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SCHOOLS AS SORTERS: THE CONSTITUTIONAL AND POLICY IMPLICATIONS OF STUDENT CLASSIFICATION*

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During the past two decades, courts have sought to define with particularity the meaning (or, better, meanings) of equal educational opportunity. Only recently, however, have courts examined within-school practices—ability grouping, special education placement, exclusion of “ineducable” children—which classify students on the basis of academic performance or potential. In this Article, Professor Kirp assesses both the plausibility of treating student classification issues in equal protection and due process terms, and the policy consequences of such treatment.

* This Article emerges from extended discussions over a considerable period of time with colleagues at Harvard and, more recently, the University of California (Berkeley). The Harvard Center for Law and Education participated in several of the cases discussed in this Article—*Ordway v. Hargraves*, *Stewart v. Phillips*, *Pennsylvania Association for Retarded Children v. Pennsylvania*, *Mills v. Board of Education*, *Guadalupe Organization, Inc. v. Tempe Elementary School District*—which were filed during the period that I was Director of the Center; those suits led me to consider more general conceptual approaches to the classification issue. That thinking has been substantially strengthened by the yeoman work of my research assistants Carl Milofsky, of the Department of Sociology, University of California (Berkeley), who introduced me to the welter of social science discussions of school sorting, and Kent Jonas, of the Class of 1972, Boalt Hall, University of California (Berkeley), who persistently reminded me of the relevance of the law to this inquiry. Associates both at Berkeley and elsewhere graciously undertook the arduous task of reading and criticizing earlier drafts of this Article. To them—Eugene Bardach, Paul Brest, William Buss, Paul Carrington, Antonia Chayes, John Coons, John Herfort, Robert O’Neil, Allan Sindler, Aaron Wildavsky—my appreciation. My particular thanks to Mark Yudof and Paul Dimond, friends and collaborators, whose criticisms compelled me to rethink major sections of the argument.

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I. INTRODUCTION: SCHOOL CLASSIFYING PRACTICES AND THE LAW

He who would do good must do so in minute particulars.¹

A. *The Law Inside the Schoolhouse*

Since the 1954 Supreme Court opinion in *Brown v. Board of Education*,² courts have increasingly scrutinized decisions once made solely by school administrators and boards of education. Most prominently, racial policies and practices of states and school districts³ and methods of allocating financial resources among school districts⁴ have been subjected to extensive legal analysis and challenge.

Such challenges have addressed school policy on the grand scale.⁵ They focus on the state,⁶ the metropolitan area,⁷ or the school district as the entity whose conduct is to be reviewed. That approach implies a model of educational reform which presumes, first, that racial and fiscal inequities ought to be undone (a proposition with which there can be little quarrel); and second, that the most effective means of undoing them is to focus on the largest governmental unit that can successfully be haled into court.

For some issues the grand scale approach is demonstrably correct. For example, the problem of interdistrict resource inequality can

¹ W. BLAKE, *JERUSALEM*, ch. 3, § 55.

² 347 U.S. 483 (1954).

³ Recent school segregation cases are discussed in Dimond, *School Segregation in the North: There Is But One Constitution*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1972).

⁴ See *San Antonio Independent School Dist. v. Rodriguez*, 93 S. Ct. 1278 (1973); cf. *Hobson v. Hansen*, 327 F. Supp. 844 (D.D.C. 1971) (intradistrict equalization of expenditures).

⁵ The cases concerning students' procedural rights and civil liberties are of course a notable exception to this generalization. For analysis of this developing body of law, see Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545 (1971); Nahmod, *Beyond Tinker: The High School as an Educational Public Forum*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 278 (1970).

⁶ See, e.g., *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

⁷ See, e.g., *Bradley v. School Bd.*, 51 F.R.D. 139 (E.D. Va. 1970).

be most cogently addressed only at the state or national level.⁸ But in those matters which directly and tangibly affect the quality of children's schooling experiences, the equation of largest with best makes little sense. The school, not the state or even the school district, has primary impact.⁹ It is at the school or classroom level that many of the critical decisions about teacher assignment, classroom composition, and curriculum are made.¹⁰

The grand scale approach intrudes on these intraschool decisions in only limited, indirect fashion. An interdistrict finance equalization suit, if successful, may affect the amount of money available to the school district, but has no necessary consequence for the individual school or classroom.¹¹ An intradistrict finance suit may establish the aggregate number of dollars to which a given school is entitled,¹² but the process of translating gross allocations into incremental educational advances is again an uncertain one. A desegregation suit may determine the racial composition of the school, but the force of that determination is often muted by policies for placing children in groups whose composition is directly correlated with racial background.¹³

Educational reformers have increasingly come to recognize both the limited potential of grand scale reform and the importance of decisions made within schools. Christopher Jencks, whose widely discussed study *Inequality* is frequently treated as an assault on traditional notions of education's significance, observes that "it is more important to eliminate inequality within schools than to eliminate inequality between one school and another."¹⁴

⁸ See Kirp & Cohen, *Education and Metropolitanism*, in METROPOLITANIZATION AND PUBLIC SERVICES (L. Wingo ed. 1972). See also Coons, *Chicago*, in U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS U.S.A.: PUBLIC SCHOOLS: CITIES IN THE NORTH AND WEST 175, 184 (1962).

Of course, many racial policy and resource allocation decisions are made at the school district level. See *Hobson v. Hansen*, 269 F. Supp. 401, 455-56 (D.D.C. 1967), *aff'd en banc sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (availability of advanced classes); Dimond, *supra* note 3 (teacher and pupil assignment); Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965) (pupil assignment).

⁹ See, e.g., P. JACKSON, *LIFE IN CLASSROOMS* (1968); J. STEPHENS, *THE PROCESS OF SCHOOLING* (1967).

¹⁰ While policy concerning some of these matters is nominally set by school superintendents and state and local education agencies, there is (in schools as in other public and private large-scale institutions) considerable disparity between policy assertion and actual implementation.

¹¹ See Kirp & Yudof, Book Review, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 619 (1971).

¹² See *Hobson v. Hansen*, 327 F. Supp. 844 (D.D.C. 1971).

¹³ See *Lemon v. Bossier Parish School Bd.*, 444 F.2d 1400 (5th Cir. 1971); J. McPartland, *The Segregated Student in Desegregated Schools: Sources of Influence on Negro Secondary Students*, June, 1968 (Center for the Study of the Social Organization of Schools, Johns Hopkins Univ. (Report No. 21)); Barber, *Swann Song from the Delta*, INEQUALITY IN EDUCATION, Aug. 3, 1971, at 4.

¹⁴ C. JENCKS, M. SMITHE, H. ACLAND, M. BANE, D. COHEN, H. GINTIS, B. HEYNS,

The reasons underlying judicial reluctance to intrude in intra-school matters—to review, for example, student grouping ostensibly based upon ability, or student assignment to special programs designed for children with particular disabilities—are also obvious and understandable. The minuteness of many within-school (and within-class) decisions makes it difficult to conceive of them as posing legally manageable problems. Such decisions are complex, interrelated, and numerous. For that reason, a court which undertook to review them might well find itself acting as schoolmaster, in an uncomfortably literal sense.¹⁵ Furthermore, ability grouping, grading, and other similar activities lie at the heart of the school official's claim to professional competence. A challenge to such practices may well be perceived as a threat to that competence, and strenuously resisted for that reason.

Small wonder, then, that the most ambitious foray into this area, *Hobson v. Hansen*,¹⁶ has not had more judicial imitation, and that most within-school controversies resulting in court decisions focus instead on such peripheral matters as hair length and armband-wearing. The necessarily limited capacity for judicial review of within-school policy questions does not, however, foreclose all judicial inquiry. Properly framed, certain aspects of what this Article terms the "school classification" process can be addressed in intelligible and manageable fashion by courts.¹⁷

S. MICHELSON, *INEQUALITY* 250 (1972) [hereinafter cited as JENCKS, *INEQUALITY*]. See also OFFICE OF EDUCATION, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, *EQUALITY OF EDUCATIONAL OPPORTUNITY* 299 (1966) [hereinafter cited as COLEMAN REPORT]; Jencks, *The Coleman Report and the Conventional Wisdom*, in *ON EQUALITY OF EDUCATIONAL OPPORTUNITY* 69 (F. Mosteller & D. Moynihan eds. 1972) [hereinafter cited as MOSTELLER & MOYNIHAN]; St. John, *Desegregation and Minority Group Performance*, 40 *REV. EDUC. RESEARCH* 111 (1970).

¹⁵ See *Wright v. Council of the City of Emporia*, 407 U.S. 451, 478 (1972) (Burger, C.J., dissenting) ("Curricular decisions, the structuring of grade levels, the planning of extra-curricular activities, to mention a few, are matters lying solely within the province of school officials, who maintain a day-to-day supervision that a judge cannot.").

The concern that courts might be asked to "manage" schools has long disturbed some justices. In *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), Justice Frankfurter, speaking for the Court in refusing to bar compulsory flag salutes, declared that the Court should not function as "school board for the country." *Id.* at 598.

¹⁶ 269 F. Supp. 401 (D.D.C. 1967), *aff'd en banc sub nom.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

¹⁷ This Article considers only the constitutional dimension of the classification issue. For a discussion of nonconstitutional case law, see Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373 (1969). See also *Elgin v. Silver*, 15 Misc. 2d 864, 182 N.Y.S.2d 669 (Sup. Ct. 1958); *Board of Educ. v. State ex rel. Goldman*, 47 Ohio App. 417, 191 N.E. 914 (1934).

That the judicial role contemplated by this Article is relatively modest may be better appreciated by comparing the approach taken here with Saretzky & Mecklenburger, *See You In Court?*, *SATURDAY REV. OF EDUC.*, Nov. 1972, at 50.

B. *School Classification*

The term "school classification" is meant to serve double duty: first, as a description of public educational practice,¹⁸ and second, as a tool of constitutional analysis.¹⁹ Classification describes the welter of schooling practices which render differentiated judgments of academic worth or potential, creating (in equal protection terms) classes or categories of students.

Public schools regularly sort students in a variety of ways.²⁰ They test them when they first arrive at school and at regular intervals thereafter in order to identify aptitude—*i.e.*, capacity to learn. Although such capacity may not in fact be measured, and may indeed be unsusceptible to measurement, what is important for descriptive purposes is the fact that schools act on the assumption that tests can measure aptitude.²¹

From primary school until graduation, most schools group (or track) students on the basis of estimated intellectual ability, both within classrooms—the brighter "tigers" separated from the less intelligent "clowns"²²—and in separate classes. In primary school grouping, the pace of instruction, but typically not its content, is varied. Grouping decisions may be made for each school subject—the cleverest in arithmetic may be dullards at spelling—or a given group may stay intact for the entire curriculum. During the school year, students are graded. Those grades, combined with aptitude and achievement test results and teacher recommendations, determine whether a child

¹⁸ Historically, practices of non-public schools have been viewed as outside the scope of the fourteenth amendment because of the limited involvement of the state. Where the state does intervene in the affairs of private schools, determining their educational requirements, an argument that such intervention renders those schools "public" for purposes of constitutional scrutiny can be made. *But see* *Bright v. Isenbarger*, 445 F.2d 412 (7th Cir. 1971). Where the nexus between school regulation and state law is more direct, the argument becomes substantially stronger. *See* *Coleman v. Wagner College*, 429 F.2d 1120 (2d Cir. 1970).

¹⁹ For a seminal analysis of the application of the equal protection clause, see Tussman and TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). Student classification raises constitutional issues of due process as well as equal protection.

²⁰ This description of "typical" classification practice is based on survey data reported in W. FINDLEY & M. BRYAN, *ABILITY GROUPING: 1970* (1971) [hereinafter cited as FINDLEY & BRYAN] and JENCKS, *INEQUALITY*, *supra* note 14, at 33-34.

²¹ Test terminology is tricky. Some tests purport to measure "aptitude"—capacity to learn—while others test "achievement"—material mastered. In fact, "all tests measure both aptitude and achievement . . . [S]uccess on IQ tests, aptitude tests, and achievement tests [reveal] varieties of intelligent behavior." JENCKS, *INEQUALITY*, *supra* note 14, at 54-57. By school convention, IQ tests are individually administered while aptitude tests are group tests; individual testing is commonly employed only for special class placement.

²² For a careful study of the rationale and effects of within-class grouping in one ghetto school, see Rist, *Student Social Class and Teacher Expectations: The Self-Fulfilling Prophecy in Ghetto Education*, 40 HARV. EDUC. REV. 411 (1970).

is promoted to the next grade level and into which ability group he is placed.²³

In secondary school, variations among educational "tracks" reflect both interest and ability. There, for the first time in his educational career, the student may be offered choices. As the process actually works, however, grammar school success usually means college track or academic high school assignment while mediocre grade school performance leads frequently to placement in a general (non-college preparatory), business, or vocational program.²⁴ It is counselors, and not students, who frequently make these decisions, by matching school offerings to their own estimates of each student's ability and potential.²⁵ That classification determines both the nature of the secondary school education—Shakespeare, shorthand or machine shop—and the gross choices—college or job—available after the twelfth grade.²⁶

Students whom the school cannot classify in this manner are treated as "special" or "exceptional" children. These students by no means resemble one another. They may have intellectual, physical or emotional handicaps; they may not speak English as their native language; they may simply be hungry, or unhappy with their particular school situation.²⁷ These students share only their differentness.

²³ The weight given to each of those factors may vary from school to school and from program to program. See Cohen, *Does IQ Matter?*, COMMENTARY, Apr. 1972, at 51, 54.

²⁴ Marvin Lazerson describes the pattern in historical terms: "Educational testing . . . became justification for and a technique with which to overcome traditional notions of choice . . . [it] could be used to pressure students and parents into particular programs." Lazerson, *Educational Testing and Social Policy* (unpublished paper, on file at Center for Educational Policy Research, Harvard University).

²⁵ A. CICOUREL & J. KITSUSE, *THE EDUCATIONAL DECISION-MAKERS* (1963), describes the counselor as serving the school's (and not the child's) needs. For a description of the historical development of the counselor's role, see D. ARMOR, *THE AMERICAN SCHOOL COUNSELOR* 24-48 (1969).

²⁶ An unpublished study of several Boston area high schools concludes that college preparatory track assignment significantly affects whether a child will go on to a four-year college; other high school placements seem to have little relationship to subsequent vocations. Harvard Center for Law and Education, *Putting the Child in Its Place* 33-39 (1972) (preliminary draft) [hereinafter cited as *Putting the Child in Its Place*]. Christopher Jencks estimates that for 5 to 20% of all students, track placement may determine whether an individual goes to college, a "not trivial" effect. JENCKS, *INEQUALITY*, *supra* note 14, at 158.

²⁷ [A]ll the terms for special kids really just mean kids who can't or won't or don't do things the way the school thinks they ought to be done; once labelled as special, the school can pretend that there is a *normal* group which is well served by the custom of the school. The school's obvious inability to satisfy many children can then become natural, since the kids are "special" and *shouldn't* be satisfied by any normal procedures and the school does not need to change its ways at all, has only to create some arrangements on the outskirts of the school to keep them special kids and special teachers out of the way.

J. HERNDON, *HOW TO SURVIVE IN YOUR NATIVE LAND* 55 (Bantam ed. 1972) (emphasis in original).

The number and variety of differentiating characteristics is large; overlapping among the characteristics (multiple differentnesses) further complicates the pattern.²⁸ Yet the school, in part because its resources are scarce, cannot tailor individual programs to satisfy individual needs. Instead, it develops classifications which attempt to reconcile the variations among "exceptional" children with the limitations of school resources.²⁹ When a school or school district provides only a single "special education" program, the classroom may resemble a Noah's Ark of deviations from the school norm: the retarded, the crippled, and the emotionally disturbed. The teacher assigned to such a class cannot hope to do much more than maintain order. A more amply endowed school district may offer several "special" programs, differentiating both among levels of retardation ("educable," "trainable," "profound") and between retardation and such other school handicaps as "learning disabilities" and "emotional disturbance."³⁰ Students unamenable to such special help—either because the school concludes that they are "ineducable," *i.e.*, unable to profit from any presently-provided educational program, or because they make life difficult for teachers and classmates—may be excluded from school.³¹

²⁸ This overlapping is a particularly common phenomenon among children who are considered "seriously" or "profoundly" mentally retarded. Gruenberg notes that one-third of "trainable" retarded children (whose IQ's are between 30 and 50) have other physical handicaps. Gruenberg, *Epidemiology*, in *MENTAL RETARDATION* 259, 274-75 (H. Stevens & F. Heber eds. 1964). The Mississippi State Department of Education found that nearly 50% of educable mentally retarded children tested had hearing or sight deficiencies. Mississippi State Dept't of Education, *Study of Screening Procedures for Special Education Services to Mentally Retarded Children*, June 1960. Mercer reports that among white middle class educable mentally retarded children, most had associated physical disabilities. Mercer, *Sociocultural Factors in Labeling Mental Retardates*, 48 *PEABODY J. EDUC.* 188, 192-93 (1971).

²⁹ These classifications may be financial bonanzas for the schools. James Herndon, noting that California schools receive \$550 extra each year for each retarded child, raises the question whether there "might be a shortage of \$550 kids to be retarded," if they were tested appropriately by the schools. J. HERNDON, *supra* note 27, at 96-97.

³⁰ Often the schools' "supply" of special services determines demand. In Boston, for example, 4000 students are assigned to classes for the retarded; only 70 have been classified emotionally disturbed. Putting the Child in Its Place, *supra* note 26, at 97. Prevalence estimates of handicapping conditions suggest that between 1.3% and 2.54% of the student population is retarded, and 2.0% of the student population is emotionally handicapped. 2 *REPORT OF THE NEW YORK STATE COMMISSION ON THE QUALITY, COST AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION* 9B.2 (1972) [hereinafter cited as *COST OF EDUCATION*].

³¹ See *TASK FORCE ON CHILDREN OUT OF SCHOOL, THE WAY WE GO TO SCHOOL: THE EXCLUSION OF CHILDREN IN BOSTON* (1971) [hereinafter cited as *THE WAY WE GO TO SCHOOL*]. Legislation and regulations refer to this process as one of "school excusal." The historical term—"elimination"—is less polite and more apt. One national study of exclusion concluded that "through legal, quasi-legal, and extra-legal devices or through apathy, schools cause, encourage, and welcome the lack of attendance in school of millions of American youngsters. Such activity by the educational system serves as a denial of civil rights as massive as the separate school systems maintained by law in prior years . . ." *THE SYSTEMATIC EXCLUSION OF CHILDREN FROM SCHOOL* 15 (J. Regal ed. 1971) (DHEW grant OEG-0-70-3126).

While the range of school classifications is almost infinite,³² the Article examines three—exclusion from publicly-supported schooling, placement in “special education” programs,³³ and ability grouping³⁴—as well as the aptitude tests used to facilitate the assignment of students to these groupings.³⁵ What factors distinguish these classifications from other school classifications? (1) They are each of relatively long duration: exclusion is almost invariably a one-way ticket out of school; movement between special and regular programs or between slow and advanced ability groups is infrequent.³⁶ (2) Their consequences are both significant and difficult to reverse: the child barred from school as “ineducable” becomes more difficult to educate because of his exclusion; the student assigned to a slow track, or a special education class, cannot easily return to the schooling “mainstream.” (3) The questionable nature of the bases for these sorting decisions suggests that the possibility of misclassification, and consequent serious injury to the child, is significant. (4) These placement decisions (unlike within-class grouping decisions, for instance) are highly visible. Typically, they are made—or at least ratified—not by classroom teachers but by school or district administrators. (5) A given student is assigned to one of these classifications relatively infrequently—once

³² For example, grading, testing, tracking, within-class grouping, exclusion, and separation of classes or schools by sex, race or age are all school classifications under this author's definition. See text accompanying notes 16-28 *supra*.

³³ “Special education” refers to classes for students with particular and acute learning disabilities. The disability may be defined in terms of test scores, see note 249 *infra*, physical impediments (*i.e.*, classes for the blind, deaf and dumb, or perceptually handicapped), or psychological disturbance (*i.e.*, classes for the emotionally disturbed). Special education classes are a relatively recent and increasingly common phenomenon. A recent national estimate of enrollment in special education concludes that 2,106,100 children (35% of those who “need” such help) are enrolled in some special program. Retarded children are somewhat better served than other children in need of special education—based on a prevalence estimate of 2.3%, close to one-half of retarded children are in special classes. R. MACKIE, *SPECIAL EDUCATION IN THE UNITED STATES: STATISTICS 1948-1966*, at 39 (1969).

³⁴ Ability grouping, or “tracking,” refers to the differential classification of students, ostensibly on the basis of aptitude, for instruction in the regular academic program. FINDLEY & BRYAN, *supra* note 20, at 4; RESEARCH DIVISION, NATIONAL EDUCATION ASSOCIATION, *ABILITY GROUPING 6* (1968) [hereinafter cited as NEA SUMMARY].

³⁵ See notes 218-45 *infra* & accompanying text.

³⁶ See, e.g., Gallagher, *The Special Education Contract for Mildly Handicapped Children*, 38 *EXCEPTIONAL CHILDREN* 527, 529 (1972): “[D]ata collected informally by the Office of Education suggested that special education was, de facto, a permanent placement. In a number of large city school systems far less than 10 percent of the children placed in special education classes are ever returned to regular education.” COST OF EDUCATION, *supra* note 30, at 9.22-9.39 offers one explanation for this phenomenon; children in special education classes are infrequently reevaluated. In New York City, during the school year 1969-70, 1,603 retarded children had not been evaluated in over three years; 2028 retarded children had not been evaluated in over five years. See also Mercer, *Sociocultural Factors in the Education of Black and Chicano Children*, paper presented at the 10th Annual Conference on Civil and Human Rights of Educators and Students, National Education Association (Feb. 1972) [hereinafter cited as Mercer, *Sociocultural Factors*]; Mercer, *Sociological Perspectives on Mild Mental Retardation*, in *SOCIAL-CULTURAL ASPECTS OF MENTAL RETARDATION* 287 (C. Haywood ed. 1970) [hereinafter cited as Mercer, *Sociological Perspectives*].

every year at most. (6) Each of these classifications carries the potential of stigmatizing students. In sum, exclusion, special class assignment, and track placement are of greater moment to the student than, for example, a failing grade on a particular exercise. They are also more obvious candidates for judicial review.

C. *School Classification and School Needs*

1. Historical Development of Classification³⁷

While, as one testing manual contends, "the original [classification] was when God . . . looked at everything he made and saw that it was *very good*,"³⁸ only during the past sixty years have schools devoted considerable effort to classifying and sorting students. The prototypical common school, energetically promoted by Horace Mann and Henry Barnard, was designed to provide a common educational experience for all comers—all, that is, who could afford to stay in school for an extended period of time. Through the nineteenth century, the shared curriculum was characteristic of schools which, at least in theory, respected neither class nor caste.

The arrival of significant numbers of immigrants from Eastern and Southern Europe late in the nineteenth century obliged school officials to provide instruction for children who spoke no English and had little, if any, previous schooling. It made no sense to place these students in regular classes; they needed assistance of a kind that schools had not previously been asked to provide. Urban school systems created "opportunity classes," special programs designed to overcome the students' initial difficulties and to prepare them for regular schoolwork.

Other societal factors served to promote the need for differentiation among students.³⁹ The insistence that schools be "business-like" and efficient was increasingly heard, and American educators began to adopt the modern business corporation's complex organizational structure as their model.⁴⁰ Further, the increasingly complex American economy and society demanded a differentiation of skills that a common education simply couldn't provide. As Boston's superintendent of schools argued in 1908: "Until very recently [the schools]

³⁷ For an amplification of these brief historical comments, see L. CREMIN, *THE TRANSFORMATION OF THE SCHOOL* (1961). Cf. C. GREER, *THE GREAT SCHOOL LEGEND* (1972).

³⁸ W. MEHRENS & I. LEHMANN, *STANDARDIZED TESTS IN EDUCATION* 3 (1969).

³⁹ For a fuller exposition, see R. CALLAHAN, *EDUCATION AND THE CULT OF EFFICIENCY* (1962); Lazerson, *supra* note 24.

⁴⁰ Cf. R. CALLAHAN, *supra* note 39, at vii-viii ("What was unexpected [in my investigation] was the extent, not only of the power of the business-industrial groups, but of the strength of the business ideology. . . ."). See also G. COUNTS, *THE SOCIAL COMPOSITION OF BOARDS OF EDUCATION: A STUDY IN THE SOCIAL CONTROL OF PUBLIC EDUCATION* (1927).

have offered equal opportunity for all to receive *one kind* of education, but what will make them democratic is to provide opportunity for all to receive such education as will fit them *equally well* for their particular life work."⁴¹ Varied curricula were developed for students of varying ability.

The advent of standardized aptitude testing early in the twentieth century provided a useful means of identifying and placing those students. As Ellwood Cubberly, one of the most influential educators of that time, maintained:

The educational significance of the results to be obtained from careful measurements of the intelligence of children can hardly be overestimated. Questions relating to the choice of studies, vocational guidance . . . the grading of pupils, promotional schemes . . . all alike acquire new meaning and significance when viewed in the light of the measurement of intelligence.⁴²

Intelligence tests were increasingly used by American educators because they accorded with the educators' demand for categorization and efficiency. Tests offered scientific justification for the differentiated curriculum, enabling it to function with some rationality.⁴³

Today ability grouping claims widespread adherence among non-rural school districts.⁴⁴ Federal and state support has made particular specialized programs—notably industrial and agricultural trade courses⁴⁵—financially attractive to school districts. Differentiated special education programs, also given impetus by state and federal legislation, have expanded with similar speed (if not quite the same universality) since the 1920's.⁴⁶

2. Current School Needs

Educators sometimes suggest that school classification represents merely the aggregation of unconnected phenomena lacking coherent

⁴¹ Brooks, *Twenty-Eighth Annual Report of the Superintendent of Public Schools* 53, in SCHOOL COMMITTEE, CITY OF BOSTON, DOCUMENTS OF THE SCHOOL COMMITTEE (1908) (emphasis in original).

⁴² L. TERMAN, *THE MEASUREMENT OF INTELLIGENCE* vii-viii (1916).

⁴³ See Schudson, *Organizing the 'Meritocracy': A History of the College Entrance Examination Board*, 42 HARV. EDUC. REV. 34, 51 (1972).

⁴⁴ See FINDLEY & BRYAN, *supra* note 20, at 2, 18. A 1958-59 survey undertaken by the National Education Association Research Division reported that among school districts with more than 2500 pupils, 77.6% grouped by ability in the primary grades and 90.5% utilized ability grouping in secondary schools. NEA RESEARCH SUMMARY, *supra* note 34, at 12. A similar pattern was reported 7 years later. See *id.* 15-17.

⁴⁵ See 20 U.S.C. §§ 11-28 (1970) (Smith-Hughes Vocational Education Act).

⁴⁶ Lord, *Medical Classification of Disabilities for Educational Purposes—A Critique*, in PROBLEMS AND ISSUES IN THE EDUCATION OF EXCEPTIONAL CHILDREN (R. L. Jones ed. 1971). The growth of differentiated special education in the United States from 1948 to 1966 is traced in R. MACKIE, *supra* note 33.

purposes.⁴⁷ Yet the frequency with which schools classify students and the importance that attaches to those classifications belie that impression. Grouping, special education assignment, and exclusion have significant and similar school purposes. They: (1) provide mechanisms for differentiating among students; (2) offer rewards and sanctions for school performance; (3) ease the tasks of teachers and administrators by restricting somewhat the range of ability among students in a given classroom;⁴⁸ and (4) purportedly improve student achievement.⁴⁹

Interestingly, the first two purposes—sorting and rewarding-punishing—are seldom mentioned by school officials.⁵⁰ The sorting function is self-evident: where previously there existed just students, classification permits the parcelling out of students among different educational programs.⁵¹ That certain of these classifications reward and others punish is apparent from investigations of the effects of grouping on students' self-perception.⁵² The reward-punishment facet of classification represents one aspect of the school's stress on intellectual competition, with praise accompanying only performance that the school or teacher defines as successful.⁵³

The third and fourth purposes—easing the tasks of teachers and administrators, and improving the education of students—are more commonly advanced.⁵⁴ These purposes—one emphasizing benefits to

⁴⁷ Cf. C. SILBERMAN, *CRISIS IN THE CLASSROOM* 81 (1970) ("Schools fail, however, less because of maliciousness than because of mindlessness."). Judge Wright's comments in *Hobson v. Hansen* concerning the "arbitrary quality of thoughtlessness," 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd en banc sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969), are also relevant here.

⁴⁸ The qualifier "somewhat" is deliberately used here, since the capacity of schools correctly to identify ability, and potential, is an open question. Mississippi State Dep't of Education, *supra* note 28, reveals that most classifying systems used by school systems have low reliability.

⁴⁹ For an impressionistic account of the effect of certain school classifications, see L. DEXTER, *THE TYRANNY OF SCHOOLING* (1964). The efficacy of ability grouping and special education is considered in Section II *infra*.

Classifications serve an additional purpose, one not directly related to the public schools: they provide a means for *other* public and private institutions (universities, employers, etc.) to distinguish among students, thus serving—for better or worse—the demands of the larger society.

⁵⁰ School exclusion is a conspicuous exception to this rule. It is frequently justified as necessary to the school's maintenance of order, if not to its survival. See H. Goldstein, J. Moss & L. Jordan, *The Efficacy of Special Class Training on the Development of Mentally Retarded Children* (1965) (Univ. of Illinois Institute for Research on Exceptional Children).

⁵¹ Certain critics charge that sorting is indeed all that schools do, see Lauter & Howe, *How the School System is Rigged for Failure*, N.Y. REV. BOOKS, June 18, 1970, at 14, and perhaps all that they have ever done. C. GREER, *THE GREAT SCHOOL LEGEND* (1972). See also Stein, *Strategies for Failure*, 41 HARV. EDUC. REV. 158 (1971).

