are created equal." It might be suggested that the use of "person" in the fourteenth amendment resolved without direct confrontation the problem Mr. Chief Justice Taney faced, note 34 *supra*, in trying to find the meaning of "men." If we start with the premise, which Taney would have accepted, that all citizens are men, the fourteenth amendment states "All persons born . . . in the United States . . . are citizens . . .," and it follows that at least those Negroes born in the United States are men. In any case, it is clear that it was intended by the drafters of the fourteenth amendment that equality attributed to men by the Declaration should be honored by the states as respects both Negroes and whites.

³⁶ If "man" has an anthropological meaning, it must be coextensive with sapience, and I do not think any anthropologist would exclude Negroes from the species. See note 33 *supra*, on the sapient threshold. Darwin did not consider the issue important: "Whether primeval man, when he possessed few arts, and those of the rudest kind, and when his power of speech was extremely imperfect, would have deserved to be called man, must depend on the definition we employ. In a series of forms graduating insensibly from some ape-like creature to man as he now exists, it would be impossible to fix on any definite point where the term 'man' ought to be used. But this is a matter of very little importance." Quoted in Dart, *Cultural Status of the South African Man-Apes*, in 3 SMITHSONIAN TREASURY OF SCIENCE 887, 896 (True ed. 1960). Though it is not a scientifically important question, it is clearly politically important. Admittedly, Coon's suggestion for a sapient threshold represents no more than that point at which the median skull capacity of a prehistoric population reached the lower end of the normal range of the skull capacity for living men. The definition, then, is circular; it would seem unlikely that anthropology can help us break the circle.

application of the Declaration's principles to Negroes and to whites. A contrary conclusion would be suggested only if racial differences were so radical as to raise a legitimate scientific question whether Negroes are men. It is impossible to escape Myrdal's conclusion, based on the clear evidence that while racial differences may be of a lesser magnitude than now appears, they almost certainly cannot be greater, that such differences as finally appear will not be of sufficient magnitude to justify invidious public policy.³⁷ Our working assumption, then, should not be that there are no differences, but that, if there prove to be, it makes no difference. I consider it curiously revealing that the authors of *The Geography of Intellect*, despite their belief that the median intelligence of Negroes is inherently lower than that of whites, suggest no public policy conclusions. A consideration of the requirements of the equal protection clause respecting legislative classification leads to the same conclusion.

The fourteenth amendment requirement of equal protection of the laws does not prohibit legislatures from making laws that apply only to specific groups, where the classification is reasonable. There has been, however, relatively little systematic attention paid to what constitutes reasonableness. Judicial discussions, while suggestive, seldom provide more than aphorism by way of analysis, and journal articles, other than those on classification within specific fields, are few and far between. My analysis here is based, in large part, on one quite helpful article, "The Equal Protection of the Laws" by Tussman and TenBroek,³⁸ in which the authors attempted to chart a vast expanse of unknown sea.

The classification problem arises when a legislature describes a problem that seems to be identified with a particular group and where it is thought most wise to solve the problem, not by a general law, but by conferring a special privilege or burden upon that group with which the problem is associated. The legislature then faces the problem of defining the group. If its purpose were to isolate those having tuberculosis, it could rely on medical diagnosis with reasonable confidence, but if it had not considered the problem sufficiently, it might decide to rely on isolating all those who have pink cheeks and persistent coughs. Sooner or later, someone would insist that he did not want to be isolated—that his pink cheeks and cough had nothing to do with consumption. In short, a legislature may try to reach a mischief (*M*) by describing a group according to a specific, and perhaps related, trait (*T*). Where all people identified with the mischief, and no others, are marked by the trait (*i.e.*, where all *M*'s

³⁷ MYRDAL, *op. cit. supra* note 18, at 149.

