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Racial Discrimination in IQ Testing - Larry P. v. Riles

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RACIAL DISCRIMINATION IN IQ TESTING— *LARRY P. v. RILES*

The decade of the seventies was marked by increasing judicial attacks upon the concept of "tracking," a method of grouping students according to their ability and achievement in public educational systems.[1] Several courts[2] have held that the placing of disproportionate numbers of poor and minority students in low track classes violates the equal protection clause of the fourteenth amendment.[3] These cases of the seventies were anticipated as early as 1967 by the United States District Court for the District of Columbia in *Hobson v. Hansen.*[4] The *Hobson* court found the Washington, D.C. school district's tracking system discriminatory because it placed a disproportionate number of black children in a low track providing only basic occupa-

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1. Subsequent to the writing of this Note, a decision—Parents in Action on Special Education v. Chicago Board of Education, No. 74-C-3586 (N.D. Ill. July 8, 1980)—in conflict with Larry P. v. Riles, No. C-71-2270 (N.D. Cal. Oct. 16, 1979), focused on the issues in *Larry P.* discussed herein. After a detailed item by item analysis of the tests in question, Judge John F. Grady found only one item on the Stanford-Binet and eight items on the WISC and WISC-R to be "culturally biased against black children." *Id.* at 115. Accordingly, he held that when these tests are used in conjunction with other assessment criteria, they do not discriminate unlawfully against black children. *See* note 108 *infra.*

2. *See* Panitch v. Wisconsin, 444 F.Supp. 320 (E.D. Wis. 1977) (ordering that the class of all handicapped children in the state of Wisconsin be given at public expense an education meeting their needs which is equivalent to the education provided nonhandicapped children); Mills v. Board of Educ., 348 F.Supp. 866 (D.D.C. 1972) (holding that no children eligible for a publicly supported education in the District of Columbia may be excluded from regular school classes unless they are allowed an adequate alternative education and a constitutionally adequate prior hearing with periodic review as to their status, progress and the adequacy of their alternative education); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F.Supp. 279 (E.D. Pa. 1972) (requiring the state not to exclude the class of mentally retarded from public education and training without a prior hearing).

3. The fourteenth amendment provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

4. 269 F. Supp. 401 (D.D.C. 1967), *appeal dismissed,* 393 U.S. 801 (1968). The plaintiffs in *Hansen* complained that the defendants, the Superintendent of Schools and the Board of Education of the District of Columbia, deprived not only black children but also poor children of all races of their right to an equal educational opportunity. *Id.* at 406. *Hansen* emphasized the socio-economic basis of this discrimination to a much greater extent than did Larry P. v. Riles, No. C-71-2270 (N.D. Cal. Oct. 16, 1979).

Judge Wright's order in *Hansen* abolishing the track system of the District of Columbia's schools was based heavily upon perceived unequal educational opportunities created by the use of IQ and aptitude tests. 269 F. Supp. at 443-92. The track system was instituted after Bolling v. Sharpe, 347 U.S. 497 (1954), held that the District of Columbia public school system was racially segregated in violation of the due process clause of the fifth amendment. The subsequent abolition of the District's dual school system resegregated the races by tending to place more black children in the lower tracks and fewer in the white "honors" track. With respect to the claim of inequality of education in the district, the *Hansen* court concluded: "[A]ll of the evidence tends to show that the Washington school system is a monument to the cynicism of the power structure which governs the voteless capital of the greatest country on earth." 269 F. Supp. at 407.

tional education with few remedial opportunities. More recently, in *Lora v. Board of Education*,[5] a federal district court declared that the placement of an excessive number of minority students in special day schools for the emotionally handicapped, a process that isolated minority children from white children in regular public schools, constituted a violation of the equal protection clause.[6] The policy underlying these two decisions is to encourage mainstreaming, an educational concept under which at least part of a child's school day must be spent in a regular classroom.[7] Congress endorsed mainstreaming in the Education for All Handicapped Children Act[8] and in section 504 of the Rehabilitation Act of 1973.[9]

The judicial activity of the 1970's in this area culminated in October of 1979 when the United States District Court for the Northern District of California issued its decision in *Larry P. v. Riles*.[10] In the action against

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5. 456 F. Supp. 1211 (E.D.N.Y. 1978). In the introduction to its opinion the court noted the critical nature of the issues before it, stating that "the dispute . . . is one of the most excruciating issues of our democratic society." *Id.* at 1214. The court felt that many children born into socio-economically and psychologically deprived backgrounds do not have equal opportunity to develop their talents and that our society depends primarily upon education to afford this opportunity—and primarily upon public education, "the great equalizer." *Lora* concluded that education cannot be the panacea for society's ills:

> But the system is—and perhaps by its nature must be—inadequate to lift fully the burden of poverty, of discrimination and of ignorance that so many of our children carry.
>
> . . .
>
> Hope for substantial improvements lies not in the courts but in the hands of those who control society's resources and of those who are trained and dedicated to use pedagogic and therapeutic arts.

Id. Upon reading the opinion, one is struck by the sympathy expressed for the educators involved, a mood which is markedly absent in *Larry P.* *See* Condas, *Personal Reflections on the Larry P. Trial and Its Aftermath*, 9 SCH. PSYCH. REV. 154 (1980) [hereinafter cited as Condas]

6. 456 F. Supp. at 1276.

7. The court in *Lora* described mainstreaming as

> —providing the most appropriate education for each child in the least restrictive setting.
>
> . . .
>
> —Looking for and creating alternatives that will help general educators serve children with learning or adjustment problems in the regular setting. Some approaches being used to help achieve this are consulting teachers, methods and materials specialists, itinerant teachers, and resource room teachers. . . .

Id. at 1265.

