Constitutional Law -- Limiting the Use of Standardized Intelligence Tests for Ability Grouping in Public Schools

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Judge Peckham of the United States District Court for the Northern District of California faced a somewhat unusual allegation of *de facto* segregation in the case of *P. v. Riles*.[2] The *de facto* segregation allegedly existed not among individual schools of the local school district, but among classes within each individual school. Plaintiffs, who remained anonymous for their own protection, alleged that placement of blacks in classes for the educable mentally retarded (EMR classes) on the basis of I.Q. tests is a denial of equal protection.[3] The district court, noting the presence of cultural bias[4] in the I.Q. tests and the great proportion of blacks in the EMR classes,[5] agreed with the plaintiffs and granted a preliminary injunction prohibiting the use of I.Q. tests as the primary standard for placement in EMR classes or for reevaluating those already placed in EMR classes.[6] At the same time the court denied plaintiffs' request for a mandatory injunction "requiring the defendants to take affirmative action to compensate black students who have been wrongfully placed in EMR classes at some time in the past."[7] Plaintiffs had sought supplemental education for those students whose progress had been hindered by erroneous placement in EMR classes, hiring of black psychologists to insure that blacks were judged fairly, and establishment of a ratio limiting the percentage of blacks allowable in EMR classes.[8]

Judge Peckham found that wrongful placement of students in EMR classes warranted injunctive relief. He said, "[E]ven if a student remains in an EMR class for only one month, that placement is

1. The phrase "ability grouping" refers to the practice of dividing students according to their measured ability to learn at a certain level.

2. 343 F. Supp. 1306 (N.D. Cal. 1972).

3. In support of this allegation, plaintiffs further alleged that I.Q. tests were the primary standard used to place children in these classes, that many blacks scored low because of the cultural bias present in the test itself, and that as a result of this erroneous placement, these students were being deprived of an equal educational opportunity. *Id.* at 1308.

4. The phrase "cultural bias" refers to that factor present in certain tests that causes a particular child to perform poorly on the test because of his cultural or environmental background.

5. The complaint alleged that while only 28.5% of all students in the school district were black, 66% of all students in EMR classes were blacks. 343 F. Supp. at 1311.

6. *Id.* at 1314.

7. *Id.*

8. *Id.*

noted on his permanent record, his education is retarded to some degree, and he is subjected to whatever humiliation students are exposed to for being separated into classes for the educable mentally retarded."[9]

The most important question before the court was whether blacks were being wrongfully placed in EMR classes in violation of their rights to equal protection. At this point the court made a significant procedural decision. The traditional equal protection test places the burden on the plaintiff to show that no rational relationship existed between the method of classification used and the resulting classification.[10] Judge Peckham rejected this traditional test and ruled that the burden of persuasion would be shifted to the defendants on the establishment of a prima facie case by the plaintiffs.[11] Consequently, the plaintiffs needed only to show that the I.Q. tests resulted in a racial imbalance and the court would shift the burden of persuasion of a rational relationship to the defendants.[12]

The court relied on analogous cases in the areas of employment discrimination,[13] jury selection,[14] and school desegregation[15] to support this shift. In addition to these lines of case law, Judge Peckham delineated three policies behind the shift: 1) shifting the burden of proof is a reflection of the strong judical policy against racial discrimination;[16] 2) in a racial discrimination case there is sometimes said to exist an affirmative duty to implement integration in certain of our institutions;[17] and 3) an empirical assumption that native intelligence is randomly distributed among the population and that if an uneven classification on that basis is found, it is probably due to discrimination.[18]

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9. *Id.* at 1308. Plaintiffs' evidence consisted of the results of standard I.Q. tests administered by black psychologists with special emphasis on reducing the cultural bias in the test through the acceptance of non-standard answers and through rewording of some of the questions that tended to show that plaintiffs were mentally retarded. *Id.* Plaintiffs' irreparable injury allegedly flowed "from plaintiffs' placement in EMR classes because the curriculum is so minimal academically, teacher expectations are so low, and because other students subject EMR students to ridicule on account of their status." *Id.*

10. *Id.*

11. *Id.* at 1311.