⁵² See J. BARKER LUNN, *STREAMING IN THE PRIMARY SCHOOL* (1970); W. BORG, *ABILITY GROUPING IN THE PUBLIC SCHOOLS* (1966) [originally appeared in 34 J. EXPERIMENTAL EDUC., Winter 1965, at 1]; Mann, *What Does Ability Grouping Do to the Self-Concept?*, 36 CHILDHOOD EDUCATION 356 (1960); cf. M. GOLDBERG, A.H. PASSOW & J. JUSTMAN, *THE EFFECTS OF ABILITY GROUPING* (1966).

⁵³ See, e.g., J. HENRY, *CULTURE AGAINST MAN* 283-322 (1963).

⁵⁴ A recent study of ability grouping asked school officials whose districts grouped

teachers and administrators, the other emphasizing benefits to students—permit school officials to view classification as an unmixed blessing. There is little recognition that classification may have decidedly limited educational benefits for schoolchildren and that certain sorting practices may even do educational injury.⁵⁵ The belief that classification helps everyone is significant for two reasons. It partially explains the popularity that grouping enjoys among teachers: only 18.4 percent of teachers surveyed by the National Education Association preferred to teach non-grouped classes.⁵⁶ It also underscores the problems that reformers—whether pedagogues or lawyers—unhappy with present classification practices are likely to encounter in seeking to restructure them.

D. *School Classification and the Critics*

1. Innovation

School sorting practices have been criticized on several fronts. The fashionable educational innovations of the past twenty years—nongraded classes, team teaching, “open classrooms” patterned after the English Leicestershire model⁵⁷—all represent efforts to modify school classifications by introducing elements of flexibility, diversify-

by ability to indicate the reasons they favored such an approach. The most common set of answers revealed a primary orientation toward the needs of teachers and administrators: “improves [teacher] attention to individual [student] needs,” “reduces ability and achievement range within the classroom,” “facilitates curriculum planning,” “permits [schools to adopt] both remedial and enrichment programs,” “results in better teaching,” “permits the more effective selection and use of materials,” and “makes instruction easier.” FINDLEY & BRYAN, *supra* note 20, at 15.

The second most frequently advanced set of rationales concerned the benefits that accrue to students from classification: “permits students to progress at their own learning rate,” “allows the student to compete on a more equitable basis,” “makes it possible for each student to achieve success,” and “results in . . . more effective learning.” *Id.*

⁵⁵ Of 180 school administrators from ability grouped districts who responded to the question, “What do you consider to be the disadvantages of homogeneous grouping in your school district?” only nine indicated that grouping “does not necessarily result in better learning.” *Id.* 16. Fewer still noted problems with establishing criteria for grouping, or recognized that grouping “tends to ‘lock’ slower learners into slow groups.” *Id.* The recognition of possible educational harm (as distinguished from social harm) was even less among districts that used limited grouping, or no grouping at all. *Id.* 16-17.

⁵⁶ Research Division, National Education Association, *Teachers' Opinion Poll: Ability Grouping*, 57 NEA J., Feb. 1968, at 53.

This discussion does not deal with general parental preferences with respect to classification. Decisions concerning classification are made primarily, if not exclusively, by school administrators; parents have little if any say. The nature and intensity of general parental attitudes on the subject has not been measured.

⁵⁷ See, e.g., CENTRAL ADVISORY COUNCIL FOR EDUCATION, CHILDREN AND THEIR PRIMARY SCHOOLS (1967) (generally referred to as the Plowden Report); J. FEATHERSTONE, SCHOOLS WHERE CHILDREN LEARN (1971); J. GOODLAD & R. ANDERSON, THE NONGRADED ELEMENTARY SCHOOL (1959); C. SILBERMAN, *supra* note 47 (1970); Glaser, *The Design of Instruction*, in THE CHANGING AMERICAN SCHOOL 215 (J. Goodlad ed. 1966) (65th Yearbook of the National Society for the Study of Education).

Grouping on the basis of tested intelligence has long been criticized. See, for example, the Appendix to Appellants' Briefs in the *School Segregation Cases*, reprinted as *The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*, 37 MINN. L. REV. 427, 435-36 (1953): “[M]any educators have come to doubt the wisdom of class groupings made homogeneous solely on the basis of intelligence. . . .

ing the school program while making any particular "classification" of more limited duration and significance. Although these innovations do reject sorting, they challenge the premise that any given grouping should include only students of like ability. They attend to subtler distinctions, varying patterns of cognitive and emotional development.⁵⁸

2. Educational Research

Educational research poses a quite different kind of challenge to present classification practice. It has increasingly undermined one of the essential premises of sorting: that it benefits students. The research concerning the educational effects of ability grouping and special education⁵⁹ reveals that classification, as it is typically employed, does not promote individualized student learning, permit more effective teaching to groups of students of relatively similar ability, or, indeed, accomplish any of the things it is ostensibly meant to do.⁶⁰ Educational efficacy studies generally find either no effect or marginal adverse effects on achievement and attitude for students who are classified, when these students are compared with non-grouped peers. These findings apply both for the average and the slow student (in some studies the brightest students appear to benefit slightly from grouping) and in evaluations both of ability grouping and special education programs for the mildly handicapped, in England and other European countries as well as the United States.⁶¹

The research indicates that classification effectively separates students along racial and social class lines,⁶² and that such segregation causes educational injury to minority groups.⁶³ It also suggests that adverse classifications stigmatize students, reducing both their self-image and their worth in the eyes of others.⁶⁴ Indeed, if the researchers had their way, the profession would now be "[w]riting an epitaph for grouping."⁶⁵

this type of segregation, too, appears to create generalized feelings of inferiority . . . and reduces learning opportunities which result from the interaction of individuals with varied gifts."

⁵⁸ See, e.g., Hall, *On the Road to Educational Failure: A Lawyer's Guide to Tracking*, INEQUALITY IN EDUCATION (June 30, 1970), at 1; Stodolsky & Lesser, *Learning Patterns in the Disadvantaged*, 37 HARV. EDUC. REV. 546 (1967).

⁵⁹ See notes 96-99 *infra* & accompanying text.

⁶⁰ See Section II *infra*.

⁶¹ See, e.g., W. BORG, *supra* note 52; M. GOLDBERG, A.H. PASSOW & J. JUSTMAN, *supra* note 52; G. HOELTKE, EFFECTIVENESS OF SPECIAL CLASS PLACEMENT FOR EDUCABLE MENTALLY RETARDED CHILDREN (1966); J. BARKER LUNN, *supra* note 52; Kirk, *Research in Education*, in MENTAL RETARDATION 57 (H. Stevens & R. Heber eds. 1964).

⁶² See FINDLEY & BRYAN, *supra* note 20; P. SEXTON, EDUCATION AND INCOME (1961).

⁶³ See McPartland, *supra* note 13; Wilson, *Educational Consequences of Segregation in a California Community*, in 2 U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 165 (1967).

⁶⁴ See sources cited note 52 *supra*; Section II *infra*.

⁶⁵ Heathers, *Grouping*, in ENCYCLOPEDIA OF EDUCATIONAL RESEARCH 559, 568 (4th ed. R. Ebel 1969).

3. Misclassifications

Even those who accept the basic premises of school sorting have reason to question whether schools can adequately do the job. Two retests of students assigned to classes for the retarded reveal notable system-made errors. In Washington, D.C., the system itself conducted the retesting; it found that two-thirds of the students placed in special classes in fact belonged in the regular program. A study of 378 educable mentally retarded students from 36 school districts in the Philadelphia area concluded that "[t]he diagnosis for 25 percent of the youngsters found in classes for the retarded may be considered erroneous. An additional 43 percent [may be questioned]."⁶⁶ To the latter study's authors, the findings yield cause for concern. "One cannot help but be concerned about the consequences of subjecting these children to the 'retarded' curriculum The stigma of bearing the label 'retarded' is bad enough, but to bear the label when placement is questionable or outright erroneous is an intolerable situation."⁶⁷

4. Heredity versus Environment

Classification on the basis of intellectual ability has also been attacked by those who assert that such distinctions are based on judgments of inherited rather than acquired intelligence, and are therefore undemocratic. Fifty years ago, Walter Lippmann criticized intelligence testing on precisely those grounds, predicting that the use of such tests "could not but lead to an intellectual caste system in which the task of education had given way to the doctrine of predestination and infant damnation."⁶⁸ Milton Schwebel, discussing the practice of grouping students, makes a similar charge:

The most direct evidence of a school system's stand on ability is the way it educates the mass of its children. . . . Only the school system which regards the genetic factor as paramount, and the environmental as . . . insignificant [would] rightly subdivide its population in accordance with native ability [as] revealed by achievement tests and would proffer a curriculum suitable to the talents of each group. The decision whether it is wise to group children by ability depends upon one's views of the origin of intelligence.⁶⁹

The claim that ability grouping treats intelligence as determined by heredity and not environment⁷⁰ is political dynamite. It encourages

⁶⁶ Garrison & Hammill, *Who Are the Retarded*, 38 *EXCEPTIONAL CHILDREN* 13, 18 (1971).

⁶⁷ *Id.* 20. One difficulty with the Garrison and Hammill study is that they, unlike the school districts they studied, used five different measures to determine retardation.

⁶⁸ Lippman, *The Abuse of the Tests*, 32 *NEW REPUBLIC* 297 (1922).

⁶⁹ M. SCHWEBEL, *WHO CAN BE EDUCATED?* 75-76 (1968).

⁷⁰ See, e.g., Jensen, *How Much Can We Boost IQ and Scholastic Achievement?*, 39

blacks to view grouping as the pedagogical equivalent of genocide and radical whites to regard it as "not the means of democratization and liberation, but of [class] oppression."⁷¹ This hostility to ability grouping has translated into varied forms of political pressure. Black psychologists and community groups have demanded, with some success, that intelligence testing be abandoned.⁷² Others have urged the abolition of all classifications in which racial minorities are overrepresented relative to their proportion of the school population.⁷³

Some of these efforts minimize the real differences among children which, whatever their source, do require varied educational programs; their equation of classification and the doctrine of inherited intelligence oversimplifies a complex problem. But whatever the objective merits of such attacks, they have had significant political impact.

E. *School Classification and the Courts*

These quite different criticisms—the innovators' view that existing classifications are too rigid, the researchers' conclusions that most classifications serve little educational purpose and that schools frequently misclassify students, the political attacks on sorting as racist in motivation or result—have not markedly diminished the public schools' penchant for classification. Nonetheless, courts have begun to limit the schools' discretion in the ways they sort students and the categories into which they sort them. Judge J. Skelly Wright's decision in *Hobson v. Hansen*,⁷⁴ which "abolished" tracking in the District of Columbia, is the most famous but not the only case addressing the constitutional propriety of school classification practices.⁷⁵ Exclusion of children from school, whether because of asserted ineducability,⁷⁶

HARV. EDUC. REV. 1 (1969); Herrnstein, *I.Q.*, ATLANTIC, Sept. 1971, at 43. A host of reactions to the Jensen article are published in *Discussion: How Much Can We Boost IQ and Scholastic Achievement?*, 39 HARV. EDUC. REV. 273 (1969).

⁷¹ Lauter & Howe, *supra* note 51, at 18.

⁷² The California legislature overwhelmingly passed a bill, vetoed by Governor Reagan, which would have accomplished just that. Assembly Bill No. 483 (Aug. 1, 1972) (vetoed Aug. 17, 1972). Cf. CAL. EDUC. CODE § 12825.5 (Supp. 1973).

⁷³ The "People's Platform," distributed in San Francisco before the 1972 Democratic National Convention called for "the abolishment of IQ tests in the schools, the tracking and discrimination that result therefrom. . . ." Cf. Larry P. v. Riles, 343 F. Supp. 1306, 1314 (N.D. Cal. 1972). See also Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133, 135 (1972).

⁷⁴ 269 F. Supp. 401 (D.D.C. 1967). The Court of Appeals for the District of Columbia Circuit affirmed the decision in an opinion which undercut much of the force of the district court's tracking discussion. *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (en banc).

⁷⁵ Unreported decisions and complaints in a number of school classification cases are collected in HARVARD UNIVERSITY CENTER FOR LAW & EDUCATION, CLASSIFICATION MATERIALS (1972) [hereinafter cited as CLASSIFICATION MATERIALS].

⁷⁶ E.g., *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (exclusion of children labeled as behavioral problems, mentally retarded, emotionally disturbed, or hyperactive); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp.

alien status,⁷⁷ or pregnancy,⁷⁸ has been overturned by a number of courts; the manner in which students are assigned to classes for the mildly retarded has been reviewed to determine the rationality of the classification procedures employed;⁷⁹ and courts have rejected attempts of formerly de jure segregated school districts to employ ability grouping, finding such efforts inconsistent with the obligation to desegregate.⁸⁰

Judicial analysis in this area is largely borrowed from school discipline and desegregation cases, and does not develop an analytic framework suited to the particular problems of school classification. Nevertheless, the beginnings of such a framework can be fashioned from the existing case law and a description of the common characteristics of classification practice.⁸¹

One approach considers the educational harm attributable to exclusion, assignment to special education programs, or to slow ability groups. The assorted ill effects of these classifications—the impact on school success; the stigmatization of individuals; the likelihood that such assignment will be viewed by school personnel as confirming judgments of stupidity, thus rendering the school's initial judgment a self-fulfilling prophesy—render plausible the claim that they deny students an equal educational opportunity. The deprivation, if factually demonstrated,⁸² is in Professor Michelman's terms both "absolute" and

1257 (E.D. Pa. 1971) (consent order enjoining exclusion of mentally retarded children); *accord*, Wolf v. Legislature, Civil No. 182,646 (Utah Dist. Ct., Jan. 8, 1969) [*reprinted in* CLASSIFICATION MATERIALS, *supra* note 75, at 171] (exclusion of mentally retarded children enjoined under Utah constitution). *See also* Harrison v. Michigan, 350 F. Supp. 846, 847-48 (E.D. Mich. 1972) (*dictum*).

⁷⁷ *Hosier v. Evans*, 314 F. Supp. 316 (D.V.I. 1970).

⁷⁸ *E.g.*, Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971).

⁷⁹ *See, e.g.*, Stewart v. Phillips, Civil No. 70-1199-F (D. Mass., Feb. 8, 1971) [*reprinted in* CLASSIFICATION MATERIALS, *supra* note 75, at 234] (denying defendants' motion for summary judgment); Diana v. California State Bd. of Educ., Civil No. 70-37 RFP (N.D. Cal. 1970) [*reprinted in* CLASSIFICATION MATERIALS, *supra* note 75, at 292] (consent decree); Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501, 504, 519-20 (C.D. Cal. 1970) (fact-finding in regard to grouping practices).

⁸⁰ *E.g.*, Lemon v. Bossier Parish School Bd., 444 F.2d 1400 (5th Cir. 1971); Johnson v. Jackson Parish School Bd., 423 F.2d 1055 (5th Cir. 1970); United States v. Tunica County School Dist., 421 F.2d 1236 (5th Cir. 1970); Singleton v. Jackson Mun. Separate School Dist., 419 F.2d 1211 (5th Cir. 1969), *rev'd in part on other grounds*, 396 U.S. 290 (1970); Moses v. Washington Parish School Bd., 330 F. Supp. 1340 (E.D. La. 1971). For an earlier and quite different treatment of the same issue, see *Borders v. Rippey*, 247 F.2d 268 (5th Cir. 1957).

⁸¹ Professor Van Alstyne, in reviewing the application of due process standards to the school setting, has argued eloquently that "even the vague and general written standards fixed in the constitution [neither] contemplate [nor] require a technique of judicial needlepoint." Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 876.

⁸² While these three classifications share, to some extent, the effects noted above, the nature of the injury varies with the classification. Slow track and special education placement provide the student with an education different from that which the school offers other children, but whether "different" can be equated with "lesser" depends on an analysis of the educational evidence. No such inquiry is necessary to establish that exclusion represents deprivation, for failure to provide a service is by definition equivalent to provision of lesser service. *See* notes 218-23 *infra* & accompanying text.

“relative,” a “real” disadvantage given additional significance by virtue of the affront, the psychic injury that it occasions.⁸³

The Supreme Court's recent decision in *San Antonio Independent School District v. Rodriguez*,⁸⁴ upholding the constitutionality of Texas' school finance statutes, casts doubt on the utility of constitutional analysis couched in terms of equality of educational opportunity. *Rodriguez* concludes that education is not, in constitutional terms, a “fundamental interest”; more critically, the majority opinion seems to foreclose any assault upon relative inequalities in the provision of educational services. Yet, for several reasons, the application of an equal educational opportunity standard to school classification issues merits pursuing. First, one such classification—exclusion from school—represents an absolute deprivation of services, and as such is clearly distinguishable from *Rodriguez*.⁸⁵ Second, the nature of the injury caused by other classifications, such as assignment to special education programs, differs markedly from the harm that assertedly flows from receiving a less well-financed education.⁸⁶ Third, the constitutional approach adopted in *Rodriguez*, its unwillingness seriously to test even the rationality of present state practices, warrants critical appraisal. Even if the “fundamental interest” analysis is abandoned by the Court, a weighing of state and individual concerns more precise and careful than that adopted in *Rodriguez*, and more typical of other recent Supreme Court decisions, may ultimately prevail.⁸⁷

A second constitutional approach focuses on the fact that minority children are assigned to slow learners' groups and classes for the mildly retarded in numbers far exceeding their proportion of the school population, and are thus denied classroom contact with white and middle-class schoolmates. The existence of such racial isolation, coupled with evidence of the racially specific injury it produces, should be sufficient to require a demonstration that these classifications are in fact based on adequate nonracial grounds and that their educational benefits outweigh the racially specific harm of within-school isolation.⁸⁸

⁸³ See Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

⁸⁴ 93 S. Ct. 1278 (1973).

⁸⁵ See notes 218-23 *infra* & accompanying text.

⁸⁶ See notes 92-147 *infra* & accompanying text.

⁸⁷ See, e.g., *James v. Strange*, 407 U.S. 128 (1972); *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164 (1972); *Reed v. Reed*, 404 U.S. 71 (1971). While each of these cases purports to apply a “rationality” standard of review, the inquiry in each is considerably more searching than that undertaken in *Rodriguez*. See generally Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

⁸⁸ See Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972). The constitutional standard suggested in this Article differs from the traditional “rational relationship” and “compelling interest” ap-

The equal educational opportunity and racial analyses both rely on the equal protection clause in challenging the legitimacy of at least some school classifications. A third approach focuses not on the legitimacy of the classifications themselves, but on the procedure by which the school determines how a particular student or class of students should be treated. This due process approach is triggered by two related factors: a significant school-imposed change in educational status; and the negative label—the stigma—which invariably attaches to students placed in these programs.

These three legal strategies are at least plausible. Each draws on previous court decisions which have sought to define with particularity the meaning of the “equal protection of the laws” and “due process” guarantees of the fourteenth amendment. Yet legal plausibility does not necessarily or automatically yield educationally sound results. This caveat assumes particular importance when courts begin to raise questions about matters as central to the educational enterprise as school classification determinations. In these as in other issues of educational policy, decisions based on the Constitution can have a salutary effect.⁸⁹ They can determine the bounds of constitutionally permissible school action, reveal arbitrary conduct, and impose some measure of fairness on school procedure. But the courts can neither revamp the educational system nor improve the quality of those who administer that system.⁹⁰

II. EQUAL EDUCATIONAL OPPORTUNITY AND SCHOOL CLASSIFICATION

Any educational system is, among other things, a great sorting-out process.⁹¹

A. *The Impact of School Classifications on Student Success*

The Supreme Court declared in *Brown v. Board of Education* that the opportunity for education, where the state has undertaken to provide it, “is a right which must be made available to all on equal terms.”⁹² While the inequality against which *Brown* inveighed was

proaches often adopted by courts. For reasons suggested in Sections II and III, both seem too mechanical and result-oriented to be appropriate in resolving questions as complex as those posed by school classification.

⁸⁹ For a general discussion of the efficacy of law in addressing civil rights questions, see Freund, *Civil Rights and the Limits of Law*, 14 BUFFALO L. REV. 199 (1964). See also Kirp, *The Role of Law in Educational Policy*, SOCIAL POLICY, Sept./Oct. 1971, at 42.

⁹⁰ This restates the distinction between viewing the Supreme Court as the “school board for the entire country,” presumably an undesirable (and unattainable) goal, and regarding the Court as “teachers in a vital national seminar.” Compare *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 598 (1940), with Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

⁹¹ ROCKEFELLER BROTHERS FUND, *THE PURSUIT OF EXCELLENCE* 17 (1958).

⁹² 347 U.S. 483, 493 (1954).

racial, non-racial educational inequities⁹³ have been struck down by the lower courts. Those decisions note the constitutional importance of education and view with sympathy the claims of children—a voteless, classless minority. Is the child's interest in an "equal" education sufficiently diminished by placement in a slow track or special class, or by exclusion from school, to warrant constitutional scrutiny?

School sorting practices, unlike explicitly racial classifications, cannot be condemned as inherently harmful. Some classification is clearly necessary if schools are to cope with the bewildering variety of talent and interest that characterizes children. Whether *particular* classifications are harmful, and hence equality-depriving, is essentially an empirical question. Thus, in a lawsuit attacking school sorting practices, demonstration of injury may well be as important as constitutional theory. "Adverse" school classification may result in two kinds of injury: educational ineffectiveness and stigmatization of students.

1. Educational Achievement

What does the evidence concerning the educational effectiveness of school sorting demonstrate? The least research has been carried out on the effects of school exclusion, with good reason: excluded children are difficult to locate.⁹⁴ Further, the educational effects of exclusion are likely to be inseparable from the impact of other social adversities, making it difficult to identify the "cause" of harm. Yet the few studies that do consider the effect of exclusion (or the impact of school shut-downs) on children predictably conclude that the lack of schooling does retard achievement.⁹⁵

⁹³ See, e.g., cases cited notes 76-78 *supra*.

⁹⁴ Wall St. J., Mar. 22, 1972, at 1, col. 1, § 21, col. 3. Estimates of the number of excluded children range from 450,000 to more than 4 million. Compare THE EXCLUSION OF CHILDREN FROM SCHOOL 3 (J. Regal ed. 1971) (DHEW Grant OEG-0-70-3126) (450,000) with 118 CONG. REC. H1257 (daily ed. Feb. 17, 1972) (remarks of Congressman Vanik) (4,250,000). The data ferreted out through litigation provide only gross approximations. See *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (plaintiffs estimated 18,000 retarded, emotionally disturbed, blind, deaf, and speech or learning disabled children excluded from Washington, D.C., schools; defendants admitted 12,340 handicapped children excluded); Plaintiffs' Memorandum in Support of Their Motion to Convene a Three Court Judge [*sic*] at 5, Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) [*reprinted in* CLASSIFICATION MATERIALS, *supra* note 75, at 44] (as many as 53,400 mentally retarded children excluded in Pennsylvania). The number of excluded children actually located after the *Mills* and *PARC* decisions are considerably smaller than these estimates.

⁹⁵ See, e.g., N.Y. Times, Feb. 15, 1970, at 1, col. 1 (children tested after year in which schools were closed for two months due to teachers' strike, showed two months' loss in reading achievement); Green & Hofmann, *A Case Study of the Effects of Educational Deprivation on Southern Rural Negro Children*, 34 J. NEGRO EDUC. 327 (1965). The children studied by Green and Hofmann had attended school in Prince Edward County, Virginia, which closed its schools to avoid desegregation. Since the effects of school exclusion and the segregation controversy—either of which might have had adverse educational consequences—are inextricably linked, it is difficult to separate the impact of each adversity on achievement. See also deGroot, *War and the Intelligence of Youth*, 46 J. ABNORMAL & SOCIAL PSYCHOLOGY 596 (1951). The impact of exclusion

With respect to internal school classifications—special education programs and ability grouping—abundant research has been undertaken. The diligent reader has available to him studies of every sort: survey data and single school studies; “natural” and “experimental” research; studies undertaken in this country and abroad.⁹⁶

The research is, however, flawed by a host of methodological difficulties: some studies are too short in time, and thus do not take into account the possibility that children behave differently because they are part of an exciting (or at least novel) experiment; “experimental” groups, assigned to particular classifications, are not adequately matched with “control” groups, so that performance variation may be explained by initial student differences; measures of change and growth vary from study to study; responses to questionnaires prove inadequate to reckon with the subtleties of sorting;⁹⁷ most important, the definition of what constitutes ability grouping or an educable mentally retarded program varies from study to study.⁹⁸

Despite these problems, the consistency of result among all the studies (and particularly among those most carefully executed) is impressive: it indicates that most school classifications have marginal and sometimes adverse impact on both student achievement and psychological development.⁹⁹

The “not proven” conclusion, an ancient Scottish verdict, should

on retarded children is somewhat clearer. See, e.g., Kirk, *supra* note 61; Toombs, O'Neill, & Rouse, *Pre-School for the Mentally Retarded: A Training Program for Parents of Retarded Children*, in CONGENITAL MENTAL RETARDATION 302-09 (G. Farrell ed. 1969).

⁹⁶ See, e.g., W. BORG, *supra* note 52; M. GOLDBERG, A. H. PASSOW & J. JUSTMAN, *supra* note 52; B. JACKSON, STREAMING: AN EDUCATION SYSTEM IN MINIATURE (1964); S. Ainsworth, An Exploratory Study of Educational, Social and Emotional Factors in the Education of Mentally Retarded Children in Georgia Public Schools (1959) (Univ. of Georgia); H. Goldstein, J. Moss & L. Jordan, *supra* note 50; Baldwin, *The Social Position of the Educable Mentally Retarded Child in the Regular Grades in the Public Schools*, 25 EXCEPTIONAL CHILDREN 106 (1958); Blatt, *The Physical, Personality and Academic Status of Children Who Are Mentally Retarded Attending Special Classes as Compared with Children Who Are Mentally Retarded Attending Regular Classes*, 62 AM. J. MENTAL DEFICIENCY 810 (1958); Kern & Pfaeffle, *A Comparison of Social Adjustment of Mentally Retarded Children in Various Educational Settings*, 67 AM. J. MENTAL DEFICIENCY 407 (1962).

⁹⁷ The questionnaire is cheap, easy, and mechanical. The study of human behavior is time consuming, intellectually fatiguing, and depends for its success upon the ability of the investigator. The former method gives quantitative results, the latter mainly qualitative. Quantitative measurements are quantitatively accurate; qualitative evaluations are always subject to the errors of human judgment. Yet it would seem far more worth while to make a shrewd guess regarding that which is essential than to accurately measure that which is likely to prove quite irrelevant.

LaPiere, *Attitudes vs. Actions*, 13 SOCIAL FORCES 230, 237 (1934).

⁹⁸ H. Goldstein, J. Moss & L. Jordan, *supra* note 50, at 10-15, notes the difficulties with special education research; M. GOLDBERG, A.H. PASSOW & J. JUSTMAN, *supra* note 52, at 17-22, analyzes similar weaknesses in tracking studies.

⁹⁹ See, for example, the studies cited in note 96 *supra*, notes 105-07 *infra*. FINDLEY & BRYAN, *supra* note 20, and Dunn, *Special Education for the Mildly Retarded: Is Much of It Justified?*, in PROBLEMS AND ISSUES IN THE EDUCATION OF EXCEPTIONAL CHILDREN 382 (R. L. Jones ed. 1971), collect and summarize much of the literature.

surprise no one familiar with contemporary educational research. That research has been able to indicate only what appears *not* to matter. It reveals that, given the existing range of school efforts, none of the school-centered explanations for children's differential academic success—facilities, teacher qualifications, school desegregation—significantly influences educational outcomes.¹⁰⁰ Proof that programs as hotly debated as classes for the mildly retarded or slow learner groups really accomplish their goals would be extraordinary. Equally singular would be a conclusive finding of educational harm.¹⁰¹

The particular problems associated with doing research on school classifications almost assure tentativism. Few parents (or school systems, for that matter) are willing to permit researchers to assign students randomly to different ability level groups.¹⁰² The possibility that "adverse" classifications do have significant harmful effects is real; the outcomes of experimentation are consequently risky. It is also difficult in undertaking such research to distinguish causation from correlation, and to know which factor—the educational program or the children's ability—is the cause and which the consequence. For these reasons, existing research is unable to predict how similar children might fare if classified differently. It can draw only hesitant conclusions.¹⁰³

¹⁰⁰ See, e.g., COLEMAN REPORT, *supra* note 14; Armor, *The Evidence on Busing*, PUB. INTEREST, Summer 1972, at 90; cf. St. John, *Desegregation and Minority Group Performance*, 40 REV. EDUC. RESEARCH 111 (1970).

¹⁰¹ Professor Lilly, commenting on the special education efficacy studies, wryly observes:

To avoid exhaustive argument with regard to research design and confounding variables in these efficacy studies, let us accept the statement that they are inconclusive to date. It must be added, however, that in the true spirit of research they will be inconclusive forever.

Lilly, *Special Education: A Teapot in a Tempest*, 37 EXCEPTIONAL CHILDREN 43, 43-44 (1970).

¹⁰² Cf. Gilbert & Mosteller, *The Urgent Need for Experimentation*, in MOSTELLER & MOYNIHAN, *supra* note 14, at 371, 372: "The random assignment of the experimental treatment triumphs over all the little excuses for not attributing the effect to the difference in treatment. . . . George Box said it well: 'To find out what happens to a system when you interfere with it, you have to interfere with it (not just passively observe it).'" None of the ability grouping research fits this model, for reasons suggested in the text.

¹⁰³ The need for caution in evaluating ability grouping on the basis of present research is underscored by Light & Smith, *Accumulating Evidence: Procedures for Resolving Contradictions Among Different Research Studies*, 41 HARV. EDUC. REV. 429 (1971). The authors criticize conclusion-drawing based either upon aggregation of research studies or upon selecting the "best" study available.

To be satisfied with this approach is tacitly to assume that genuinely contradictory results can never be a valid description of reality. Would we really be so surprised to find that one kind of ability grouping benefited children in one school, but that a similar program failed to benefit comparable children in a different school? Nature may be consistent, but to assume that her consistency has been captured exactly in current research is rather a strong . . . [and] not a particularly credible [assumption].

Id. 438.