8. 20 U.S.C. §§ 1232, 1401, 1405, 1406, 1411-1420, 1453 (1976). *See* note 39 *infra*.

9. 29 U.S.C. § 794 (1976). *See* note 38 *infra*.

10. No. C-71-2270 (N.D. Cal. Oct. 16, 1979). Larry P. and the class of black children in California "who have been or in the future will be wrongly placed and maintained in special classes for the 'educable mentally retarded' (EMR)" were the plaintiffs in the case. *Id.* at 3. The defendants included Wilson Riles, Superintendent of Public Instruction for the State of California, members of the California State Board of Education, Robert Alioto, Superintendent of Schools for the San Francisco Unified School District, and the members of the local board of education. *Id.* at 4, 5. Hispanic plaintiffs had brought an action with claims similar to those in *Larry P.* in the same court. This suit was settled by a stipulated agreement. Diana v. Board of Education, No. C-70-37 RFP (N.D. Cal. June 18, 1973).

Wilson Riles, Superintendent of Education for the State of California, the court held for Larry P., a black child assigned to an educable mentally retarded (EMR)[11] classroom in the San Francisco Unified School District. The court found that the school district had not provided Larry P. and similarly situated students with equal educational opportunities and thus had violated the equal protection clause.[12] It accepted plaintiffs' arguments that they were treated unfairly, because standardized individual intelligence (IQ) tests, primarily used to place them in a "dead-end" special education class, were designed to evaluate white middle-class students, not black children.[13] In essence, the court analogized the placement of a disproportionate number of minority children in EMR classes to the dual school system declared violative of the fourteenth amendment in *Brown v. Board of Education*.[14] The net result was the same: black children were stigmatized by isolation from white children and by placement in inferior educational settings. While Larry P. and his fellow plaintiffs were not the first to challenge discriminatory placement procedures for special education, they were the first to succeed in obtaining a permanent injunction against the use of IQ tests in these procedures.[15]

The *Larry P.* decision represents an attack on a particular "track," that of EMR classes, a special education category authorized by the California legislature.[16] Further, it overturned two fundamental assumptions of special education: that IQ tests may be validly used to assess a black child's mental ability and that a black child may be placed in an EMR class on the basis of such test results.[17]

This Note reviews the rationale for *Larry P.'s* finding that California's challenged educational practice violated the equal protection clause of the fourteenth amendment. It analyzes the court's reasoning in light of other recent decisions involving charges of racial discrimination in educational and other public institutions. Finally, the Note explores the impact of *Larry P.* on American education and its significance for attorneys practicing in the educational area.

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11. " 'Educable mentally retarded' (E.M.R.) children are defined as incapable, 'because of retarded intellectual development,' of mastering the skills necessary to advance beyond a minimal educational level." No. C-71-2270 at 1(a) (quoting CAL. EDUC. CODE § 56500 (1978)).

12. *Id.* at 100.

13. *Id.* at 103.

14. 347 U.S. 483 (1954).

15. No. C-71-2270 at 103, 104. The court did indicate that IQ tests could be used if they were judically approved; however, no guidelines for approval were established.

16. *Id.* at 4, 5. *See* CAL. EDUC. CODE § 1880 (West 1976).

17. No. C-71-2270 at 101. To enjoin IQ tests is to ban not only a way of measuring ability, but also to ban a way of comparing the degree of similarity between a student's ability and achievement, a method of discovering significant strengths and weaknesses in a student's learning pattern (e.g., significant deviations in auditory, visual, or cognitive skills from his or her overall ability), and, hence, a way of providing objective data which may be used to plan individualized programs for the best possible education for these individuals.

THE DECISION

To understand the significance and impact of *Larry P.*, it is necessary to highlight the key issues presented. As noted above, the plaintiffs challenged the use of IQ tests in the process of placement for EMR classes.[18] They charged that the tests contained racial and cultural biases, discriminated against black children, and resulted in placing them in classes that subjected them to "stigma, inadequate education, and failure to develop the skills necessary to productive success in our society."[19] In addition, plaintiffs contended that the gross overrepresentation of black children in EMR classes in proportion to their numbers in the student population clearly revealed the racial bias of these IQ tests.[20]

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18. The litigation which culminated in *Larry P.* began in 1972. In Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974), the court issued a preliminary injunction (limited to the San Francisco Unified School District) against the use of IQ tests in the placement of EMR children. *See* Note, *Constitutional Law—Limiting the Use of Standardized Intelligence Tests for Ability Grouping in Public Schools*, 51 N.C. L. REV. 1564 (1973); Note, *Equal Protection and Intelligence Classification*, 26 STAN. L. REV. 647 (1974).

Following the initation of this suit in 1972, the plaintiffs moved to modify the class and the terms of the preliminary injunction to include all black California school children who have been or may be classified as mentally retarded on the basis of IQ tests. The court agreed and filed an order on December 13, 1974 expanding the terms of the injunction. No. C-71-2270 at 6. The injunction restrained both the use of individual standardized intelligence tests that do not properly account for the cultural background and experience of black children and the placement of black children into EMR classes based on the results of such tests. *Id.* In January 1975, the defendants voluntarily imposed a moratorium on the use of IQ testing for EMR placement of all children in the State of California, regardless of race. Nevertheless, during trial superintendent Riles testified that the state wished to continue IQ testing. *Id.* at 30.

Plaintiffs then filed an amended complaint on January 18, 1977 indicating several statutory bases for their claims including the Emergency School Aid Act of 1972, 20 U.S.C. §§ 1601-1619 (1976), and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-4. They also alleged violations of the California Constitution and the California Education Code. No. C-71-2270 at 7.