12. *Id.*

13. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

14. Carmical v. Craven, 457 F.2d 582 (9th Cir. 1971), *cert. denied,* 409 U.S. 929 (1972).

15. United States v. School Dist. 151, 286 F. Supp. 786 (N.D. Ill.), *aff'd,* 404 F.2d 1125 (7th Cir. 1968).

16. 343 F. Supp. at 1309.

17. *Id.* at 1310.

18. *Id.*

The court found that the statistical evidence alleged by plaintiff was sufficient to establish a racial imbalance. To establish the second element of their prima facie case, that I.Q. tests were the primary determinant in placement, plaintiffs relied mainly on the finding of *Hobson v. Hansen*[19] that I.Q. tests influence all of the other evaluations of a student made by school officials. Teacher evaluation was shown in *Hobson* to be especially tainted by knowledge of a student's I.Q. score.[20] In finding that the plaintiffs had presented a prima facie case of discrimination, the court relied on the influence argument of *Hobson* as well as language in the Education Code[21] stating that other evidence must "substantiate" the I.Q. score before a student could be placed in an EMR class.[22]

Once the burden of proving rationality had shifted to them, defendants argued that the racial imbalance was not a result of the tests or that the tests, though racially biased, were still rationally related to the classification because they were the only means of classification available.[23] The court made quick work of these arguments dismissing the first by observing that defendants had failed to produce any supporting evidence in its favor and dismissing the second by alluding to alternative methods of placing mentally retarded students in practice in New York and Massachusetts.[24]

After this dismissal of defendants' arguments, the court granted the preliminary injunction sought by the plaintiffs but rejected their other claims for mandatory relief in order to give defendants flexibility in formulating a corrective plan.[25] The narrow holding of the case was that the use of I.Q. tests as the primary basis for placing black students in classes for the educable mentally retarded that results in a significant racial imbalance in such classes is a denial of equal protection. This result was based on the absence of any evidence to establish

19. 269 F. Supp. 401 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1969).
20. *Id.* at 484.
21. CAL. EDUC. CODE § 6902.085 (West Supp. 1973).
22. 343 F. Supp. at 1312. The court also found that the use of I.Q. scores by parents in signing required consent forms tainted the consent features of the Code so as to make the consent not a truly voluntary one. The court found that parents were overawed by the seemingly scientific significance of the I.Q. scores. *Id.* at 1313.
23. *Id.* The defendants also argued that the racial imbalance resulted from the "location of EMR classes in predominantly black schools prior to desegregation" and because more white parents of mentally retarded children put their children in private schools than did black parents of mentally retarded children. *Id.*
24. *Id.* The court cited the use of achievement tests and teacher evaluation in New York and the Massachusetts requirement of "psychological assessment." Both of these districts exclude the use of group I.Q. tests. *Id.* at 1314.
25. *Id.* at 1314-15.

that I.Q. tests were culture free[26] or that a reasonable rationale for the use of the present culturally biased text existed. Since defendants failed to carry their burden of proof/persuasion by producing evidence to show that the tests were culture free, the result might conceivably be different in future cases in which defendants are more diligent.

The question treated by the federal district court has never reached the Supreme Court, but it has been treated extensively by at least one other district court and incidentally by several other courts.[27] The right of school districts to separate students on the basis of learning ability was recognized in *Shuttlesworth v. Birmingham Board of Education.*[28] In *Jones v. School Board*[29] assignments were made to particular schools on the basis of I.Q. scores. The court held that this use of I.Q. tests was not unconstitutional *per se*; however, this standard must be "properly applied".[30] The court also stated that the school district could not consider racial factors in making assignment decisions. In contrast to *P. v. Riles,* the *Jones* court left the burden of proof of the issue of rational relationship on the plaintiff.[31]

In *Miller v. School District Number 2* [32] the issue of ability grouping was also raised. In that decision the district court explained that its primary concern was to prevent racial discrimination and that "the practice of separating study groups or classes into accelerated or slow sections is a matter for educators."[33]

Both of these earlier cases treated the use of I.Q. tests incidentally in the context of broader school desegregation questions. These courts were more concerned with the achievement of integration within a school district and the avoidance of blatant discrimination in school attendance than with unintentional intra-school segregation of the type resulting from the use of I.Q. tests in class placement. Ability grouping was regarded as an educational tool to be employed at the discretion of those in charge of operating the school system. Their decision

26. A culture free test is one that lacks the elements creating cultural bias. *See generally* P. Pascale, The Impossible Dream: A Culture-Free Test, 1971 (published on microfiche by Educ. Research Information Center, catalog no. ED 054 217).

