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Intelligence Testing beyond Griggs v. Duke Power Company

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NOTES AND COMMENTS

INTELLIGENCE TESTING BEYOND *GRIGGS V. DUKE POWER COMPANY*[1]

I. INTRODUCTION

> The Supreme Court decision was only one month old when I entered prison, and I do not believe that I had even the vaguest idea of its importance or historical significance. But, later, the acrimonious controversy ignited by the end of the separate-but-equal doctrine was to have a profound effect on me. The controversy awakened me to my position in America and I began to form a concept of what it meant to be black in white America.[2]

Since 1954 little significant change has occurred in the meaning of being black in white America. The controversy still burns and discrimination still exists. No citation is necessary to substantiate the fact that black people still live in a predominantly white America.

Despite a multiplicity of corrective efforts at all levels of government as well as private endeavor, even some of the more blatant expressions of racial discrimination have not yet been purged from our society. Just as the awakening that the *Brown* decision caused in one of the most infamous black revolutionaries of our time, Eldridge Cleaver, remains an unfulfilled though potentially explosive ideology; so also does the integration that it required in public education remain an unkept yet volatile promise. In addition, discrimination persists through countless subtle devices, many of which go largely unnoticed for the attention paid the obvious ones. Occasionally, however, some of these subtleties are identified, challenged and eliminated (perhaps even at the expense of those which may have social or other value that outweighs their insidiousness).

Since before the beginning of this century, intelligence testing has been generally and passively accepted as a seemingly integral, even necessary part of American life. Recently, however, it has come under increasingly hostile attack as being a tool used by white America for the implementation and maintenance of segregation, particularly in education and employment. The use of intelligence testing in these two fields has now become a controversial possibility in the search for abstruse discriminatory practices.

Questions of whether intelligence testing is discriminatory in these specific instances have already received judicial attention. Two particularly noteworthy

[1] 401 U.S. 424 (1971), *rev'g* 420 F.2d 1225 (4th Cir. 1970), *aff'g in part* 292 F. Supp. 243 (M.D. N.C. 1968).

[2] E. Cleaver, Soul on Ice 3 (1968). The reference is obviously to Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

decisions have emerged: *Hobson v. Hansen*,[3] concerning intelligence testing in education; and, *Griggs v. Duke Power Company*, regarding its use in employment. The two cases are readily distinguishable, not only because education and employment present two different sociological contexts in which the tests are used, but also because the decisions were formulated in two different legal settings. The former case relied upon the constitutional grounds suggested by the *School Desegregation Cases*,[4] while the latter was determined under the Equal Employment Opportunity provisions of the Civil Rights Act of 1964.[5] Additionally, of course, only the latter case was decided by the Supreme Court, leaving the question of its interpretation of the former to conjecture and analogy for the present.

This discussion will examine these decisions and comment upon their bases, reasoning, and results, particularly with respect to the potential significance of the *Griggs* decision on testing in education cases and to the meaning of being black in white America.

II. Background

What are "intelligence tests"? For purposes of this discussion, the term "intelligence tests" includes any type of measurement technique that is intended to quantitatively assess an individual's ability to read, write, speak, comprehend, perceive, remember or reason. Reasonable though this definition may at first seem, while all of the emunerated properties may very well have something to do with intelligence, neither individually nor collectively do they fully describe intellectual capacity. Just as certainly and exactly as a person's height may be measured, his intelligence *cannot* be so closely ascertained: intelligence has not yet been precisely defined by science.[6] It is not a quantifiable characteristic of human beings; and, as such, any test to measure it must only be indicative of less than all of its components. Such tests are, therefore, inconclusive at best.

Simply stated, intelligence tests measure present abilities. Unfortunately, they are often used to indicate intelligence and, just as unfortunately and often, they are used to predict performance in various endeavors.[7] Thus, the primary problem is that in attempting to assess intelligence the tests place the cart before the horse: they specify units of measure and then define the subject of measurement according to those units. This process is somewhat akin to taking

[3] 269 F. Supp. 401 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968), *aff'd sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[4] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

[5] Civil Rights Act of 1964, Title VII, § 703(h), 78 Stat. 241, 42 U.S.C. § 2000e-2(h) (1964).

[6] R. Herrnstein, *I.Q.*, The Atlantic 43, 49-50 (Sept. 1971). No attempt will be made here to define "intelligence," as this would lead the discussion into waters as yet not clearly charted by even psychologists and others who continuously deal with that still mysterious concept in the normal course of their professional endeavors.

[7] J. Gardner, Excellence 49-51 *passim* (1962).

a ruler and using it to measure and predict the weight of various objects. Since not all objects of the same size and dimensions are composed of the same materials, they are not necessarily of the same weight. Further, a ruler is hardly an appropriate device for predicting what an object might weigh in the future. Even measuring with a scale; who can say that a man who weights 150 pounds today will weigh the same tomorrow? Similarly, to measure intelligence without first knowing what it is or to forecast the magnitude of a man's success with a test that measures his present ability in a specific area, attributes supernatural powers to mortal techniques.[8] In spite of these conceptual difficulties, intelligence tests have proliferated.

A myriad of tests have been devised to attempt to measure and predict intelligence by evaluating all of the above mentioned abilities, individually and in combinations.[9] One of the first, and still probably the most influential and representative of these attempts, were the "I.Q." tests. These tests are composed of questions designed such that, theoretically, a predetermined number of them can be correctly answered by all "average" persons of a corresponding age, *e.g.*, the number of correct answers determines a person's "mental" age. The mental age thus derived for a person is then divided by his chronological age and multiplied by 100 to derive his "Intelligence Quotient" (I.Q.).[10] Aside from any question of whether this determination is a true indication of intelligence, the validity of the technique is entirely dependent upon the accuracy of the method used to develop the questions and the sample used to achieve the predetermined levels that "average" members of a given age group should reach.