Cf. Gallagher, *supra* note 36, at 527, 528 (1972): "[W]e cannot have much faith

The research concerning the efficacy of special education programs is best treated as two sets of data. Studies of programs for children with profound problems—for example, autistic children or those whose IQ is below 25—reveal that careful intervention can secure substantial benefits.¹⁰⁴ Of course, the measure of benefit differs for these children: the ability to tie one's own shoes or to talk is a major success. But the benefits are real, and for the most part unquestioned.

Research concerning classes for children with etiologically more ambiguous handicaps—the educable mentally retarded,¹⁰⁵ mildly emotionally disturbed and perceptually handicapped¹⁰⁶—reach quite different conclusions. Those programs do not tangibly benefit their students, whose equally handicapped counterparts placed in regular school classes perform at least as well and without apparent detriment to their “normal” classmates.

It is indeed paradoxical that mentally handicapped children having teachers especially trained, having more money (per capita) spent on their education, and being enrolled in classes with fewer children and a program designed to provide for their unique needs, should be accomplishing the objectives of their education at the same or at a lower level than similar mentally handicapped children who have not had these advantages and have been forced to remain in the regular grades.¹⁰⁷

That finding has led one psychologist to term such programs “the ‘human waste disposal authority’—dead places,”¹⁰⁸ and another to suggest that he would go to court before permitting his child to be placed in a “‘self-contained special school or class.’”¹⁰⁹

The methodological difficulties, noted earlier, suggest one reason for treating these findings with some caution. Where, for example,

in the decision not to label as turning out well merely because the children who have been labeled achieved limited academic success.”

¹⁰⁴ See, e.g., Kirk, *supra* note 61.

¹⁰⁵ See Dunn, *supra* note 99.

¹⁰⁶ See E. RUBIN, C. SIMSON & M. BETWEE, *EMOTIONALLY HANDICAPPED CHILDREN IN THE ELEMENTARY SCHOOL* (1966).

¹⁰⁷ Johnson, *Special Education for the Mentally Handicapped—A Paradox*, 29 *EXCEPTIONAL CHILDREN* 62, 66 (1962). Similar findings are reported in G. HOELTKE, *EFFECTIVENESS OF SPECIAL CLASS PLACEMENT FOR EDUCABLE MENTALLY RETARDED CHILDREN* (1966); Christoplos & Renz, *A Critical Examination of Special Education Programs*, 3 *J. SPECIAL EDUC.* 371 (1969); Kirk, *supra* note 61; Lilly, *supra* note 101; Smith & Kennedy, *Effects of Three Educational Programs on Mentally Retarded Children*, 24 *PERCEPTUAL AND MOTOR SKILLS* 174 (1967). *But cf.* Johnson, *supra*, at 66 (“The only area in which the special class has demonstrated superiority of any significance is in peer acceptance.”).

¹⁰⁸ Burton Blatt, interview in *Update* (Syracuse University School of Education Publication, Winter, 1972).

¹⁰⁹ Dunn, *supra* note 99, at 385. See also Zito & Bardon, *Achievement Motivation Among Negro Adolescents in Regular and Special Education Programs*, 74 *AM. J. MENTAL DEFICIENCY* 20 (1969).

"special education" is a euphemism for a day-sitting room staffed by an unqualified teacher, as is too often the case, any benefits that it yielded would be remarkable.¹¹⁰ Yet the philosophy of isolated special class treatment also makes the failure of such ventures understandable. These programs typically adopt a "passive-acceptant" approach, reflecting the assumption that

the retarded individual is essentially unmodifiable and, therefore, that his performance level as manifested at a given stage of development is considered as a powerful prediction of his future adaptation. . . . Strategies aiming at helping him to adapt . . . will consist of molding the requirements and activities of his environment to suit his level of functioning, rather than making the necessary efforts to raise his level of functioning in a significant way. *This, of course, is doomed to perpetuate his low level of performance.*¹¹¹

Thus, even if a child performs admirably in the special class, he inevitably falls further behind his counterparts in the regular program. Only an "active-modificational" approach—which rejects the educational isolation and early labeling of retarded children—is likely to reverse this pattern.¹¹²

In sum, the research conclusion about special education programs is consistent, if modest: programs for the severely handicapped do benefit children, while classes for the mildly retarded and mildly emotionally disturbed do not serve those children better than regular class placement. Nor, it should be pointed out, do those classes markedly impair academic performance: if the empirical findings are correct, special education assignment has little effect on student achievement.

Studies of ability grouping generally reach a similar conclusion: differentiation on the basis of ability does not improve student achievement. It improves the performance of the brightest only slightly (and only for some academic subjects), while slightly impairing the school performance of average and slow students.¹¹³ Professor Borg, whose

¹¹⁰ For criticism of special education programs on these grounds, see H. Goldstein, J. Moss & L. Jordan, *supra* note 50, at 13-14.

¹¹¹ Feuerstein, *A Dynamic Approach to the Causation, Prevention, and Alleviation of Retarded Performance*, in *SOCIOCULTURAL ASPECTS OF MENTAL RETARDATION* 341, 343 (H. Haywood ed. 1970) (emphasis added).

¹¹² *Id.* 345; cf. A. YATES, *BEHAVIOR THERAPY* 324 (1970) (rejecting "the pessimistic views, which have been so widely and for so long entertained regarding the ineducability of the mental defective . . .").

¹¹³ See, e.g., FINDLEY & BRYAN, *supra* note 20, at 23-31; Heathers, *supra* note 65, at 565-67. Cf. Goodlad, *Classroom Organization*, in *ENCYCLOPEDIA OF EDUCATIONAL RESEARCH* 221, 224 (3d ed. 1960). As noted earlier, the force of these findings is lessened by the failure of the several studies to define consistently what grouping constitutes. A. Sorensen, *Organizational Differentiation of Students and Educational Opportunity*, 43 *SOCIOLOGY OF*

tracking study is perhaps the most careful yet undertaken, found that

neither ability grouping with acceleration nor random grouping with enrichment is superior for all ability levels of elementary school pupils. In general, the relative achievement advantages of the two grouping systems were slight, but tended to favor ability grouping for superior pupils and random grouping for slow pupils.¹¹⁴

The National Education Association, surveying the tracking literature, concludes: "Despite its increasing popularity, there is a notable lack of empirical evidence to support the use of ability grouping as an instructional arrangement in the public schools."¹¹⁵

The premises of ability grouping are in many respects similar to those of special education programs. Both assume the relative immutability of learning capacity; both structure educational offerings to match what is presumed to be the maximum capacity of the child. While students do change tracks, the amount of such movement appears relatively small—predictions of student ability become its proof as well. Professor Coleman has made a similar point:

The idea inherent in the new [ability-grouped] secondary school curriculum appears to have been to take as given the diverse occupational paths into which adolescents will go after secondary school, and to say (implicitly): there is greater equality of educational opportunity for a boy who is not going to attend college if he has a specially-designed curriculum than if he must take a curriculum designed for college entrance.

There is only one difficulty with this definition: it takes as *given* what should be problematic—that a given boy is going into a given post-secondary occupational or educational path.¹¹⁶

The conclusion that tracking has only slight effects is not surprising. However, one reanalysis of data collected for the massive *Equality of Educational Opportunity* (commonly referred to as the Coleman Report, after its chief author) suggests that the grouping studies may

EDUCATION 355, 359-63 (1970), develops a typology of grouping systems. Sorensen defines such systems in terms of their *inclusiveness* (to what extent does grouping limit or expand future choices); *electivity* (to what extent does placement reflect student choice); *selectivity* (what is the degree of homogeneity resulting from the selection process); and *scope* (how long-lasting is the effect of any particular classification decision on the individual student).

¹¹⁴ W. BORG, *supra* note 52, at 30.

¹¹⁵ NEA RESEARCH SUMMARY, *supra* note 34, at 44.

¹¹⁶ Coleman, *The Concept of Equality of Educational Opportunity*, in EQUAL EDUCATIONAL OPPORTUNITY 9, 15 (Harvard Educational Review ed. 1969) (emphasis in original). For a discussion of the essential equivalence of diversified curricula and ability grouping, see text accompanying notes 38-46 *supra*.

have underestimated the impact of sorting on achievement.¹¹⁷ The source of that speculation is the striking, albeit little noticed, finding of the Coleman Report that "a generally low proportion of variance in achievement lay between schools . . . between 15 and 20 percent for blacks, and less than 15 percent for whites."¹¹⁸ Marshall Smith argues:

Because information about school resources was only gathered on a schoolwide basis, the school resource factors could not account for any of the differences between students within the same school. Therefore, the percent of total variance that lies *between* schools is a kind of upper limit on the amount of variance school resources could account for.

. . . .

Even so . . . a great diversity exists among children within schools and little diversity exists between schools. This suggests that if the survey had gathered data on the utilization of the school resources differentially among students within schools, the conclusions of the Report might have been very different.¹¹⁹

It is difficult to know what to make of the Coleman Report's finding, or how to relate it to the classification studies. Professor Coleman himself has suggested that since the between-school portion of variance in student achievement is constant during twelve years of education, schooling may be merely confirming initial student differences, which are indeed marked.¹²⁰ Yet the magnitude of the achievement gap increases significantly: a deficiency initially measured in months grows to several years by the end of the schooling process. One is tempted to say that something is happening within the school, and to leave it at that.

Smith offers a different explanation:

The early home-background experiences have a strong effect on the measured achievement level at which the student enters 1st grade. This helps determine the child's initial placement into fast or slow reading and arithmetic groups and affects the quality of work expected by his teachers. The initial grouping in conjunction with continued family influences helps to maintain and may in some cases amplify the early differences between the children *within* an elementary school.¹²¹

¹¹⁷ See Smith, *Equality of Educational Opportunity: The Basic Findings Reconsidered*, in MOSTELLER & MOYNIHAN, *supra* note 14, at 230, 247-49.

¹¹⁸ Coleman, *The Evaluation of Equality of Educational Opportunity*, in MOSTELLER & MOYNIHAN, *supra* note 14, at 146, 164. An inspection of the same data reveals that, in the North, the between-school variation was only 7-14% of the total variance. Smith, *supra* note 117, at 248.

¹¹⁹ Smith, *supra* note 117, at 247, 249 (footnote omitted) (emphasis in original).

¹²⁰ Coleman, *supra* note 118, at 164.

¹²¹ Smith, *supra* note 117, at 263 (emphasis in original).

While Smith's approach makes intuitive sense, it remains merely an unverified hypothesis.

These studies define the effects of school sorting in terms of test-measured achievement. A quite different approach considers the effect of sorting on subtler measures of attitude and outlook, examining the possibility that certain classifications stigmatize students.

2. Stigmatization

a. *Stigmatization as a Social Process*

Stigma, what Erving Goffman calls "an undesired differentness," is a fact of social life.¹²² In some societies stigmatization officially identifies classes of individuals of different worth. The Indian caste system, for example, created a category of persons so unfit for social intercourse as to be literally untouchable. The banishment of lepers to isolated colonies, although based on a different motive—fear of disease—accomplishes the same end.¹²³

In American society, the processes of stigmatization are more extended, complex and elusive.¹²⁴ No class is officially branded outcast; indeed, the concept of equality which theoretically governs democratic social relations refuses to recognize any class-based traits. Nonetheless, for segments of the society, labels as varied as "blind," "Negro," "homosexual," and "convict" convey broadly accepted meanings. They are social stigmas.

A stigma is not inherently value-laden; the stigmatizing attribute is neither creditable nor discreditable per se. Its value lies in how people perceive it—that is, its socially accepted meaning. For example, the polygamist fulfills his traditional Mormon duty, yet he also violates American norms. Stigma is thus properly defined in relational terms.¹²⁵

Stigmatization, whether formal or informal, facilitates interaction with certain types of individuals by prescribing appropriate social strategies for managing encounters with them. Society pities the blind, shuns the criminal, disdains the homosexual, all without reference to

¹²² E. GOFFMAN, *STIGMA* (1963). This discussion relies heavily on the insights of Professor Goffman.

¹²³ Precisely the same point may be made about legally imposed racial segregation.

¹²⁴ Cf. L. DEXTER, *supra* note 49, at 30:

Our society does not actually kill or seriously mutilate anybody for being stupid. The most our authorities do is to commit certain high-grade retardates accused of "creating trouble" to institutions for defective delinquents or to colonies for retardates, for very long terms, without much effort to determine whether they actually are guilty.

¹²⁵ "The normal and the stigmatized are not persons but rather perspectives. These are generated in social situations during mixed contacts by virtue of the unrealized norms that are likely to play upon the encounter." *STIGMA*, *supra* note 122, at 138.

the personal qualities which complicate the labeling process. Individual differences are subsumed under the common, negatively perceived attributes.

Stigmatization also serves a number of other societal purposes. As Goffman notes:

The stigmatization of those with a bad moral record clearly can function as a means of formal social control; the stigmatization of those in certain racial, religious, and ethnic groups has apparently functioned as a means of removing these minorities from various avenues of competition; and the devaluation of those with bodily disfigurements can perhaps be interpreted as contributing to a needed narrowing of courtship decisions.¹²⁶

Even in an egalitarian society, some stigmas are legitimately imposed through official action. The convicted murderer is labeled and punished for a deed which society feels deserving of punishment. His stigma is justified as a form of social control.¹²⁷

This process (which might be termed just or permissible social stigmatization) is so basic to society that it typically passes unnoticed. Yet there are other more subtle stigmas, equally real and debilitating, which are officially imposed by the state. Many laws classify: they divide the world into classes of people, only some of whom are eligible for or benefit from particular treatment. And many classifications can be said to stigmatize: zoning laws perpetuate a "wrong side of the tracks";¹²⁸ licensing laws separate the qualified from the charlatan.¹²⁹

The decisionmaking agency may well not intend this result. It is more likely to be interested in providing humane treatment or in

¹²⁶ *Id.* 139. "Society establishes the means of categorizing persons and the complement of attributes felt to be ordinary and natural for members of each of these categories. Social settings establish the categories of persons likely to be encountered there." *Id.* 2. Cf. Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 *SOCIAL PROBLEMS* 175 (1967).

¹²⁷ "The act is branded as reprehensible by authorized organs of society, and this official branding of the conduct may influence attitudes quite apart from the fear of sanctions." Andenaes, *Does Punishment Deter Crime?*, 11 *CRIM. L.Q.* 76, 81 (1968).

In both the cases of the Mormon polygamist and the murderer, the formal societal involvement is the same. What distinguishes the two cases is our view of the justness of the governmental stigmatizing process.

¹²⁸ That phenomenon is increasingly subject to legal challenge. See Abascal, *Municipal Services and Equal Protection: Variations on a Theme By Griffin v. Illinois*, 20 *HASTINGS L.J.* 1367 (1969); Fessler & Haar, *Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure*, 6 *HARV. CIV. RIGHTS-CIV. LIB. L. REV.* 441 (1971).

¹²⁹ The connection between legal classification and stigma is not always so straightforward. In some instances, such as welfare legislation, what is viewed by the recipients as a right is perceived by others as a label denoting undesirable character traits. Cf. R. O'NEIL, *THE PRICE OF DEPENDENCY* 251 (1970). Often the stigma which the classification creates is nominal. And differing legal classifications may reward and stigmatize the same individual for the same attribute. See generally Tussman & tenBroek, *supra* note 19; Note, *Developments in the Law—Equal Protection*, 82 *HARV. L. REV.* 1065 (1969).

securing administrative ease.¹³⁰ Involuntary confinement in mental hospitals and even the incarceration of criminals, for example, are asserted to be rehabilitative. Yet in understanding stigma, motive matters less than consequences; the relevant inquiry is whether an individual is effectively branded in a manner which he and those with whom he comes into contact regard as undesirable.

b. *Stigma and Schooling*

Many of the classifications that schools impose on students are stigmatizing. However well-motivated the decision or complex the factual bases leading to a particular classification, the classification lends itself to simplified labels. The slow learner or special student becomes a "dummy." The student excluded from the school system which initially compelled his attendance is simply an outcast, "told . . . that he is unfit to be where society has determined all acceptable citizens of his age should be."¹³¹

These adverse school classifications reduce both the individual's sense of self-worth and his value in the eyes of others. For many children, this process is particularly painful because it is novel. It represents the first formal revelation of differentness.¹³² The school's inclination to cope with a particular learning or social problem by

¹³⁰ See Robert Kennedy's description of "injuries which result simply from administrative convenience, injuries which may be done inadvertently by those endeavoring to help—teachers and social workers and urban planners." Address by Attorney General Kennedy, University of Chicago Law School, May 1, 1964, excerpted in Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1337 n.27 (1964).

¹³¹ Buss, *supra* note 5, at 545, 577 (1971). Professor Buss adds: "Furthermore, the stigma and humiliation attaching to . . . expulsion may be 'life long.'" *Id.* (citing Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388, 1392-93 (E.D. Mich. 1969)). See COST OF EDUCATION, *supra* note 30, at 9.55-9.67. The concept of stigma, as used in this discussion, is a relative one. The slow learner, performing at the bottom of a heterogeneous class, may well regard himself as stigmatized; indeed his perception of stigma might even be more acute than that held by his counterpart, performing well in a class for mildly retarded students. That issue merits empirical investigation, which thus far has not been undertaken. But the stigma associated with being placed in a special class differs in one constitutionally noteworthy way: it is directly caused by an action of the school, rather than arising informally from student interaction. Further, the "stigma" felt by the slow learner in the regular class may well represent a more accurate awareness of his own relative competency. Regular classes are much like the world outside the schoolhouse. They recreate (as well as schools can) the environment in which a student will function once he leaves school. The issue of relative stigma is similar to that posed by studies of the self-image of black students in segregated and desegregated schools. Cf. Pettigrew, *Race and Equal Educational Opportunity*, in EQUAL EDUCATIONAL OPPORTUNITY 69, 76 (Harvard Educational Review ed. 1969): "[E]ach child faces a two-stage problem: first, he must learn that he can, within reasonably broad limits, act effectively upon his surroundings; and, second, he must then evaluate his own relative capabilities for mastering the environment."

¹³² Professor Goffman observes that "public school entrance is often reported as the occasion of stigma learning, the experience sometimes coming very precipitously on the first day of school, with taunts, teasing, ostracism, and fights." E. GOFFMAN, *supra* note 122, at 33. See R. CRIDDLE, LOVE IS NOT BLIND 18 (1953) (experiences of a blind person); H. VISCARDI, A MAN'S STATURE 13-14 (1952) (experiences of a dwarf).

isolating those who share that problem reinforces the child's sense of stigma.

[T]he more the child is "handicapped" the more likely he is to be sent to a special school [or to a special program within the school] for persons of his kind, and the more abruptly he will have to face the view which the public at large takes of him. He will be told that he will have an easier time of it among "his own," and thus learn that the own he thought he possessed was the wrong one, and that this lesser own is really his.¹³³

The stigmatized child, who "tends to hold the same beliefs about identity that [others] do,"¹³⁴ comes to learn, through contact with the school, that he has in effect been devalued by both the school and the society.¹³⁵

Children perceive all too well what the school's label means. Jane Mercer observes that those assigned to special education classes "were ashamed to be seen entering the MR room because they were often teased by other children about being MR . . . [and] dreaded receiving mail that might bear compromising identification."¹³⁶ As one black mother, whose own son is in a special class, reported:

Let's face it, children can be real cruel. I feel for the most part the youngsters that are in those classes and retained suffer a great emotional handicap. It's as if they have a sign around their neck for everyone to read. Bill is being retarded in special education. He doesn't like being labelled as retarded. It's affecting him. He begs us to have him removed from that class The only reason he consents to go [to school] is because we have been promised that he'll be taken out of that EMR class.¹³⁷

Students assigned to the general or slow learner track described similar feelings:

General teachers make kids feel dumb. Their attitude is, "Well, nobody's been able to do anything with you, and I can't do better."¹³⁸

Differences among school children clearly exist, and it would be

¹³³ E. GOFFMAN, *supra* note 122, at 33.

¹³⁴ *Id.* 8.

¹³⁵ Cf. A. LINDESMITH & L. STRAUSS, SOCIAL PSYCHOLOGY 180-83 (1956 ed.); Dreeben, *The Contribution of Schooling to the Learning of Norms*, 37 HARV. EDUC. REV. 211 (1967).

¹³⁶ Mercer, *Sociocultural Factors*, *supra* note 36.

¹³⁷ *Id.*

¹³⁸ Putting the Child in Its Place, *supra* note 26, at 41. See also Comer, *The Circle Game in School Tracking*, INEQUALITY IN EDUCATION, July 1972, at 23, 24-25.

folly to ignore them: to treat everyone in exactly the same fashion typically benefits no one. Yet even with that qualification, the consequentiality of the school's classification is an awesome fact with which the child must cope. Its psychological ramifications extend beyond the child; they reach his family, and those with whom the child has contact.¹³⁹ The child assigned to a special education class or a slow learners' group discovers that his society is totally altered. His differentness is what matters most to the school.¹⁴⁰

The stigma is further exacerbated, at least in part, by the school's curriculum. The curriculum offered to the "slow" or "special" child is less demanding than that provided for "normal" children; even if the child assigned to the special class does creditable work, he falls further behind the school norm. The initial assignment becomes a self-fulfilling prophesy;¹⁴¹ the child's belief in his inferiority is reinforced by the knowledge that he is increasingly unable to return to the regular school program.¹⁴² In addition, because his classmates and teachers make fewer demands on him (for by definition less can be expected of the handicapped than the normal),¹⁴³ he comes to accept their judgment

¹³⁹ See R. EDGERTON, *THE CLOAK OF COMPETENCE* (1967); Freedman, Helme, Havel, Eustic, Riley & Langford, *Family Adjustment to the Brain-Damaged Child*, in *A MODERN INTRODUCTION TO THE FAMILY* 555 (N. Bell & E. Vogel eds. 1960); Iano, *Social Class and Parental Evaluation of Educable Retarded Children*, 5 *EDUC. & TRAINING OF THE MENTALLY RETARDED* 62 (1970); Mercer, *Social System Perspective and Clinical Perspective: Frames of Reference for Understanding Career Patterns of Persons Labelled as Mentally Retarded*, 13 *SOCIAL PROBLEMS* 18 (1965); Valentine, *Deficit, Difference, and Bicultural Models of Afro-American Behavior*, 41 *HARV. EDUC. REV.* 137 (1971); Vogel & Bell, *The Emotionally Disturbed Child as the Family Scapegoat*, in *A MODERN INTRODUCTION TO THE FAMILY* 382 (N. Bell & E. Vogel eds. 1960).

¹⁴⁰ Goffman's description of the means by which society circumscribes the life chances of those whom it stigmatizes is particularly relevant:

[W]e believe the person with a stigma is not quite human. On this assumption we exercise varieties of discrimination, through which we effectively, if often unthinkingly, reduce his life chances. We construct a stigma-theory, an ideology to explain his inferiority and account for the danger he represents, sometimes rationalizing an animosity based on other differences We tend to impute a wide range of imperfections on the basis of the original one. . . .

E. GOFFMAN, *supra* note 122, at 5. See Riesman, *Some observations Concerning Marginality*, 12 *PSYCHON* 113, 122 (1951); cf. H. BECKER, *OUTSIDERS* (1963); M. EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964). But this phenomenon is not inevitable. Cf. L. WEBB, *CHILDREN WITH SPECIAL NEEDS IN THE INFANTS' SCHOOL* 154 (1967):

Many of these youngsters come to think of themselves as bad, stupid and doomed to failure Viewing themselves as incompetent, they behave as incompetents, even in circumstances within their coping capacity. This at least, the teacher can do something to prevent, and by use of no more than his own specialist skills and intelligent appreciation of the difficulties such children face.

While Webb's case studies of English children illustrate such "intelligent appreciation," they do not suggest how the system of education might be structured to behave similarly.

¹⁴¹ See Gallagher, *supra* note 36.

¹⁴² Dexter suggests that "[t]he child may learn nothing else in school, but he does learn to become sensitive to stupidity." L. DEXTER, *supra* note 49, at 51.

¹⁴³ Cf. Wilson, *Social Stratification and Academic Achievement*, in *EDUCATION IN DEPRESSED AREAS* 217 (A.H. Passow ed. 1963) (suggesting that teachers give bright students lower grades than slow students for the same work because they expect more from bright students).

of acceptable progress as his own.¹⁴⁴ As one student said: "All the kids here [in the slow track] are victims. They've finally believed it."¹⁴⁵

The consequences of excluding a child who is allegedly ineducable are even more substantial. The excluded child begins to understand that the school, the social agency whose task is the education of the young, can offer him nothing, or, worse, must protect itself from his influence by excluding him. Such a child is most in need of the assistance that structured instruction can afford him. Because of his limited intelligence, he is less capable than the "normal" child of managing his own affairs. Exclusion not only recognizes this fact—it confirms it. The child excluded from school as ineducable is unlikely ever to acquire even a measure of self-sufficiency.

The effects of school-imposed stigmas do not cease at the time the child leaves school, for schools significantly are society's most active labelers. The schools label more persons as mentally retarded, share their labels with more other organizations, and label more persons with I.Q.'s above 70 and with no physical disabilities than any other formal organization in the community.¹⁴⁶ Slow track assignment makes college entrance nearly impossible and may discourage employers from offering jobs; assignment to a special education program forecloses vocational options. For the child who cannot escape his past—as by moving from the South to the North to seek employment, leaving all school records except a diploma behind him—the "retarded" label sticks for life. While many children labeled retarded by the school do come to lead normal lives, the stigma persists. Robert Edgerton, who interviewed one hundred formerly institutionalized retardates, reports:

To find oneself regarded as a mental retardate is to be burdened by a shattering stigma, . . . the ultimate horror. . . . These persons cannot both believe that they are mentally retarded and still maintain their self-esteem. Yet they must maintain self-esteem. . . . [T]he stigma of mental retardation dominates every feature of the lives of these former patients. Without an understanding of this point, there can be no understanding of their lives.¹⁴⁷

It overstates the point, but not by much, to suggest that through

¹⁴⁴ See R. ROSENTHAL & L. JACOBSON, *PYGMALION IN THE CLASSROOM* (1968). But see THORNDIKE, Book Review, 5 *AM. EDUC. RESEARCH J.* 708 (1968).

¹⁴⁵ Putting the Child in Its Place, *supra* note 26, at 41.

¹⁴⁶ Mercer, *Sociological Perspectives*, *supra* note 36.

¹⁴⁷ R. EDGERTON, *supra* note 115, at 205-08. See also D. BRAGINSKY & B. BRAGINSKY, *HANSELS AND GRETELS* (1971). This attention to stigma should not obscure the fact that children labeled as retarded or different develop strategies for coping with their altered environments. One study of institutionalized retardates—which concludes that "institutionalized cultural-familial retardates can be understood in terms usually reserved for 'normal' people"—found retardates "no more helpless, inadequate, stupid, or less able to control their fates than their non-institutionalized counterparts." *Id.* 102 (1971).

adverse classifications schools can manage not only the lives of children but the lives of adults as well.

B. *Constitutional Standards—the Importance of Education and the Interests of Children*

That certain school classifications—exclusion, special education, and slow track placement—do not benefit and may well injure students readily evokes the policy conclusion that such sorting is educationally dubious practice. Yet bad policy is not necessarily, or even usually, unconstitutional policy. If the transition could be so effortlessly made, courts would in fact function as super-legislatures. If, however, the interests at stake are sufficiently closely linked to constitutionally guaranteed rights, or the class of persons asserting discrimination is demonstrably vulnerable to majoritarian abuse, then the claim that particular policies operate inequitably becomes more susceptible to judicial analysis; judicial deference to legislative judgment¹⁴⁸ gives way to careful examination of competing interests. In a challenge to school sorting, the bases for such judicial treatment are two: 1) the inequitable deprivation of education, an important, if not a “fundamental” interest;¹⁴⁹ 2) the status of children, a class of individuals who deserve the protection of the courts in securing their rights.

The nature of that inquiry says rather interesting things about the process of constitutional analysis and adjudication. The process depends upon the accretion of normative judgments concerning such concepts as fundamentality and protected classes, judgments not typically hospitable to empirical evaluation.¹⁵⁰ It may well be that the

¹⁴⁸ Under the traditional equal protection doctrine, courts uphold legislatively imposed classifications which “bear some rational relationship to a legitimate state end.” *McDonald v. Board of Election Comm’rs*, 394 U.S. 802, 809 (1969); see Note, *Developments in the Law—Equal Protection*, *supra* note 129, at 1076-87. This standard results in near-total deference to legislative discretion:

The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

Except in the case of total exclusion, the application of the “minimal scrutiny” standard, *Gunther*, *supra* note 87, at 8, would assuredly doom a suit challenging school classification practices. *But cf. id.* 18-20.

¹⁴⁹ *Cf. San Antonio Independent School Dist. v. Rodriguez*, 93 S. Ct. 1278 (1973). Even the majority opinion professes “an abiding [judicial] respect for the vital role of education in a free society.” *Id.* at 1295.

¹⁵⁰ Professor Hazard, discussing the uses of social science evidence in judicial decisions, notes that “science requires the agreement of minds,” a process which seems to Hazard “more satisfying to the modern mind than the conclusions advanced from authority. That, however, is not much consolation for law men, whose concerns are for immediate, cheap, and significant decisionmaking. For them there are continuing attractions in the Delphic Oracle.” Hazard, *Limitations on the Uses of Behavioral Science in the Law*, 19 CASE W. RES. L. REV. 71, 75, 77 (1967). *Cf. Reich, Toward the Humanistic Study of Law*, 74 YALE L.J. 1402, 1406 (1965) (“[P]olicy-makers trained as lawyers are suscepti-

derivation of principled standards, untested (and often untestable) against empirical evidence, is all that constitutional review ought to undertake.¹⁵¹ Yet the run of legal labels that advocates on either side typically advance do not materially promote reasoned analysis.² It seems equally unhelpful to assert that education is a "fundamental interest" (in order to justify an alteration of prevailing practice)¹⁵² or that education is merely a publicly provided service (giving judicial warrant to the uncritical preservation of inequities). In each instance, the label negates analysis. The complexity of the school classification issue demands careful review and balancing of the competing interests—those of the child and of the school—not result-oriented legal shorthand.