³⁸ 37 CALIF. L. REV. 341 (1949).

are *T*'s and all *T*'s are *M*'s), there is no problem of equal protection; the law is treating in the same manner all who are similarly situated. Unfortunately, such perfect congruence often proves difficult to achieve. Logically, there are four patterns of imperfect identity between *M* and *T*:

1. No *M*'s are *T*'s and no *T*'s are *M*'s. In other words, a perfect blunder.
2. All *M*'s are *T*'s, but not all *T*'s are *M*'s. Everyone with tuberculosis has pink cheeks, but not everyone with pink cheeks has tuberculosis. Such a classification can be called overinclusive because it takes within its reach some with whom the legislature really had no concern.
3. All *T*'s are *M*'s, but not all *M*'s are *T*'s. This is underinclusive classification because some people with the mischief (*M*) do not have the trait (*T*) and are therefore not called to account by the legislature.
4. Some *T*'s are *M*'s, but not all, and some *M*'s are *T*'s, but not all. Such a classification is both over and underinclusive.³⁹

*Skinner v. Oklahoma*⁴⁰ provides an apt illustration of a categorization that is simultaneously over and underinclusive; it is worth examining, moreover, because the problem involved there represents so close an analogue to the use of race as a trait for achieving ability separation. Skinner was to be sterilized under an Oklahoma habitual criminal law that provided such for those who had been convicted a third time of certain specific types of felonies. The Supreme Court found that sterilization was not a punishment, but a means of protecting the community from the propagation of inheritable criminal tendencies. The problem was whether the classifying trait (three-time loser with respect to certain felonies) was sufficiently congruent with the mischief (tendency to propagate criminal tendencies) to satisfy the equal protection clause. Mr. Justice Douglas, writing for the majority, saw no apparent reason for sterilizing a three-time chicken thief but not a three-time embezzler, and held the law unconstitutional insofar as it classified according to type of felony.⁴¹ Mr. Justice Douglas was describing the law as underinclusive, a defect Oklahoma could have tried to explain. In failing to do so, indeed in not attempting to do so,⁴² Oklahoma's law had to be struck down.

³⁹ *Id.* at 347-48.

⁴⁰ 316 U.S. 535 (1942).

⁴¹ *Id.* at 541-42.

⁴² "Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks." *Id.* at 541.

This despite the fact that it is reasonably easy to justify to a court's satisfaction underinclusive classification; administrative expediency is usually adequate.⁴³

From what we know of genetics, it is probably more certain that the criminal tendencies of some people are not inheritable by their children than that anybody's criminal tendencies can be passed along genetically. In this sense, the Oklahoma sterilization law was overinclusive as well as underinclusive; even if criminal tendencies are sometimes inheritable, there is no certainty that Skinner could pass his traits on through his genes to his children. Mr. Chief Justice Stone, in a separate concurrence, offered this overinclusiveness as the chief failing of the Oklahoma law.⁴⁴

Overinclusiveness is much more serious a fault than underinclusiveness. Every overinclusive classification necessarily involves a due process problem—does the person upon whom the burden is imposed actually belong to the group the legislature wants to reach? It would appear that wherever the burden imposed is weighty or the right interfered with is a significant one, a means consistent with due process must be provided for determining whether the individual involved is one upon whom the burden ought be placed. Where the burden is significant, an overinclusive law may be used only for rough screening and must be followed by an administrative or judicial procedure for a final determination of the individual case.⁴⁵

One aspect of the classification problem that Tussman and TenBroek fail to consider explicitly is the degree of conformance between trait and mischief. While it may or may not be true that the permissible severity of the burden varies directly with the approximation of congruence, there is a point where congruence becomes so imperfect that no burden can be imposed. That is one way of analyzing the Court's dissatisfaction with the distinction between burglars and embezzlers in the *Skinner* case. A more clearcut example occurs in *Toomer v. Witsell*.⁴⁶ In defend-

⁴³ Mr. Justice Douglas in his opinion reviews with citations some acceptable justifications. *Id.* at 539-40.

⁴⁴ *Id.* at 543-45. Mr. Chief Justice Stone does not describe his objection as one of the overinclusiveness of the classification, but as one of due process. The due process problem is, however, the one inevitably present in any overinclusive classification.