On August 8, 1977, the U.S. Department of Justice moved to participate as amicus curiae claiming that if a disproportionate impact on black children were demonstrated or if IQ tests were not validated for the purpose for which they were used, then a violation of the Education for All Handicapped Children Act and section 504 of the Rehabilitation Act of 1973 had occurred. The motion was granted on August 19, 1977. *Id.* The court later granted plaintiffs leave to file a second amended complaint alleging violations of the Education for All Handicapped Children Act. *Id.* at 7.

19. No. C-71-2270 at 1. This notion that children are stigmatized by enrollment in special education classes was also expressed in Hobson v. Hansen, 269 F. Supp. 401, 515 (D.D.C. 1967).

20. The court extensively reviewed the data on the disproportionate number of black children in EMR classes. No. C-71-2270 at 19. It found that at the time of the trial only ten percent of California's general student population was black, and that black children constituted twenty-five percent of the population enrolled in EMR classes. "In the 20 districts accounting for 80 percent of the enrollment of black children, black students comprise about 27.5 percent of the student population and 62 percent of the EMR population." *Id.* at 23. "These figures in practice mean that EMR classes are often almost entirely composed of minority students, chiefly black and Hispanic children. From the 1972-73 academic year until at least 1974-75, a majority of San Francisco's EMR classes had 80 percent or more minority students." *Id.* at 23 n.33.

Addressing the question of the validity of the IQ tests for blacks and the construction of such tests, the plaintiffs alleged, as a documented and generally accepted fact, that black children as a group perform less well on IQ tests than white children.[21] The court found the argument that this discrepancy is caused by genetic or socio-economic factors inconclusive.[22] Thus,

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Moreover, the testimony of expert witnesses indicated that these excessive enrollments could not be the result of chance even if it were to be assumed that black children have a higher incidence of mild mental retardation than white children. *Id.* at 24.

In addition, the court compared enrollments for EMR classes with enrollments in trainable mentally retarded (TMR) classes, and found that there was no disproportionate enrollment of black children in TMR classes. *Id.* It is difficult to make direct comparisons between EMR and TMR class enrollments. The child in the EMR class should be distinguished from the TMR child, or clinically retarded child, who manifests a moderate to profound intellectual deficit which has "concomitant organic deficits of a neurologic, metabolic, or physiological sort." R. EDGERTON, MENTAL RETARDATION 3 (1979). The TMR child appears to be born in equal numbers among all social classes and ethnic groups. *Id.* at 4. Therefore, a direct comparison between the number of black children in EMR and TMR classes cannot be made.

Seeking the reason for the disproportionate number of black children in EMR classes, the court initially looked to the cause of and measurement of intelligence. A substantial portion of the 10,000 page transcript is devoted to expert testimony on the issue of testing. No. C-71-2270 at 2. Plaintiffs alleged that it had been documented and generally accepted by professionals that there was a significant difference in the IQ scores of black and white children on standardized intelligence tests. *Id.* at 41. However, the reasons for this disparity are open to a variety of interpretations by professionals in the field.

21. No. C-71-2270 at 39, 41. As the court stated:

> It has generally been known since at least the 1920's that black persons do worse than white ones on standardized intelligence tests of the kind developed earlier in the century. The undisputed testimony of experts from both sides of the case demonstrated this disparity graphically. . . . Black children score, on average, one standard deviation below white children.

Id. at 39-40.

22. *Id.* at 43. The reasons for this IQ disparity are not clear, and thus the court pursued the possible causes in an effort to clarify the performance discrepancy. The court first considered the argument that heredity is a cause, *i.e.*, that the constituents of intelligence are inherited and that through natural selection a "gene pool" results which determines inherited capacity. The conclusion of this argument is that blacks as a group are generally less intelligent than whites. In *Larry P.*, the court noted that while certain state officials would not rule out the genetic argument, they were unwilling to base any policies on it. *Id.*

Socio-economic factors may also explain the lower IQ test scores of blacks. *Id.* at 44, 45. Some expert witnesses explained that poor children are at a disadvantage on IQ tests. *Id.* at 43. The court, however, raised the question whether such disadvantage leads to mental retardation and to poorer school and test performance. *Id.* The court heard testimony that poverty creates a greater risk of all kinds of disease, including mental retardation, due to inadequate prenatal care, malnutrition, and poor health care. Recognizing that expert witnesses disagree as to the effect of malnutrition on intelligence, the court relied on a study discounting the theory that malnutrition causes significant measurable damage. *Id.* at 44. The court realized that the whole issue of nature/nurture is still under study, and therefore did not accept the genetic, socio-economic, or malnutrition theories of causation. *Id.* at 44-45. *See* R. EDGERTON, MENTAL RETARDATION (1979) (discussion of environmental effect on intelligence); J. HUNT, INTELLIGENCE AND EXPERIENCE (1961) (same); Jensen, *How Much Can We Boost I.Q. and Scholastic Achievement?*, 39 HARV. EDUC. REV. 1 (1969) (discussion of the influence of heredity on intelligence). *See also* Reschly, *Psychological Evidence in the Larry P. Opinion: A Case of Right*

the court focused its attention on the state's list of tests[23] which, once employed, would satisfy a state statutory requirement to administer a verbal or non-verbal intelligence test before EMR placement.[24] The court indicated that the list was hastily compiled without a careful selection process; hence, little or no effort was made to control racial bias.[25] After examining the cognitive and perceptual skills measured by IQ tests and how well or poorly black children performed on these tests compared to white children, the court concluded that there was sufficient evidence indicating cultural bias in the tests themselves.[26]

The court next endeavored to interpret that bias. Defendants contended that IQ tests mirror the culture of the United States and that to live in our

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Problem-Wrong Solution?, 9 SCH. PSYCH. REV. 123 (1980) (analysis of the issues in *Larry P.*). Other evidence on the psychological effects of low socioeconomic status was either not presented at trial or was ignored by the court. No. C-71-2270 at 125.