Thus, intelligence tests have two inherent properties that make them especially susceptible to criticism: their specified performance levels can be based upon questions that are arbitrary or oriented to particular groups of people and upon statistical samples that are not representative of the measured group; and, they can be misinterpreted as being indicative of qualities they cannot possibly measure and predictive of a future they cannot possibly foresee.

Despite their vulnerability to inaccuracy and misuse, intelligence tests can play a valuable role in our society.[11] If accurately conceived and properly used, they can help identify an individual's present talents and abilities, as well as his deficiences; and thus assist educators and employers in making the best possible use of his positive traits while indicating those areas in which they can guide him toward improvement.

[8] The writer recognizes that statistical correlations have been made between test performance and later achievement, but submits that such correspondences are subject to the same criticisms as the tests themselves.

[9] *See* R. Herrnstein, *supra* n.6, at 45-49; *see generally* Cooper and Sobel, *Seniority and Testing Under Fair Employment Laws, A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598 (1969); Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 Colum. L. Rev. 691 (1968) (hereinafter cited as Columbia Note).

[10] R. Herrnstein, *supra* n.6, at 47.

[11] *Supra* n.7, at 46-48.

In the past, criticism of intelligence testing has largely been ignored as being merely an unrealistic "fear of the *potentialities* for social manipulation and control inherent in any largescale processing of individuals" due to a lack of comprehension of testing processes.[12] While this reasoning acknowledges the possibility of misuse, it impliedly assumes that the tests are valid, both as to their composition and their ability to measure some given quality. This assumption appears to be the reason intelligence testing has escaped careful scrutiny until just recently. But, now the time for quiet acquiescence seems to have passed. The law has been presented with the challenge of determining the roles that intelligence testing will play in our lives, specifically in education and employment.

In taking up the challenge, Congress determined in the Civil Rights Act of 1964 that testing in employment is an appropriate area for legal attention and the Supreme Court confirmed that view in *Griggs*. The question whether testing in education is also such an area still remains. Thus, the query is not only one as to the criteria that should be used to evaluate intelligence tests, but also whether the judiciary should deal with the use of testing in education.

III. Griggs v. Duke Power Company

The *Griggs* decision is essentially the last chapter in the history of that portion of the Equal Employment Opportunity provisions of the Civil Rights Act of 1964 which reads in pertinent part as follows:

> [N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex or national origin.[13]

In order to place the decision into perspective with its legislative basis, a chronological review of this statutory language and the attendant circumstances is necessary.

The first chapter in the history was written in Illinois in early 1964 by the Illinois Fair Employment Practices Commission. A young Negro, named Myart, contended to the Commission that as a part of his application for employment at Motorola, Inc., he had taken and passed a standardized test; but that because he was a Negro, his score had been falsely recorded so as to deny him employment. The Commission believed him. On February 26, 1964, it issued an order directing Motorola to "cease and desist from denying equal employment opportunity to any qualified applicant because of his race."[14]

[12] *Id.* at 47 (emphasis added).

[13] *Supra* n.5.

[14] Myart v. Motorola, Inc., Ill. F.E.P.C. Dec. No. 63C-127, CCH State Laws, ¶ 47,503 (1964) (reprinted at 110 Cong. Rec. 5662 (1964)), *aff'd sub nom.*, Motorola, Inc. v. Ill. F.E.P.C., CCH State Laws, ¶ 49,519 (Cir. Ct. of Cook County 1964), *rev'd* 34 Ill. 2d 266,

News of the decision soon reached Washington, where Congress was considering the bill that was to become the Civil Rights Act of 1964. The effect was startling, particularly in the Senate. The order was widely interpreted as flatly prohibiting the use of standardized tests on which whites perform better than blacks, to the end that the use of such tests could not be justified even by legitimate business needs.[15] This view, juxtaposed with the version of § 703(h) then before the Senate, gave rise to the fear that the proposed statutory language could be interpreted as supporting similar pervasive decisions in the future, *e.g.*, that no test on which whites as a group scored higher than blacks as a group could be used.[16]

The ensuing debate clearly underscored the intention of the Senate to construe § 703(h) so that if employers used job-related tests for the purpose of determining applicants' job qualifications, the tests would be considered non-discriminatory. Though the intention was clear, the result can hardly be considered clearly reflective of such intent.

Thus, the responsibility for precisely setting out the meaning of that language devolved to the Equal Employment Opportunities Commission (EEOC).[17] In a series of guidelines and decisions issued by the EEOC since 1964, it has clearly and unequivocally indicated that a "professionally developed ability test" must measure qualities required by specific jobs or classes of jobs in order to be permissible under the statute.[18]

The *Griggs* case was set against this legislative and administrative backdrop. The facts are essentially simple:[19] the defendant, Duke Power Company, operates its Dan River power station at Draper, North Carolina, employing about 95 people. The jobs at the plant are divided into five categories, including one called "labor." Prior to 1965, jobs for Negro employees were limited to the labor department. The device used to implement this confinement was the requirement of a high school diploma or its equivalent for employment in or transfer to the other departments.

In 1965, when the Civil Rights Act of 1964 became effective, the defendant added new hiring and transfer policies, including one making satisfactory

215 N.E.2d 286 (1966). The Commission acted under authority granted it by § 856 of the Illinois Fair Employment Practices Act of 1961, Ill. Rev. Stat. ch. 48, §§ 851-66 (1969).