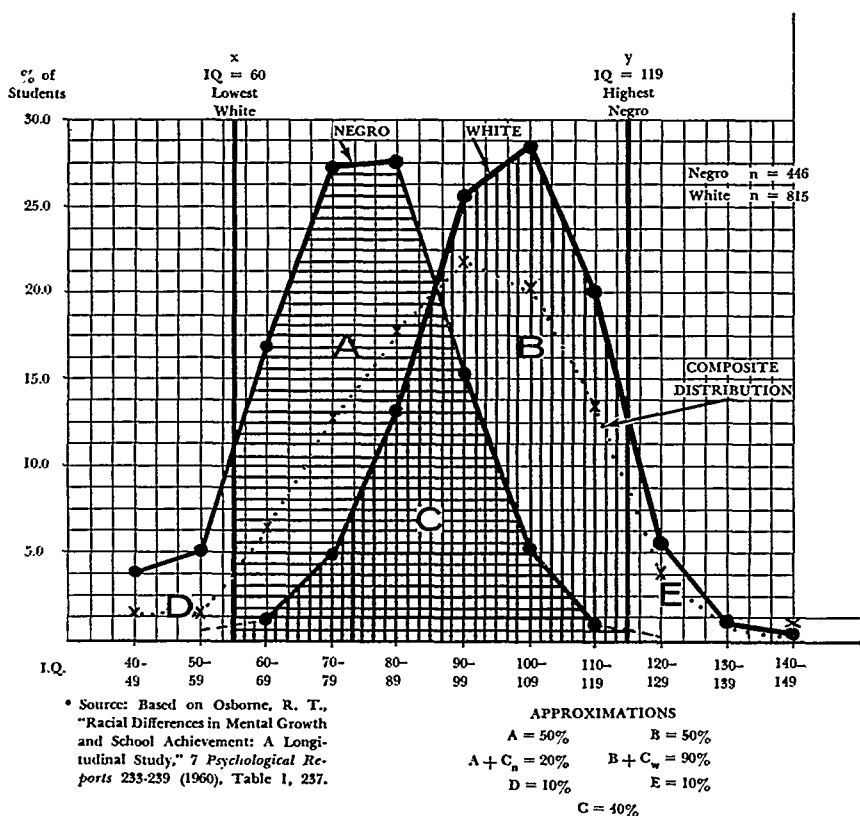
⁴⁵ Such a process occurs, for instance, in the most common type of open-occupancy legislation. Such legislation is first applied to the group from whom the most serious evil is expected to come, typically apartment building owners and tract developers. Upon this group is imposed the possibility of having to litigate a charge of discrimination. The final sanctions of the law, criminal or civil, are not applied, however, until it is determined by administrative or judicial procedure whether the particular apartment owner or developer charged is actually within the group of discriminators against whom the legislation is actually aimed.

⁴⁶ 334 U.S. 385 (1948).

ing the constitutionality of a South Carolina statute that imposed discriminatory taxes on out of state shrimp boats, appellees argued that the legislation was justified as a means of conservation. The Court responded that no evidence had been offered to show how, with respect to that goal, behavior, fishing equipment or enforcement problems differed as between citizens and non-citizens.⁴⁷ Correlation between the trait (non-resident in South Carolina) and the mischief (exploitation of resources) was too slight to justify the burden imposed.

Consider now what is probably a typical study showing racial differences in I.Q., Osborne's study of the Savannah public school system,⁴⁸ and assume the differences detected are immutable racial characteristics. The accompanying chart summarizes the results of this study for white

WHITE & NEGRO I.Q. DISTRIBUTION FOR CHILDREN IN 6TH GRADE IN THE SAVANNAH, GA.
(SEGREGATED) SCHOOL SYSTEM IN 1954*



⁴⁷ *Id.* at 398-99.

⁴⁸ Osborne, *Racial Differences in Mental Growth and School Achievement: A Longitudinal Study*, 7 *PSYCHOLOGICAL REPORTS* 233 (1960).

and Negro children in the 1954 sixth grade class in this segregated system. The curve to the left represents the I.Q. distribution among the Negro children, that to the right the white I.Q. distribution. The vertical line x indicates the lowest I.Q. (60) of any white child in the group. Line y indicates the highest I.Q. (119) of any of the Negroes studied.

This chart graphically demonstrates the difficulty inherent in racial classification. Less than ten percent of the whites (area E) have I.Q.'s higher than any of the Negroes. More than ninety percent of the whites (area $B + C$) are to the left of y , and therefore have I.Q.'s no higher than the brightest Negro in the group. Correspondingly, less than ten percent of the Negro students (area D) have I.Q.'s lower than any of the whites. With respect to intelligence, then, race is a classification that is simultaneously over and underinclusive.