27. See text accompanying notes 28-33 and 45-49 *infra.*

28. 162 F. Supp. 372 (N.D. Ala. 1958) (dictum), *aff'd,* 358 U.S. 101 (1958). "Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn . . . ." Borders v. Rippy, 247 F.2d 268, 271 (5th Cir. 1957), *quoted,* 162 F. Supp. at 378.

29. 278 F.2d 72 (4th Cir. 1960) (per curiam).

30. *Id.* at 75.

31. *Id.* at 77.

32. 256 F. Supp. 370 (D.S.C. 1966).

33. *Id.* at 375.

was final so far as the courts were concerned as long as race was not a criterion in placement. They seemed to have been unaware of the possibility of having *de facto* segregation arising totally from the use of I.Q. tests themselves.

The argument that discrimination might arise from the cultural bias of I.Q. tests finally emerged in the first extensive judicial treatment of ability grouping. Judge Skelly Wright wrote at length on this problem in *Hobson v. Hansen* in 1967. In the context of a major attack on segregation in the District of Columbia's school system, plaintiffs attacked the use of a track system by local school authorities that divided pupils into four tracks ranging from "basic" to "honors" based primarily on comparative I.Q. scores. The school officials acknowledged that the track system was developed as a "response to problems created by the sudden commingling of numerous educationally retarded Negro students with the better educated white students."[34] Judge Wright found that the "effect of this separation would be to insulate the more academically developed white student from his less fortunate black schoolmate, thus minimizing the impact of integration . . . ."[35] Despite no evidence of an intentional violation, the court held that the use of I.Q. tests to support a track system was a violation of equal protection since these tests were standardized on a white middle class level and thus were discriminatory against blacks.[36] To implement this conclusion, the court ordered the abolition of the track system.[37]

Judge Wright seemed especially concerned over the substantial risk that the intelligence of black children would be underestimated by the I.Q. tests and thus they would be undereducated.[38] The lack of flexibility in the system, the lack of movement upward, and the lack of any attempt to supplement the education of those blacks who were behind weighed heavily in the decision. A parallel concern of the court in *Hobson* was that in an urban school system blacks and whites though going to school together were not being taught together because of the track system.[39] Judge Wright seemed to be saying that integrated classrooms as well as integrated schools were needed to insure that blacks actually received an equal educational opportunity.

34. 269 F. Supp. at 442.
35. *Id.* at 443.
36. *Id.*
37. *Id.* at 517.
38. *Id.* at 489.
39. *Id.* at 443.

The court in *Hobson* applied the traditional equal protection test of rationality.[40] It has been pointed out, however, that "the court seems to apply a standard less permissive than the rationality test."[41] Although Judge Wright only hinted at the application of a compelling state interest test,[42] that seems to be what he applied.[43] This more stringent test is derived from the constitutionally suspect classification of race.[44] Judge Wright placed the burden of proof on this issue on the defendants, and the court in *P. v. Riles* followed his example.

Following Hobson, other courts have seized on its reasoning in deciding *de facto* segregation cases. In *Graves v. Walton County Board of Education*[45] a federal district court in Georgia issued an injunction requiring defendants to "provide remedial education programs which permit students attending or who have previously attended segregated schools to overcome past inadequacies in their education."[46] In a recent decision from a federal district court in North Carolina, the judge described the duty on local school boards "as not simply a negative duty to refrain from active legal racial discrimination, but a duty to act positively to fashion affirmatively a school system as free as possible from the lasting effects of such historical *apartheid*."[47] In that case, however, the court sanctioned a division of students into study groups based on achievement in a particular course even though evidence showed that there was a high percentage of blacks in the "slow" and "regular" sections.[48] The court declared that it was an educational matter whether ability grouping was allowed in a particular school system.