[15] 91 S. Ct. at 855 n.10; 420 F.2d at 1242 (dissenting opinion).

[16] The precise meaning of the fact that blacks may tend to uniformly score lower on certain tests than whites has been one of the most heated issues in the intelligence testing controversy. The opinions range from a simple assumption that such tests are discriminatory, Columbia Note, *supra* n.9 at 691; to the view that they disclose an inherent inferiority of blacks to whites, R. Hernstein, *supra* n.6 at 56.

[17] The EEOC acted under the provisions of § 713(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-12(a) (1964).

[18] *See, e.g., Guidelines on Employee Selection Procedures*, 35 Fed. Reg. 12333 (1970); Dec. of EEOC No. 70-552, CCH Empl. Prac. Guide, ¶ 6189 (1970); *Guidelines on Employee Testing Procedures*, CCH Empl. Prac. Guide, ¶ 16,904 (1966).

[19] The facts herein stated are a compilation of the descriptions contained in the three decisions cited n.1, *supra*.

scores on two standardized professionally-developed general intelligence tests requisite to being hired into or transferred to all but the labor department. The tests were general in nature and did not relate directly to any of the defendant's five job classifications. This additional standard was not applied to employees hired prior to its implementation. Those employees who did not have high school diplomas were allowed to substitute satisfactory test scores for the diploma requirement. In either case, most of the Negro employees still found themselves confined to the jobs in the labor department. Accordingly, thirteen of the fourteen Negro employees at the Dan River station brought a class action to enjoin these purported violations of § 703(h).

In a memorandum opinion the district court dismissed the complaint, finding that neither the high school education nor the general testing requirements were themselves discriminatory and therefore that the plaintiffs had not sustained the burden of proving that the defendant had engaged in discriminatory employment practices.[20] In so holding, the court acknowledged the existence of the EEOC guidelines in respect of § 703(h), but forthrightly disagreed with them and said:

> Nowhere does the Act require that employers may utilize only those tests which accurately measure the ability and skills required of a particular job or group of jobs. Nowhere does the Act require the use of only one type of test the exclusion of other nondiscriminatory tests.[21]

On appeal to the Fourth Circuit Court of Appeals, a majority of that court agreed with the district court in rejecting the EEOC guidelines. This court, however, felt compelled to do more than simply dismiss the guidelines without any legal support. The majority acknowledged that "it has been held [by the Supreme Court] that the interpretation given a statute by an agency which was established to administer the statute is entitled to great weight."[22] and then proceeded to afford the EEOC guidelines absolutely no weight at all. It found that the requirements in question were neither intended to be nor in fact were used discriminatorily and therefore that they were valid under § 703(h).[23]

In a vigorous dissent, Circuit Judge Sobeloff carefully pointed out that neither the legislative history of § 703(h) nor the decisions of the Supreme Court relating to the administrative interpretations of statutes supported a construction of the section so widely variant from that of the EEOC.[24] His opinion concluded with the plea:

> This case deals with no mere abstract legal question. It confronts us with one of the most vexing problems touching racial justice and

[20] 292 F. Supp. at 251.
[21] *Id.* at 250.
[22] 420 F.2d at 1234.
[23] *Id.* at 1232-33.
[24] *Id.* at 1239-47 (dissenting opinion).

> tests the integrity and credibility of the legislative and judicial process. We should approach our task of enforcing Title VII with full realization of what is at stake.[25]

In reversing the decision of the court of appeals, the Supreme Court appears to have drawn heavily upon the materials and reasoning of Judge Sobeloff's dissent. A unanimous court, speaking through Mr. Chief Justice Burger, delivered a succinct opinion which may be summarized as follows:

1) Under the Civil Rights Act of 1964, tests that may themselves be neutral and that may not be intended to be discriminatory cannot be used if they have the effect of perpetuating prior discriminatory employment practices. "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[26]

2) Section 703(h) was not intended to force the hiring of unqualified persons but rather to eliminate discrimination based upon factors not at all related to employment.[27] In this spirit Congress specifically provided for the use of "professionally developed" tests to help determine the qualifications of applicants with respect to particular jobs.[28] "Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant."[29]

3) Both the legislative history and the actual expression of § 703(h) indicate that the EEOC's guidelines are accurate representations of the intent of Congress to ensure that any tests used in employment be fair and job-related.[30]

The Supreme Court saw testing in employment as a hand that open could be extended to provide assistance and increased efficiency to employers, but which closed could become the fist of tyranny and despotism. It acted to keep that hand open. It decided that the manner of use of testing and the effects of that use are determinative of whether a given test is discriminatory, and that job-relatedness is the prime determinant of whether that test is properly used.[31]

During the entire course of *Griggs'* journey to judgment by the Supreme

[25] *Id.* at 1248.

[26] 401 U.S. at 429 (emphasis original).

[27] "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431.

[28] "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.

[29] *Id.* at 436.

[30] *Id.* at 434.

[31] It has been suggested that "the law seems to be moving toward emphasis on the impact of the challenged action rather than on the purposes behind it." Cooper and Sobel, *supra* n.9 at 1671 n.4. The Griggs decision obviously conforms to that observation.