In order to support such a distinction, insofar as it is overinclusive and the burden imposed an onerous one, it would presumably be necessary to provide some means consonant with due process for further refining the classification in individual cases. The most obvious way of doing so would be the administration of individual I.Q. tests. The logic of the discussion would suggest the singling out of Negroes by legislation for further study by individual I.Q. tests. The question may then be raised whether the classification could not easily be made more accurate by the administration of I.Q. tests to all. When there are open to a state relatively simple means of more accurately reaching the purported goal of the legislation, the method used can be questioned.⁴⁹

In order to support the classification insofar as it is underinclusive, it is necessary to offer some rational justification, administrative convenience or other, for the inadequacy of the classification. The most obvious answer is that Negroes constitute a peculiar source of the evil at which the statute is aimed, as is demonstrated by the results of such studies as Osborne's. While such a contention would do to justify some examples of underinclusive classification, it is rebuttable. Three questions at least may be asked: (1) How close is the correspondence between the mischief and the trait? (2) Is there readily available any more adequate basis for

⁴⁹ "[A]ssuming such were the facts [that there are differences legislatively significant in the type of equipment or method of fishing used by non-residents], they would not necessarily support a remedy so drastic as to be a near equivalent of total exclusion. The State is not without power, for example, to restrict the type of equipment used in its fisheries, to graduate license fees according to the size of the boats, or even to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation of expenditures from taxes which only residents pay. We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them." *Toomer v. Witsell*, 334 U.S. 385, 398-99 (1948).

classification or any more satisfactory means for otherwise achieving the same end? (3) How severe is the discrimination to be practiced?

In respect to the accuracy of classification, assume that the legislative purpose in making a racial distinction is to discriminate between these above and below 90 I.Q., a convenient point because it is approximately where the Negro curve intersects with the white on the chart at the apex of area C. It will be seen that in terms of this purpose the distinction would be wrong in respect of about twenty percent of the white population ($\frac{1}{2} C$), who have I.Q.'s below 90 but are given favored treatment because they are white; it is wrong with respect to twenty percent of the Negro population ($\frac{1}{2} C$) who have I.Q.'s over 90, but who are burdened because they are Negro; and it is invidious with respect to seventy percent of the Negro population ($A + \frac{1}{2} C$) with I.Q.'s between 60 and 90 who are treated differently than the twenty percent of the white population falling within that range. Two additional points are worth making. First, this small sample does not include any of the Negroes we know to exist with extremely high I.Q.'s;⁵⁰ if the sample were large enough to include such individuals, the invidiousness and inaccuracy of racial classification would be even more apparent. Secondly, in absolute numbers, since Negroes represent about ten percent of the U.S. population, the twenty percent of the white population with I.Q. below 90 constitutes twice as many individuals as the total Negro population.

While a mathematical value could be assigned a correlation between mischief (M) and trait (T) of this degree of accuracy, I do not believe such a correlation could be given any conclusive meaning with respect to the adequacy of classifications generally. One responds instinctively, I think, that it is difficult to conceive of a legislative purpose for which so rough a classification would be permissible. The distribution of intellect, or any other characteristic, within one racial group is almost certain to correspond too closely to the distribution in other racial groups; too many people equally circumstanced would be treated differently. It is just this inherent inaccuracy, I would suggest, that has tempted people to say that race is a classification impermissible under any circumstances—thus raising the question of neutrality of constitutional principles.⁵¹ But considered in terms of statistical distribution of characteristics, the objection to racial classification is neutral. Similarly, there

⁵⁰ See note 9 *supra*, and accompanying text.

⁵¹ Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

is no reason for asserting that there is an absolute prohibition against racial classification.⁵²

This objection to racial classification on the basis of inaccuracy should be sufficient to undermine such classification for most purposes, especially in light of a public policy that looks upon such classification with suspicion.⁵³ In some situations, the additional objection can be raised that the asserted purpose of the classification could better be reached by other means. The obvious case is the availability of I.Q. tests for making classifications based on intelligence. In sum, the hurdles placed by the equal protection clause in the way of racial classification make it practically impossible to so classify, without reliance upon any supposed absolute prohibition. And this result follows even if racial differences prove to be as great as Weyl and others believe them to be.