23. The court noted:

> This list [compiled in 1969] was divided into two basic tests, one of which had to be used for E.M.R. placement, and supplemental tests. The basic list included the Stanford-Binet, and WISC (Wechsler Intelligence Scale for Children, now superceded by the revised WISC-R), the WAIS (Wechsler Pre-School and Primary Scale of Intelligence) [sic], the WPPSI (Wechsler Pre-School and Primary Scale of Intelligence), and the Leiter International Performance Scale. The supplemental list included (1) Arthor Point Scale of Performance Test, revised from II, (2) Catell Infant Intelligence Scale, (3) Columbia Mental Maturity Scale, revised edition, (4) Draw-a-Person (Goodenough), (5) Full Range Picture Vocabulary test, (6) Gessell Development Schedule, (7) Goodenough-Harris Drawing Test, (8) Merrill-Palmer Pre-School Performance Test, (9) Peabody Picture Vocabulary Test, (10) Raven Progressive Matrices, (11) Slosson Intelligence Test, and (12) Van Alstyne Picture Vocabulary Test.

No. C-71-2270 at 1(a) n.3.

24. In 1976 the California legislature for the first time enacted a statutory provision that required a test from this list be given for EMR placement. CAL. EDUC. CODE § 56505 (West 1976). The *Larry P.* court found fault with the California State Board of Education in large part because of the method it employed in creating this mandatory list of tests. No. C-71-2270 at 27-28. In the face of rising attacks on the discriminatory EMR placement procedures, the court felt the Board had grasped too hastily for an objective tool that would be a prime determinant of placement. *Id.* Unfortunately, the Board used frequency of use by currently practicing psychologists as the primary criterion for placing a test on the list; consequently, the court found the list to be a self-engendering form of discrimination. *Id.*

25. No. C-71-2270 at 27-28. In fact, the California list contains the most widely used and researched individual assessment devices available, the Stanford-Binet and Wechsler tests. *See* A. JERSILD, CHILD PSYCHOLOGY 374-75 (1960). In the 1960's and 1970's emphasis was placed on "culture-free" or "culture-fair" ability tests, but recent research shows that the black/white discrepancy continues to exist using these tests.

26. No. C-71-2270 at 47-48. The court scrutinized one of the most extensively researched tests available, the Wechsler Intelligence Scale for Children, which in 1977 underwent a new standardization to include black children (after that known as the WISC-R). The court noted, however, that the changes were insufficient, and that although black children were included in the norm group and the items were revised to be multi-cultural, the test was still biased because it did not erradicate the black/white disparity in test results. Studies not mentioned by the court concluded that the greatest disparity between black and white children on the WISC-R is due to nonverbal factors. A. JENSEN, BIAS IN MENTAL TESTING (1979), as reported in the Chicago Tribune, December 3, 1979, § 5, at 2, col. 1.

culture, one needs certain skills measurable by the IQ test. Those persons who do not independently succeed belong in a special class, namely EMR, where they will learn essential skills to "get along" in this culture.[27] The court characterized this approach as giving up on black children and indicated that from the evidence presented, IQ tests were unacceptably racially biased.[28]

Additional evidence of test bias leading to unequal opportunity centered around the content and curriculum of the EMR classes, which the court described as "dead end."[29] The *Larry P.* court found substantial evidence to indicate that, once placed in the EMR track, it was virtually impossible for a child to leave.[30] Thus, the child would be denied an equal opportunity to prepare for the adult world.

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27. No. C-71-2270 at 50.

28. No. C-71-2270 at 51. One commentator has proposed looking at the situation in a different way. She indicated that children are referred for the possibility of placement into EMR due to failure in the classroom. In other words, children have demonstrated that they are not achieving before a referral is ever initiated. She also indicated that IQ testing more frequently demonstrates that the student has better ability than expected instead of showing that a student is functioning at an EMR level. Lambert, Legal Challenges to Testing—Larry P. A Case in Point 2 (1978) (unpublished paper presented at the American Psychological Ass'n Convention in Toronto, Canada) [hereinafter cited as Lambert].

29. Special education classes had been characterized as "dead end" by the plaintiffs in Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) (discussed at note 4 and accompanying text *supra*). One witness stated that the lower levels of the track system were a "straitjacket." *Id.* at 459. The court perceived that "when a student is placed in a lower track, in a very real sense his future is being decided for him; the kind of education he gets there shapes his future progress not only in school but in society in general." *Id.* at 473. Evaluating the evidence for the 1963-64 school year, the court observed that less than 10% of high school students in the lowest track were reassigned upwards. *Id.* at 461. Statistics are, however, a matter of perspective. That 15 out of 100 children moved out of EMR placement could be said to demonstrate the flexibility of the system, but the court agreed with the plaintiffs that it proved the reverse, *i.e.*, a rigid constraining structure. *Id.* The court mused on "how a student given a steady diet of simplified materials can keep up, let alone catch up, with children his own age who are proceeding in a higher curriculum at a faster pace and with a more complex subject-matter content." *Id.* at 470. The objective of the lowest track in essence is to teach less and slower, rather than to concentrate on stimulating, enriching, and challenging the students to raise themselves into a higher level. Many special educators, however, argue that a student who reads on a third grade level must be given materials at that level in order to progress, and will be exceedingly frustrated in a class where a minimum reading level of ninth grade is required.

30. No. C-71-2270 at 19. In addition, the court indicated that children are usually about eight to ten years of age when they are placed in EMR, and are not thought to be capable of learning through the regular curriculum. Academic skills are de-emphasized in favor of social adjustment and economic usefulness, and "naturally they will tend to fall farther and farther behind the children in the regular classes." *Id.* In addition, the court observed that "[t]he educational goals for the educable mentally retarded are not reading, writing and arithmetic per se. . . . Academic skills can be objectives when they are taught with the content of the broader goal and when they are appropriate skills for the cognitive level of the pupil." *Id.* at 17 (quoting a 1974 California handbook "Programs for the Educable Mentally Retarded in California Public Schools"). It appears, however, that the required individual educational plan, developed by parents, teachers and other team members, would be the proper instrument to determine which pupils should receive more academic instruction.