1. Education as a "Fundamental Interest"

Under the "new equal protection" theory which came into prominence during the Warren Court era, legislative classifications touching on "fundamental interests" or involving "suspect classifications" trigger the reviewing court's strict scrutiny, and can be justified only by a showing of a "compelling state interest."¹⁵³ As Professor Gunther has pointed out, this kind of scrutiny has proven to be "'strict' in theory and fatal in fact;"¹⁵⁴ especially in light of the current inability of the research to prove any real educational benefits due to sorting,¹⁵⁵ the school classifications discussed in this Article might well fall before the mechanical application of a compelling interest test.

The claim that education either has been held to be, or, more candidly, merits treatment as a "fundamental interest," was rejected in *San Antonio Unified School District v. Rodriguez*.¹⁵⁶ The Supreme Court affirmed its "historic dedication to public education,"¹⁵⁷ yet could find no constitutional warrant for distinguishing educational inequities from inequities in the provision of any other publicly supported

ble to becoming trapped in their own logic. They may operate wholly from within a logical system the basis of which (quite possibly mistaken) they do not question. . . . Men who 'think like lawyers' can rigidify the operations and the thinking of government.")

¹⁵¹ See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); cf. Cahn, *Jurisprudence*, 30 N.Y.U.L. REV. 150 (1955).

¹⁵² Where courts have identified an interest as "fundamental" they have required the state to show: (1) that its interest in classifying is "compelling"; (2) that the means chosen to effectuate that interest are "less onerous" than available alternatives. See generally Note, *Developments in the Law—Equal Protection*, *supra* note 129. The result of applying such a test is predictable: the complainant invariably wins.

¹⁵³ E.g., *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

¹⁵⁴ Gunther, *supra* note 87, at 8.

¹⁵⁵ See text accompanying notes 94-121 *supra*.

¹⁵⁶ 93 S. Ct. 1278 (1973).

¹⁵⁷ *Id.* at 1295.

good or service. Having identified no special status for education explicit or implicit in the Constitution, the Court proceeded to apply the traditional equal protection test—to determine whether state financing schemes were “rational,” and whether the means adopted by the state “reasonably” furthered the state’s avowed goal.¹⁵⁸ In short, the *Rodriguez* Court revived the mechanical two-level test inherited from the Warren era; in so doing, it ignored its own more recent cases which utilized a process of review less rigid in structure, and more evidently attuned to the nature of the particular legal question at issue.¹⁵⁹

Even before the *Rodriguez* decision, the insistence that education—like voting,¹⁶⁰ access to a transcript¹⁶¹ or counsel¹⁶² in state criminal appeals, and travel¹⁶³—be classified as “fundamental” rested on shaky factual and legal ground.

Several reasons have been advanced for the proposition that education merits treatment as a fundamental interest. (1) Education is critical to the securing of other basic personal rights: the capacity to obtain work, to participate intelligently in the political processes which govern society, and, perhaps most importantly, to exercise fully and effectively the rights of speech and association guaranteed by the first amendment.¹⁶⁴ (2) The fact that education is both universal and compulsory differentiates it from other state-supported services and suggests its more abiding importance.¹⁶⁵ (3) Schooling occupies a decade or more of each child’s life, a fact which renders it the most substantial state encroachment on individual liberty.¹⁶⁶ (4) Education, unlike most other public services, functions to shape individual character and intellect, affecting not only personal development but, ultimately, societal conduct.¹⁶⁷

Language in a number of pre-*Rodriguez* Supreme Court decisions appeared to substantiate the claim of fundamentality: Justice Holmes’

¹⁵⁸ *Id.* at 1300.

¹⁵⁹ See, e.g., *James v. Strange*, 407 U.S. 128 (1972); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Reed v. Reed*, 404 U.S. 71 (1971).

¹⁶⁰ *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Reynolds v. Sims*, 377 U.S. 533 (1964).

¹⁶¹ *Griffin v. Illinois*, 351 U.S. 12 (1956).

¹⁶² *Douglas v. California*, 372 U.S. 353 (1963).

¹⁶³ *Shapiro v. Thompson*, 394 U.S. 618 (1969).

¹⁶⁴ *Serrano v. Priest*, 5 Cal. 3d 584, 605, 487 P.2d 1241, 1255-56, 96 Cal. Rptr. 601, 615-16 (1971) (“[E]ducation is a major determinant of an individual’s chances for economic and social success . . . [and] a unique influence on a child’s development as a citizen and his participation in political and community life.”) See also Kirp, *The Poor, the Schools and Equal Protection*, 38 HARV. EDUC. REV. 639, 642-44 (1968).

¹⁶⁵ *Serrano v. Priest*, 5 Cal. 3d 584, 609-10, 487 P.2d 1241, 1259, 96 Cal. Rptr. 601, 619 (1971); J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION*, 416-17 (1970) [hereinafter cited as *PRIVATE WEALTH*].

¹⁶⁶ *Serrano v. Priest*, 5 Cal. 3d 584, 609, 487 P.2d 1241, 1259, 96 Cal. Rptr. 601, 619 (1971).

¹⁶⁷ *Id.* at 609-10; 487 P.2d at 1258-59; 96 Cal. Rptr. at 618-19.

observation that "Massachusetts always has recognized [education] as one of the first objects of public care";¹⁶⁸ the statement in *Meyer v. Nebraska* that "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted";¹⁶⁹ and, of course, the *Brown* paean to education as "perhaps the most important function of state and local governments."¹⁷⁰ If this language is extracted from the contexts of the cases, the claim that education has historically been regarded by the Supreme Court as a "fundamental" interest can be made with some plausibility. However, an examination of the legal disputes which prompted those observations undercuts much of the argument.

In *Interstate Consolidated Street Railway Co. v. Massachusetts*, the Court upheld state legislation requiring a city transit company to charge school children half-fare.¹⁷¹ But such legislation can be justified as a valid exercise of the police power; it seems as consistent with the state's authority to legislate for the general welfare as a similar policy for senior citizens would be. That the particular statute enabled children to attend school more cheaply is irrelevant to the constitutional analysis. *Meyer* held unconstitutional a criminal statute proscribing the teaching of foreign languages. The statute was held to violate teachers' substantive due process rights. And *Brown*, viewed in retrospect, is more properly read as resting on the wrong caused by racial discrimination, not on the importance of schooling.¹⁷²

More recently, several lower federal courts which considered the constitutionality of particular educational deprivations indicated that education might be regarded as fundamental. In holding that officials could not bar aliens from public schooling,¹⁷³ and that pregnancy did not justify the exclusion of women,¹⁷⁴ these courts found education to be a basic right which could not be routinely denied to various classes of children. *Serrano v. Priest*¹⁷⁵ and its progeny,¹⁷⁶ overruled by the

¹⁶⁸ *Interstate Consol. St. Ry. v. Massachusetts*, 207 U.S. 79, 87 (1907).

¹⁶⁹ 262 U.S. 390, 400 (1923).

¹⁷⁰ *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

¹⁷¹ The majority of the Court confined its decision to the ground that the challenged statute was already in force at the time the defendant railway company received its charter; since the act of incorporation made prevailing state law implicitly a part of the charter, the company was deemed to have consented to the statute. 207 U.S. at 84. Justice Holmes, speaking for himself alone, proceeded to discuss the constitutionality of the statute. *Id.* at 85-88.

¹⁷² See, e.g., Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 24-32 (1959).

¹⁷³ *Hosier v. Evans*, 314 F. Supp. 316 (D.V.I. 1970).

¹⁷⁴ E.g., *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971); cf. *Perry v. Grenada Mun. Sep. School Dist.*, 300 F. Supp. 748 (N.D. Miss. 1969).

¹⁷⁵ 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

¹⁷⁶ E.g., *Rodriguez v. San Antonio Independent School Dist.*, 337 F. Supp. 280 (W.D.

Rodriguez decision (insofar as they rely upon the equal protection clause), also identified the fundamentality of education as requiring close judicial scrutiny of school expenditure policies.¹⁷⁷

But the empirical findings concerning education's effects on individual development indicate that the relationship between education and its putative benefits is more complex and less self-evident than these judicial opinions admit.¹⁷⁸ In considering critically the justifications proffered for education's special status, is it obviously true that success in school routinely converts into life success? Does schooling matter more than social class (or happenstance) in determining individual outcomes?¹⁷⁹ If the state simply handed out money to individuals, rather than investing society's resources in schooling, would those individuals (or the society) be decidedly worse off? Christopher Jencks concludes his reexamination of the *Equality of Educational Opportunity*¹⁸⁰ data by observing:

If and when we develop a comprehensive picture of inequality in American life, we will find that educational inequality is of marginal importance for either good or ill. Such things as control over capital, occupational specialization, and the traditions of American politics will turn out to be far more important than the schools.¹⁸¹

These are not questions that judges are inclined to pose. But even if the rationales advanced for the importance of schooling are correct, do they not apply with greater force to the provision of food and shelter? Why should the life of the mind—or for that matter, the right

Tex. 1971), *rev'd*, 93 S. Ct. 1278 (1973); *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971).

¹⁷⁷ Some state courts have rested school finance decisions in whole or part on state constitutional guarantees. *See, e.g.*, *Robinson v. Cahill*, No. 8618 (N.J., Apr. 3, 1973); *Sweetwater County Planning Comm. v. Hinkle*, 491 P.2d 1234 (Wyo. 1971). These decisions may well survive the reversal of *Rodriguez*.

¹⁷⁸ These decisions may be viewed as treating the importance of education as a given, that is, a proposition which needs no proof. *See Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). ("It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens."). Given the dizzying variety of educational efficacy evidence, and the primitiveness of existing knowledge, that presumptive approach may be the only one realistically available to the courts. Yet it does suggest that the court is adopting a "don't confuse me with facts—I've already made up my mind" stance.

¹⁷⁹ *See generally* COLEMAN REPORT, *supra* note 14. However, David Cohen observes that ability (as measured by standardized tests) and social status combined account for less than half of the variation in student track assignment, college attendance, and vocational success. Cohen, *Does I.Q. Matter?*, COMMENTARY, Apr. 1972, at 51.

¹⁸⁰ COLEMAN REPORT, *supra* note 14.

¹⁸¹ Jencks, *The Coleman Report and the Conventional Wisdom*, in MOSTELLER & MOVNIEHAN, *supra* note 14, at 69, 105. Jencks amplifies this point in JENCKS, *INEQUALITY*, *supra* note 14.

to travel¹⁸²—be constitutionally preferred to the “economic needs of impoverished human beings”?¹⁸³ Might not “growing up with an abundance of rats and a scarcity of physical security . . . mold a child’s personality and undermine his participation in ‘free enterprise democracy’ ”¹⁸⁴ as much as educational deprivation? The response that a “child’s mind is constitutionally distinguishable from his stomach”¹⁸⁵ invents distinctions which can be maintained in courtrooms, and only in courtrooms.

Rodriguez raises many of these problems, but the path that its analysis follows—curt dismissal of the claim that educational inequities merit something more than perfunctory scrutiny—is fully as unsatisfying an approach as the “fundamentality” technique. As Justice White observes in dissent:

Requiring the State to establish only that unequal treatment is in furtherance of a permissible goal, without also requiring the State to show that the means chosen to effectuate that goal are rationally related to its achievement, makes equal protection analysis no more than an empty gesture.¹⁸⁶

Justice Marshall’s critique of the analysis—“an emasculation of the Equal Protection Clause”¹⁸⁷—is sharper, but equally correct.

Even if education is not of “fundamental” moment, it clearly bears upon the exercise of constitutionally guaranteed rights. For that reason, in reviewing assertions of inequity the Court should be able to distinguish education from regulation of economic interests, where the lenient standard of rationality has historically been applied. Indeed, in a host of cases—particularly involving state legislation which assertedly diminishes the individual’s “right to privacy”¹⁸⁸—the Court

¹⁸² *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1968).

¹⁸³ *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). *Dandridge* distinguishes between “regulation . . . affecting freedoms guaranteed by the Bill of Rights” and purely social and economic regulation, demanding only rational justification for inequality with respect to the latter set of interests. *Id.* at 484-85.

¹⁸⁴ Karst, Serrano v. Priest: *A State Court’s Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CALIF. L. REV. 720, 728 (1972). See also Comment, *Educational Financing, Equal Protection of the Laws, and the Supreme Court*, 70 MICH. L. REV. 1324 (1972).

¹⁸⁵ Brief for John Serrano, Jr. and John Anthony Serrano as Amici Curiae at 40, *San Antonio Independent School Dist. v. Rodriguez*, 93 S. Ct. 1278 (1973). Cf. Comment, *The Evolution of Equal Protection—Education, Municipal Services, and Wealth*, 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 103 (1972).

¹⁸⁶ 93 S. Ct. at 1314 (White, J., dissenting).

¹⁸⁷ *Id.* at 1330 (Marshall, J., dissenting).

¹⁸⁸ See, e.g., *Roe v. Wade* 93 S. Ct. 705 (1973) (due process); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1941). Since the right to privacy is nowhere explicitly to be found in the Constitution, the Court has to determine, first, that the affected personal interest can be characterized as an interest in “privacy,” and, second, that the right of privacy is itself closely linked to constitu-

has, under the guise of "rationality," applied a more stringent standard of judicial review.¹⁸⁹ That approach does not require the Court "to create substantive constitutional rights in the name of guaranteeing equal protection of the laws"¹⁹⁰ or "mark an extraordinary departure from principled adjudication under the Equal Protection Clause of the Fourteenth Amendment."¹⁹¹ Instead, as Justice Marshall's dissent notes, it calls for a determination of "the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution,"¹⁹² requiring the Court to consider, as it did in *Weber v. Aetna Casualty & Surety Co.*, "[w]hat legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"¹⁹³

In rejecting the claim that education is of "fundamental" constitutional significance, *Rodriguez* appears to foreclose all challenges to inequities in the provision of education—or, at least, inequities which are neither racial in nature nor represent complete denial of schooling. Yet the analytic formula that the Court adopts is unsatisfactory, at least in part because it *is* a formula. It seems more constitutionally appropriate (if less result-oriented) to review each assertedly adverse educational classification in order to determine whether it suitably furthers an appropriate governmental interest.¹⁹⁴ That approach, as Professor Gunther argues, would "close the wide gap between the strict scrutiny of the new equal protection and the minimal scrutiny of the old not by abandoning the strict but by raising the level of the minimal from virtual abdication to genuine judicial inquiry."¹⁹⁵

tionally guaranteed rights. The link between education and the rights of free speech and the franchise is more direct.

¹⁸⁹ See cases cited note 159 *supra*.

¹⁹⁰ *San Antonio Independent School Dist. v. Rodriguez*, 93 S. Ct. 1278, 1297 (1973).

¹⁹¹ *Id.* at 1310 (Stewart, J., concurring).

¹⁹² *Id.* at 1332 (Marshall, J., dissenting).

¹⁹³ 406 U.S. 164, 173 (1972).

¹⁹⁴ *Cf. Police Dep't v. Mosley*, 408 U.S. 92 (1972).

¹⁹⁵ Gunther, *supra* note 87, at 24. Professor's Gunther's effort to locate an equal protection theory underlying the decisions of the Supreme Court's 1971 term is not without difficulties. As Gunther notes, a means-oriented (or revitalized rationality) approach is "not a simple formula capable of automatic, problem-free application." *Id.* 48. The approach also recalls the standard of review applied by the Supreme Court under the guise of substantive due process. Compare, for example, the test applied in *Nebbia v. New York*, 291 U.S. 502, 525 (1934): does "the means selected . . . have a real and substantial relation to the object sought [by the legislature] to be attained." And, most important, "[i]t is always possible to define the legislative purpose of a statute in such a way that the statutory classification is rationally related to it." Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 *YALE L.J.* 123, 128 (1972). Thus, when a court postulates an incongruity between legislative means and ends, its analysis may be quite as result-oriented as, if less candid than, the "new equal protection's" insistence on divining fundamentality. Yet the "sliding scale" analytic approach proposed in Professor Gunther's

If such an approach were to be adopted by a court considering the constitutionality of school sorting practices, the claim for relief might well be strong. The very things which link education to rights guaranteed by the Constitution—political participation, intellectual growth—seem to be directly affected by school classification. This cause-and-effect relationship between the impact of the injury and the nature of the right is most readily established with respect to school exclusion. Since exclusion represents a total deprivation of schooling, all of education's benefits are necessarily denied the excluded child. Special education or slow learner assignment presumably also affects subsequent opportunities for political participation and intellectual growth, although the link is not so easily fashioned.

2. The Interests of Children

Age requirements are not, in constitutional terms, "suspect classifications." The state may, for example, set minimum age limits for driving a motor vehicle, drinking alcoholic beverages, or voting,¹⁹⁶ and no court is likely to subject the state's classifications to "strict scrutiny." However, there is reason for the courts to treat with special solicitude the constitutional claims of children,¹⁹⁷ requiring a degree of judicial inquiry greater than a determination of mere rationality but less severe than "strict scrutiny"—an approach complementary to that suggested in the preceding section.¹⁹⁸

The status of children is unique in the legal system. Children cannot pursue their interests through political avenues; they are barred from participation because of their youth.¹⁹⁹ Nor can they directly seek redress through the courts; they must be represented by an adult, typically a parent, whom the law presumes will act on their behalf.²⁰⁰ Their lives are managed and directed to an extent that adults would find intolerable. Educational decisions are routinely made

Article does have one signal virtue: it *permits* courts to undertake a more exacting view of competing interests than does the "fundamentality" approach.

¹⁹⁶ See, e.g., *Kramer v. Union Free School Dist.*, 395 U.S. 621, 625 (1969); *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959).

¹⁹⁷ Cf. *Kaimowitz, Legal Emancipation of Minors in Michigan*, 19 WAYNE L. REV. 23, 47-48 (1972).

¹⁹⁸ Cf. *Gunther, supra* note 87 at 20-24.

¹⁹⁹ That *parents* can vote is little comfort for the child, whose interests may not coincide with his parents. Cf. *Johnson v. New York State Educ. Dep't*, 449 F.2d 871 (2d Cir. 1971), *vacated and remanded for a determination concerning mootness*, 409 U.S. 75 (1972). To the extent that children are barred from the political process, they may be viewed as one of the "discrete and insular minorities [excluded from] those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

²⁰⁰ That requirement sometimes serves to deny children access to the courts. See *Kaimowitz, supra* note 197, at 27-33. See generally *Green, The Law of the Young*, in *WITH JUSTICE FOR SOME* 1, 33-37 (B. Wasserstein & M. Green eds. 1970).

by the state, which functions as the steward of youth. In almost all states children are compelled to attend school for at least nine years,²⁰¹ and that initial compulsion serves as a basis for the imposition of further constraints.

Most remarkable has been the ease with which the state has been able to justify its imposition of values on those occasions when its interests and those of children collide. For example, the distribution of religious literature, fit activity for adults, impairs the health and welfare of children;²⁰² books suitable for adult consumption cannot be sold to children, whose moral growth might be stunted.²⁰³ In each case, the Supreme Court has viewed the child's interest in liberty as conflicting with the state's general concern for the well-being of children, and in resolving that conflict, the children have lost.²⁰⁴ It is instructive that the Supreme Court only four years ago declared explicitly for the first time that children "are 'persons' under our Constitution."²⁰⁵ Their rights as persons have been minimal.²⁰⁶

Courts have recently begun to recognize the civil rights of children independent of the rights of their parents.²⁰⁷ *Tinker v. Des Moines Independent Community School District*,²⁰⁸ which asserted the first amendment rights of children, is of course the leading case.²⁰⁹ *Weber v. Aetna Casualty & Surety Co.*²¹⁰ reveals judicial concern

²⁰¹ See Goldstein, *supra* note 17, at 393-94 n.74 (1969).

²⁰² *Prince v. Massachusetts*, 321 U.S. 158 (1944).

²⁰³ *Ginsberg v. New York*, 390 U.S. 629 (1968).

²⁰⁴ In the *Prince* context—where children of Jehovah's Witnesses were barred from distributing religious literature—it may be more accurate to say that the children's interests were not considered, than to assert an identity between the interest of children and parents.

²⁰⁵ *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969).

²⁰⁶ Even *In re Gault*, 397 U.S. 1 (1967), typically eulogized as protecting children from the excesses of juvenile justice, affords the child only a watered-down version of constitutional procedural protection. See Kaimowitz, *supra* note 197, at 25-26.

²⁰⁷ Earlier cases dealing with what could have been viewed as the rights of children were instead decided on the basis of the rights of parents or teachers. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Even *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), which came closest to recognizing an independent right in the child, also involved prosecution of the parents.

²⁰⁸ 393 U.S. 503 (1969).

²⁰⁹ In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court concluded that the Amish desire to maintain a religious community which frowned on worldly schooling justified exempting the "plain people's" children from compulsory education beyond the eighth grade. Yet, as Justice Douglas noted, while Amish youngsters may in fact benefit from the decision, the Court's concern lay with the rights of parents, not children:

The Court's analysis assumes that the only interests at stake are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.

Id. at 241. Justice Douglas would have remanded the case in regard to two of the respondents in order to determine the children's religious views.

²¹⁰ 406 U.S. 164. "Courts are powerless to prevent the social opprobrium suffered

for the rights of one class of children—those born out of wedlock. In at least two other kinds of cases, lower courts also have explicitly recognized children's personal rights. The Supreme Court of Pennsylvania, in a case involving the right of a Jehovah's Witness to refuse medical treatment for her sixteen-year-old child where the child's life was not in imminent danger, remanded for a hearing to ascertain the wishes of the child.²¹¹ In *Chandler v. South Bend Community School Corp.*,²¹² a federal district court upheld the independent interests of children in education. The district court, which struck down a school policy of suspending students and withholding their report cards unless their parents either paid a textbook fee or established their indigency, declared: "The school fee collection procedure . . . conditions [children's] *personal* right to an education upon the vagaries of their parents' conduct, an intolerable practice"²¹³

The claim that adverse and harmful school classifications deny equal protection recognizes another interest of children: a concern for educational choice, for securing the maximum liberty possible within the liberty-constraining setting of a compulsory school system. Children are both too unformed and too precious to be treated arbitrarily by the state. That claim of worth, and the family's interest in preserving the worth of the child by securing his differentness, has received passing judicial recognition.²¹⁴ It underlies the Court's observation in *Tinker* that children may not be viewed as "closed-circuit recipients of only that which the State chooses to communicate,"²¹⁵ a proposition that logically applies with even greater force to school instruction than to political activities which happen to transpire in the schoolhouse.

All of this may be treated as legal speculation. Yet the presumed equality of all children ("equality of innocence," as Professor Coons

by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth." *Id.* at 176. See also *Levy v. Louisiana*, 391 U.S. 68 (1968).

²¹¹ *In re Green*, 448 Pa. 338, 292 A.2d 387 (1972).

²¹² Civil No. 71-S-51 (N.D. Ind., Oct. 22, 1971). See *Arnold v. Carpenter*, 459 F.2d 939 (7th Cir. 1972). But see *Johnson v. New York State Educ. Dep't*, 449 F.2d 871 (2d Cir. 1971), vacated and remanded for a determination concerning mootness, 409 U.S. 75 (1972).

²¹³ Civil No. 71-S-51, at 5. Professor Coons and his colleagues suggest that cases concerning children's rights to an equal educational opportunity can be distinguished from *Prince* and *Ginsberg*. Those cases, they argue, pit different conceptions of the child's best interests against each other, a tension lacking in the education arena. Their argument dismisses as de minimis state interests (saving money, sorting children) which are indeed antagonistic to the claims of the child. PRIVATE WEALTH, *supra* note 165, at 422-24.

²¹⁴ See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

²¹⁵ *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969).

puts it)²¹⁶ provides strong basis for contesting actions which threaten that equality by restricting the child's potential for growth.²¹⁷

C. *Applying the Constitutional Standard*

All school classifications do not assume equal importance in the life of a child. Exclusion and assignment to special education and slow learner programs have been singled out as the most consequential sortings, those most likely to warrant judicial inquiry. There are also important distinctions among these three classifications; the application of a constitutional standard necessarily differs for each.

1. Exclusion

School exclusion, the most extreme classification, is also the simplest to confront in legal terms. Exclusion represents the complete denial of a service, not merely the provision of an inferior service; no provision is by definition unequal provision. Even if education plays only a marginal role in shaping life opportunities, denial of education is not a trivial matter: without instruction, children are unlikely to reinvent physics or reading. In addition, exclusion based on a judgment of ineducability is likely to cause real and irreversible harm to both the child's achievement and psyche. Thus courts can, and should, hold that exclusion from school is unconstitutional as a denial of equal protection even in the absence of a showing of actual injury. Several courts appear to have adopted this theory;²¹⁸ most prominently, in *Mills v. Board of Education*, the district court ordered that the Washington, D.C., school system readmit all previously excluded children "regardless of the degree of the child's mental, physical or emotional disability or impairment."²¹⁹

For the excluded child, access to some form of publicly supported education and special assistance to permit him to overcome the school-

²¹⁶ PRIVATE WEALTH, *supra* note 165, at 420.

²¹⁷ This focus on "children" should not obscure the fact that those injured by adverse school classification are only a small sub-class of children. Yet an assertion of the interest of a defined sub-class seems analytically indistinguishable from an assertion of the interest of children as a whole; there is no apparent conflict between the interests of children generally and those "adversely" classified, no clear benefit flowing to some children from the sorting of others. The same factors, noted in this section, which support special judicial solicitude for children apply to adversely classified children as well.

²¹⁸ See, e.g., *San Antonio Independent School Dist. v. Rodriguez*, 93 S. Ct. 1278, 1298-99 (1973) (dictum) (denial of educational service); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (dictum) (exclusion of indigents); *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971) (exclusion of pregnant students); *Hosier v. Evans*, 314 F. Supp. 316 (D.V.I. 1970) (exclusion of aliens).

²¹⁹ 348 F. Supp. 866, 878 (D.D.C. 1972); *accord*, *Wolf v. Legislature*, Civil No. 182,646 (Utah Dist. Ct., Jan. 8, 1969) [*reprinted in Classification Materials, supra* note 75, at 171]; see *Harrison v. Michigan*, 350 F. Supp. 846 (E.D. Mich. 1972) (dictum).

imposed handicap²²⁰ is all that he can constitutionally demand. To insist upon more, to require that the school system make an educationally "correct" placement, calls upon the court to treat complex judgments of educational needs as constitutional requirements, a position that courts will justifiably be reluctant to adopt.²²¹ Yet the two district courts which have confronted the issue of exclusion based on asserted ineducability have, in defining remedy, spoken in terms of individual needs and appropriate placement, leaving those matters in the hands of a court-appointed master or school officials.²²² As a discretionary exercise of the court's equity jurisdiction, that approach seems clearly warranted. It assures that the educational opportunity that is in fact offered is not meaningless and unusable; it tailors the remedy to fit the constitutionally cognizable harm. As the Supreme Court has often noted, a court of equity has vast powers in framing its decree to "go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances."²²³

2. Within-School Classifications

Challenges to within-school classifications pose more difficult constitutional problems. They demand that a court weigh the quite different benefits and costs associated with varied educational approaches, a task usually—and quite properly—left to educators. The difficulty is compounded because the balancing process is riddled with ambiguity. If, for example, few students return from special to regular classes, does the explanation lie with the structure of the educational offering or the capacities of the child? As the court of appeals' decision in *Hobson* notes: "In some cases statistics are ineluctably ambiguous in their import—the fact that only a small percentage of pupils are reassigned [from slow to faster programs] may indicate

²²⁰ Cf. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966), cert. denied, 389 U.S. 840 (1967). In that case the court of appeals ordered the previously segregated school district to provide remedial educational assistance in order to overcome past inadequacies in the education of those children who had attended all-Negro schools. *Id.* at 891-92, 900.

²²¹ Cf. *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969). In rejecting an educational "needs" standard, the three-judge district court noted that: "[T]here are no 'discoverable and manageable standards' by which a court can determine when the Constitution is satisfied and when it is violated." 293 F. Supp. at 335. See also *Burruss v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970).

²²² *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) (consent order).

²²³ *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

either general adequacy of initial assignments or inadequacy of review."²²⁴ How does a court, confronted with two equally plausible hypotheses which existing evidence can neither affirm nor reject, resolve that ambiguity?

One easy but unsatisfactory solution to such dilemmas is to treat all within-school sorting decisions similarly, as matters of educational discretion beyond the ambit of judicial review. That approach ignores distinctions between the benefits and harms associated with special education placement, on the one hand, and track assignment on the other; these are differences of degree, to be sure, but differences upon which constitutional distinctions can logically rest.

a. *Special Education*

Special education placement is clearly the more onerous of the two classifications. Even the euphemistic "special" conveys a judgment of abnormality, which all the well-intentioned efforts to label the handicapped as well as the gifted as "exceptional children" cannot undo. Sarason has observed that "[i]n the school culture special education . . . has been treated in much the same way that the race problem was treated by the larger society,"²²⁵ explaining that "these classes tend to be viewed as alien bodies in the school culture, with the result that children in these classes . . . feel different and apart from the school."²²⁶ Students with mild disabilities—physical, mental, or emotional—are carefully removed from their "normal" peers to isolated classrooms or different school buildings. They are not routinely considered as candidates for readmission into the mainstream of the educational program. In large city school systems, fewer than one of every ten students assigned to special programs ever returns to regular classes.²²⁷ Special education assignment thus embodies a judgment of consequential differentness which carries "a potential to injure through an effect of stigmatizing certain persons by implying popular or official belief in their inherent inferiority or undeservingness."²²⁸ Furthermore, such programs typically present only scaled-down educational offerings, presuming that children placed in them

²²⁴ *Smuck v. Hobson*, 408 F.2d 175, 187 (D.C. Cir. 1969), *aff'g en banc* *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967).

²²⁵ Sarason has noted that "[i]n the school culture special education . . . has been treated in much the same way that the race problem was treated by the larger society," explaining that "these classes tend to be viewed as alien bodies in the school culture, with the result that children in these classes . . . feel different and apart from the school." S. SARASON, *THE CULTURE OF THE SCHOOL AND THE PROBLEM OF CHANGE* 156 n.2 (1971).

²²⁶ *Id.*

²²⁷ Gallagher, *supra* note 36.