From these scattered opinions, it is difficult to ascertain any common standard. The court in *P. v. Riles* relied only on *Hobson* in making its decision. Judge Peckham drew from *Hobson* the shifting of the burden of proof[49] as well as the realization that testing could lead to

40. *Id.* at 511.
41. Note, *Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board*, 81 HARV. L. REV. 1511, 1519 (1968).
42. This test is applied in Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 630 (1969). The Supreme Court decided that for a suspect classification to be upheld it must "promote a compelling state interest." *Id.*
43. *See* 269 F. Supp. at 513; Note, 81 HARV. L. REV., *supra* note 41, at 1519-20.
44. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
45. 300 F. Supp. 188 (M.D. Ga.), *aff'd*, 410 F.2d 1152 (5th Cir. 1968).
46. *Id.* at 200.
47. Swann v. Charlotte-Mecklenburg Bd. of Educ., 300 F. Supp. 1358, 1363 (W.D.N.C. 1969).
48. *Id.* at 1367.
49. *See* note 62 *infra*.

de facto segregation within a school. He did not seem as concerned, however, over the use of ability grouping or the lack of supplemental programs for deprived blacks as Judge Wright was. The main goal of all courts dating from the original desegregation decision[50] has been to provide the black with an equal educational opportunity. One commentator has rephrased this goal: "In a broad sense probably the most important idea underlying the entire push for school desegregation, de-jure and de facto, is the possibility of developing greater intellectual and other competence in Negro children who are looked upon as culturally deprived."[51] The implementation of this goal has raised several questions for the courts in relation to the use of I.Q. tests for ability grouping.

Educational theorists are themselves not in agreement on the answers to such questions as: 1) is ability grouping educationally useful?[52] 2) are I.Q. tests accurate standards for placement in ability groups?[53] and 3) are varying results on I.Q. tests by race due entirely

50. Brown v. Board of Educ., 347 U.S. 483 (1954).

51. Punke, *Competence as a Basis of Student Assignment*, 32 ALA. LAW. 24, 40 (1971).

52. *See generally* M. Bryan, Ability Grouping: Status, Impact, and Alternatives, June 1971 (published on microfiche by Educ. Research Information Center, catalog no. ED 052 260); D. Esposito, Homogeneous and Heterogeneous Grouping: Principal Findings and Implications of a Re-search of the Literature, July 1971 (published on microfiche by Educ. Research Information Center, catalog no. ED 056 150).

53. Several educational theorists have written that I.Q. tests are accurate predictors of academic achievement. *See* V. Bennett, Intelligence Testing in the Schools, 1970 (published on microfiche by Educ. Research Information Center, catalog no. ED 045 708); V. Bhushan, Comparison of IQ and Socioeconomic Index in Predicting Grade Point Average, Mar. 6, 1970 (published on microfiche by Educ. Research Information Center, catalog no. ED 039 304); D. Goslin, The Social Consequences of Predictive Testing in Education, May 1965 (published on microfiche by Educ. Research Information Center, catalog no. ED 018 219); Hughson, *The Case for Intelligence Testing*, in CONTEMPORARY ISSUES IN EDUCATIONAL PSYCHOLOGY 366 (1970). However, other theorists have denied that I.Q. tests are useful for any purpose. *See* L. Barrit, Intelligence Tests and Educationally Relevant Measurements, Sept. 1, 1967 (published on microfiche by Educ. Research Information Center, catalog no. ED 016 255); R. Nichols, Implications of Racial Differences in Intelligence for Educational Research and Practice, Feb. 6, 1969 (published on microfiche by Educ. Research Information Center, catalog no. ED 033 179); Yourman, *The Case Against Group IQ Testing*, in CONTEMPORARY ISSUES IN EDUCATIONAL PSYCHOLOGY 371 (1970). There does seem to be a general agreement that I.Q. tests do not measure innate learning potential. *See* Garcia, *IQ—The Conspiracy*, PSYCHOLOGY TODAY, Sept. 1972, at 40; Mercer, *IQ—The Lethal Label*, PSYCHOLOGY TODAY, Sept. 1972, at 44. For a summary of American attitudes toward I.Q. tests, *see* O. Brim, Experiences and Attitudes of American Adults Concerning Standardized Intelligence Tests, 1965 (published on microfiche by Educ. Research Information Center, catalog no. ED 018 209). For the effect of tester's attitude on I.Q. test results, *see* J. Jacobs, Expectancy and Race: Their Influences upon the Scoring of Individual Intelligence Tests, Mar. 14,