Although the California Code mandates that a team make placement decisions, several witnesses testified that these teams overemphasized the IQ score.[31] In addition, the court indicated that measures required by the 1970 Education Code, such as adaptive behavior measures, developmental histories, school achievement measures and cultural background data, were not uniformly used as primary placement criteria.[32]

Of special note was the court's dismissal of a defense based upon California statutory provisions requiring parental permission before a school system could place a child in an EMR class.[33] The defendants claimed the voluntary character of placement rendered any discriminatory effect of the IQ tests insignificant.[34] The court, however, rejected this defense because black parents seldom refused to give their consent due to the mystique of teacher authority and the overwhelming effect of IQ scores.[35]

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31. To stress the overemphasis on IQ scores, the court included in its opinion the following testimony of Robert Whiteneck, Director of Special Education of the Sonoma County Office of Education and Director of Special Education from 1965 to 1975 of the Berkeley Schools:

> Q. Despite requirements in the Education Code that factors such as developmental history, adaptive behavior and medical history be assigned, is it your opinion that I.Q. tests were the primary determinant in E.M.R. placement?
> A. I feel definitely they were the prime determinant.
> Q. Can you explain why?
> A. There is a magic, I think involved with the I.Q. test that has been trained into us in our schools of education, whether we be regular educators or special educators, and I think we seem to see that as some sort of a final, solid piece of data that we can use to make judgments.
> Q. Has it been your judgment that teachers and educators tend to look at the I.Q. scores as an objective criteria?
> A. They do, indeed, and they seem to quote scores and feel that the number has some sort of very definite magic-determining effect on their decisions.

No. C-71-2270 at 31-32.

32. *Id.* at 33. Counsel for the defendant, Joanne Condas, stated that the IQ score appeared frequently not because it was the only data used for placement, but because it was a fiscal control mechanism used to keep pupils out of costly special programs and to justify reimbursement for those students who qualified. Condas, *supra* note 5, at 157.

33. CAL. EDUC. CODE § 56507(5) (West 1976).

34. No. C-71-2270 at 30. In the words of counsel for the defendant, Joanne Condas, speaking personally, not professionally, about the *Larry P.* case: "[I]t often seems to take an audience by surprise to be told that in California the EMR program is an *optional* one—that this incredible brouhaha involves a program anyone may accept or reject. . . . If one meets the eligibility criteria, he is entitled to avail himself of the EMR program but he is never required to." Condas, *supra* note 5, at 157.

35. No. C-71-2270 at 33(a) n.51. The court in Lora v. Board of Educ., 456 F. Supp. 1211 (E.D.N.Y. 1978), also addressed the issue of the difference of response of black and white parents to the evaluation process. *Id.* at 1235. It found non-minority parents more successful in contesting placement because they were able to more readily afford private consultations and "had a greater familiarity with, and initiative in using, community resources outside the school system." *Id.* Non-minority parents could more readily "avail themselves of public schools at public expense." *Id.* at 1256. Also, white parents who wanted to keep their children from the public schools heavily populated with minority students could, according to the court, more easily pay for private schooling if public funds were not available. *Id.* It appears, however, that again the issue is not strictly one of race, but one of economic condition. One would assume that poor parents of whatever nationality would experience the same difficulties with the system.

Thus, the court found that the defendants had utilized IQ tests that were racially and culturally biased and thereby had discriminated against Larry P. and the class of plaintiffs. In so doing, the defendants were held to have violated Title VI of the Civil Rights Act of 1964,[36] the Emergency School Aid Act of 1972,[37] section 504 of the Rehabilitation Act of 1973,[38] and the Education for All Handicapped Children Act of 1975.[39] The defendants infringed upon these laws, the court stated, by the use of placement mechanisms that had not been validated for their intended purposes and by placing a disproportionate number of black children in EMR classes.[40] In addition, the court held that by tolerating the disproportionate enrollments and racially biased IQ tests, the Board had violated the state and federal constitutional guarantees of equal protection of the laws.[41]

Having found these violations, the court ordered the following remedies: that individual standardized intelligence tests should not be used in California to identify and place black children into EMR classes without prior court approval; that the defendants monitor and eliminate disproportionate placement of black children in EMR classes in California; and that the defendants should direct each school district to reevaluate every black child currently classified as an EMR student, without using an IQ test that the court has not approved.[42]

LEGAL ANALYSIS

The plaintiffs contended that the placement of black children into EMR classes based on the results of IQ tests not standardized for their subculture

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36. 42 U.S.C. §§ 2000d-2000d-4 (1976). Title VI states that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

37. 20 U.S.C. §§ 1601-1619 (1978).

38. 29 U.S.C. § 794 (1976). Section 504 of the Rehabilitation Act of 1973 echoes Title VI: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

39. 20 U.S.C. §§ 1232, 1401, 1405, 1406, 1411-1420, 1453 (1976). The Act provides procedural safeguards for programs funded under it including the requirement that procedures be established that "assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory." *Id.* at § 1412(5)(C).

40. No. C-71-2270 at 101. Plaintiffs' argument that the use of IQ tests is discriminatory may receive some support from statistics compiled since the court's 1975 ban on IQ testing. There has been a 4% drop (from 50% to 46%) in placement of black children in EMR classes in the 20 California school districts with 80% of the black students in the state. *Id.* at 37. The court found this evidence statistically significant, thus supporting the inference that the IQ tests have a discriminatory effect. *Id.* On the other hand, it might be that other causes are responsible for this drop, such as a greater awareness of the overrepresentation of minority children in EMR classes and a resulting reluctance to place them in EMR classes.