²²⁸ Michelman, *supra* note 83, at 20.

can never hope to be more than marginal members of the society.²²⁹ And, too often, that presumption becomes fact.

The perceptible harms—stigmatization, lessened educational offerings and reduced life chances—wrought by special education placement for the mildly handicapped presumptively deny those individuals equal educational opportunity. For that reason, it seems appropriate to alter the normal allocation of procedural burdens. In a suit challenging the constitutionality of special class treatment, once evidence of harm has been introduced, school officials should be required to show that the special education program accomplishes what it is supposed to do: that it sufficiently benefits students to justify the inevitable stigma that attaches to such placement.

That standard of “demonstrable benefit” has been applied in challenges to involuntary confinement in institutions for the retarded. The district court in *Wyatt v. Stickney* declared that institutionalized retardates “have a constitutional right to receive such individual habilitation as will give each of them a realistic opportunity to lead a more useful and meaningful life and to return to society.”²³⁰ Although

²²⁹ Feuerstein, *supra* note 111.

This Article does not treat in detail the recently advanced claims that schools have a constitutional obligation to create *additional* classifications for certain classes of children. Two quite different groups have recently pressed such an argument: non-English speaking children, asserting that they have a constitutional entitlement to bilingual instruction, see *Lau v. Nichols*, 472 F.2d 909 (9th Cir. 1973); *Morales v. Shannon*, No. DR-70-CA-14 (W.D. Tex., Feb. 13, 1973); *Aspira of New York v. Board of Educ.*, No. 72-4002 (S.D.N.Y., Jan. 23, 1973) (denying defendants' motion for summary dismissal); *Serna v. Portales Mun. School Dist.*, 351 F. Supp. 1279 (1972); and children with particular handicapping conditions, asserting that they are entitled to educational programs which attend to that condition, see *Tidewater Soc'y for Autistic Children v. Tidewater Bd. of Educ.*, No. 426-72-N (E.D. Va., Dec. 26, 1972). The claims made in these cases may be couched in terms of “equal access.” Both the non-English speaking and the handicapped argue that for the state to provide the same education to all is not to provide “equal” education. As the *Aspira* court characterizes plaintiffs' complaint:

‘nondiscriminatory,’ compulsory public education in the English language is a fraud and an affliction, at war with federal law and the Constitution, for people who speak only Spanish and are not taught the language of instruction.

Yet these demands resemble earlier arguments, rejected in *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969), that the state must satisfy the varying “educational needs” of its children.

The dissent in *Lau* sought not to make “needs” an absolute requirement but to balance this “needs” concept against the state's resource constraints: “once the state chooses to put itself in the business of educating children, it must give each child the best education its resources and priorities allow.” That rejoinder raised another problem for the *Lau* majority: should the court attempt to define “the best education”? The court's response was conclusory, not analytical:

[T]he determination of what special educational differences faced by some students within a State or School District will be afforded corrective action, and the intensity of the means undertaken, is a complex decision, calling for significant amounts of executive and legislative expertise and non-judicial value judgments.

²³⁰ 344 F. Supp. 387, 390 (M.D. Ala. 1972) (emphasis added). See 325 F. Supp. 781 (M.D. Ala. 1971). Other opinions in the same case are reported at 344 F. Supp. 373 (M.D. Ala. 1972); 334 F. Supp. 1341 (M.D. Ala. 1971). For discussions of these cases, see Herr, *Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded*, 23 SYR. L. REV. 995 (1972); Murdock, *supra* note 73, at 152-54. See generally *Symposium, The Legal Rights of the Mentally Retarded*, 23 SYR. L. REV. 991-1165

Judge Johnson found a constitutional right to habilitation in a due process context,²³¹ the analogy between special education assignment and involuntary confinement suggests the appropriateness of applying the *Wyatt* demonstrable benefit standard within the school.²³² If benefit cannot be demonstrated, either for particular students or for all those placed in classes for the mildly retarded or handicapped, it makes constitutional (and pedagogical) sense to reassign those students to regular classes, providing them with supplementary instruction to help recapture lost educational ground. The standard seems both manageable and just.²³³ In defining justification in terms of efficacy, it avoids the Scylla of "compelling interest" and the Charybdis of "rational basis," imposing a burden more aptly tailored to the problem. The standard also encourages more frequent evaluation of each student's progress, thus assuring that special classes are not transformed into a "penitentiary where one could be held indefinitely for no convicted offense."²³⁴ The demonstrated ineffectiveness of special education programs for the mildly handicapped indicates that few will survive if obliged to prove their mettle.²³⁵

(1972). Cf. *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972). In *Affleck*, the court found unconstitutional the state's failure to provide some rehabilitative programs—including educational programs—to its juvenile inmates. The court noted: "[t]here is a bitterly cruel irony in removing a boy from his parents because he is truant from school, and then confining him . . . where he gets no education." *Id.* at 1369. See also *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972). See generally Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742 (1969).

²³¹ *Wyatt v. Stickney*, 325 F. Supp. 781, 785 (M.D. Ala. 1971); cf. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972); *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972). See generally Declaration of the Rights of Mentally Retarded Persons, United Nations Resolution 2856 [XXVI] (1971): "2. The mentally retarded person has a right to . . . such education, training, rehabilitation, and guidance as will enable him to develop his ability and maximum potential."

²³² In *Wyatt*, patients were confined involuntarily in the absence of criminal safeguards and denied medical treatment. In the absence of medical treatment, the court declared, the patient is deprived of liberty without either procedural protections or an adequate substitute. In the school situation, by contrast, all children must undergo some restraints on their liberty. If educational benefits may be similarly viewed as protection, those children provided with only diminished educational offerings are denied due process insofar as the alternative protection is inadequate and are denied equal protection insofar as they are treated inequitably (regardless of whether the benefits received are sufficient to satisfy a due process standard).

Under a different theory both *Wyatt* and the school classification case can be fit within an equal protection framework. The involuntarily confined patients (or special students) are a class singled out for adverse treatment; the state's interest is in protecting the health and welfare of the affected class. Consequently, if the state does not provide the compensatory treatment which was the justification for the classification, its action is irrational.

²³³ In this context, the argument that courts lack competence to judge such benefits seems singularly weak. If courts can review the administration of mental hospitals—or, for that matter, oversee the management of bankrupt corporations under statutory authority—they can distinguish between plausible and implausible educational justifications. Indeed, in other school contexts, they have demonstrated their willingness to do just that. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

²³⁴ *Ragsdale v. Overholser*, 281 F.2d 943, 950 (D.C. Cir. 1960) (concurring opinion).

²³⁵ See text accompanying notes 105-12 *supra*.

b. *Ability Grouping*

Special education represents within-school sorting at its most consequential. Such placement implies that, while an individual is not ineducable, his potential is markedly more limited than the majority of his peers. Of course, any grouping scheme is designed to produce judgments of differentness; but the significance of the judgment—defined both by the school and the child—varies with the classification.

If, to borrow from Dante, exclusion places a child in the ninth circle of hell, assignment to a lower track leaves him at hell's gates; there remains the possibility of reprieve. That difference in consequentiality, phrased with unavoidable looseness, should result in a different application of the constitutional standard as courts reviewing challenges to ability grouping balance individual and institutional needs. Proof that tracking is harmful in fact should be requisite to a successful constitutional challenge. And rigorous proof of injury is difficult to come by.

Distinguishing between special education placement and routine track assignment emphasizes differences both in the nature of the school's decision and in the consequences of judicial inquiry. A challenge to programs for the educable mentally retarded or mildly emotionally disturbed, on the grounds that they both stigmatize individuals and reduce life chances without providing offsetting benefits, has a relatively modest and accomplishable goal: the effective integration of those students into the general life of the school.²³⁶ Tracking, on the other hand, lies at the heart of the educational enterprise; the differentiation that it promotes is less easily distinguishable from any school-created distinctions.²³⁷ For that reason, a general objection to tracking readily converts into an attack on any educational practice which rewards some students—either in school terms, such as high grades, or in life-success terms, such as college entrance.²³⁸

It might be asked whether such an institutional attack is necessarily a bad thing. If none of the sorting that schools engage in ap-

²³⁶ See K. BEERY, *MODELS FOR MAINSTREAMING* (1971); *NEW DIRECTIONS IN SPECIAL EDUCATION* (R. Jones ed. 1970).

²³⁷ The factors listed at text accompanying notes 225-29 *supra* apply less easily and less forcefully to tracking than to exclusion and to special education placement.

²³⁸ Cf. Raab, *Quotas By Any Other Name*, COMMENTARY, Jan. 1972, at 41, 44 ("[P]roposals [to abolish grouping] are frustrated reactions to the fact that white school children are informally but effectively ascribed a superior status. But surely the remedy is to remove that ascription by affirmative action as swiftly as possible, not to move from ascribed inequality to ascribed equality."). Yet if the empirical evidence is to be credited, it is just such "affirmative action" that tracking cannot accomplish.

Christopher Jencks, reviewing the tracking literature, concludes that excluding some students from the college curriculum "is mainly a matter of bureaucratic convenience and 'maintaining standards.'" He would "let students place themselves." JENCKS, *INEQUALITY*, *supra* note 14, at 36.

pears to benefit students—except, as one commentary observes, “to build (inflate?) the egos of the high groups”²³⁹—why not discard it? Such a question frames the point too broadly, confusing what educators might well do with what courts can legitimately do in order to secure equal protection of the laws. Phrasing a question as one of educational policy does not, of course, render the courts impotent to act.²⁴⁰ Yet the very facts which render research concerning the efficacy of tracking so unsatisfying—tracking’s near-universality, its links with other school differentiations, its varied connotations—counsel for judicial restraint rather than potentially disruptive action.

The difficulty of framing a remedy reveals yet another reason for judicial restraint. A court order abolishing tracking does not automatically result in an end to sorting, which is a central and perhaps inevitable function of the school. Used with care, differentiation permits the teacher to cope with the particular problems of an individual student at a particular point in time. Used mechanically, as it too often is, an initial and imperfect description of student ability may become a self-fulfilling predictor of student achievement or failure. While flexible sorting is easily praised and rigid grouping readily damned, it is difficult to conceive of a court order which is clear and specific enough to be effective but does not itself fall prey to inflexibility. In fact, it is not clear precisely what a court order would accomplish, or, to put the point differently, how the schools would accommodate their need to classify with any court-imposed constraints. Indeed, there may be no way to evaluate any given accommodation except in terms of compliance with the particular court order, a circular and unsatisfactory exercise.

The example of Washington, D.C., is instructive here. *Hobson v. Hansen*,²⁴¹ which declared that tracking as practiced in the District of Columbia must “simply be abolished,” has had no impact. School officials—relying on the court of appeals decision in *Hobson*, which limited the applicability of the district court order to the existing tracking system while permitting “full scope for . . . ability grouping”²⁴²—retained the full panoply of student differentiation, while simply changing labels.

A challenge to tracking on grounds that it impairs equality of educational opportunity may well be, in reality, a disguised demand

²³⁹ FINDLEY & BRYAN, *supra* note 20, at 40.

²⁴⁰ *But see* Smuck v. Hobson, 408 F.2d 175, 196 (D.C. Cir. 1969) (en banc) (separate opinion of Burger, J.); *Note Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board*, 81 HARV. L. REV. 1511, 1525 (1968).

²⁴¹ 269 F. Supp. 401 (D.D.C. 1967).

²⁴² Smuck v. Hobson, 408 F.2d 175, 189 (D.C. Cir. 1969) (en banc).

that schools eliminate disparities between student outcomes. The difficulty with that demand is simply that it is unaccomplishable through any educationally sound and administratively feasible remedies presently available.²⁴³ Since individuals' capabilities clearly differ, it would be a cruel hoax, a "deceit of equality,"²⁴⁴ to premise a challenge to tracking on the argument that tracking caused school failure, implicitly promising that the educational differences would vanish if tracking were done away with. Given the uncertainty concerning the causal connections between slower learner track assignment and any educational effects, one can urge the researchers to explore their hypotheses further and encourage school systems to question the premises of their classifications, while staying judicial intervention which would abolish tracking as a denial of equal educational opportunity.²⁴⁵

D. *Equal Educational Opportunity and the Mechanisms of School Sorting*

That tracking should not be judicially "abolished" unless harm can be empirically demonstrated does not imply that all issues linked with ability grouping should be skirted by the courts. Even if the assumptions underlying tracking prove correct—or, more likely, unverifiable—sorting *mechanisms* may be defective, and consequently risk mistreatment of students. Identifying the nature of the risk, and the possibility of harm, requires an examination of the devices—tests, grades, teacher recommendations—employed to facilitate sorting.

School systems employ a host of factors in determining how to sort students. Past performance in school, student willingness to adapt to the particular classroom regime laid down by the teacher, parental intervention—all play some part in determining whether a given student is assigned to a regular or slow class for the coming year.²⁴⁶ Nor is sorting a once a year exercise; it is imbedded in the daily life of the school. Teachers evaluate students constantly, distributing praise and criticism in classroom comments, remarks on written work, and gossip in teachers' lounges. For students, the stress on evaluation

²⁴³ The school official may take his defense from the hoary contract law doctrine of impossibility of performance.

²⁴⁴ M. YOUNG, *THE RISE OF MERITOCRACY* 49 (1961).

²⁴⁵ However, since the evidence is—and is likely to remain—ambiguous, the society "may not wish to pay for more evidence on this point, but may prefer to decide on the basis of its own value system to what extent it regards tracking as acceptable." Mosteller & Moynihan, *A Pathbreaking Report*, in MOSTELLER & MOYNIHAN, *supra* note 14, at 3, 54.

²⁴⁶ One anguished parent reported to me that students whose siblings have been assigned to special classes are routinely assigned to the same classes. Such a practice is obviously illegitimate; one hopes that relatively few school systems continue to believe in the Kallikaks and Jukes myth of family stupidity, as developed in H. GODDARD, *THE KALLIKAK FAMILY: A STUDY IN THE HEREDITY OF FEEBLEMINDEDNESS* (1912).

creates what Jules Henry has called "the *essential nightmare*," embroiling them all in the "drive" toward success.²⁴⁷ While one might hope to improve the quality of informal evaluations, render them more compassionate or less likely to instill anxiety, there exist no readily available ways of doing so.²⁴⁸

Yet schools do use more objective measures of ability, intelligence tests, which carry great weight in determining the child's educational future. In many school systems, aptitude tests form the primary basis for sorting decisions. Students who score below 75 are assigned to classes for the educable mentally retarded; students who score between 75 and 90 are placed in slow learners groups; and so on.²⁴⁹

These tests are at least nominally objective, and do not directly depend on such concededly irrelevant factors as teacher prejudice and social class.²⁵⁰ They are also decent predictors of subsequent school success,²⁵¹ better able to estimate performance than school grades or teacher recommendations or parental pressure. Aptitude tests do measure with considerable accuracy the adaptability of a given student to the school's expectations.²⁵²

Aptitude tests and the uses to which they are put have been sharply criticized for a number of reasons. (1) Their questions are ambiguous, a trap for the overly thoughtful who rightly recognize

²⁴⁷ J. HENRY, *supra* note 53 (emphasis in original).

²⁴⁸ Professor Rist discusses the ways in which students are regularly sorted within the classroom. *Student Social Class and Teacher Expectation: The Self-fulfilling Prophecy in Ghetto Education*, 40 HARV. EDUC. REV. 411 (1970).

²⁴⁹ The following table, taken from A. BAUMEISTER, *MENTAL RETARDATION* 10 (1967), describes a system of classifying retardedness according to scores on two generally accepted IQ tests:

Level of Retardation	I.Q. Range	
	Stanford-Binet Test	Wechsler Test
Borderline	68-83	70-84
Mild	52-67	55-69
Moderate	36-51	40-54
Severe	20-35	25-39
Profound	below 20	below 25

²⁵⁰ Cf. M. YOUNG, *supra* note 244, at 73: "Teachers unconsciously favored children from their own class; old-fashioned exams were kinder to the more cultured homes. Intelligence tests, less biased, were the very instrument of social justice. . . ."

²⁵¹ See Anastasi, *Some Implications of Cultural Factors for Test Construction*, in *TESTING PROBLEMS IN PERSPECTIVE* 453, 456 (A. Anastasi ed. 1966). The predictive validity of aptitude tests is far from perfect. "[T]he correlation between elementary school test scores and eventual educational attainment [years of schooling completed] seems to have hovered just under 0.60 for some decades." JENCKES, *INEQUALITY*, *supra* note 14, at 144.

²⁵² Aptitude tests have greater "predictive validity" than do employment tests generally, *cf.*, *e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), tests which some school systems have employed to determine teacher competency, *cf.*, *e.g.*, *Baker v. Columbus Mun. Separate School Dist.*, 462 F.2d 1112 (5th Cir. 1972), or administrative ability, *cf.*, *e.g.*, *Chance v. Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972).

that more than one answer may be correct.²⁵³ (2) They treat intelligence (or, more accurately, school intelligence) in aggregate terms, failing to recognize that a given student is likely to be competent at some things but not at others, and that combining those strengths and weaknesses into a single score necessarily misdescribes and oversimplifies the notion of intelligence.²⁵⁴ (3) They fail to measure "adaptive behavior," the capacity to survive in society, and place too high a premium on school intelligence.²⁵⁵ (4) The tests do not indicate why a given student did poorly in a particular subject. That a child scored in the fortieth percentile in mathematics aptitude, for example, does not tell the teacher what he did not understand or why he did not understand it. It provides no basis for educational intervention to improve performance. (5) So-called intelligence tests treat a highly mutable phenomenon—aptitude—as a given with which the school can work. They identify intelligence as static and not dynamic, and fail to account for the "uneven growth patterns of individual children."²⁵⁶

Those who design aptitude tests rightly argue that many of these criticisms are properly directed not at the tests but at those who use them. Aptitude tests need not be employed in punitive, prophesy-confirming ways; test results can be of some use in developing appropriate educational strategies. Yet too often, the tests are misused: a single score becomes the basis for student assignment in a particular track from which there is no escape until the next test is administered. That use of tests seems as inappropriate for placing students as it is for placing teachers or would-be principals or other workers.²⁵⁷ The schools' apparent incapacity to test students accurately makes test administration appear even more dubious.²⁵⁸

²⁵³ B. HOFFMAN, *THE TYRANNY OF TESTING* (1962). That criticism says interesting things about the school performance which they predict. While the ample criticism of Hoffman in the psychometric literature suggests his position is too narrow, misuse of tests in schools may create undesirable effects. See Dunnette, *Critics of Psychological Tests: Basic Assumptions: How Good?*, 1 *PSYCHOLOGY IN THE SCHOOLS* 63 (1964).

²⁵⁴ Lesser, Fifer & Clark, *Mental Abilities of Children from Different Social Class and Cultural Groups*, 30 *MONOGRAPH OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT* #4 (1965); Stodolsky & Lesser, *supra* note 58.

²⁵⁵ Heber, *A Manual on Terminology and Classification in Mental Retardation*, AM. J. MENT. DEFICIENCY (Monograph Supp. 1961).

²⁵⁶ J. FRANSETH & R. KOURY, *SURVEY OF RESEARCH ON GROUPING AS RELATED TO PUPIL LEARNING* 36 (U.S. Office of Educ., DHEW, 1966).

²⁵⁷ See note 202 *supra*. See also I. BERG, *EDUCATION AND JOBS: THE GREAT TRAINING ROBBERY* (1970).

²⁵⁸ In *Hobson*, school psychologists examined 1272 students assigned to the "special education" or "basic" track; almost two-thirds of them had been improperly classified by the school system. *Smuck v. Hobson*, 408 F.2d 175, 187 (D.C. Cir. 1969) (en banc). See also Garrison & Hamill, *supra* note 66, at 48 (25-68% of those assigned to EMR classes in Philadelphia should be in regular classes.). All of the suits challenging classifica-

When aptitude results are the basis upon which disproportionate numbers of non-white and non-English-speaking children are assigned to slower learner groups and educable mentally retarded classes, the criticisms acquire particular force. Tests are condemned as "culturally biased," confirming white middle-classness rather than measuring intellectual potential, "something in black and white to justify a prejudice."²⁵⁹ They assertedly function not as predictors of ability but as "built-in headwinds" for minority groups,²⁶⁰ asking for definitions of words as exotic as belfry, shilling, and mosaic. The manner in which aptitude tests are administered—in the highly structured school setting, rather than in a more relaxed environment—may also impair the performance of minority children.²⁶¹

The deficiencies of such tests were the basis on which Judge Wright overturned Washington, D.C.'s tracking system. Judge Wright focused his inquiry on aptitude testing, viewing it as "a most important consideration in making track assignments."²⁶² His conclusion that "standardized aptitude tests . . . produce inaccurate and misleading test scores when given to lower class and Negro students,"²⁶³ coupled with the school system's failure to advance any more culturally "neutral" sorting alternatives, led him to strike down the existing tracking scheme.

For the advocate bent on undoing school classifications, an attack on testing holds considerable appeal. If it can be shown that aptitude tests do not measure aptitude, the argument for sorting based primarily on the results of such tests collapses like a house of cards.

tion practices have alleged marked discrepancies between the school's tests results and scores attained on independently administered tests.

²⁵⁹ Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691, 735 (1968); cf. Note, *Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board*, *supra* note 240, at 1521. While tests identify acculturation, not "innate ability," Mercer, *I.Q.: The Lethal Label*, 6 PSYCHOLOGY TODAY, Sept. 1972, at 44, school curricula are geared to the very same factors.

²⁶⁰ *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); cf. *Gaston County v. United States*, 395 U.S. 285 (1969) (literacy test for voter registration suspended under the Voting Rights Act of 1965, § 4(a), 42 U.S.C. § 1973b(a) (1970), because of discriminatory effect on Negroes).

²⁶¹ See, e.g., Labov, *The Logic of Non-Standard English*, in LANGUAGE AND POVERTY 153 (F. Williams ed. 1971); Cole & Bruner, *Cultural Differences and Inferences About Psychological Processes*, 26 AM. PSYCHOLOGIST 867, 874 (1971): "[C]ulturally deprived black children, tested appropriately for optimum performance, have the same grammatical competence as middle-class whites, though it may be expressed in different settings." Mercer argues that these practices render non-white children more vulnerable to adverse school assignment. Mercer, *Institutionalized Anglocentrism: Labeling Mental Retardates in the Public Schools*, in RACE, CHANGE AND URBAN SOCIETY 311, 322-23, (P. Orleans & W. Ellis eds. 1971); Mercer, *Sociocultural Factors in Labeling Mental Retardates*, 48 PEABODY J. EDUC. 188 (1971).

²⁶² *Hobson v. Hansen*, 269 F. Supp. 401, 475 (D.D.C. 1967), *aff'd en banc sub nom. Snauck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

²⁶³ 269 F. Supp. at 514.

The basis for differential treatment becomes simply irrational.²⁶⁴ The difficulty with that approach rests in its failure to distinguish careful from careless test *use*. Tests do indicate something about a student's capacity to perform. They do not reveal, but merely remind, that non-middle-class and minority children fare badly in schools as they presently are organized.

To abolish the tests, while ignoring the fact that different students (and different classes of students) perform differently, is about as sensible as the ancient Greek practice of slaying the messenger who brings bad news. In that light, it is sobering but instructive to recognize that minority children do poorly even on so-called culture free tests, which supposedly do not reward middle-classness.²⁶⁵

When they are abused, however, testing processes are properly amenable to judicial scrutiny. The practice of administering tests in English to students whose native language is Spanish, and using the results as a measure of ability, is simply indefensible; the scores of those students are, at best, only a proxy for acculturation into the dominant culture.²⁶⁶ Further, to the extent that test scores serve as the primary basis for student assignment—ignoring a host of factors, cultural and psychological, that could influence test performance; summing verbal and reading and numerical ability into a single "intelligence score"; failing to take into account adaptive behavior—their use becomes more suspect.

The importance that attaches to a single test also has legal relevance. While achievement tests, which purport to measure subject matter competence and not "ability," are appropriately employed to group children in a particular subject for a limited time, the use of aptitude tests to track students for a period of years, prohibiting either cross-tracking (which recognizes the differential abilities of any

²⁶⁴ Administrative relief for test misuse is also conceivable. Since title V of the National Defense Education Act, 20 U.S.C. §§ 481 et seq. (1970), pays for about 35% of secondary school aptitude testing, D. GOSLIN, *THE SEARCH FOR ABILITY* 71-72 (1963), the federal government could require school districts to validate the tests they use for their particular school population, or cut off subsidies under title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq. (1970).

²⁶⁵ See, e.g., Rosenblum, Keller & Papania, *Davis-Eells ("Culture-Fair") Test Performance of Lower-Class Retarded Children*, 19 J. CONSULTING PSYCHOLOGY 51 (1955); Angelino & Shedd, *An Initial Report of a Validation Study of the Davis-Eells Tests of General Intelligence or Problem Solving Ability*, 40 J. PSYCHOLOGY 35 (1955); Altus, *Some Correlates of the Davis-Eells Tests*, 20 J. CONSULTING PSYCHOLOGY 227 (1956); S. SARASON, *PSYCHOLOGICAL PROBLEMS IN MENTAL DEFICIENCY* 482-87 (1959).

Similarly, when psychologists have looked at different students' performance on a question-by-question basis, they have found that poor and non-white children do no better on "culture-free" questions. See, e.g., Chase & Pugh, *Social Class and Performance on an Intelligence Test*, 8 J. EDUC. MEASUREMENT 197 (1971); Lesser, Fifer & Clark, *supra* note 254.

²⁶⁶ See, e.g., *Diana v. State Bd. of Educ.*, No. C-70-37 (N.D. Cal. 1970); *Guadalupe Organization v. Tempe Elementary School Dist. No. 3*, Civil No. 71-435 (D. Ariz., filed Aug. 9, 1971) (settled by consent decree Jan. 24, 1972).

given student) or limiting egress from slow tracks when educational intervention succeeds, should raise considerable judicial suspicion.²⁶⁷

Flexibility, test reliance, the utilization of tests as means to identify particular learning difficulties: these represent matters of careful and complex judgment. For a court to insist upon them requires the elaboration of distinctions between appropriate and dangerous testing practices, avoiding the easier but inappropriate judicial alternatives of abolishing testing or treating testing questions as unmanageable. As long as some sorting is to be tolerated (and sorting is likely to persist, no matter what courts or, for that matter, school administrators, say and do) judgments about ability will necessarily be difficult to defend with precision. Nevertheless, since classification decisions do affect a student's educational career, a demonstration that the aptitude tests which are employed can accurately predict school performance for different types of students is an appropriate legal burden for the school to bear.²⁶⁸

III. SCHOOL CLASSIFICATION, RACIAL OVERREPRESENTATION, AND EQUAL PROTECTION

[C]ause for concern is found not in some repugnant discrimination which may accompany a deprivation, but in the severe deprivation itself; and this is true even though such deprivations may take the form of, or be known through the observation of, particular kinds of "extreme inequalities."²⁶⁹

A. *The Incidence and Consequences of Minority Overrepresentation*

Few schools sort students explicitly on the basis of race. Classification in large systems is routinely handled by a school official who knows nothing about a given student except his academic record. When counselors discuss appropriate track placement with their students, their recommendations are not prompted by racial considerations, but are premised on estimates of student ability and school

²⁶⁷ Cf. A.H. PASSOW *et al.*, TOWARD CREATING A MODEL URBAN SCHOOL SYSTEM 17 (1967) [hereinafter cited as A.H. PASSOW], noting that, in Washington, "the tracking system was as often observed in the breach as it was in adherence to any set of basic tenets."

²⁶⁸ Cf. *Allen v. City of Mobile*, 466 F.2d 122 (5th Cir. 1972) (Goldberg, J., dissenting) (tests for promotion of police officers).

A sorting device would be invalid to the extent that it does not measure aptitude for a group of students, or is misused in creating classes not based on aptitude; in both cases the basis for separation is simply irrational. But a test need not be uniformly accurate to satisfy equal protection requirements. "That the test might not be an educationally valid one for a few individual children does not, and of itself, give rise to a constitutional deprivation." *Murray v. West Baton Rouge Parish School Bd.*, 472 F.2d 438, 444 (5th Cir. 1973). Erroneous, individual determinations, however, should be subject to due process review, see text accompanying notes 332-410 *infra*.

²⁶⁹ Michelman, *supra* note 83, at 8.

needs. The grounds on which school administrators defend sorting—its alleged benefits to both students and teachers—reveal no apparent racial motivation. And while prevailing sorting practices are widely and vigorously criticized, it is usually their inefficacy and not their racial effect that is noted.

Yet school sorting does in fact have significant racial consequences. It isolates—or, more accurately, tends to concentrate—minority children in certain less advanced school programs. While racial disproportionality does not characterize programs for students with readily identifiable handicaps²⁷⁰—classes for the trainable mentally retarded or the blind, for example—the proportion of minority students in school classifications whose efficacy has been questioned—assignment to special programs for the educable mentally retarded;²⁷¹ placement in slow learners' classes²⁷² and non-academic high school programs²⁷³—

²⁷⁰ In California, for example, 9.3% of the students are black; 13.1% of the physically handicapped and 12.4% of the trainable mentally retarded are black. Sixteen percent of the students are of Spanish surname; 14.6% of the physically handicapped and 19.2% of the trainable mentally retarded are of Spanish surname. CALIFORNIA STATE DEP'T OF EDUC., RACIAL AND ETHNIC DISTRIBUTION OF PUPILS IN CALIFORNIA PUBLIC SCHOOLS, FALL 1971, app., table 1 (1972).

²⁷¹ In California, for example, 26.7% of the EMR students are black; blacks constitute 9.3% of the student population. For students with Spanish surnames, the disproportionality is slightly less dramatic; 23.9% of EMR students, and 16.0% of all students, are of Spanish surname. A 1971 California statute asserts "that there should not be disproportionate enrollment of any socioeconomic, minority, or ethnic group pupils in classes for the mentally retarded . . ." CAL. EDUC. CODE § 6902.06 (West Supp. 1972).

In New York State, "segregated" school districts enroll 33.6% of black students in special classes, slightly more than their proportion of the school age population. In "desegregated" districts, however, 47.8% of the special education students are black, although blacks account for only 22.5% of the school age population. COST OF EDUCATION, *supra* note 30, at 9.27-9.29.