Beneath the suave and dispassionate exterior maintained for the bulk of *The Geography of Intellect* one suspects there lurks something other than the spirit of open inquiry. One chapter entitled "The Loyal, the Unloyal and the Disloyal," lets the cat out of the bag. Not only does this chapter differ in style and mood, but much of what it says is in flat contradiction to the rest of the book. In fact, it would appear that the authors are, after all, very dubious about the value of intelligence. One subsection of this chapter is entitled "The Treason of the Scholars."⁵⁴ The contradiction is only partly hidden by referring to those treasonous scholars as pseudo-intellectuals. Among these disparaged is Harry Stack Sullivan, described as "the prophet of interpersonal relations, [who] was too warped and disturbed a human being to have good interpersonal relations with anyone."⁵⁵ And it is said of the class of pseudo-intellectuals that "it is easy to believe that a large part of the male membership regards sexuality as onerous."⁵⁶ This chapter also urges us to glory in the fact that man is "the lineal descendant of a highly successful killer-ape,"⁵⁷

⁵² It is possible that some mischief to be dealt with will be sufficiently correlated with race, and the burden imposed sufficiently slight, so that a racial classification would be acceptable. Sickle cell anemia, characterized by curling of red blood corpuscles, for instance, is a disease noticeably more common among Negroes than among whites [the possession of a single sickling gene provides resistance to malignant malaria, but if both controlling genes are of the sickling type, the anemia is likely to result, Coon, *op. cit. supra* note 25, at 22]. It seems to me conceivable that racial classification might be sufficiently accurate to support a health program, aimed at controlling this disease, that proceeded through universal screening of Negroes.

⁵³ See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

⁵⁴ P. 259.

⁵⁵ P. 265.

⁵⁶ P. 263.

⁵⁷ P. 271. It is interesting that in apparently accepting this theory of Dart's, *op. cit. supra* note 36, Weyl and Possony once again abandon Coon, upon whom they other-

which would seem in conflict with the point made elsewhere that war and civil disturbance are highly dysgenic. One has, in fact, the sense that Henry Regnery made a vast error, including in this volume a chapter from an entirely different book. We are returned to our senses and to our confidence in modern day book manufacturing when we recall that, on both sides of the fence, scientific evidence respecting race is largely a weapon in a polemical war between the liberal and the racist, and the reader just happens to be in the way when the opposition runs out of arrows and starts flinging mud.

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wise rely. See note 25 *supra* and accompanying text. Dart argues that Australopithecine remains in South Africa are accompanied by evidence of tools made of bone, teeth and horn—a cultural level he describes as “osteodontokeratic,” *id.* at 901—and from this infers that Africa is the cradle of mankind. Coon rejects the evidence of tool-making capacity and says, in any case, that the “step from *Australopithecus* to *Homo* was taken, not on African soil, but in the *Meganthropus-Pithecanthropus* sequence” in southeast Asia. COON, *op. cit. supra* note 25, at 656.

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Tax Fraud and Evasion. By HARRY GRAHAM BALTER. New York: Ronald Press, 3rd ed. 1963. Pp. 760. \$25.00.

An eminent person (J. K. Galbraith) has recently written that reviewers should, as Senators should, disclose any conflicts of interest; that he was reviewing a book by a person he knew as a friend; and that it was a worthwhile book. I wish to adopt the same introduction.

Let us get to the main point at once and put aside standard criticisms of small detail (except this reviewer's annoyance at the absence of ordinary page numbers and the use of separate paging for each chapter). Mr. Balter has performed a useful service in taking time from practice to give us a new edition of his well-known work. It is more than the usual new edition. So much has happened in the past ten years that this is substantially a new book.

It is no slur on the author to dispute the publisher's claim that this is a “definitive work”; for this is impossible, absent weekly supplements, in such a changeable field. A striking proof is the Supreme Court decision in *Reisman v. Caplin*,¹ handed down January 20, 1964, which clarified and affirmed on numerous points a taxpayer's procedural rights when claiming any privilege to withhold testimony or records. The case is reminiscent of *Marbury v. Madison*. Technically, the decision was against

1 375 U.S. 430 (1964).