41. *Id.* at 101.

42. *Id.* at 104-06.

violated both statutory law and the equal protection clauses of the United States and the California Constitutions.[43] The court discussed both the federal statutory and the constitutional claims in some depth but gave less attention to the claims under the California Constitution.[44]

Generally, all the federal statutes in question allow a party demonstrating that an educational system is engaged in a practice having a discriminatory effect to seek an injunction of such conduct, even though the school system has no purposeful design to perpetrate such discrimination.[45] Because the San Francisco school system's placement statistics provided the prima facie case that a significantly disproportionate number of blacks were placed in EMR classes, discriminatory effect was readily apparent and virtually impossible to contest under these statutes.[46]

Nevertheless, the court in *Larry P.* did not rest its decision on the federal statutory claims alone, but rather proceeded to analyze the constitutional grounds for finding illegal discrimination. Because the statutes under consideration had been enacted only recently and there had been little judicial interpretation of discrimination under those laws,[47] the court felt compelled to examine the claims under the equal protection clause of the fourteenth amendment.

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43. Following the holding of Cannon v. University of Chicago, 441 U.S. 677 (1979), the court rejected the defendants' arguments that plaintiffs cannot enforce their federal statutory claims because they lack a private right of action under the federal statutes. No. C-71-2270 at 52-55. The defendants further objected that the plaintiffs had not exhausted the administrative remedies provided by the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1232, 1401, 1405, 1406, 1411-1420, & 1453 (1976). No. C-71-2270 at 55. The court rejected this defense, however, because the case was originally brought on the basis of constitutional claims which do not require the plaintiffs to first pursue relief through administrative channels. *Id.* The court reasoned as follows:

> Given the close relationship in this litigation of Title VI, section 504, and the E.H.A. and our finding that the first two do not require exhaustion, it would be absurd as a practical matter to deny redress under the E.H.A., which took effect on October 1, 1977. . . . [I]n a case based on multiple statutes and charging system-wide testing and placement biases, we frankly do not see the purpose of individual exhaustion.

Id. at 56.

44. The plaintiffs also argued that the defendants violated California statutory law, but the court disagreed. It stated that the equal protection provision of the California constitution did not require a finding of purposeful segregative intent. Rather, it is a settled rule under California case law that there is an affirmative constitutional duty to eradicate segregation in the California public schools. In the court's opinion, the EMR placement process violated that duty. *Id.* at 97(a) n.110.

45. *See* notes 36-39 and accompanying text *supra.*

46. *See* note 20 *supra.*

47. It remains unclear whether a showing of racial discrimination under Title VI requires a demonstration of purposeful segregative intent or merely a showing of disproportionate racial impact. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Guadalupe Org., Inc. v. Tempe Elementary School, 587 F.2d 1022, 1026 n.2 (1978); Lau v. Nichols, 483 F.2d 791 (9th Cir. 1973).

The starting point for the court's analysis was the rule of law anticipated by *Keyes v. School District No. 1*,[48] and later pronounced by the United States Supreme Court in *Washington v. Davis*,[49] that disproportionate impact is not enough to compel strict judicial scrutiny[50] of a racial classification. Rather, purposeful discriminatory intent must be demonstrated.[51] While a showing of disproportionate impact by statistical evidence may give rise to an inference of discriminatory purpose,[52] ultimately the plaintiff must prove segregative intent.[53] Of course, it is not necessary to prove

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48. 413 U.S. 189 (1973) The *Keyes* Court held that "plaintiffs must prove not only that segregated schooling exists but also that it was brought about by or maintained by intentional state action." *Id.* at 198.

49. 426 U.S. 229 (1976). In the Court's words:

> [We] have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

Id. at 242. The alleged discriminatory practice in *Washington* was the use of a pre-employment test by the District of Columbia Police Department that excluded a much higher percentage of black than white candidates. *Id.* at 232-33.

50. The Supreme Court has exercised strict scrutiny when analyzing certain fundamental rights (*e.g.*, the right to vote) or suspect classifications (*e.g.*, race). Under this test, courts inquire whether the alleged discriminatory practice is necessary to effectuate a compelling state interest. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1000 (1978).

51. 426 U.S. at 242. One rationale for this rule is certainty of legislation:

> Were the existence of a disproportionate impact alone sufficient to confer on the courts the task of weighing the importance of governmental interests (and the efficacy of particular classifications in furthering those interests), legislatures and other governmental bodies would be unable to act conclusively whenever it was foreseeable, or even conceivable, that a choice might have a greater-than-average adverse effect on a "protected" group.

Note, *Discriminatory Impact: An Assessment After Feeney*, 79 COLUM. L. REV. 1376, 1384 (1979) [hereinafter cited as *Disproportionate Impact*].

52. Washington v. Davis, 426 U.S. at 242. The Court stated: "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Id.* Yet, in *Washington* the Supreme Court was unable to infer the requisite intent in the administration of an employment test "simply because a greater proportion of Negroes fail[ed] to qualify than members of other racial or ethnic groups." *Id.* at 245. It is important to note that in Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977), the Court warned that the extreme disproportionate impact that would constitute prima facie proof of purposeful discrimination is rare.

53. Generally courts have followed Justice Steven's understanding of the "objective" nature of discriminatory purpose:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged

that the sole motive for the discriminatory conduct is segregative intent. Thus, the problem is to determine what constitutes purposeful segregative intent.[54] This is necessarily true because legislative decisions are the result of collective actions, and consequently are rarely, if ever, motivated by a single concern.[55]

Following precedent from the United States Court of Appeals for the Ninth Circuit,[56] *Larry P.* rejected the analysis employed by the court in *Lora v. Board of Education*[57] and most other circuits.[58] Under the *Lora* analysis, the institution charged with discrimination is presumed to intend the foreseeable consequences of its actions.[59] Recognizing that the Supreme

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> discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be validated because an atheist voted for it.