Plaintiffs in *Guadalupe Organization v. Tempe Elementary School Dist. No. 3*, Civ. No. 71-435 (D. Ariz., filed Aug. 9, 1971) (settled by consent decree Jan. 24, 1972), alleged that, while 17.78% of the District's schoolchildren are Mexican-American, 67.59% of the children assigned to EMR classes and 46.34% of the children assigned to classes for the trainable mentally retarded are Mexican-American.

See also J. JASTAK, H. MCPHEE & M. WHITEMAN, *MENTAL RETARDATION: ITS NATURE AND INCIDENCE* (1963); Mullen & Nee, *Distribution of Mental Retardation in an Urban School Population*, 56 AM. J. MENT. DEFICIENCY 777 (1952).

²⁷² *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd en banc sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). FINDLEY & BRYAN, *supra* note 20; Jones, Erickson & Crowell, *Increasing the Gap Between Whites and Blacks: Tracking as a Contributory Source*, 4 EDUC. & URBAN SOC. 339 (1972). A study by the U.S. Department of Labor found that, proportionally, whites are twice as likely as blacks to be in the college preparatory track.

On the relationship of social class and income to tracking, see P. SEXTON, *EDUCATION AND INCOME* (1961).

²⁷³ [W]ithin schools of similar racial compositions the program of study in which a student is enrolled has a strong influence on the chance that he will be in a majority white class. . . . [S]tudents in the college preparatory curriculum . . . are most likely to be in classes which are more than half white students. Those in vocational, commercial, or industrial arts programs are least likely to have mostly white classmates.

McPartland, *supra* note 13, at 96.

See also McPartland, *The Relative Influence of School and of Classroom Desegregation on the Academic Achievement of Ninth Grade Negro Students*, J. SOCIAL ISSUES, Summer, 1969, at 93 [hereinafter cited as *School and Classroom Desegregation*]. In Boston,

is typically two or three times greater than their proportion of the school-age population. Substantial minority overrepresentation in these programs is universally found, no matter who undertakes the inquiry: education researchers, litigants objecting to particular classification practices, even state departments of education. These findings indicate that ability grouping functions as a means of making respectable the procedures whereby pupils from lower socioeconomic and racial or ethnic minority groups are relegated to a basically inferior education. Observers of racially mixed schools frequently find that ability grouping is a means by which pupils are resegregated within the school²⁷⁴—a sharp contrast to the historical assertion that “[sorting] is not a social segregation. It is not a caste stratification.”²⁷⁵

The limited available evidence suggests that overrepresentation in these less advanced programs may be particularly hurtful to minority students. Although few studies have examined the racially specific harm of sorting,²⁷⁶ one reanalysis of *Equality of Educational Opportunity* did attempt to assess the impact of within-school segregation on the verbal achievement of black students. It concluded that while *school* integration does not benefit blacks, *classroom* integration does improve black students' test scores. “[C]lassroom desegregation has an apparent beneficial effect on Negro student verbal achievement no matter what the racial enrollment of the school.”²⁷⁷ Since proportionately more whites than blacks are assigned to higher tracks, advanced track placement does influence student success. But “the differences in verbal achievement between Negro students in mostly white classes and those in mostly Negro classes cannot simply be explained by selection processes which operate within the school.”²⁷⁸ Classroom

only 2.3% of the students in the elite Boston Latin School are black, while 23% of that city's school population is black. Putting the child in its place, *supra* note 26. A suit in San Francisco sought in part to challenge minority underrepresentation in that city's elite high school. *Berkelman v. San Francisco Unified School Dist.*, No. C-71-1875 (N.D. Cal., July 8, 1972) (defendant's motion for summary judgment granted) (motion for appeal filed Jan. 15, 1973).

²⁷⁴ See A.H. PASSOW, *supra* note 267.

²⁷⁵ H. RYAN & P. CRECELTIUS, *ABILITY GROUPING IN JUNIOR HIGH SCHOOLS* 1 (1927).

²⁷⁶ The special education and ability grouping research discussed in Section II was carried out either in white or racially unspecified communities, and thus is of limited relevance. Since *Equality of Educational Opportunity* provides student performance information for only one point in time, it is difficult to mine that richest of education data sources for evidence of the consequences of reassigning students from one group to another. Cf., e.g., Smith, *supra* 117, at 239, 313-15 (The Report does not tell scholars and policymakers “what will happen if they change the status quo.” (emphasis in original)).

²⁷⁷ *School and Classroom Desegregation*, *supra* note 273, at 102.

²⁷⁸ *Id.* Tracking decisions also appear to have more significant effects for blacks than whites. While half of all white children assigned to a college track actually enter college, only a third of whites in non-college tracks continue their education beyond high school. For blacks, the likelihood of college attendance is diminished even further by assignment to a non-college track. JENCKS, *INEQUALITY*, *supra* note 14, at 156-58 (1972).

segregation itself causes harm, for black students in fast as well as slow classes; classroom desegregation has racially specific benefits.

The United States Civil Rights Commission's reexamination of the Coleman data noted a subtler (and difficult to document) effect of within-school segregation: black students in nominally integrated schools, "accorded separate treatment, with others of their race, in a way which is obvious to them as they travel through their classes, felt inferior and stigmatized."²⁷⁹ The harm caused by between-school segregation appeared to the Commission far less substantial than the harm caused by within-school segregation: while between-school segregation resulted from the relatively impersonal criterion of neighborhood residence, within-school segregation was clearly caused by personal and pejorative judgments of ability.

Aptitude tests, the most frequently used facilitators of school sorting, also have harsher school impact on minority students than on whites. While psychologists define learning deficiency in terms of below-normal intellectual functioning and adaptive behavior (ability to cope in social situations), the classification approach employed in most schools considers only the first of these two criteria.²⁸⁰ One study found that, for white children, intelligence and adaptive behavior deficiencies coincided; however, 60 percent of all Mexican-American, and 91 percent of all black children whose intelligence rendered them vulnerable to the retarded label did demonstrate normal adaptive ability.²⁸¹ If they overcome the stigma of retardation, after school graduation these "quasi-retarded" minority children lead lives similar in important respects to their normal brethren. They are labeled retarded, and treated accordingly, only while in school.²⁸²

B. *Overrepresentation and the Constitution: Defining the State's Responsibility*

School sorting has two racially specific consequences: first, minority children are disproportionately assigned to less advanced school programs; second—and less clearly established—racial disproportionality has a particularly damaging impact on the attitudes and verbal achievement of minority students. The constitutional implications of these conclusions are not, however, self-evident.

Racial classifications typically run afoul of the Constitution if they

²⁷⁹ 2 U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 86-87 (1967).

²⁸⁰ Heber, *supra* note 255.

²⁸¹ Mercer, *Sociocultural Factors supra* note 36.

²⁸² *Id.* See also R. EDGERTON, *supra* note 139.

result either from explicit legislative mandate²⁸³ (as in the school desegregation cases)²⁸⁴ or from the discriminatory application of an apparently neutral legislative scheme.²⁸⁵ The efforts of formerly dual school systems to couple desegregation with the adoption of an ability grouping scheme embody the latter form of discrimination. In those instances, the motivation for initiating tracking is quite probably racial.²⁸⁶ The fact that segregated schools have typically provided black students with fewer school resources than their white classmates suggests that such discrimination would be likely to recur in an ability-grouped school. Since grouping inhibits school desegregation, it violates those districts' obligation to desegregate "at once."²⁸⁷ That segregated school districts historically offered an inferior education to black students does not justify maintaining such status differentials through the device of tracking. Thus, the Fifth Circuit has refused to consider plans which incorporate ability grouping, at least until southern districts have functioned for several years as unitary systems, free from the taint of racial discrimination.²⁸⁸

In most school systems, however, the overrepresentation of minority students in less advanced school programs stems neither from statutory command nor from discriminatory practice. It is, rather, an unintended consequence of a policy whose premises are meritocratic, not racial; the disproportionality is inadvertent.²⁸⁹ Such unintended disproportionalities have not been recognized by the courts as neces-

²⁸³ See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).

²⁸⁴ See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

²⁸⁵ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Cases concerning jury discrimination, see, e.g., *Turner v. Fouche*, 396 U.S. 346 (1970), and municipal services discrimination, see, e.g., *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), *aff'd en banc* 461 F.2d 1171 (5th Cir. 1972), have focused on discriminatory application of ostensibly neutral policies.

²⁸⁶ For two views of the importance of "motive" analysis in constitutional adjudication, see Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

²⁸⁷ *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (1969).

²⁸⁸ In *Johnson v. Jackson Parish School Bd.*, 423 F.2d 1055 (5th Cir. 1970), the school board "desegregated" its schools, while maintaining complete classroom segregation. Other tracking plans were rejected in *Lemon v. Bossier Parish School Bd.*, 444 F.2d 1400 (5th Cir. 1971); *Jackson v. Marvell School Dist. No. 22*, 425 F.2d 211 (8th Cir. 1970); *Singleton v. Jackson Municipal Separate School Dist.*, 419 F.2d 1211, 1219 (5th Cir. 1969), *connected cases vacated & rev'd*, 396 U.S. 226 (1969), 396 U.S. 290 (1970), *cert. denied in connected cases*, 396 U.S. 1032 (1970); *Moses v. Washington Parish School Bd.*, 330 F. Supp. 1340 (E.D. La. 1971). For a quite different approach, see Punke, *Competence as a Basis of Student Assignment*, 32 AIA. LAW. 24 (1971).

²⁸⁹ The possibility that tracking might produce such segregation apparently did not concern those who argued *Brown*. As Thurgood Marshall said: "I have no objection to academic segregation, only racial segregation. If they want to put all the dumb ones, white and black, into the same school that is fine, provided they put all the smart ones, white and black, into the same school." J. PELTASON, *FIFTY-EIGHT LONELY MEN* 112 (1961).

sarily stating a valid cause of action under the equal protection clause. In *Jefferson v. Hackney*,²⁹⁰ the Supreme Court was confronted with the contention that Texas' welfare policy was constitutionally suspect because it provided a less adequate subsidy for the Aid for Dependent Children (AFDC) program, whose beneficiaries were primarily black, than for welfare programs whose recipients were primarily white. The contention was characterized, and dismissed, as a "naked statistical argument."²⁹¹

In many instances, such curt treatment of claims premised solely on disproportionate racial impact seems proper. Except for those rare governmental actions which treat all persons uniformly, every statute classifies on some basis. And in all save the statistically freakish instance, an inadvertent consequence of that classification will be racial: for example, government-subsidized research on the causes of sickle cell anemia is of primary concern to blacks; in a residentially segregated city, some municipal bus routes will attract more black passengers while others carry mostly whites. Surely such effects do not call for the "compelling" state justification demanded where racial discrimination can be proved.

Yet in considering the racial consequences of school sorting, the *Jefferson* standard is inappropriate for several reasons. Regardless of the presence or absence of racial motivation, the disproportionate impact of school sorting links race with education. Courts have long recognized the harm done by state-mandated school segregation. Student classification does pose legal questions different from the run of desegregation cases. What differentiates school sorting is not the fact of harm—indeed, the evidence that within-school desegregation is educationally damaging is, if anything, stronger than the "inherent" or empirically demonstrated harm upon which *Brown* rests—but the nature of the state's responsibility in the two cases. Yet judicial inquiry involves more than blame-attaching; it also attends to the fact of harm.

The expansive view of state responsibility for school segregation adopted by several northern federal courts may be premised on just such considerations. Those courts have looked at the racial consequences of ostensibly neutral policies—school boundary-setting, construction, teacher assignment and the like—and have been willing to infer state action from a finding of racially isolating effect.²⁹² They suggest that a school district may be held to answer for the foreseeable

²⁹⁰ 406 U.S. 535 (1972).

²⁹¹ *Id.* at 548. See also *Copeland v. School Bd.*, 464 F.2d 932 (4th Cir. 1972), which rejects the contention that racial disproportionality in special schools for the retarded is on its face unconstitutional.

²⁹² *Davis v. School Dist.*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971);

consequences of its actions (and even its failure to act).²⁹³ What makes these decisions defensible is not the legal legerdemain which converts inaction into action, color blindness into culpability, but the fact that segregation, whatever its source, may inflict real and perceived injury.

The educational harm caused by disproportionate placement of minority students in the least advanced of educational programs is in part racially specific. That proportionately more blacks than whites populate the lower tracks and special education classes has more than statistical significance. If the reanalyses of the *Equality of Educational Opportunity* data and the evaluations of aptitude test impact are to be credited, such assignments affect blacks more harshly than they do whites; the injury has racial connotations. That fact distinguishes school sorting from such governmental actions as the Texas welfare policy affirmed in *Jefferson* which, while hurting more blacks than whites, hurts the individual black no more than his white counterpart.²⁹⁴

The argument that minorities deserve special judicial solicitude because of their vulnerability to majoritarian abuse,²⁹⁵ so frequently advanced in cases involving racial discrimination, assumes particular force in the context of school classifications. Track assignment (unlike, for example, welfare roll-trimming) is not a general, public decision around which the far from voiceless black political leadership can coalesce.²⁹⁶ It is, in form if not in fact, not a political issue at all but an individual judgment of intellectual worth which the black parent feels particularly powerless to challenge. As the House Committee on Education and Labor noted:

Johnson v. San Francisco Unified School Dist., 339 F. Supp. 1315 (N.D. Cal. 1971); Bradley v. Milliken, 433 F.2d 897 (6th Cir. 1970).

²⁹³ When the power to act is available, failure to take the necessary steps so as to negate or alleviate a situation which is harmful is as wrong as is the taking of affirmative steps to advance that situation. Sins of omission can be as serious as sins of commission.

Davis v. School Dist., 309 F. Supp. 734, 741-42 (E.D. Mich. 1970), *aff'd*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971). For a general discussion of these cases, see Dimond, *supra* note 3.

²⁹⁴ The racially specific effect argument is generally discussed in Goodman, *supra* note 88, 298-320.

²⁹⁵ The source of this argument remains United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938):

[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

That the claims of minorities do not always entitle them to such protection is made clear in *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971), where the Supreme Court characterized black voters' claims of election district discrimination as embodying the disappointment of political losers, not warranting judicial intervention.

²⁹⁶ For a discussion of such organizational efforts, see Kirp, *Has Organizing Survived the 1960's?*, SOCIAL POLICY, Nov./Dec. 1972, Jan./Feb. 1973, at 44.

Parents, according to printed policy, have always had the right to protest the placement of their children Relatively few did, or do, however. Most parents of poverty area [and black] pupils would feel themselves incapable of arguing the point, even if they are aware of it.²⁹⁷

These factors—that racially disproportionate sorting practices do plausible educational harm and affect a vulnerable minority—suggest that judicial attention is properly directed to the phenomenon. Once significant racial disproportionality has been shown, a school district should be obliged to demonstrate that its classifications serve substantial independent educational purposes.

Taken together, however, these arguments for judicial involvement do not stress discrimination against minority students, as compared with their white counterparts, but rather speak to the deprivation attributable to racial overrepresentation.²⁹⁸ This focus on deprivation, not discrimination, has several noteworthy implications. It shifts the analysis from blame-fixing to problem-solving, and thus is less attentive to the causes of injury. It renders of limited utility the prima facie case approach,²⁹⁹ which fastens on evidence of disproportionate racial impact (with respect to the provision of municipal services, for example³⁰⁰) as presumptively demonstrating racial discrimination, substituting an inquiry into the consequences of a school policy which isolates minority students in particular school programs.³⁰¹ And it implies that providing identical schooling experiences for minority and white chil-

²⁹⁷ TASK FORCE ON JUVENILE DELINQUENCY AND YOUTH CRIME, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 241 (1967). Challenges to the testing practices on which assignment to slow track or EMR classes are premised identify the potential for abuse, however inadvertent the cause. In every suit challenging such placements, individual retesting of adversely classified children revealed substantial underestimation of minority students' ability. In *Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972), for example, each of the plaintiff children who had been assigned to an EMR class scored significantly above the 75 IQ cutoff point when retested.

Since classification policies are made by the schools, school officials are in far better position than parents to explain those policies; that fact also justifies imposing the explanatory burden on the school.

²⁹⁸ The distinction is made by Professor Michelman in discussing revenue-expenditure practices and their impact on the poor, unable by virtue of their poverty "to protect against certain hazards which are endemic in an unequal society." Michelman, *supra* note 83, at 9. Michelman does not discuss racial questions, many of which are doubtless best understood in discrimination terms. See, e.g., *Brunson v. Board of Trustees*, 429 F.2d 820, 824-26 (4th Cir. 1970) (Sobeloff, J., concurring).

²⁹⁹ This approach is described in Fessler & Haar, *supra* note 128; Dimond, *supra* note 3, at 4-11. For a treatment of the racial overrepresentation question in terms of the prima facie analysis, see Sorgen, *Testing and Tracking in the Public Schools*, 24 *HASTINGS L. J.*—(forthcoming: Apr., 1973).

³⁰⁰ See cases cited note 285 *supra*.

³⁰¹ This approach qualifies the often-quoted assertion that "figures speak, and when they do, Courts listen." *Brooks v. Beto*, 366 F.2d 1, 9 (5th Cir. 1966). If figures—in this case, racial disproportionality data—do "speak," they do so with real ambiguity, resolvable only by looking behind the figures to an understanding of their social effects.

dren might be constitutionally appropriate only if such evenhandedness promises to overcome the deprivation upon which the judicial inquiry is premised. Analysis couched in deprivation terms is, in short, necessarily more fully attentive than traditional approaches to the problem posed by racial overrepresentation in a given school program.

Allegations of disproportionate racial impact in education and employment, couched in deprivation terms, have prompted several courts to shift the burden of demonstrating the efficacy of the classifying device to those responsible for implementing it.³⁰² However, the analyses set forth in these cases are of limited utility because the courts, while tacitly accepting the deprivation theory for the purpose of shifting the burden of proof, continue to stress discrimination and the traditional equal protection analysis when determining what showing that burden requires.

To Judge J. Skelly Wright, for example, "the fact that those who are being consigned to the lower tracks are the poor and the Negroes" was a "precipitating cause" of the *Hobson v. Hansen* inquiry into the workings of the Washington, D.C., track system.³⁰³ Although the District of Columbia had initiated tracking shortly after it was ordered to dismantle its dual school system, *Hobson* did not treat the grouping scheme as racially motivated. Yet lack of evil motive did not exonerate the school system. As the court declared, "the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."³⁰⁴ That black children were most likely to be placed in the slowest programs revealed to the court "unmistakable signs of invidious discrimination" which demanded explanation.³⁰⁵

While racial overrepresentation provides adequate grounds for judicial scrutiny of school policy, the particular burden imposed in *Hobson* seems inappropriate.

Since by definition the basis of the track system is to classify students according to their ability to learn, the only explanation defendants can legitimately give for the pattern of classification found in the District schools is that it does reflect students' abilities. If the discriminations being made are founded on anything other than that, then the whole pre-

³⁰² See, e.g., *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972) (employment); *Chance v. Board of Examiners*, 458 F.2d 1167, 1176 (2d Cir. 1972) (same); *Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972) (education); cf. *Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1665 (1969).

³⁰³ 269 F. Supp. 401, 513 (D.D.C. 1967).

³⁰⁴ *Id.* at 497.

³⁰⁵ *Id.* at 513.

mise of tracking collapses and with it any justification for relegating certain students to curricula designed for those of limited abilities.³⁰⁶

The critical word here is "ability." If the court is referring to present level of proficiency, then reliance on aptitude tests to classify students might well be rational. *Hobson*, however, equates ability with "innate capacity to learn," and correctly concludes that aptitude tests do not reveal such inherited traits.³⁰⁷ But few school officials would ever claim to base sorting decisions on grounds of innate capacity. The premise of tracking (and classification generally) is that, whatever the source of the differences, students with particular and varied learning styles and abilities require the special assistance that only a differentiated curriculum can offer. That premise does not countenance "discrimination," except in the non-pejorative (and non-legal) use of that word. Whether or not classification does serve those varied needs, or indeed has any educational consequences, is the crucial question for one concerned with school-caused deprivation. But the *Hobson* court's analytic missteps—equating ability with innate characteristics, and stressing discrimination rather than deprivation—prevented it from confronting the question. The remedy which followed from the court's analysis—the abolition of tracking—was quite possibly unresponsive to the problem at hand.

A similar analytic pattern—using deprivation analysis to shift the burden of proof, but relying on disguised discrimination analysis to define that burden—has been applied in an employment examination case. In *Chance v. Board of Examiners*, a suit challenging competitive examinations for school supervisory positions on the ground that the tests had "significant and substantial" differential racial impact, the court of appeals found that a prima facie case of discrimination had been established.³⁰⁸ The court struggled to define the nature of the discrimination, characterizing it as invidious but de facto, rejecting the argument that such conduct should be treated in the same manner as intentional discrimination. Nonetheless, the court upheld the claim of minority applicants, concluding that New York City had failed to demonstrate that the supervisory exams were rationally related to job performance.

The silliness of the particular test—which asked, among other

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 514.

³⁰⁸ *Chance v. Board of Examiners*, 458 F.2d 1167, 1175-76 (2d Cir. 1972); cf. *Armstead v. Starkville Municipal Separate School Dist.*, 461 F.2d 276 (5th Cir. 1972).

things, who killed Cock Robin and which character in the *Mikado* sang *I've Got a Little List*—left it vulnerable to ridicule.³⁰⁹ Yet the “heavy burden of proof” imposed by the court indicates that more than a rational defense was in fact demanded.³¹⁰ The competitive examination might well have been defended as more objective, and more likely to predict job performance, than other alternatives. Such a showing would not have satisfied the court, which concluded that the benefits to the school system of such examinations did not outweigh the harm done to minority job applicants, whose job qualifications the test could not effectively assess.³¹¹ The constitutional standard explicitly adopted in *Castro v. Beecher*³¹²—“[T]he public employer must . . . demonstrate that the means [of applicant selection] is in fact substantially related to job performance”³¹³—seems at once more fitting, and a more candid statement of the burden of proof actually applied in *Chance*.³¹⁴

In *Larry P. v. Riles*,³¹⁵ a suit challenging San Francisco's special education assignment policy as racially biased, the district court asked only that school personnel provide a “rational” defense of their classification procedure. But in *Larry P.*, as in *Chance*, the inquiry was far more exacting than that typically associated with the requirement of mere rationality. The court asserted that intelligence tests were the primary criterion for placement in classes for the educable mentally retarded, dismissing evidence that those examinations were but one of several bases on which placement decisions were made.

More significantly, the court rejected school officials' remarkably candid statement that “the tests, although racially biased, are rationally related to the purpose for which they are used because they are the best means of classification currently available.”³¹⁶ While “the best . . . available” seems readily equatable with rational practice, the court

³⁰⁹ The test is exhaustively evaluated in the district court opinion, 330 F. Supp. 203, 220-23 (S.D.N.Y. 1971).

³¹⁰ 458 F.2d 1167, 1177 (2d Cir. 1972).

³¹¹ The court did not determine whether a “compelling interest test” was applicable. Such a test would have required a showing that less discriminatory means were not available, even if the examination were found to be job-related. The court indicated, however, that the application of such a strict test to a case such as this, in which the discrimination was unintentional, would have gone beyond present Supreme Court precedent. *Id.*

³¹² 459 F.2d 725 (1st Cir. 1972).

³¹³ *Id.* at 732.

³¹⁴ *Cf. Baker v. Columbus Municipal Separate School Dist.*, 462 F.2d 1112, 1115 (5th Cir. 1972) (footnote omitted): “When a test has a valid function [in distinguishing among the quality of faculty applicants] and is fairly applied to all teachers, it outweighs the fact that it may result in excluding proportionally more blacks than whites.” See also *United States v. Texas Educ. Agency*, 459 F.2d 600 (5th Cir. 1972).

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

³¹⁶ *Id.* at 1313.

redescribed the issue, in effect penalizing the school authorities for their candor. "[T]he absence of any rational means of identifying children in need of such treatment can hardly render acceptable an otherwise concededly irrational means, such as the IQ test as it is presently administered to black students."³¹⁷

The fact that other bases for grouping students—such as achievement tests, teacher recommendations, and psychological evaluations—exist does not, as the court implied, automatically render the measures employed in San Francisco irrational. None of these alternatives is self-evidently preferable to intelligence testing. The standard of review adopted in *Chance* and *Larry P.* is both different from and more demanding than the courts' focus on rational school behavior indicates.³¹⁸ Both decisions in fact call for a demonstration that the classifying device used has real benefits—that it can predict job competence or student performance—which justify its continued use.

Applying this standard to the racially disproportionate classifications themselves, the burden appropriately placed upon the school is to show that its classifications actually serve a "substantial educational purpose"—that they provide real benefits for the affected students.

C. Applying the "Substantial Educational Purposes" Standard

1. The School's Burden of Proof

Requiring school officials to demonstrate the benefits associated with particular classifications that have racially specific adverse effects poses many of the same judicial dilemmas that a non-racial challenge to tracking might create. While the situations can be distinguished—an added element of harm has been introduced in the racial case; the inquiry is relatively more bounded, less readily converted into a challenge to all school differentiations—the problems noted in Section II, notably those of proof and of remedy, persist.

School officials will have a difficult time establishing that placement in a slow track or special class for the mildly retarded or disturbed does in fact make good its promise of improving school performance. Existing evidence simply does not support the proposition.³¹⁹ Thus, the "benefit" that the present system provides is more candidly described in terms of teachers' (and school bureaucrats') needs. While the needs of schoolmen assuredly must be kept in mind if a court decision is to

³¹⁷ *Id.*

³¹⁸ The courts' approach in these cases resembles the "means scrutiny" formulation of equal protection in *Gunther*, *supra* note 87. The school or employer's behavior would not be rational merely because there were no better methods available; rather, the means would have to be justified by showing "an affirmative relation between means and ends." This would be, "to a large extent . . . an empirical inquiry." *Id.* 47.

³¹⁹ See notes 59-65 *supra* & accompanying text.

be implemented in fact, one can readily imagine educationally promising reform—less restrictive alternatives, if you will—which would not produce either new crises in the classroom or administrative chaos.

School officials might construct a quite different argument, one which sought to prove that blacks are genetically inferior to whites, thus justifying minority overrepresentation in slow classes. *Hobson's* analysis of "legitimate" classifying criteria clearly contemplates such a justification.³²⁰ For political reasons, such an argument will rarely if ever be voiced in a courtroom. The more interesting question, however, is not whether the position is actually advanced but whether it is correct.

The scanty evidence that exists does not support the proposition of genetic racial inferiority. The heredity-environment relationship remains an unfathomable chicken-egg puzzle, even after the furore created by inquiries into the influence of heredity on tested measures of aptitude.³²¹ How the influence of each factor is felt, the nature of the interaction between them; these questions simply lack answers. The evidence that does exist—concerning IQ differences between identical twins reared apart, for instance—can be read in a host of ways.³²² Heritability estimates "tell us almost nothing about differences between specific individuals, almost nothing about differences between social groups, and rather little about populations."³²³ For those reasons, it is impossible to know what to make of the consistently reported finding that the average white child scores about 15 points higher on standardized tests than the average black child.³²⁴

[The research] difficulties derive from the fact that an individual's genes can and do influence his environment. In a certain sense, both sides [those who favor genetic explanations of I.Q. disparities and those who favor environmental explanations] agree that genes account for the difference between black and white test scores; they simply disagree about the extent to which environment is also involved. One side argues that the genes that cause dark skin thereby influence

³²⁰ *Hobson v. Hansen*, 269 F. Supp. 401, 513 (D.D.C. 1967) *aff'd en banc sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

³²¹ See, e.g., Jensen, *supra* note 70; Shockley, *Dysgenics, Geneticity, Raceology: A Challenge to the Intellectual Responsibility of Educators*, 53 *PHI DELTA KAPPAN* 297 (1972); Shockley, *A Debate Challenge: Geneticity is 80% for White Identical Twins; I.Q.'s*, 53 *PHI DELTA KAPPAN* 415 (1972). But cf. Hunt, *Has Compensatory Education Failed? Has It Been Attempted?*, 39 *HARV. EDUC. REV.* 278 (1969); Cronbach, *Heredity, Environment, and Educational Policy*, 39 *HARV. EDUC. REV.* 338 (1969); Stinchcombe, *Environment: The Cumulation of Effects Is Yet to be Understood*, 39 *HARV. EDUC. REV.* 511 (1969).

³²² Cohen, *supra* note 179, at 52-53.

³²³ JENCKS, *INEQUALITY*, *supra* note 14, at 68-69.

³²⁴ *Id.* 142.

opportunities and incentives to learn. The other side argues that the genes that cause dark skin . . . influence how much an individual learns from his environment. There is no way to resolve such disagreement in the foreseeable future.³²⁵

That recital of unknowns suggests that only a court seeking confirmation of previously held biases could, on the basis of existing knowledge, endorse the heredity-inferiority approach.³²⁶

And even if the genetic inferiority of non-whites were accepted by a court, it does not necessarily follow that the isolation of these students is an efficacious means of minimizing inherited handicaps. In focusing on deprivation, not discrimination, blaming becomes irrelevant. We care less about why something happens than about what can be done to diminish the resulting injury. Similarly, while black children may grow up in an environment less conducive to schooling success than their white counterparts, that fact surely does not argue for the wisdom of assigning minority students to school programs that only reinforce racial stereotyping, while not providing offsetting benefit.³²⁷

In sum, the "substantial educational purposes" test imposes a heavy burden on school officials, who are obliged to show that slow learner and special classes can overcome those existing educational deprivations that correlate with the racial grouping. Unless such benefit can be established, significant racial overrepresentation should be constitutionally indefensible.

2. The Problem of Remedy

But what can be done to remedy the deprivation? The seeming intractability of what economists term the "education production func-

³²⁵ *Id.* 82-83.