Court, the case was argued on precisely this point—the use and effects of the tests. Because these tests were professionally developed, a tacit assumption was made throughout the litigation that they were validly conceived. In addition, the accuracy of the tests as devices to measure "general ability" was never put in issue. The statute itself seems to assume that, but for questions of misuse, professionally developed abilities tests would otherwise be perfectly acceptable. Nevertheless, since the desired result was achieved, further action was unnecessary. The singular, simple statutory standard was sufficient.[32]

IV. HOBSON V. HANSEN

On the same day that the Supreme Court decided in *Brown v. Board of Education of Topeka* that "separate educational facilities are inherently unequal" and that the equal protection clause of the fourteenth amendment therefore required integration in state public schools,[33] it also decided *Bolling v. Sharpe.* In the latter case, the problem was segregation in the public schools of the District of Columbia. The distinguishing factor was that the fourteeth amendment was not applicable. Undaunted, the Supreme Court relied upon the due process clause of the fifth amendment and found that

> [s]egregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.[34]

Twelve years after this decision was rendered and more than eleven years after *de jure* segregation had been eliminated from the District's public schools,[35] the question of whether *de facto* segregation lingered on was raised by the plaintiffs in *Hobson.* One of the pivotal arguments in the case dealt with the assignment of students to one of four curricula by using intelligence tests, called the "track system." This discussion will address only this aspect of the case.[36]

The track system was conceived, at least in substantial part, by Dr. Carl F. Hansen, who in 1954 was Assistant Superintendent of the District of Columbia public school system responsible for senior high schools, as an attempt to

32 Thus, of the several questionable properties of intelligence testing suggested above, only one was dealt with here. This conclusion leaves open for the time being the question of whether the other suggested infirmities might also be proper subjects for judicial inquiry. *See, supra* n.11 and preceding text.

33 347 U.S. at 495.

34 *Id.* at 500. The Court did recognize that while equal protection and due process are two different guarantees entailing different standards, they both stem from "our American ideal of fairness," and therefore they "are not mutually exclusive." *Id.* at 499.

35 269 F. Supp. at 411-12, 442.

36 The court also discussed questions of "Student Segregation," *Id.* at 408-21; and "Personnel Segregation and Discrimination," *Id.* at 421-42; and found that in these respects as well as in the track system, segregation still existed in the District of Columbia school system.

maximize the quality of education received by each student according to his general level of ability, and concurrently to comply with the desegregation mandate of *Bolling* by eliminating race as a determinant of educational opportunity.[37] The track system was adopted by the board of education in 1956 and has been used throughout the District's public schools since that time. Plaintiffs contended that the track system was in reality a method used to "resegregate" the public schools since its effects were discriminatory and thus violative of their constitutional rights and of *Bolling*.[38]

Circuit Judge J. Skelly Wright, sitting as District Judge for the case, carefully considered the evidence, found merit in the plaintiffs' contentions, and accordingly ordered the abolition of the track system. A summary of his findings of fact and law follows.

The track system was conceived "to provide differing levels of education for students with widely differing levels of academic ability."[39] As implemented in the District of Columbia, it had four educational levels, the two higher of which were essentially college preparatory and the lower two, vocational, *e.g.*, "blue-collar" oriented. Students were placed into tracks according to their abilities as determined by various tests for that purpose, and were theoretically able to change tracks or take courses in two tracks concurrently (called "cross-tracking") should subsequent testing so warrant.

> The express assumptions of this approach are three: *First*, a child's maximum educational potential can and will be accurately ascertained. *Second*, tracking will enhance the prospects for correcting a child's remediable educational deficiences. *Third*, tracking must be flexible so as to provide an individually tailored education for students who cannot be pigeon-holed in a single curriculum.[40]

Judge Wright then embarked upon an exhaustive study of the evidence that had been presented regarding the actual operation, success and effects of the track system in the District. For purposes of this discussion, the evidence clearly showed that the track system—concededly, unintentionally—had become but a sophisticated means to perpetuate segregation and discrimination.

a) A correlation existed between the socio-economic character of the neighborhoods served by schools and the relative numbers of students in each

[37] *Id.* at 442-44.

[38] *Id.* at 444.

[39] *Id.*

[40] *Id.* at 446. Judge Wright apparently felt that circumstances exist in which these three "assumptions" could exist, and that the track system could be made to operate beneficially and fairly. In stating that "[w]hatever may be said of the concept of ability grouping in general, it has been assumed here that such grouping can be reasonably related to the purposes of public education," *Id.* at 512, he implied that systems meeting the "reasonable relationship" criterion ostensibly derived from Bolling, *see* test accompanying n.34, *supra*, would validate his assumptions.

track at each school, *e.g.*, "the higher the median income level, the greater the per cent of students . . . found in the higher tracks."[41]

b) "As a general rule, in those schools with a significant number of both white and Negro students a higher proportion of the Negroes will go into the [lowest track] than will the white students."[42]

c) Actual student movement between tracks had been so small as to be virtually nonexistent. Students initially assigned to the lowest tracks, primarily blacks, were seldom moved into higher ones or even cross-tracked.[43]

d) The remedial and compensatory programs that had been instituted to assist the effectiveness of the track system, particularly at the lower levels, had not performed their intended functions.[44]

Without going further, this evidence indicated that the track system had the effects of being a device to segregrate and discriminate. As the primary determinant of track assignments, the tests used to make those assignments were also therefore discriminatory. The evidence plainly established that the use and effects of the tests were discriminatory and that the due process clause prohibited their continued use.[45] Such reasoning is also in substantial agreement with the *Griggs* "use and effects" criterion. Thus, even though the *Hobson* and *Griggs* cases rely upon two different legal bases, one constitutional and the other statutory, the objective standard applied to the tests is essentially the same, making the cases so parallel as to be in agreement.