Washington v. Davis, 426 U.S. at 253.

54. For a discussion of this issue, see generally Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication* 52 N.Y.U.L. REV. 36 (1977); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979); Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L.F. 961.

55. Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

56. Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264 (9th Cir. 1974); Johnson v. San Francisco Unified School Dist., 500 F.2d 349 (9th Cir. 1974); Soria v. Oxnard School Dist., 488 F.2d 579 (9th Cir. 1973).

57. 456 F. Supp. 1211 (E.D.N.Y. 1976). *See* note 5 and accompanying text *supra*.

58. *See* Penick v. Columbus Bd. of Educ., 583 F.2d 787 (6th Cir. 1978), *aff'd* 443 U.S. 449 (1979); Arthur v. Nyquist, 573 F.2d 134, 142-43 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978); United States v. Board of Schools Comm'rs, 573 F.2d 400 (7th Cir.), *cert. denied*, 439 U.S. 824 (1978); NAACP v. Lansing Bd. of Educ., 559 F.2d 1042 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977); Austin Independent School Dist. v. United States, 532 F.2d 380 (5th Cir. 1976), *vacated and remanded sub nom.* United States v. Texas Educ. Agency, 429 U.S. 990 (1977), *petition for rehearing denied*, 579 F.2d 910 (5th Cir. 1978) (en banc), *cert. denied*, 443 U.S. 915 (1979); United States v. School Dist. of Omaha, 521 F.2d 530 (8th Cir. 1975), *vacated and remanded*, 433 U.S. 667 (1977), *prior judgment reinstated per curiam*, 565 F.2d 127 (8th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1064 (1977). *Cf.* Richardson v. Pennsylvania Dept. of Health, 561 F.2d 489 (3d Cir. 1977).

59. 456 F. Supp. at 1283-85. "The eyes of authorities are sufficiently evil, if they could and should have foreseen the racially discriminatory import of their actions." *Id.* at 1285. Citing the Second Circuit's opinion in Arthur v. Nyquist, 573 F.2d 134, 142 (2d Cir. 1978), the *Lora* court clarified the rationale for its foreseeability analysis:

> In adopting this approach, we focused not on the mental process of a changing group of school board members, but rather on the actions taken by the board itself. When such actions have the "natural, probable and foreseeable result of increasing or perpetuating segregation," a presumption of segregative purpose is created. The burden of proof then shifts to defendant officials to show that the pattern of actions taken by those officials can be explained in a manner consistent with the absence of segregative intent. Put differently, once the burden of proof has shifted, *school officials must be able to demonstrate that no reasonable alternative policy would have achieved the same permissible educational goals with less segregative effect.* When such a showing cannot be made, it is entirely reasonable to infer that the officials acted with unlawful segregative intent.

456 F. Supp. at 1283-84 (emphasis added) (quoting Arthur v. Nyquist, 573 F.2d 134, 142 (2d Cir. 1978)).

Court has not accepted this presumption analysis, Judge Peckham looked to the factors outlined in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[60] to determine the existence of purposeful segregative intent: the discriminatory effect of the school district's and state's actions, the history of the charged behavior and the reasons for it, the specific sequence of actions being challenged, deviations from normal procedural sequence, legislative or administrative history, and statements of the school officials involved.[61]

Applying the *Arlington Heights* factors to the facts of *Larry P.*, the court had no difficulty agreeing with the plaintiffs that the biased IQ tests had the tremendously discriminatory effect of placing a significantly disproportionate number of black children in EMR classes.[62] Then, in analyzing the second factor—a history of discrimination—the court returned to the earliest decades of this century to find discriminatory taint.[63]

While the Second, Fifth, Sixth, and Eighth Circuits have endorsed this test, *see* cases cited in note 58 *supra*, the United States Supreme Court has not. In Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979), a case dealing with the over-representation of men in the state civil service, the Supreme Court rejected this standard: "Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences." *Id.* at 279. Although awareness of the consequences of its aczions supports an inference of intent on the part of the institution, "an inference is a working tool not a synonym for proof." *Id.* at 279 n.25. *See also* Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979) (rejecting foreseeability analysis under equal protection clause in school desegregation case); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (same); notes 81-93 and accompanying text *infra*. *Cf.* Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1038 (1979) (advocating foreseeable consequences test) [hereinafter cited as Perry].

60. 429 U.S. 252 (1977). In *Arlington Heights*, the plaintiffs attacked zoning ordinances and a refusal to permit a variance that prevented the building of low cost housing in a municipality. *Id.* at 254. To demonstrate lack of purposeful segregation, the defendants proffered such purposes as protecting property values and maintaining a policy of allowing the construction of apartment buildings only in "buffer" zones between commercial and residential areas. *Id.* at 258. The Court found that the ordinances did have a disproportionate impact on racial minorities, but could not find the discriminatory purpose required by *Washington*. *Id.* at 269-70.

61. *Id.* at 266-68. The *Arlington Heights* Court also outlined a structure of judicial inquiry in equal protection cases in which there is an allegation of a disproportionate racial impact: (1) plaintiffs must establish that the promulgators of the challenged action were "motivated in part by a racially discriminatory purpose"; (2) defendants must rebut by showing that the challenged action would have resulted even without the discriminatory purpose; (3) if defendants cannot make this showing, the action is found to be unlawful discriminatory, unless they can demonstrate that the discrimination is not invidious, i.e., based on the inferiority of the class who is the object of discrimination. *Id.* at 270-71 n.21. *See* Perry, *supra* note 59, at 1037 n.70.