to environmental factors?[54] These conflicts make the legal determinations on these issues more difficult. As for the first question, the courts seem willing to allow the decision of local educators to control. The courts found the second and third questions to be central to a decision on *de facto* segregation claims in *Riles* and *Hobson*. The failure of defendants to provide the court with an adequate answer to these questions ultimately decided *Riles* against them. Their best possible argument, one that defendants failed to make, was presented by Kenneth Eells in a well-known article on cultural bias in I.Q. tests.[55] Eells has suggested that if what is wanted from I.Q. tests is a good prediction of how well a child will do in school, then cultural bias is a necessary element of these tests.[56] The school system as it now exists bases judgments of a student's progress on a white middle-class standard, the same one on which I.Q. test results are based. Most educators feel that used for this limited purpose, I.Q. tests are excellent instruments.[57] Problems arise when people look on these tests as measures of some innate ability and not of present ability to achieve on a certain level.[58] Even when I.Q. tests are used for this limited purpose, however, the results can be disastrous for the child involved. Teachers tend to look at a low I.Q. score as signifying a child with limited educational potential when the child, especially if he is black, possibly has a deprived educational background.[59] As a result of this attitude on the part of teachers, the child begins to view himself as incapable of learning and begins to perform at a low level.[60] This re-

1972 (published on microfiche by Educ. Research Information Center, catalog no. ED 068 529); Watson, *IQ—The Racial Gap*, PSYCHOLOGY TODAY, Sept. 1972, at 48.

54. A recent article by Arthur Jensen suggests that racial differences in I.Q. scores are not due to cultural bias, but rather to genetic differences between blacks and whites. Jensen, *How Much Can We Boost IQ and Scholastic Achievement*, 39 HARV. EDUC. REV. 1 (1969). All that can be definitely said about this theory is that it is extremely unpopular. *See* E. Epps, Race, Intelligence, and Learning: Some Consequences of the Misuse of Test Results, Aug. 1970 (published on microfiche by Educ. Research Information Center, catalog no. ED 048 423); E. Gordon, Jensenism: Another Excuse for Failure to Educate, Sept. 1969 (published on microfiche by Educ. Research I formation Center, catalog no. ED 037 519). Not enough evidence exists on either side to make a definite decision, as Jensen readily admits. *See generally* A. Jensen, Intelligence, Learning Ability, and Socioeconomic Status, Feb. 8, 1968 (published on microfiche by Educ. Research Information Center, catalog no. ED 023 725).

55. Eells, *Some Implications for School Practice of the Chicago Studies of Cultural Bias in Intelligence Tests*, 23 HARV. EDUC. REV. 284 (1953).

56. *Id.* at 293.

57. *Id.*

58. *Id.* at 294.

59. 343 F. Supp. at 1312-13; Hobson v. Hansen, 269 F. Supp. 401, 489 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1969).

60. Hobson v. Hansen, 269 F. Supp. 401, 484 (D.D.C. 1967), *appeal dismissed*,

sult could be avoided by renaming the tests and by expressly limiting their function to prediction of academic performance.[61] Thus, a strong argument can be constructed in defense of the cultural bias present in the I.Q. tests now used.

The *Riles* decision does little to advance the legal answers to the questions posed above. The failure of the defendants to bring forth their strongest potential argument prevented the court from analyzing the varying educational theories. One significant result of the decision is that the court showed no inclination to extend *Hobson* into a requirement that classes be integrated. Ability grouping was not abolished, and although the court noted the need for a supplemental system to aid culturally deprived blacks, it did not require that the school system implement one.