³²⁶ *Stell v. Savannah-Chatham County Bd. of Educ.*, 220 F. Supp. 667 (S.D. Ga. 1963), *rev'd*, 333 F.2d 55 (5th Cir.), *cert. denied*, 379 U.S. 933 (1964), a school desegregation suit, turns directly on the issue of heredity and intelligence. The district court, accepting the conclusion that "the differences in educability between Negro and white children were inherent," *id.* at 672, ordered a tracking plan "based on racial traits directly concerned with proficiency and mental health." *Id.* at 681. While recognizing that some blacks might be capable of doing advanced work, the court insisted upon total racial segregation, arguing that selective integration would cause even greater psychological harm than would total integration, for blacks as a group would be deprived of their most promising members. *Id.* at 684. When that decision was reversed by the Fifth Circuit, the district court then ordered the adoption of a tracking scheme under which a student's class assignment would be based solely on tested ability. 255 F. Supp. 88 (S.D. Ga. 1966), *rev'd*, 387 F.2d 486 (5th Cir. 1967). The court of appeals again reversed:

The order of the trial court directing the Board of Education to assign its pupils according to intelligence tests was beyond the power of the court. No person has the constitutional right to attend schools in classes which are divided according to ability or intelligence quotients.

387 F.2d at 491.

³²⁷ Quite different questions are raised by racial isolation sought by the minority community, and accompanied both by minority control over school governance and by educational programs tailored to the needs of that community. *See, e.g., Kirp, Community Control, Public Policy, and the Limits of Law*, 68 MICH. L. REV. 1355 (1970).

tion"—how to manipulate school resources in a manner which affects student performance—differentiates education from most state-supported activities. Where, for example, discrimination in the provision of municipal services or representation on jury rolls has been proved, the problem in effect defines its own remedy: equalize services, assure minority representation on juries. But no such straightforward relationship between problem and resolution exists for school sorting. It is, in other words, easier to identify the problem than the remedy.

That fact argues against the adoption of a remedial approach which limits the school systems' options by seizing upon a single solution as necessarily appropriate. A racial quota system for school classifications or court-ordered abolition of sorting are equally misguided remedies, albeit for different reasons.

In *Larry P.*, plaintiffs proposed a racial quota standard, "whereby the percentage of black students in EMR classes could exceed the percentage of black students in the school district as a whole by no more than fifteen per cent."³²⁸ That approach is undesirable,³²⁹ for it embraces and sustains existing classifications whose pedagogical benefits are at best dubious. To the arbitrariness of existing sorting practice it adds another level of arbitrariness, responding not to educational differences but to statistical nicety.³³⁰

To require wholesale randomization of classes seems equally unwise. In a given sixth grade class, the most advanced may be reading at a ninth grade level, the slowest at a third grade pace; a uniform curriculum could not hope to confront such variation. It is tempting, but incorrect, to jump from the assertion that existing classifications mislabel and miseducate students to the remedy of doing away with all efforts to identify and intelligently address differences among students.

Judicial insistence on a modification of existing classifications, which seeks both to reduce racial overrepresentation in less advanced groups and to secure greater flexibility in grouping, represents a far

³²⁸ 343 F. Supp. 1306, 1314 (N.D. Cal. 1972).

³²⁹ Under such a standard, whether a school policy was constitutionally permissible would turn in part on whether significant numbers of white children opted out of the public school system.

³³⁰ In *Johnson v. San Francisco Unified School Dist.*, 339 F. Supp. 1315 (N.D. Cal. 1971), the court in its final order enjoined the district from: "Authorizing, permitting or using tracking systems or other educational techniques or innovations without effective provisions to avoid segregation." A racial quota system would presumably be permissible, since it would not "defeat the objectives of integration." *Id.* at 1325-26.

Notwithstanding that judicial imposition of such statistical remedies would be unwise, a court might well be obliged to accept such solutions if proposed by the school. Removal of the racial disproportion, even though accomplished by arbitrary means, alleviates the constitutional infirmities discussed at text accompanying notes 292-307 *supra*, although it raises questions similar to those discussed in Section II, *supra*.

better approach. That standard leaves the school district free to adopt a variety of grouping alternatives taking account of varied student needs, while not locking students into a tracked strait jacket. Given the existing uncertainty concerning the causes and cures of this particular deprivation, the command of reconsideration and flexibility has considerable virtue.

In rethinking and reconstructing its classification system, the school district should focus on three variables, linking remedial efforts in all three areas to develop a more rational and constitutionally justifiable system. First, gross extremes of racial separation should be reduced. Outside of the classroom, in those aspects of school life that are more social than academic (for example, assemblies, athletic events, lunch periods), efforts should be made to promote social mixing.

The second variable is the need for flexibility in the tracking scheme itself. Classification decisions should be based on criteria broader than the usual standardized tests; adaptive behavior, for example, should be taken into account. Placement of students should be reviewed frequently, to allow greater mobility. Cross-track integration in those areas that the tests do not measure—music, art, physical education—will increase this flexibility. In the higher grades, testing and tracking by subject, rather than by general ability, will render the structure more rational, while increasing the possibilities of in-class mixing. Larger school systems might consider adopting “stratified heterogeneous grouping,” which reduces ability disparities within any given classroom, or team teaching with flexible grouping.³³¹

Assuming that some classes will remain predominantly segregated, attention should be focussed on relieving educational deprivation within the minority-dominated tracks. The most obvious step would be to increase the per student allocation of educational resources in the lower tracks. But the educational benefits of such action remain unclear. Alleviation of racially (or culturally) specific deprivation may require something beyond “more resources”—the need may be for different resources. Culturally sensitive pedagogical techniques, analogous to the creation of Spanish-language classes for Mexican-Americans, may be employed. The use of pedagogical methods geared to the differences in minority learning patterns and cultural background, if combined with efforts to increase integration and create a more flexible system, should satisfy the “valid educational purposes” test.

“Modification” is a vague remedial standard, until given substance by a school district plan. It would not necessarily eliminate all instances

³³¹ FINDLEY & BRYAN, *supra* note 20, at 84-87, describes these and other alternative schemes.

of racial disproportionality; indeed, it would not be designed to do so. While a modification approach encourages a school system to adopt a sorting scheme which fixes less pronounced labels on students, it does not pretend to remove all stigma. Yet modification of school classifications, if undertaken with an eye to integrating minorities into the life of the school, might well benefit both the school and the minority student upon whom the preponderant burden of adverse classification presently falls, thus responding to the problems associated with racial overrepresentation.

IV. CLASSIFICATION AND DUE PROCESS

[S]ubstantive rights are involved when the legality of government action is tested. It would be difficult indeed to determine whether a set of procedures fulfills the requirements of due process without answering the questions: What rights are placed in jeopardy here? How much protection do they need or merit? . . .

. . . Any procedure . . . may affect the allocation of substantive rights, but some procedures determine the rights themselves. At that point, the relation between substantive and procedural aspects of due process becomes intimate indeed.³³²

A. *The Constitutional Command of Fairness*

The due process clause of the Constitution, which declares that "no state shall . . . deprive any person of life, liberty, or property, without due process of law," states a command to the government: act fairly. There is no attempt in the language of the clause to define what fairness means in particular situations. As the Supreme Court has observed:

"Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.³³³

The openendedness of the due process requirement, while contemplating the exercise of discretionary justice tailored to individual circum-

³³² P. SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 256 (1969).

³³³ *Hannah v. Larche*, 363 U.S. 420, 442 (1969). The elusiveness of the due process requirement has often been noted by the Supreme Court. *See, e.g.*, *Jenkins v. McKeithen*, 395 U.S. 411, 426 (1969) (quoting *Hannah*); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring).

stances, does not countenance arbitrariness.³³⁴ It elevates the idea of rational governmental behavior to the status of a constitutional requirement, imposing rational form (if not rationality) on governmental action.³³⁵

That some procedural safeguards should attach to the provision of public education is by now well-settled law.³³⁶ While much of the case law concerns school discipline, several recent decisions have required that students be afforded procedural protection prior to such basic changes in their status as assignment to slow learner groups or special education programs, or school exclusion.³³⁷ The appropriateness of applying such safeguards is premised on factors discussed earlier in this Article: the educational effect of these decisions,³³⁸ the possibility of arbitrary decisionmaking and consequent misjudgment, and the stigma that these adverse classifications convey.³³⁹ The nexus between educational injury and arbitrariness on the one hand, and loss of liberty or property on the other, is both straightforward and constitutionally familiar. The link between stigmatization and the necessity of procedural protection is less obvious, and for that reason requires some amplification.

The law seeks to regulate stigmatizing conduct in a variety of ways. The law of defamation, for example, punishes statements which injure reputation. It defines those injuries, as stigma has been defined here, in relational terms.³⁴⁰ "What is the reason why saying a man

³³⁴ See, e.g., *Holmes v. New York City Housing Authority*, 398 F.2d 262, 265 (2d Cir. 1968) ("It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program . . . would be an intolerable invitation to abuse."). See generally K. DAVIS, *DISCRETIONARY JUSTICE* (1969).

³³⁵ *Greene v. McElroy*, 360 U.S. 474, 506-08 (1959); cf. *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 866, 894-99 (1969).

³³⁶ See, e.g., *Williams v. Dade County School Bd.*, 441 F.2d 299 (5th Cir. 1971); *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961); *Banks v. Board of Pub. Instr.*, 314 F. Supp. 285 (D. Fla. 1970), vacated, 401 U.S. 988 (1971).

The Supreme Court's willingness to expand the constitutional rights of nonadults is apparent in the landmark cases of *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) (free speech) and *In re Gault*, 387 U.S. 1 (1967) (juvenile court procedure).

Non-education cases upholding the right of prior review include *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957).

³³⁷ *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) (consent decree); *Stewart v. Phillips*, Civ. No. 70-1199-F (D. Mass. 1971) (order denying defendant's motion to dismiss complaint which sought, in part, prior hearing for children classified as retarded); *Marlega v. School Bd. of Directors*, C.A. No. 70-C-8 (E.D. Wis. 1970) (temporary restraining order). But cf. *Madera v. Board of Educ.*, 267 F. Supp. 356 (S.D.N.Y.), rev'd, 386 F.2d 778 (2d Cir. 1967), cert. denied, 390 U.S. 1028 (1968).

³³⁸ See, e.g., text accompanying notes 95, 105-09 *supra*.

³³⁹ See text accompanying notes 124-51 *supra*.

³⁴⁰ See Green, *Relational Interests*, 31 ILL. L. REV. 35 (1936). The concept of "in-

has the leprosy or plague is actionable? It is because the having of either cuts a man off from society"³⁴¹ Defamation actions serve two quite different social purposes. They provide the aggrieved individual both an opportunity for monetary recoupment for the injury to reputation and a public forum to test the justness of the stigma. Defamation law does not, however, reach discretionary governmental action. That exemption, couched in terms of judicial or legislative privilege, presumably leaves government free to conduct its business in more intrepid fashion.³⁴²

Yet courts do examine governmentally imposed stigmas. Review of stigma creation is but a different way of describing the familiar process of judicial scrutiny of those classifications which are asserted to violate equal protection guarantees.³⁴³ Review of stigma imposition describes judicial inquiry into the process by which a particular label (which may or may not be otherwise constitutionally offensive) came to be applied to a particular individual. The theory underlying insistence upon appropriate procedural protection before the government imposes stigma, or otherwise deprives a person of liberty or property, is relatively straightforward: the process is designed to guard against thoughtless or arbitrary governmental action.³⁴⁴ Two recent Supreme Court decisions—*Wisconsin v. Constantineau*³⁴⁵ and *Board of Regents v. Roth*³⁴⁶—make explicit the tie between governmental stigma and the due process requirement.

Acting pursuant to Wisconsin law, which permits designated officials to forbid the sale of liquor to one who "by excessive drinking" poses a problem for family or community,³⁴⁷ the Hartford, Wisconsin police chief sent a notice to all local retail liquor stores, forbidding them to sell or give liquor to Norma Grace Constantineau. The Wisconsin statute provided for no hearing prior to the officially imposed prohibi-

jury to reputation" has been broadly viewed, to include, for example, imputations of insanity, *Kenney v. Hatfield*, 351 Mich. 498, 88 N.W.2d 535 (1958), and poverty, *Katapodis v. Brooklyn Spectator, Inc.*, 287 N.Y. 17, 38 N.E.2d 112 (1941).

³⁴¹ *Villers v. Monsley*, 2 Wilson 403, 404, 95 Eng. Rep. 886, 887 (K.B. 1769). For a good review of the sociology of deviance and stigmatization, which treats the issue in relational terms, see D. MATZA, *BECOMING DEVIANT* (1969).

³⁴² See W. PROSSER, *LAW OF TORTS* § 115 (4th ed. 1971).

³⁴³ In this light, it is instructive to recall that *Brown* strikes down state-imposed segregation in part because segregation "generates a feeling of inferiority . . . that may affect [children's] hearts and minds in a way unlikely ever to be undone." 347 U.S. 483, 494 (1954).

³⁴⁴ See, e.g., *Greene v. McElroy*, 360 U.S. 474 (1959); *Holmes v. New York City Housing Auth.* 398 F.2d 262 (2d Cir. 1968).

³⁴⁵ 400 U.S. 433 (1971).

³⁴⁶ 408 U.S. 564 (1972).

³⁴⁷ Law of Feb. 2, 1934, ch. 13, § 176.26, [1933-34 Spec. Sess.] Wis. Laws 39 (repealed 1972) (last codified as Wis. STAT. ANN. § 176.26 (1969)).

tion, and none was held; that fact, the Court concluded, rendered the statute constitutionally defective.

Constantineau does not question the right of states to protect themselves against public drunkenness. It concludes instead that such a label is a "badge of infamy" which the state may not attach without first providing an opportunity for challenge. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."³⁴⁸

Two aspects of this brief opinion bear mention. First, it is government action (in the Court's colloquial phrase, "what the government is doing to him") that brings into play the due process requirement. Second, *Constantineau* reflects the importance that courts have traditionally attached to procedural fairness as a necessary check on governmental power. "It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat."³⁴⁹

The *Roth* decision, while rejecting the contention that a non-tenured university faculty member is routinely entitled to a hearing before being dismissed at the end of a one-year appointment, recognized that in certain circumstances the injury caused by contract nonrenewal warrants procedural protection.

The State . . . did not make any charge against him that might *seriously damage his standing and associations in his community*. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. . . .

[T]here is no suggestion that the State . . . imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.³⁵⁰

The circumstances most clearly envisioned by the *Roth* dicta emphasize moral accusations; the "disabilities" the Court mentions seem centered on absolute bars to future state employment. Yet, if the label "alcoholic," or dismissal clouded by allegations of dishonesty, stigmatize, the argument for treating similarly the adverse school classifications which have equally devastating social and economic effects assumes considerable force.

To the child and his family, the fact that certain decisions previously left to the discretion of the school are subject to review and

³⁴⁸ 400 U.S. at 437.

³⁴⁹ *Id.* at 436.

³⁵⁰ 408 U.S. 564, 573 (1972) (emphasis added).

challenge should matter considerably. Proceduralization makes the school's decision appear more fair—if only because the bases of the decision are shared and not secret³⁵¹—and minimizes the possibility that school discretion will be abused. As Professor O'Neil notes:

Fair procedures . . . are essential because . . . few men are angels. Even the few government administrators who have achieved this state of grace occasionally make mistakes. The average bureaucrat strays more often.³⁵²

And proceduralization increases the likelihood of educationally sound decisions, for the exercise of review forces school officials regularly to reexamine both the premises and conclusions of sorting. In that sense, due process functions as a truth-seeking device, the legal analog of the scientific method.³⁵³

In this setting, the real significance of due process lies not in the recognition that school sorting is too consequential to be undertaken arbitrarily, but in the scope of procedural protection that courts conclude is appropriate. The mere existence of something called a hearing says nothing about the rules governing the inquiry, or the likelihood that a particular showing will yield a given outcome—and those issues frame the real points of contention.³⁵⁴ To wax rhapsodic about due process without providing either context or content for the concept risks elevating principled means above just ends.³⁵⁵

In determining precisely what due process should mean in this particular context, courts are obliged to balance the needs and interests of several concerned parties. This balancing exercise is a familiar one to courts, and distinguishes the request for procedural protection

³⁵¹ See, e.g., Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406 (1957); Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969).

³⁵² R. O'NEIL, *supra* note 129, at 301.

³⁵³ See Foster, *Social Work, the Law and Social Action*, 45 SOCIAL CASEWORK 383, 386 (1964). O'Neill, *Justice Delayed and Justice Denied*, 1970 SUP. CT. REV. 161, 184-95, identifies as interests and values served by the due process hearing: (i) accuracy and fairness, (ii) accountability, (iii) visibility and impartiality, (iv) consistency, and (v) administrative integrity. O'Neill notes several governmental interests—(i) collegiality and informality, (ii) flexibility in the dispensation of benefits, (iii) agency initiative, (iv) discretion and confidentiality, (v) minimization of expense—each of which is at least potentially impaired by the insistence on procedural formality.

³⁵⁴ Cf. Fuller, *Adjudication and the Rule of Law*, 1960 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 1, 5-7:

[A]djudication must take place within a framework of accepted or imposed standards of decision before the litigant's participation in the decision can be meaningful. If the litigant has no idea on what basis the tribunal will decide the case, his day in court—his opportunity to present proofs and arguments—becomes useless There must be an extra-legal community, existent or in process of coming into existence, from which principles of decision may be derived.

³⁵⁵ See, e.g., Tribe, *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1381 (1971): "Indeed, it is at least arguable that there is nothing good or bad about any trial outcome as such; that the *process*, and not the *result in any particular case*, is all-important."

from the more novel claim that courts review such substantive educational issues as the efficacy of particular school placements. As Professor Buss observes, "[h]owever little courts may know about education . . . they do know about factfinding, decisionmaking, fairness, and procedure."³⁵⁶ For that reason, the development of procedural safeguards which promote fair classification—which render stigmatization "just," if you will—is an easier task for the judiciary to contemplate than is the development of substantive education rights doctrines.

B. *Classification and Due Process: Interest Balancing*³⁵⁷

In school sorting disputes, the contending parties include the child, his family, and the school. The interest of each differs, and each has to be taken into account. The child's interest is at once obvious and vital. The importance of education to his future well-being has often been recognized by courts.³⁵⁸ *Brown's* panegyric to education has been so often repeated by so many interested parties in support of such varied arguments that its force has been blunted, the language rendered a cliché. But this cliché, like so many others, is rooted in an important truth. Educational performance and educational status do affect life success, even if the nature of the relationship differs from the model that *Brown* had in mind.

The structure of the school regime exerts a profound impact on the lives of children both for the ten or twelve years that they are compelled to attend school, and after the child graduates; that latter impact may without hyperbole be likened to the effect on reputation of which the *Roth* opinion takes note. The child also has an interest in avoiding the unjust imposition of stigma and (to phrase the point in more familiar language) in liberty. School-imposed stigmas bedevil children because children are compelled to submit to them, to surrender at least a decade of their lives to the state. That infringement of liberty itself raises constitutional issues.³⁵⁹ It also distinguishes school-imposed classifications from those created by governmental agencies whose control over the citizenry is in some sense voluntary.

The child's interest will of course vary with the nature of the school classification. A failing grade, a whack on the backside by an

³⁵⁶ Buss, *supra* note 5, at 571.

³⁵⁷ This section does not attempt an exhaustive review of existing case law concerning due process standards in school discipline cases. Professor Buss' excellent article, *supra* note 356, provides a thorough and analytically helpful review of those cases; I have borrowed from that analysis in this far briefer discussion.

³⁵⁸ See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971); *Hosier v. Evans*, 314 F. Supp. 316 (D.V.I. 1970); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

³⁵⁹ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

irate teacher, denial of school privileges: all can be said to have adverse effects. What differentiates these from the classifications that have been discussed here is the nature and long term significance of the effect. That school exclusion exerts a more profound influence on the child's future than, say, a failing grade does not imply that some procedural safeguards are not appropriate in both situations.³⁰⁰ It does indicate that the nature of the safeguard should vary with the seriousness of the stigma or deprivation of liberty that the school has imposed.

The child's parents also have an interest in the issue, but their concerns should be distinguished from those of the child. Even if both share the same perception of the school's decision, its consequences will affect them differently. This point assumes particular importance when the school, by assigning a child to a special class or excluding him as ineducable, has in effect identified him as less than normal. That determination may spawn a host of parental reactions: parents may, for example, hire outside experts to supplement the school's program, or they may give up on the child, and see him in the school's terms. Their reactions may reflect grief and shame, guilt (for presumed parental mistakes), or resentment. Parents may be unwilling to endorse the educational program which is objectively best for the child, if the recommended course of action appears to compound parental problems. The distinction between parents' and children's interests must be kept in mind when framing procedures for reviewing adverse school classifications.³⁰¹

³⁰⁰ In *Connelly v. University of Vermont*, 244 F. Supp. 156 (D. Vt. 1965), the federal district court held that a student's claim that he had been dismissed from medical school because of an arbitrarily awarded failing grade stated a cause of action. *But cf. Mustell v. Rose*, 282 Ala. 358, 211 So. 2d 489, *cert. denied*, 393 U.S. 936 (1968). Where the accumulation of "minor" punishments, none of which taken by itself demands a formal hearing, results in drastic school action, more careful due process review may be required. *See Hagopian v. Knowlton*, 470 F.2d 201, 210-11 (2d Cir. 1972) ("It would be an undue burden to impose on the routine administration of the [United States Military] Academy's disciplinary system the requirements of a hearing . . . before an adjudication of demerits for such infractions as a dirty uniform Short of expulsion, the procedures available to a cadet (explanation of a reported delinquency, request for reconsideration, and appeal to superior authorities) are ample to satisfy the demands of due process")

The demands of due process, however, are greater when the accumulation of demerits subjects the cadet to the severe sanction of expulsion rather than a form of milder discipline")

³⁰¹ *See, e.g., Schild, The Family of the Retarded Child*, in *THE MENTALLY RETARDED CHILD AND HIS FAMILY: A MULTIDISCIPLINARY HANDBOOK* 431, 441 (R. Koch & J. Dobson eds. 1971). ("The impact of retardation on the family is generally stressful and traumatic and adds to the family's vulnerability in coping with the problem.")

See also Freedman, Helme, Havel, Eustis, Riley & Langford, *Family Adjustment to the Brain-Damaged Child*, in *A MODERN INTRODUCTION TO THE FAMILY* 555 (N. Bell & E. Vogel eds. 1968); S. SARASON, *PSYCHOLOGICAL PROBLEMS IN MENTAL DEFICIENCY* 331-46 (1st ed. 1959) [hereinafter cited as SARASON, *PSYCHOLOGICAL PROBLEMS*]; Iano, *supra* note 139; Mercer, *Social System Perspective and Clinical Perspective: Frames of Reference*

The school's interests are equally legitimate, and very different. The school has to concern itself with the aggregate welfare of all children as well as the individual welfare of any given child. It will resist any arrangement, such as the provision of a particular program not previously offered, which demands additional expenditures; the cost of that program, if not subsidized by state categorical assistance, will be borne by the district. And those added costs will require either additional tax dollars or trimming other parts of the budget. The education of an autistic child, for example, costs at least \$10,000—20 times what most school districts annually spend for the average student.³⁶² Yet to the autistic person, the \$10,000 investment may well enable him to break through the psychological barriers that cut him off from the world. To choose between those two interests poses problems of exquisite difficulty, unanswerable by recourse to such formulas as "the [school district's] interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources."³⁶³

School officials will also resist proceduralization of school sorting decisions as a diversion from the business of education. That claim

for *Understanding Career Patterns of Persons Labeled as Mentally Retarded*, 13 *SOCIAL PROBLEMS* 18 (1965).

Disciplinary action also affects parents and children differently: parents may, for example, want their children back in school at any cost, while the child may be more interested in affirming his right to behave in a particular way.

³⁶² The example is not merely hypothetical. Janice King, one of the named plaintiffs in *Mills*, is described by the court as thirteen years old She has been denied access to public schools since reaching compulsory school attendance age, as a result of the rejection of her application, based on the lack of an appropriate educational program. Janice is brain-damaged and retarded, with right hemiplegia, resulting from a childhood illness.

348 F. Supp. at 870. Michael Williams, another named plaintiff, is "epileptic and allegedly slightly retarded." *id.* Steven Gaston allegedly is "slightly brain-damaged and hyperactive," *id.* at 869.

³⁶³ *Id.* at 876. *McMillan v. Board of Educ.*, 430 F.2d 1145 (2d Cir. 1970), declares that

if New York had determined to limit its financing of educational activities at the elementary level to maintaining public schools and to make no grants to further the education of children whose handicaps prevented them from participating in classes there, we would perceive no substantial basis for a claim of denial of equal protection.

430 F.2d at 1149.

Yudof, *Equality of Educational Opportunity and the Courts*, 51 *TEXAS L. REV.* 411 (1973), offers one way of balancing the individual interests of the child and the collective best interests served by the school. If the school can provide meaningful education to a given child, by spending on his education exactly what it spends on the average child living in the district, then (and only then) does there exist an obligation to provide some level of education, not necessarily limited to the average expenditure.

That approach suggests, quite rightly, that there exists no absolute right to a "needs-satisfying" education, but it poses problems of its own. Why should the balance between individual and collective best interests be struck at the average expenditure level, since the school district is at present likely to be spending more than the average on at least some students? And how is the court to determine whether provision of educational services that the average expenditure allotment can purchase is meaningful education? While the balancing approach is appealing, some more subtle balance will in fact have to be struck by the courts.

may mask the feeling that any review of school-made decisions necessarily threatens the authority of administrators, making their lives less comfortable; but comfort does not deserve to be treated as a legitimate interest.³⁶⁴ When an administrator has erred, there is no legitimate interest in upholding his authority; when he is right, review will reinforce his authority, not threaten it. The "diversion" argument also poses more serious issues. Insistence on adequate procedural protection of students prior to consequential sorting decisions requires effort on the part of those who make the decisions. It demands time, both for framing and defending an adequate justification. It may demand money, for if the justness of a classification turns on the opinion of specially trained school personnel, the school's budget will have to be adjusted accordingly.

There exist other and subtler costs to the school: teacher resentment at being obliged to defend a judgment; unwillingness on the part of school personnel to make any decisions concerning special treatment for a particular child for fear of the procedural regime invoked by such decisions. As Professor Gellhorn notes, "[a]wareness that someone is constantly peering over their shoulders causes some public servants to become too timid instead of too bold."³⁶⁵

Many of these arguments are recited whenever a student challenges a disciplinary decision of the school, in the school board meeting room or the courtroom. In those circumstances, courts since *Dixon*³⁶⁶ have generally concluded that serious infringements on a child's liberty cannot be imposed unless adequate procedural protection is provided.³⁶⁷ The application of such safeguards to adverse school classifications arguably poses a different problem. It questions a judgment couched in educational and not disciplinary terms, a decision central to the school's claim of pedagogical competence. For that reason, the school official is likely to resist terming such classifications as stigmatizing. He will also object to the creation of any process which distinguishes the interest of the school and the child, claiming that school classifications further both interests.³⁶⁸

³⁶⁴ See, e.g., *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 508-09 (1969); *Breen v. Kahl*, 296 F. Supp. 702 (W.D. Wis.), *aff'd*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

³⁶⁵ W. GELLHORN, WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES 52 (1966).

³⁶⁶ *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

³⁶⁷ *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Goldwyn v. Allen*, 54 Misc. 2d 94, 281 N.Y.S.2d 899 (1967). See generally Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 30 U. FLA. L. REV. 290 (1968).

³⁶⁸ Cf. Carlin, Howard & Messinger, *Civil Justice and the Poor: Issues for Sociological Research*, 1 LAW & SOC. REV. 9 (1966), for a more extended and general discussion of the "adversary" and "mutual welfare" approaches to resolving the legal claims of the poor.

Courts, in reviewing school decisions more obviously punitive in nature than classifications, have not been unsympathetic to these assertions. Judge Cameron's dissent in *Dixon* notes that schools "make many rules governing the conduct of those who attend them . . . based upon practical and ethical considerations which the courts know very little about and with which they are not equipped to deal."³⁶⁹ The Second Circuit's decision in *Madera v. Board of Education*³⁷⁰ denied procedural safeguards to a suspended student compelled to attend a "Guidance Conference." The court stressed the pedagogical purpose of the conference—"to provide for the future education of the child"³⁷¹—and concluded that counsel could appropriately be barred from that stage of the process.³⁷² Although the conference stage was a preliminary one, and procedural safeguards were provided at later, more consequential proceedings, the court's rationale is disturbing, given the unhappy consequences that could flow from even this initial hearing.³⁷³

The distinction between "educational" and "punitive" decisions—which has its analog in the claim that juvenile criminal proceedings are intended to help and not punish youngsters, and therefore should be unfettered by procedures³⁷⁴—makes little sense in either setting. However the school chooses to describe the enterprise, its consequences vary for the parties at interest; what is best for one may well not be suitable for the others. And for the student, the effect of "punitive" and "educational" decisions is similar if not identical: exclusion, whether premised on incorrigibility or ineducability, results in absolute educational deprivation; suspension or special class assignment both diminish educational opportunities and stigmatize the affected student.

The school may choose to ease teachers' burdens by separating children into groups according to tested measures of ability. If the school cannot afford the educational services that a severely retarded

³⁶⁹ 294 F.2d 150, 160 (5th Cir. 1961).

³⁷⁰ 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

³⁷¹ *Id.* at 788.

³⁷² The relevant statute did, however, allow the parents and child to be accompanied by "a representative from any social agency to whom the family may be known." *Id.* at 781.

³⁷³ The court listed 3 possible consequences of this conference: 1. reinstatement of the child in his former school; 2. transfer to another school on the same level; and 3. transfer to a special school for socially maladjusted children, with the parents' consent. *Id.* at 782. The court minimized the existence of harm in these options; but without the presence of counsel, the provision for parental consent could become a mere formality for parents confronted by school officials.