But, Judge Wright was not satisfied with simply finding that the intelligence tests used by the District of Columbia public school system were discriminatory because they relegated students to segregated instructional groupings and confined them to courses of study which limited their specific future vocational prospects. He extended his analysis to include treatment of the fairness of the tests themselves. Based upon the testimony of several expert witnesses and treatises, his opinion included extensive, conclusive and highly critical comment regarding the inaccuracies of the tests themselves, many of which are used nationwide.

Judge Wright prefaced this section of his opinion by stating that

[41] 269 F. Supp. at 453.
[42] *Id.* at 456.
[43] *Id.* at 461.
[44] *Id.* at 473.
[45] *See, Supra* n.34 and accompanying text. Significantly, while Judge Wright obviously relied upon the Bolling reasoning, he interpreted it to include a concept not expressly acknowledged therein or in Brown: "The sum result of those infirmities, when tested by the principles of equal protection and due process, is to deprive the poor and a majority of the Negro students in the District of Columbia of the *constitutional right to equal educational opportunities.*" *Id.* at 511 (emphasis added). Were it not for this assertion—that there is a constitutional right to equal educational opportunity—and its myriad ramifications, much of the controversy surrounding the Hobson decision might not have arisen. *See, infra*

> the tests which are used, and which are of critical importance to the child, are wholly inappropriate for making prediction about the academic potential of disadvantaged Negro children, the tests being inherently inaccurate insofar as the majority of District schoolchildren are concerned.[46]

He next indicated that two kinds of intelligence tests are generally used in educational evaluation: those which are designed to measure present ability ("achievement" tests) and those which are designed to predict future achievement or performance ("aptitude" tests).[47] Any number of environmental factors, in addition to innate ability, can affect test scores because the units of measure are based upon skills that must be learned and acquired through actual experience.[48]

What in the typical poor black environment so adversely affects black children's performance on intelligence tests? Judge Wright perceived two broad types of handicaps in the disadvantaged environment that prohibit high academic achievement.

1) Environmental factors. These factors include the black child's experiences both inside and outside the home. Inside, he is typically not exposed to use of the kind of language found on aptitude tests. The language he has experienced is generally simple in form and peppered with slang, poor diction and incorrect grammar. The home itself tends to be crowded and noisy, with consequent less opportunity for concentration and auditory perception. Reading materials are often lacking. Outside, the experience of the black child seldom ranges beyond the world of his immediate neighborhood, limiting his recognition of things that middle-class white children normally take for granted.[49]

[46] 269 F. Supp. at 474.

[47] *Id.* at 478. The court suggests that the term "intelligence tests" is misleading because intelligence is only whatever such tests measure, and thus that the term "aptitude tests" is more descriptive of the process of assessing present abilities and inferring capacity to learn therefrom. The writer prefers the term "intelligence tests" here simply because that is what they attempt to measure, regardless of whatever else they might be called, tests used to predict the future tend to make self-fulfilling prophesies that relegate disadvantaged blacks to predetermined fates (unless they be used *solely* to measure specific present abilities). *See, infra* n.50 and accompanying text.

[48] The court also stated that the tests may be either verbal or nonverbal, but that no strong evidence supports any contention that the latter tests tend to neutralize detrimental environmental influences, although the effects of an adverse environment more often seem less pronounced on this type of test. *Id.* at 481, 481 n.132.

[49] *Id.* at 480-81. Underlying these remarks was Judge Wright's acknowledgment that the disadvantaged white child is just as likely to be susceptible to this kind of environment as the disadvantaged black child. However, since the problem here was specifically defined as the lower class blacks in Washington, D.C., his remarks and conclusions were so framed.

Though Judge Wright's conclusive treatment of this topic does not so indicate, the subject of whether environmental factors really do play a significant role in influencing test performance has been one of the central points of dissension in the argument over whether blacks are inherently inferior to whites. *See, supra* n.16. The debate on this point has raged for years, with both sides ever more deeply entrenched in their respective positions and little apparent hope for resolution. Compare, *e.g.*, A. R. Jensen, *How Much*

2) Psychological factors. Typically, black children suffer from a lack of self-confidence. This problem can be compounded by poor performance in school, which can lead to frustration and result in acting out and lack of discipline. It can also result in poor test performance and trouble in the classroom, thus forming a vicious circle. Initially low self-esteem leads to acting out, which in turn leads to reprimand or academic failure or both; this problem then leads to even lower self-opinion and possible withdrawal.[50] Thus the circle is formed.

Already handicapped by these factors, the inaccuracies of the tests compound the problems. First, since the group of people generally used to standardize the tests is the total population, a predominantly white middle-class influence will be found in the "average" or "normal" performance levels derived.[51] Second, since most of the tests are verbal and most of the questions are framed so as to reach the norm, a strong white middle-class orientation results.[52] Thus, such tests—usually nationally standardized and white middle-class oriented—could not possibly accurately reflect the aptitudes of disadvantaged black children in the District of Columbia.[53]

The sum total of this analysis of the tests themselves was that

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Can We Boost I.Q. and Scholastic Achievement?, Harv. Educ. Rev., 123 (1969) (purporting to statistically prove that environmental factors are overwhelmingly trivial in relation to the inheritability of intelligence), and W. George, The Biology of the Race Problem (1962) (purporting to prove the inferiority of blacks in disadvantaged environments by comparison to those in not-disadvantaged environments), with, *e.g.*, C. E. Silberman, Crisis in the Classroom (1971) (pointing out fallacies in Jensen's arguments and statistical techniques, and illustrating how environmental factors have in fact been overcome in instances involving new and different teaching philosophies), and M. Deutsch, The Disadvantaged Child (1967) (showing that inappropriate and inadequate teaching techniques, as a part of a child's total environment, contribute to poor performance as much as do the home and community environment).