Riles can be fairly characterized as a retreat from the far-reaching possibilities of *Hobson.* The wide leeway allowed the defendants to perfect a remedy is a strong indication that this court considered educators better able to settle the questions raised by the use of I.Q. tests in ability grouping than the courts. An inference can be drawn that as long as educators operate in good faith and on reasonable grounds, the courts will not interpose their own system of classroom division. This inference draws support from the retreat from a compelling state interest requirement in *Hobson* to a rational relationship requirement in *Riles.* This retreat was authored despite the presence of the suspect classification based on race. Thus the decision is at best inconsistent with the main line of equal protection cases. Judge Peckham's decision not to apply the compelling state interest test can only be attributed to some unarticulated policy reason, for modern legal precedent does not support him.[62]

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393 U.S. 801 (1969); Eells, *supra* note 55, at 295. This theory is referred to as the self-fulfilling prophecy. *See* R. Rosenthal, PYGMALION IN THE CLASSROOM (1968); J. Evans, Interpersonal Self-Fulfilling Prophecies: Further Extrapolations from the Laboratory to the Classroom, 1969 (published on microfiche by Educ. Research Information Center, catalog no. ED 034 276); Rosenthal, *Self-Fulfilling Prophecy,* PSYCHOLOGY TODAY, Sept. 1968, at 44. *Contra,* E. FLEMING, Teacher Expectancy or My Fair Lady, Mar. 5, 1970 (published in microfiche by Educ. Research Information Center, catalog no. ED 038 183).

61. Eells, *supra* note 55, at 295.

62. This retreat is unusual in that the Supreme Court has used the compelling state interest test frequently in modern decisions when faced with cases of prima facie denials of equal protection involving suspect categories, of which race is the leading one. *E.g.,* Korematsu v. United States, 323 U.S. 214 (1944). In *Hobson* the compelling state interest test was followed when the court considered the *de facto* inter-school segregation charges. 269 F. Supp. at 506. But when the *Hobson* court considered the challenge to the track system, it purported to use the rational relationship test.

This area of the law must necessarily remain unsettled until the larger questions of inter-school integration are answered. When issues such as busing are finally laid to rest, the Supreme Court may choose to advance further in this field by putting a premium on protection of the individual child's learning experience. Any system relying on testing will make errors in placement from time to time. Whether the judicial system will choose to tolerate these mistakes as incidental to the benefits derived from an objective standard of placement remains for the future.

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Constitutional Law—A New Constitutional Right To An Abortion

The controversy concerning legalized abortion has been active in the United States for almost twenty years. The medical profession, legislators, and the judiciary have wrestled with the legal, moral, and social conflicts involved in the abortion issue. Recently in *Roe v. Wade*[1] and a companion case[2] the United States Supreme Court determined that the right of privacy inherent in the due process clause of the fourteenth amendment protected a woman's right to choose whether or not to

Id. at 511. It is unclear why such a distinction is drawn, in *Hobson* (in form) and in *Riles* (in fact), when all the classifications are based on race. The present test for testing the constitutionality of ability grouping therefore appears to be the rational relationship test and not the compelling state interest one.

1. 93 S. Ct. 705 (1973).

2. Doe v. Bolton, 93 S. Ct. 739 (1973). The decision is important apart from *Wade* because *Bolton* involved an attack on a relatively liberal abortion law adopted by Georgia in 1968, GA. CODE ANN. § 26-1202 (1972). The Court determined that in spite of the liberal nature of the statute it nevertheless could not stand in view of the standards established in *Wade*. The statute established certain procedural requirements that must be met before an abortion could be performed. These included requirements that the abortion be performed in a hospital accredited by the Joint Committee on Accreditation of Hospitals; that the operation be approved by the hospital staff abortion committee; and that the performing physician's judgment be confirmed by independent examinations of the patient by two other licensed physicians. The Court held these requirements unconstitutional as having no rational relation to the statute's purposes, as being unduly restrictive of the patient's rights already safeguarded by her physician, and as being an undue infringement on the physician's right to practice. The statute's residency requirement was found to violate the privileges and immunities clause of the Constitution by denying protection to persons entering Georgia for medical services.