³⁷⁴ *Cf.* D. MATZA, *DELINQUENCY AND DRIFT* 133-34 (1964), who puts himself in the place of the delinquent and told that the court is "helping him" with "his underlying problems." "What on earth could they [the judge and his helpers] possibly be hiding that would lead them to such heights of deception?"

child requires, it may attempt to relinquish its obligation to educate the child by labeling him ineducable. The regular classroom teacher who cannot cope with a child who "acts out" may propose assignment to a less advanced track or a special education program as a means of tempering behavior.³⁷⁵ The child's needs are more simply stated: he needs an adequate education. Confronted with the school's statement that he is ineducable or less educable than his peers, the child is at the very least entitled to an advocate who can distinguish his needs from those of the school and a forum in which to press his contention.³⁷⁶

C. *The Nature of the Due Process Requirement in School Classification Cases*

Characterizing the interests of children, parents, and school officials, while essential to comprehending the nature of the potential dispute, does not define with precision the scope of procedural protection. The mechanical transplanting of procedural protections developed in the school discipline context to issues of school classification ignores differences between the two problems.

In the routine discipline case, the decisive issue is the truthfulness of the accusation: did *X* threaten his teacher with a knife? The hearing effectively concludes when this determination is made. The facts concerning the wisdom of a school classification are not so readily established. Is *Y* an educable mentally retarded child? On what basis is that judgment made? What alternative explanations can be suggested for his behavior? The appropriate remedy may also be more difficult to develop. If *X* did indeed brandish a knife, he will be punished by being suspended from school for some period of time; the only determination that must be made is the duration of the suspension.³⁷⁷ But the fact of retardation does not warrant punishment. It requires careful and intelligent educational intervention which demonstrates some promise of benefiting the child. The range of plausible alternatives includes institutionalization, assignment to a spe-

³⁷⁵ "Segregation of problem children is the prepotent response to the professional and personal dilemmas teachers face." S. SARASON, *supra* note 225, at 156.

³⁷⁶ Cf. Buss, *supra* note 5, at 611-12:

When the proceeding has the sole purpose of excluding the student from the school, however, the plea to avoid hardening positions along adversarial lines is singularly weak, even assuming that the exclusion is to be temporary. A student facing expulsion will usually be sufficiently at odds with those running the school that he will be aware of his involvement in an adversarial proceeding even without a lawyer to convince him. Precisely because the student has everything to lose and because these proceedings are more adversarial than is usually admitted, little is lost by increasing the student's ability to help himself.

³⁷⁷ That statement, of course, does not imply that punishment of such students in fact curbs their antisocial behavior, or otherwise "rehabilitates" them.

cial program, or placement in a regular class coupled with the provision of additional assistance.

Where the justness of diminished educational status is at issue, two critical questions require resolution: the accuracy of the school's classification (is the particular assignment consistent with general guidelines for a given placement?) and the appropriateness of the proposed treatment (is the particular assignment likely to benefit the child?). The first query calls both for clarity and administrative regularity, obliging school personnel to specify the bases upon which they sort children.³⁷⁸ The second question demands justification, joining substantive standards (presumptions) with procedural nicety.³⁷⁹ Substance and procedure must be linked in this fashion if the arbitrariness against which due process protects is to acquire meaning.³⁸⁰

In this setting, such questions can be answered best by school officials, and for that reason it makes sense to place the burden of justification with them. School officials, not parents or children, control the information upon which a given decision is based; school officials also determine the policies which the classifiers—teachers and counselors—carry out. They are thus in the best position to explain the rationale for any challenged placement.

The burden appropriately borne by the school is not satisfied by mere explications of policy. The potential stigma and educational inefficacy of certain treatments—assignment to special classes and exclusion—suggests that placement in a regular school program, supplemented with special help, should be presumptively appropriate, that presumption rebutted only when the school can demonstrate that another alternative offers substantially greater promise. As the *Mills* court notes: "placement in a regular public school class with appropriate ancillary services is preferable to placement in a special public school class."³⁸¹ Either is to be preferred to institutional care.³⁸²

When a contested placement involves assignment to a slow track

³⁷⁸ Cf. *Kent v. United States*, 383 U.S. 541 (1966) (*parens patriae* authority of the state does not justify juvenile court's failure to give reasons for declining jurisdiction over minor); *Holmes v. New York City Housing Auth.*, 398 F.2d 262 (2d Cir. 1968) (authority must articulate standards for admission to public housing). See also *Thorpe v. Housing Auth.*, 386 U.S. 670 (1967).

³⁷⁹ By "substantive standards" I refer to the type of standards discussed in Sections II and III. In classical sociological terms, the suggested approach demands "substantive rationality"—concern for the justness of outcomes in individual cases—as well as "formal rationality"—the systematizing of general rules and patterns of procedural regularity. MAX WEBER ON LAW IN ECONOMY AND SOCIETY, ch. 11 (M. Rheinstein ed. 1954).

³⁸⁰ See P. SELZNICK, *supra* note 332, at 255-56.

³⁸¹ *Mills v. Board of Educ.*, 348 F. Supp. 866, 880 (D.D.C. 1972).

³⁸² *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257, 1260 (E.D. Pa. 1971) ("[P]lacement in a special public school class is preferable to placement in any other type of program of education and training.").

See also SARASON, *PSYCHOLOGICAL PROBLEMS*, *supra* note 361, at 347-60.

within the regular school program, the burden on the school should be proportionately less. The educational harm and stigma to the child are not so severe as in the exclusion and special education classification cases;³⁸³ the cost to the school of justifying its decisions would also be higher because of the greater number of students involved in such tracking. The school should be expected to justify its classification of each child who contests placement, but there would be no presumption against that classification.

Before reclassification (or assignment to a special program) becomes a fact,³⁸⁴ the school should inform the family and the child affected, to explain the proposed action and to indicate what alternatives might be available. If such a process actually functioned—if parents and students understood “what the government is doing to [them]”³⁸⁵ and voluntarily approved that determination—the need to secure the more formal protections of due process might well disappear. There is, however, little evidence from past school behavior to justify hope that such wise and preventive measures will be adopted.³⁸⁶

Schools do not encourage parental involvement in any sorting decision. Even where state law requires parental consent before a child is assigned to a special education class, that requirement is often either ignored or satisfied by coercing parental acquiescence. Parents are informed that a particular placement is the only option available and occasionally threatened with criminal sanctions if they reject it. Misunderstanding or intimidation become even more common when parents speak little or no English, and school officials speak only English.³⁸⁷ Schools are unwilling to discuss sorting decisions with parents for many of the same reasons that they object to formal procedural review: such discussions take time, they require that educational decisions be rendered in a language comprehensible to laymen, and they necessarily invite challenges over matters that the school treats as its prerogative.

In terms of due process requirements and parental and student participation, there are two essential time references: the point of

³⁸³ See text accompanying notes 218-34 *supra*.

³⁸⁴ *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972), establishes detailed prior notice requirements regarding such placement.

³⁸⁵ *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

³⁸⁶ See, e.g., T. WILLIAMS, OPINIONS, ATTITUDES AND PERCEPTIONS OF PARENTS OF CHILDREN IN SPECIAL CLASSES FOR THE SOCIALLY MALADJUSTED AND EMOTIONALLY DISTURBED IN NEW YORK CITY PUBLIC SCHOOLS (Center for Urban Education Report AO74C, 1969).

³⁸⁷ See *Covarrubias v. San Diego Unified School Dist.*, No. 70-394-S (settled by consent decree, July 31, 1972); *Guadalupe Organization v. Tempe Elementary School Dist. No. 3*, Civ. No. 71-435 (D. Ariz., filed Aug. 9, 1971) (settled by consent decree Jan. 24, 1972); *Arreola v. Board of Educ.*, Civ. No. 160-577 (Super. Ct., Orange County, Cal., filed 1968).

decisionmaking, and the subsequent event of implementation. There are valuable policy advantages to rationalizing the initial decision-making, and encouraging parent and child to participate at this first evaluative stage. The parents' and student's views can be most fully reckoned with at this point, before the teachers' and counselors' opinions have been rendered as a decision. Moreover, an adverse decision, whether or not implemented, may have a negative impact on the child. A balance of the competing interests at stake,³⁸⁸ however, suggests that the primary focus for due process protection is the implementation of the classification decision.

The child has a vital interest in obtaining a fair hearing prior to his exclusion from school or assignment to a special education class. Once he is removed from the mainstream of the school, injury has been incurred.³⁸⁹ It is a clear message of *Constantineau* that a hearing should be provided before the imposition of a stigma. Similarly, during the period that he is misclassified, the child suffers educational deprivation. This harm outweighs the school's interests in immediately carrying out its determination. There is not the same need for present action as there might be in a discipline case where restraint of disruptive behavior demands summary action.³⁹⁰ Disruption and expense would be minimized, not aggravated, if an erroneous decision were reversed before an actual shift in classification occurred.³⁹¹

After an adverse classification occurs, effective review of the decision requires both access to the school's records and the opportunity to have the school's determination reviewed by an impartial outside authority. Unless parents can examine test scores, psychological interview writeups, teacher recommendations and the like, the school's decision is not only unchallengeable; it is simply incomprehensible.³⁹² And unless the parents can obtain the services of a disinterested pro-

³⁸⁸ The interests of the school in postponing due process protections are stronger, and the child's interests weaker, prior to the implementation stage itself. Disruption in the initial evaluation process could involve substantially more students and greater expense; at the implementation stage, only adverse decisions are challenged. The harm to the child at the earlier point is much more speculative; when his placement is changed, the consequences are readily discernible.

³⁸⁹ When the classification is within the mainstream, but to a lower class, the harm is proportionately less, the school's burden significantly greater. Cf. text accompanying note 383 *supra*. Arguably, post-implementation review would be sufficient in these circumstances. A requirement to the contrary could stymie the entire classification program.

³⁹⁰ In the discipline case, action beyond restraint of disruptive behavior would require a hearing before implementation. See cases cited note 364 *supra*.

³⁹¹ The school would avoid the disruptive effect of returning the child to his former class; it would also be spared the expense of remedying whatever educational deprivation the child suffered.

³⁹² *Mills*, *PARC*, and *Marlega* all require access to student records in classification hearings.

fessional, they may well lack the competence to understand the basis of the school's action. This need for expertise distinguishes classification from discipline cases. The significance and complexity of these adverse classifications, as well as the possibility of professional misjudgment, suggest that parents should be entitled to expert assistance, a right which should not depend on their capacity to pay for the expertise.³⁹³

If the need for expert help is greater in classification cases than in discipline disputes, the need for legal counsel may be less important. A great deal of energy has been expended in deciding whether a child confronted with the possibility of punitive school action is entitled to legal assistance, or—to make the point differently—whether lawyers should be barred from such proceedings because they might convert orderly discussions into miniature courtrooms. Lawyers contend that only with their help will justice be served; school officials resist with all the vehemence of the Andorrans, who bar “[t]he appearance in our courts of these learned gentlemen of the law, who can make black appear white, and white appear black.” This energy seems misspent. Although the child is likely to need the assistance of someone familiar with his particular problem and willing to represent his interests, that person can be a lawyer or almost any other outsider. While the lawyer may be a particularly useful advocate—he is familiar with hearing procedures, understands (perhaps too well) the need to negotiate and the requirements of a formal record for appeal—he is by no means the only person who can adequately discharge the duties of an advocate.

The utility of a lawyer in classification hearings will depend upon the nature of the issues raised. If the sources of evidence are varied, the evidence itself ambiguous, and the issues complicated or confused, a person with lawyerly qualities can usefully present such evidence in an orderly fashion. The competency and qualifications of the decisionmaker and the need for lawyer-type advocacy skills are also related: the better the advocacy, the less demanding the decisionmaking function; the more amateurish the advocacy, the greater the need for control by a competent decisionmaker, capable of imposing clear ground rules for the proceedings.³⁹⁴

³⁹³ A comparison of the complexity and the importance of discipline and classification cases suggests the greater need of expert assistance—appointed, if necessary—in the latter cases. That retesting has revealed substantial school-made errors makes the need for such expert assistance all the stronger. See *Smuck v. Hobson*, 408 F.2d 175, 187 (D.C. Cir. 1969) (en banc); *Stewart v. Phillips*, Civ. No. 70-1199-F (E.D. Mass. 1971). See, e.g., *Madera v. Board of Educ.*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

³⁹⁴ Professor Buss (in private communication) first noted this point.

For the advocate to function effectively, he must be permitted to question those whose judgments are being reviewed. Such examination may well be both novel and frightening to school teachers and school psychologists. For that reason, there is real need for care and respect in probing; for avoidance of tactics suitable for courtroom confrontations which might increase discomfiture and tension. Such care is also likely to encourage candid conversation, and thus to illuminate the bases for the school's decision.

Finally, if the process is to function fairly (and to appear fair) the reviewing panel should be impartial. It will not do, for example, to have the school psychologist review his own decision, or even to have the school superintendent review the psychologist's decision; the identity of interests is too great, the overlapping of decisionmaking and decision-reviewing functions too substantial.³⁹⁵ As Professor Davis notes:

A superior officer has a continuing relation with each subordinate and often has official, psychological, or personal reasons for protecting that relation, so that his review of a subordinate's decision is often affected by and even controlled by considerations other than its merits. . . . [A] check by an independent officer rather than by a superior is often what justice requires.³⁹⁶

Several alternatives are conceivable. The school board could act as a reviewing agency; the limited expertise and already substantial agenda of that body make that option unappealing. The school board could create an ad hoc group to make recommendations to the board; such a group might well develop the expertise that review of these decisions and judgments among competing alternatives require. A master, himself an expert but not otherwise connected to the school system, might be appointed to consider classification matters.³⁹⁷ Yet another option, possibly linked with one of these three, would leave ultimate review in the hands of a higher education agency (a representative of the county or state department of education, for example) whose ostensible detachment from the school's recommendation would suggest fairness.³⁹⁸ None of these alternatives is constitutionally re-

³⁹⁵ 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 13 (1958, Supp. 1970), reviews the voluminous case law concerning impartial tribunals.

³⁹⁶ K. DAVIS, DISCRETIONARY JUSTICE 144-45 (1969).

³⁹⁷ The *PARC* court ordered the appointment of a master to oversee placement of excluded children, 334 F. Supp. at 1266; *Mills* suggests that failure by the school system properly to place children will result in such an appointment, 348 F. Supp. at 877.

³⁹⁸ Administrative decisions made by officials with sufficient expertise can consider subtle judgmental problems which, although crucial to the individual child, are likely to escape judicial notice. See, e.g., *Taurig v. Board of Educ.* (N.J. Comm'r of Educ.,

quired. What is required is a tribunal sufficiently divorced from the initial decision to be capable of unbiased and informed judgment.³⁹⁹

The Office of Civil Rights has recently promulgated draft regulations which (if ultimately adopted) would require all districts to create an independent "Assessment Board" fulfilling many of these procedural functions.⁴⁰⁰ The source of the Civil Rights Office's concern lies with the prevalence of minority overrepresentation in special classes, a fact which provides statutory warrant for the proposed requirement. But the Assessment Board—whose membership is to be "drawn from persons broadly representative of the community," including "at least one outside psychologist, social worker, and teacher" as well as parents—confronts the racial issue only indirectly. Its duties include informing parents about special education programs, determining whether or not individual evaluations are appropriate, and—most notably—passing on proposed placements in classes for the retarded. "If . . . the Assessment Board concludes on the basis of either (1) the psychometric indicators interpreted with medical and sociocultural background data, or (2) the adaptive behavior data, that the assignment of the student to a special education class for the mentally retarded is inappropriate, the Assessment Board may terminate the proposed assignment."⁴⁰¹

For the child who has been excluded from school or improperly assigned to the wrong track for a considerable period of time, due process review comes rather late.⁴⁰² If the arguments developed here carry any weight, such exclusion or misplacement was legally wrongful because the student was not provided with procedural protection. More pertinently, injury has been done: the child has been denied some or all of the benefits of an education to which he was entitled.

June 16, 1971). The commissioner adjudicated a dispute concerning which special program was best suited for Traurig. The opinion is a model of how administrative hearings can function at their best. *Cf.* Parents of "K. K." v. Board of Educ. (N.J. Comm'r of Educ., June 1, 1971).

³⁹⁹ An unbiased and independent tribunal is easier to conceptualize than to enforce. Experience in other realms—particularly the quasi-judiciary regulating agencies—suggests that the "independent" agency may in fact come to represent the interests of those whose conduct it is supposed to review. *See, e.g.,* R. NOLL, REFORMING REGULATION 99-101 (1971). And who is "impartial" in the realm of schooling decisions? Despite these caveats, judicial scrutiny can be invoked as a check on unfair partiality that threatens a child's due process rights.

⁴⁰⁰ Office of Civil Rights, Draft Guidelines to State and Local Agencies, Elimination of Discrimination in the Assignment of Children to Special Education Classes for the Mentally Retarded (Nov. 2, 1972).

⁴⁰¹ *Id.* v (Appendix: Model of an Assessment Board).

⁴⁰² In reviewing welfare cutoffs, the Supreme Court has insisted that a due process hearing be provided prior to the cutoff. *Goldberg v. Kelly*, 397 U.S. 254 (1970). The harm done by "educational cut-off" may be regarded by courts as even more substantial. *Cf. Palmer v. Thompson*, 403 U.S. 217, 229 (1971) (Blackmun, J., concurring); notes 150-70, 173-75 *supra* & accompanying text.

Especially for the handicapped or severely retarded child, who can be helped more quickly and more effectively early in life, the injury is real indeed.⁴⁰³ For that reason, the child should be entitled to educational assistance equivalent to that which the school has denied him.⁴⁰⁴ While one federal district court has insisted on just such relief where exclusion was not preceded by a due process hearing,⁴⁰⁵ schools may well resist this measure even more strenuously than they oppose the imposition of process itself, since adequate educational assistance for these children is expensive. That consideration might lead a court to conclude that the state, obliged by constitutional and statutory language to educate all children, and not the financially strapped school district, should bear the additional cost.⁴⁰⁶ The fact of financial burden should not, however, release the educational system from its obligation to undo the wrong caused by exclusion or misclassification.

D. *Does Due Process Provide Adequate Relief?*

The procedural approach to sorting issues converts matters of substance into matters of form, leaving the critical placement determinations in the hands of assertedly neutral educators. The minimal judicial involvement implicit in the approach has considerable appeal to courts reluctant to make what appear to be educational policy decisions. Yet the ultimate impact of proceduralization on both the school and the student remains a subject for speculation. While hear-

⁴⁰³ J. GALLAGHER, TUTORING OF BRAIN INJURED MENTALLY RETARDED CHILDREN (1960), found that: (1) tutoring helps brain-injured children; (2) tutoring in verbal skills was more effective than tutoring in non-verbal ones; and (3) younger children profited more than older ones.

⁴⁰⁴ The definition of equivalency is tricky. Money damages do not necessarily secure educational opportunity; determining what education the child has *not* had poses a formidable task. In the clearest case requiring remedy—exclusion—obliging the school to make up the amount of schooling lost, measured simply in terms of school days, commends itself only because of its ease of application. In *Knight v. Board of Educ.*, 48 F.R.D. 115, 117 (E.D.N.Y. 1969), the court ordered periods of remedial work during the school day, after-school tutorial classes, guidance and psychological services, and summer make-up programs to remedy wrongful exclusion. Guidance and psychological counseling would be an important element in remedying the stigmatic injury from any adverse classification. See also CAL. EDUC. CODE §§ 18,102.11-102.12 (West Supp. 1973), which provides "transitional" education assistance to students moving from special to regular classes. *But cf.* *Elgin v. Silver*, 15 Misc. 2d 864, 182 N.Y.S.2d 669 (1958), in which the court on nonconstitutional grounds upheld the decision of the school board to refuse further education to a retarded student who had reached age 18, despite a state statute assuring public education until age 21.

⁴⁰⁵ *Knight v. Board of Educ.*, 48 F.R.D. 115 (E.D.N.Y. 1969).

⁴⁰⁶ The metropolitanization order in *Bradley v. Milliken*, 345 F. Supp. 914 (E.D. Mich. 1972), fastens constitutional responsibility on the state for acts of *de jure* segregation; the analogy is admittedly imperfect, but apt nonetheless. Many states already provide school districts with additional resources for special education programs, or maintain state-run special schools. See, e.g., CAL. EDUC. CODE §§ 18,355, 18,358 (West Supp. 1973), amending CAL. EDUC. CODE §§ 18,355, 18,358 (West 1969).

ings may force schools to adopt uniform decision criteria, that very fact may leave the school less willing to make (plausibly better) decisions tailored to specific cases.⁴⁰⁷ The possibility that a school might retaliate against a child intrepid enough to demand review of a sorting judgment, in subtle ways that a court could never hope to confront, represents a quite different cost of review.⁴⁰⁸ Further, neither the child nor his parents are likely to perceive themselves well-served if a formal hearing reveals that an adverse school classification has in fact been justly imposed. Such a finding denies both child and parent the opportunity to feel wronged, to view the school's action as a misrepresentation of the child's "true" potential. Process protects against the arbitrary imposition of unjust stigmas; it also reinforces the impact of stigmas found to be properly imposed.⁴⁰⁹

The introduction of procedural niceties into the life of the school may also have unintended but important beneficial consequences. The school required to review each adverse classification may, in the face of that considerable burden, choose to reconsider the process of sorting. It may conclude that children are better served by labels that are less conclusory, and carry with them less pervasive consequences, than those presently in use. In this sense the claims for procedural and substantive justice share identical aspirations. Professor Buss, in discussing the application of due process to student discipline matters, voices much the same thought, that a school's approach to discipline is likely to influence its approach to education proper. "[F]air procedures will tend to force the rules and the reasons for punishment into the open, subjecting the wisdom of the rules to the scrutiny of all."⁴¹⁰

One ardently hopes that this is true. Yet even if this hope is misplaced, even if schools continue to develop ever more intricate classifying schemes to sort the students they minister to, the application of procedural standards makes public what has hitherto been secret and hidden, and provides a means of contesting particular decisions. That represents at least a step in the right direction.

⁴⁰⁷ Cf. Aubert, *Competition and Dissensus: Two Types of Conflict and of Conflict Resolution*, 7 J. CONFLICT RESOLUTION 26 (1963).

⁴⁰⁸ Cf. Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479 (1966). Professor Handler discusses the ways in which the welfare department can retaliate against contentious clients.

A permanent, expert review panel, see text accompanying notes 395-97 *supra*, would have an advantage over the court system in its ability to supervise compliance with its decisions.

⁴⁰⁹ Cf. M. YOUNG, *supra* note 244, at 152. "[W]idespread recognition of merit as the arbiter may condemn to helpless despair the many who have no merit, and do so all the more surely because the person so condemned, having too little wit to make his protest against society, may turn his anger against, and so cripple, himself."

⁴¹⁰ Buss, *supra* note 5, at 550.

V. CONCLUSION: CONSTITUTIONAL PRINCIPLES AND THE CULTURE OF THE SCHOOL

Castes or classes are universal, and the measure of harmony that prevails within a society is everywhere dependent upon the degree to which stratification is sanctioned by its code of morality.⁴¹¹

Sorting, long considered to be one of schooling's chief functions, has been called into question for a host of reasons. That courts are being asked to review the legitimacy of school exclusion and to reassess the ways in which children are classified within schools is only one manifestation of this broader criticism. Educational researchers have generally concluded that sorting does not improve children's academic performance. Educational reformers have advanced a variety of alternatives which challenge the utility of existing school sorting practices. Minority group leaders assail special education and slow learner classes as segregating devices which keep black and Mexican-American students in their place.⁴¹²

To one unfamiliar with the ways in which schools operate, that array of legal, political, and pedagogical criticism might signal imminent and perhaps revolutionary change in schooling practice, precipitated by political crisis, voluntary school action, or judicial intervention. Yet change, though devoutly to be wished, will not occur so readily.⁴¹³

As a generation of would-be educational reformers have learned to their sorrow, long entrenched school practices are not lightly tampered with. School teachers and administrators do not deliberately set out to act arbitrarily; their behavior is at least convenient, and sometimes necessary in light of the constraints placed upon them. That behavior serves particular needs: to maintain order; to provide tranquility for the majority; to define relationships among school personnel, demarcating the boundaries that separate teachers, counselors, and administrators. It is behavior tested and found appropriate (or comfortable) over a considerable period of time. Whether it is functional for the society is almost beside the point; what matters is that it is functional for the school as an institution. To the extent that any

⁴¹¹ M. YOUNG, *supra* note 244, at 152.

⁴¹² In this context, lawsuits may function as "society's last line of defense in the indispensable effort to secure the peaceful settlement of social conflicts." Hart & McNaughton, *Evidence and Inference in the Law*, in EVIDENCE AND INFERENCE 48, 52 (D. Lerner ed. 1958).

⁴¹³ Cf. M. CROZIER, *THE BUREAUCRATIC PHENOMENON* 198 (1964):

[A] bureaucratic system of organization is not only a system that does not correct its behavior in view of its errors; it is also *too rigid to adjust without crisis to the transformations that the accelerated evolution of industrial society makes more and more imperative.*

(emphasis in original)

bright new idea threatens to undermine this culture of the school,⁴¹⁴ it is for that reason suspect.

That observation applies to any alteration of the status quo, whether it be a new math curriculum or an in-service teacher training program. It applies even more forcefully to the issues that this Article raises—most generally put, the legitimacy of prevailing differentiations in student treatment—because they are so critical to the school's perception of its task. A brief recapitulation of one aspect of that perception may clarify the point. Teachers are frustrated when asked to instruct students whose ability and willingness to undertake schoolwork vary widely; they feel threatened when what they have done in the past no longer seems to work well; they react to that threat by removing the offending student, either by within-class segregation or by creating some new special classification.⁴¹⁵ Counselors respond to teacher and parent demands by encouraging less bright or less well-mannered students to enroll in special programs, thus protecting the school from the implicit challenge to its competence posed by those students. Administrators, who lack the skills (or feel they do) to deal with "problem children,"⁴¹⁶ acquiesce in decisions made by the professionals, defending those decisions as in the best interests both of the child and the school.

No mandate, whether from school officials or courts, will easily upset this pattern. And no mandate can ever hope to undo the informal determinations of worth and worthlessness that everywhere occur. James Herndon's description of the playground behavior at one of the country's best schools is sadly typical:

It appears that the kids (kindergarten to sixth grade) are all running around yelling *kill* and *murder* and *beat up* and about *stupid* and *MR* and *dumb-ass*. . . . Back in the classroom . . . they are all these goddamn nice neat marvelous white middle-class children, even if occasionally black, talking about equal rights . . . and everyone is smart (even them fucking MR's). . . .⁴¹⁷

A visit to the teachers' lounge would prove instructive to one who be-

⁴¹⁴ The phrase is borrowed from S. SARASON, *supra* note 225. This section addresses explicitly the problem of organization resistance to change in educational practice, a question that has surfaced intermittently throughout the Article. G. ALLISON, *ESSENCE OF DECISION* (1972), offers an elegant review of theories of organizational decision-making. See generally A. DOWNS, *INSIDE BUREAUCRACY* (1967); *HANDBOOK OF ORGANIZATIONS* (J. March ed. 1965).

⁴¹⁵ "Segregation of problem children is the prepotent response to the professional and personal dilemmas teachers face." S. SARASON, *supra* note 225, at 156. See also McIntyre, *Two Schools, One Psychologist*, in *PSYCHOEDUCATIONAL CLINIC: PAPERS AND RESEARCH STUDIES* (F. Kaplan & S. Sarason ed. 1969).

⁴¹⁶ S. SARASON, *supra* note 225, at 156 n.2.

⁴¹⁷ J. HERNDON, *supra* note 27, at 59.

believes that people grow out of these childish intolerances. "Those Portuguis," one teacher says, standing two feet from the Portuguese students in the class (presumably they can't hear) "are just dumb. They can't learn anything." Surely the comment reveals bias. And just as surely the behavior that accompanies such perceptions will not be directly affected by anything that educators or judges say to them, no matter how forcefully and cogently it is said. "The power to legislate change," observes Professor Sarason, "is no guarantee that the change will occur."⁴¹⁸ Some sorting, often of the most logically indefensible nature, may well be as inevitable in the schools as in the society.⁴¹⁹

Yet to state that change will be difficult to accomplish does not imply that currently prevailing school practices will forever persist. Educators have changed their minds, altered their cultures before; they are likely to do so again. And judicial intervention to secure one or another of the constitutional principles discussed in this Article may well serve to encourage such changes of mind by insisting upon changes in behavior.

How might that process work? We can only venture informed guesses. The school obliged to readmit students it had deemed educable or incorrigible may find a way to educate those on whom it had given up. Called upon to defend a sorting scheme which places a disproportionate number of minority students in the least advanced school classifications, a school may devise educational strategies which treat cultural differentness as a school resource. The school, asked to explain the devices by which particular children are assigned to certain educational programs, may come to recognize subtleties of student ability and performance that those devices simply ignored. The insistence that school systems provide procedural safeguards for those whom they would adversely classify may evoke a reexamination of the premises on which sorting is based.

Each of these statements embodies only a sentiment, a hope of what will happen in the culture of the school as the result of a judicial

⁴¹⁸ S. SARASON, *supra* note 225, at 120 (referring to the obstacles faced by a principal in trying to change a teacher's method of teaching).

⁴¹⁹ In a generally favorable discussion of English "open education" prepared for Educational Testing Service, Edward Chittenden notes that

[g]iven the demonstrated emphasis on respect for the children . . . I found it difficult to understand why some of the teachers used unnecessary global labels in describing children—labels such as "backward," "dull," "lazy." I found too that staff members were quite aware of the measured ability of students in their schools And while most of these educators voiced a view that such measures had little value, they might, at the same time, refer to their students as a "low ability" group.

Chittenden, *What Makes the British Bandwagon Roll*, LEARNING, Apr., 1973, at 6, 9.

decision which addresses some aspect of within-school classification.⁴²⁰ But every notable constitutional claim embodies the similar hope that a declaration of rights will lead people to change their lives, to act consistently with what has been held to be just behavior. In the school setting that this Article describes, the hope seems at least plausible, and justifies judicial efforts to protect school children against the too often ill-considered, arbitrary and hurtful distinctions made by their elders.

⁴²⁰ There is always the risk that judicial intervention will lend "unnecessary rigidity to treatment of the social problems involved by foreclosing a more flexible, experimental approach." Note, *Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board*, *supra* note 240, at 1525. This Article attends (perhaps in too great detail) to that risk; the standards that it suggests are meant to discourage rigidity both of judicial review and school behavior.