Logically and in light of the works of Messrs. Silberman and Deutsch, the writer finds it extremely difficult to accept any argument that deemphasizes or disregards the detrimental effects of a disadvantaged environment upon the academic performance of a child or that attributes poor performance by black children to inherent inferiority. Without going into an extensive analysis of the various positions taken by both sides, the following hopefully compelling illustration is submitted to the reader for his own evaluation:

"The non-verbal character of the lower-class home means that youngsters' memory, as well as their attention span, receive less training. . . . The non-verbal atmosphere also means that lower-class children have a limited perception of the world about them: they do not know that objects have names (table, wall, book), or that the same object may have several names (an apple is fruit, red, round, delicious); the reason is that the middle-class mother will say, 'Johnny, pick up that book from the table and put it back in the shelf," while the lower-class mother may restrict herself to, 'Bring *that*; put it *there*,' and point, or use other 'sign language' to indicate '*what*' and '*where*'." C. E. Silberman, Crisis in Black and White 271-72 (1964) (emphasis original).

[50] For an excellent analysis of this subject, *see* Poussaint and Atkinson, *Black Youth and Motivation*, The Black Scholar 43 (Mar. 1970).

[51] 269 F. Supp. at 479.

[52] *Id.* at 484-85.

[53] The court also discussed two possibilities for improving the tests: development of locally standardized tests and, in the less desirable alternative, establishment of local norms for nationally standardized tests; thereby implying that the tests themselves could be constructed so as to not be discriminatory. *Id.* at 487-88.

> [b]ecause these tests are standardized primarily on and are relevant to a white middle-class group of students, they produce inaccurate and misleading test scores when given to lower class and Negro students. As a result, rather than being classified according to ability to learn, these students are in reality being classified according to their socio-economic or racial status, or—more precisely—according to environmental and psychological factors which have nothing to do with innate ability.[54]

By the time that this decision came before the court of appeals two years later, both the superintendent of schools and the board of education had changed. Dr. Hansen was gone and a newly elected board sought on appeal for a modification of that portion of the district court decree abolishing the track system to permit a form of ability grouping that would be reasonably related to the purposes of public education.[55] In refusing to so modify, the court interpreted the decree as affecting only the track system circa 1967 and thus without need of modification.[56]

The affirmance was by a one vote majority. The three dissenting judges were adamant. Among them was then Circuit Judge Warren F. Burger. Of prime concern to the dissent and particularly to Judge Burger was the opinion that in affirming, the majority had impliedly conceded that the whole broad spectrum of educational policy was acknowledged as being open to judicial scrutiny. The dissenters thought this area so far from the realm of judicial competence as to demand imposition of judicial self-restraint.[57]

V. COMMENT[58]

In the two immediately preceding sections of this discussion, the two most important cases thus far decided on the subject of intelligence testing were described. The purpose of the remainder of this discussion is to compare and comment upon them, particularly with respect to the three most obvious characteristics which distinguish them. Specifically, these are: 1) *Griggs* was concerned with the use of intelligence testing in employment, whereas *Hobson* was related to its use in education; 2) *Griggs'* legal foundation was statutory, *e.g.*, the Equal Employment Opportunity provisions of the Civil Rights Act of 1964, whereas *Hobson* was based upon the constitutional guarantees of due process and equal protection as interpreted in the *School Desegregation Cases*; and, 3) *Griggs* was decided in 1971 by the Supreme Court, whereas *Hobson* was decided in 1967 by a federal district court (notwithstanding its affirmance in 1969 by a court of appeals).

54 *Id.* at 514.

55 *See, supra* n.40.

56 408 F.2d at 189-90.

57 *See id.* at 193-97 (dissenting opinions). This notion is more fully explored below. *See, infra* n.n.66-70 and accompanying text.

58 The reader is reminded that reference to Hobson herein includes only that portion of the decision dealing with the use of intelligence testing in the track system.

In spite of these differences, the two cases do have a common thread connecting them. This thread, of course, is intelligence testing. Is this common topic sufficient to overcome and reconcile the three differences? Would application of the same objective standard in both education and employment operate to overcome the differences that might otherwise separate them? The answer to these questions is "Yes" for the following reasons.

1) *Employment versus Education*

Though the fields of employment and education are admittedly very different, and though the uses of intelligence testing in them may differ accordingly, one striking similarity exists in the two situations: intelligence testing can be misused to promote segregation and discrimination. And, in this single likeness, with its potential for evil and destruction, all of the differences between the fields in which intelligence testing is applied must lose their significance. To argue that because education and employment are different, segregation and discrimination in one of them is somehow different than in the other, is like believing that because two one dollar bills have different serial numbers they have different values.

If intelligence testing is used to or has the effect of causing or preserving segregation or discrimination, the field of endeavor in which it is applied should not matter.[59] After all, the purpose of judicial inspection and regulatory action with respect to intelligence testing would be the elimination or prevention of wrongs clearly prohibited by either statute or the Constitution or both, rather than control over or regulation of the field in which it is applied.[60]

Also, applications of one objective standard to intelligence testing would effectively nullify differences in its areas of application. This standard, of course, would be the *Griggs* "use and effects" criterion. By considering only whether the testing in question is misused (*e.g.*, whether any valid purpose or any reasonable relationship to the conduct of the activity is served by its use, and whether its use has any unfair effect) virtually no question as to the existence of compelling peculiarities or distinguishing characteristics in that activity can arise. Indeed, a showing of some idiosyncrasy of significant importance to a given field would probably make the task of determining whether testing was misused even easier.

2) *Statute versus Constitution*

Further discussion on the statutory provision upon which the *Griggs* decision was predicated is unnecessary as the decision itself validated it and

[59] *See, supra* n.27.

[60] *See, supra* n.31. Such reasoning clearly would not be repugnant to the Supreme Court. For example, in finding testing to be within the purview of the Voting Rights Act of 1965, § 4(c), 79 Stat. 438, 42 U.S.C. § 1973b(c) (1964 ed. Supp. III), the Court found that "[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating evil." South Carolina v. Katzenbach, 383 U.S. 301, 330 (1966).

specified the manner in which it is to be interpreted.[61] Rather, the problem is one of proper application of the equal protection and due process clauses of the Constitution.

Clear though the mandate of the *School Desegregation Cases* might at first appear,[62] it led to general upheaval, confusion, debate and lack of compliance that still persists in public education throughout the country and which has thus far prevented any real progress toward the Supreme Court's avowed goal.[63] In turn, this mandate could logically be expected to lead to similar results for subsequent cases relying upon the *Brown* or *Bolling* rationale.

Such confusion with respect to that portion of the *Hobson* decision with which this article is concerned may not be warranted. Had the court in *Hobson* stopped with the simple constitutional requirement that the due process clause does not permit segregation in the public schools of the District of Columbia and that the track system was a form of racial discrimination, it would not have had to go further to justify abolition of the track system.[64] Unfortunately, Judge Wright went beyond *Bolling* and *Brown* and beyond the due process clause to the equal protection clause. He suggested that a right to equal educational opportunity may be derived from those constitutional provisions.[65]

This simple proposition caused a storm of protest that tended to obscure

[61] *See, supra* n.n.5, 13, 18 and 27 and accompanying text.

[62] *See, supra* n.n.33 and 34 and accompanying text.

[63] *See* Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. Chi. L. Rev. 583, 594 (1968). In addressing the question of whether the equal protection clause includes a right to equal educational opportunity, Professor Kurland proposed three "ingredients," at least two of which must be present for any decision based upon that constitutional provision to be "successful": (1) The constitutional standard must be simple; (2) The judiciary must have adequate control over the means of enforcement, *e.g.*, a prohibition can usually be easily endorsed whereas a directive for affirmative action more often requires complex regulatory facilities that the judiciary simply does not have; and, (3) The public must acquiesce in the decision. Without yet applying these criteria to Kurland's thesis, using them to make a cursory examination of the *School Desegregation Cases* discloses that while the first one was met, *e.g.*, the finding that segregated public schools violate the equal protection and due process clauses is certainly simple enough, one is hard pressed to find the remaining two fulfilled. Although the prohibition of school segregation might at first glance seem to be enforceable as a simple negative standard, further analysis as well as experience indicate that affirmative action must be taken and closely supervised in order to comply with the desegregation order. And, of course, experience has also conclusively indicated the existence of a widespread public distaste for the means apparently necessary for implementation of the order, and consequently for the rule itself. Thus, assuming the criteria valid, since two of the three fail to be met by the decisions in the cases, it is not difficult to see why they have not yet been complied with to any significant extent.

[64] *Id.* Application of Professor Kurland's three criteria would tend to support a conclusion that the decision so founded would be "successful," for in addition to the simplicity of the standard the result is totally negative and therefore enforceable regardless of whatever public opinion on the subject might be.

[65] *See, supra* n.45. This reference to equal educational opportunity was not singular, *see, e.g.*, 269 F. Supp. at 515; the idea seemed to underlie much of Judge Wright's discussion of the law relied upon for his results.

what might have been the true thesis of the decision, the due process clause. In his dissenting opinion, Judge Burger noted the opposition by legal scholars to the equal educational opportunity theory and consequently to *Hobson* and agreed that the theories are untenable because the running of a public school system is far beyond the realm of proper judicial inquiry.[66] The difficulty with this view is that it is directed at the entire *Hobson* holding.[67] However, the appeal concerned only the abolition of the track system and not the affirmative action also required by *Hobson*.[68]

Whatever may be said with regard to the right to equal educational opportunity and the problems that would necessarily arise from attempted judicial enforcement of such a right,[69] the argument is unrelated to the specific question of the track system and intelligence testing. The common link between the abolition of the track system and the remainder of the *Hobson* opinion (which very well might be an improper, unreasonable or meddlesome extension of judicial inspection into an area it is not qualified to regulate) seems to be the

[66] 408 F.2d at 196-67. In his opinion Judge Burger cited Professor Kurland's article, *supra* n.63, and two other law review comments: Note, Hobson v. Hansen; *Judicial Supervision of the Color-Blind School Board*, 81 Harv. L. Rev. 1511 (1968); and, Note, Hobson v. Hansen: *The De Facto Limits on Judicial Power*, 20 Stan. L. Rev. 1249 (1968).

[67] 269 F. Supp. at 517. In addition to abolishing the track system, the decree also ordered defendants to, among other things, submit a plan to desegregate the students, provide specific transportation arrangements for certain students, and submit a plan for integrated teacher assignment.

[68] *See, supra* n.n.55-56 and accompanying text.

[69] The commentaries cited by Judge Burger generally expressed the opinion that the idea of equal educational opportunity is too intricate to be handled properly by the judiciary rather than by trained, skilled and experienced professional educators. *See* 408 F. 2d at 196-97.

In addition to feeling that such a doctrine would carry the judiciary into an area foreign to its expertise, Professor Kurland argued that it also would lead to a dilution in the quality of better schools without substantially improving that of poorer ones, *e.g.*, attainment of equality in educational opportunity could only be had at the expense of excellence. Kurland, *supra* n.63, at 590. Such a fear may indeed be a valid one (it is interesting to note that former HEW Secretary John Gardner devoted an entire book to the question of "[w]hether we can be equal and excellent too" and was unable to achieve an answer. *See* J. Gardner, Excellence (1962), but it only sidesteps the very current and very real problems of improving inferior schools for a conjectural possibility. And, it avoids the demand of the equal protection clause that one cannot be denied an at least adequate education where it is offered by the state. *See* Brown v. Board of Education, 347 U.S. 483, 493 (1954). If preservation of superior schools be the only argument for denying the implementation of the equal educational opportunity idea, then it certainly cannot be adequate reason to not improve the quality of inferior schools by supporting such a right.

This is, of course, where Professor Kurland's three criteria come into play. *See, supra* n.63. In his analysis of whether the Supreme Court should expressly recognize the right to equal educational opportunity, he found none of the three criteria could be met and therefore that such a pronouncement would not be "successful." This, because first, "equality has never been adequately defined as a general legal concept [citation omitted]" and is steeped in political ramifications that make it far less than a simple legal standard; second, the standard would require continuous affirmative action and judicial supervision and thus deprive the judiciary of an effective means of enforcement; and third, "[w]here are you to find your men and women of good will to support such a change?" *See, supra* n.63 at 598.

mention of equal educational opportunity. Were equal educational opportunity not mentioned, the only constitutional concept remaining would be the straightforward application of the *Bolling* decision.[70] As indicated by the discussion of the *Hobson* case, *Bolling* was all that was necessary to achieve the result.[71] Since the Supreme Court has not specifically acknowledged the existence of a right to equal educational opportunity, the court's reliance on such a right was premature particularly since other grounds for decision were available.

Thus having separated the grain from the chaff in *Hobson*, the larger question of the use of intelligence testing in education generally can be considered. The only remaining problems are the prohibition of segregation in public schools and the tests themselves. Clearly, these problems lead directly to the *Griggs* "use and effects" criterion. What more logical and simple standard exists other than if intelligence testing in education is used or has the effect of segregating students according to their race it must not be permitted? Such a test would not only conform with the constitutional guarantees of equal protection and due process, but with common sense as well.[72]

3) *Supreme Court versus J. Skelly Wright*

The foregoing discussion makes comment upon the difference between the *Griggs* and *Hobson* decisions nearly redundant. At the heart of the matter (and when *Hobson* is considered only with respect to intelligence testing), one simple objective standard is all that is necessary to make a judicial determination of whether a given test may be used. Hence, for the Supreme Court to refuse to adopt such reasoning and to refuse to apply the *Griggs* criterion to situations other than employment would defy explanation and reason.

In performing his exhaustive analysis of the District of Columbia public school system, Judge Wright went well beyond the point at which the track system could have been adequately treated. His extensive discussion of "environmental," "psychological" and other factors related to intelligence testing as well as his apparent reliance upon a right to equal education opportunity served no purpose other than to underscore his basic findings, betray his zealousness in attempting to purge all of the evils he found in one fell swoop, raise many unnecessary corollary issues, and provide critics with an abundance of material.

[70] This statement assumes that a straightforward application is possible, which may be a bit presumptuous because in the Brown decision it was said that adequate education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." 347 U.S. at 493. However, since the real basis of the Hobson decision was Bolling, in which the Supreme Court was so concerned with justification of using the due process clause to the same end achieved in Brown, using the equal protection clause, that it did not reach the subject of equality, application of its constitutional interpretations to Hobson can be deemed to be without such ancillary overtones.

[71] *See, supra* n.45 and accompanying text.

[72] The writer optimistically submits that even the Chief Justice would be amenable to this proposition if questions concerning intelligence testing were carefully separated from other matters that could create the same kind of camouflage as was present in *Hobson*.

His apparent attempt to so firmly support his opinion with facts and law that it would be beyond question had precisely the opposite effect.[73]

VI. Conclusion

Once the smokescreen of extraneous matter has been blown away, remaining are: intelligence testing, the "use and effects" criterion, and a nation of too many segregated inferior schools. Certainly, the last item has not been the exclusive result of the first; but, just as certainly where, as in the District of Columbia, testing is misused, segregation can result and even flourish under the guise of classification for some other reason. And, though it possibly be but a relatively subtle technique, it can be nonetheless harmful.

Remaining now is the problem of whether intelligence testing can be maximally beneficial to educators and students alike, and yet not racially discriminatory. The answer to this probably lies in the use to which the results of the tests are put. Since it is logistically impossible to individually treat each student (which would be the ideal case), some sort of grouping arrangement is a necessary evil in our educational system. Could some form of intelligence testing be used to achieve a fair classification system?[74] The answer to this question is probably best left to those most qualified to answer it.

Bruce Vodicka

[73] Professor Kurland went so far as to say: "And everything that Judge Skelly Wright can do will not afford an integrated school system for the Nation's capital [footnote omitted]. All that he can accomplish is to assure that the brighter student receive no better education within the system than the other students." Kurland, *supra* note 63 at 595.

[74] *See*, *supra* n.n.40 and 53. The writer also recommends that a careful reading of Mr. Silberman's latest work provides some very innovative, interesting and unique possibilities. *See generally* C. Silberman, Crisis in the Classroom (1971).