62. No. C-71-2270 at 85.

63. *Id.* at 86. An astute psychologist might direct Judge Peckham to Hammurabi's Code and its "eye for an eye" ethic, to feudal combats, or to witch trials to cast aspersions on the origins of legal practice. Any discipline could be faulted for the ill-considered notions of its early forefathers. Certainly the Supreme Court in *Arlington Heights* did not intend justices to delve into ancient history to find discriminatory purpose. To fault the respective San Francisco and California Boards of Education for actions between the World Wars, as Judge Peckham did, is to impute to them the sin of Adam. As the Supreme Court in Keyes v. School Dist. No. 1, 413

But perhaps the most important factor, the one that formed the basis of the *Larry P.* court's holding for the plaintiffs, was the irregularity of the events preceding the requirement that certain basic tests be used in the placement of children in EMR classes. The court found that the Board never considered the question of test bias, basing its choice of tests solely on the frequency of their use at the time. The Board neither held hearings on the propriety of the tests nor investigated the opinions of minority testing experts.[64] Although the legislature had called the Board's attention to the problem by a legislative resolution,[65] the Board failed to respond. The court thus concluded that the inference of purposeful segregative intent was inescapable.[66]

Finally, with respect to the last factor, the school officials damned themselves. In testifying, several "key" officials of the state Department of Education revealed their belief that there was actually a higher incidence of mental retardation among minority children than among white children.[67] Moreover, the Board's failure to address problems raised by critics of the tests on the mandatory list was further evidence of its lack of interest in the disproportionate enrollments.[68]

Thus, finding plaintiffs' evidence showed purposeful segregative intent under the *Arlington Heights* factors, the court imposed the strict scrutiny standard of judicial review.[69] Under strict scrutiny, the defendants were required to demonstrate a compelling state interest to justify their use of biased tests in the EMR placement process. Offering such interests as the need to prevent misclassification, the lack of alternatives to IQ tests as objective measures of intelligence and the need for fiscal control, the Board could not convince the court that these interests were compelling.[70] In fact, the court suggested the Board had itself shown the lack of a compelling interest by voluntarily agreeing to eliminate EMR placement disparities for Hispanic children. This concession left the Board with no excuses for its behavior.[71]

U.S. 189, 211 (1973), noted—reiterating the suggestion of Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31 (1971)—"the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of [purposeful] segregation warranting judicial intervention."

64. No. C-71-2270 at 86-87. It would appear to be much more reasonable to attribute the Board's failure to check the validity of the IQ tests on the required list to the omnipresent conservatism and inertia inherent in almost all school boards and institutions, rather than to bad faith and wilful segregative intent. *See* Hobson v. Hansen, 269 F. Supp. 401, 418 (D.D.C. 1967) (explanation of the District of Columbia's decision not to abandon neighborhood schools that obviously did not promote the mixing of the races).

65. CAL. H.R. RES. 444, 1969 Reg. Sess., 1969 Assembly Journal 7647-48.

66. No. C-71-2270 at 86-87.

67. *Id.* at 88.

68. *Id.* at 89-92.

69. *Id.* at 94.

70. *Id.*

71. *Id.* at 71.

Having found segregative intent present and strict scrutiny therefore appropriate, the *Larry P.* court concluded its analysis by asserting that defendants could not prevail even if intermediate scrutiny were applied.[72] *Berkelman v. San Francisco Unified School District,*[73] a case predating *Washington,* formed the framework for that analysis.[74] In *Berkelman,* the court had applied intermediate scrutiny in an equal protection analysis of a school district's practices governing admission to a preferred academic high school. These practices resulted in the admission of a disproportionately small number of black, Spanish American and low-income students;[75] however, the court found the admission standard, past academic achievement, not to be unlawful because "the challenged classification further[ed] the central purpose of the classifier."[76] In essence, the test set forth by *Berkelman* asks whether the school's action provided the best possible education for the students in the district.[77] The court believed that it had a duty to apply this test regardless of whether it could find intent to discriminate. Under *Berkelman's* interpretation of intermediate scrutiny, therefore, challenged practices may be found discriminatory without a showing of segregative intent.[78]

Applying the *Berkelman* test to *Larry P.'s* facts, the court concluded that the special education placement procedures did not permit the San Francisco Unified School District to provide the best possible education because they fostered injustices against black children.[79] Thus, the court held that the school district's placement procedures for special education were not closely related to achieving the state's objective of providing the best possible education, and hence violated the equal protection clause.

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72. *Id.* at 96. Intermediate scrutiny is used frequently in assessing discrimination based on gender or illegitimacy classifications. Essentially, it requires that the objectives served by the classification, if not compelling, must be sufficiently important to merit its use, and that there must be a substantial relation between the classification and the achievement of the sought objective. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1082-83 (1978); Emden, *Intermediate Tier Analysis of Sex Discrimination Cases: Legal Perpetuation of Traditional Myths,* 43 ALB. L. REV. 73 (1978); Note, *Alimony Awards Under Middle-Tier Equal Protection Scrutiny,* 57 NEB. L. REV. 172 (1980); Note, *Equal Protection and The Middle-Tier: The Impact On Women And Illegitimates,* 54 NOTRE DAME LAW. 303 (1978); Note, *O'Neil v. Baine: Application of Middle-Level Scrutiny to Old-Age Classifications,* 127 U. PA. L. REV. 798 (1979).

73. 501 F.2d 1264 (9th Cir. 1974).

74. *See* No. C-71-2270 at 96.

75. 501 F.2d at 1265-67.

76. *Id.* at 1268. The court distinguished the practice under review from tracking cases in that the students who were not admitted would suffer little psychic injury or stigma, and would not be relegated to an inferior learning situation. *Id.*

77. *Id.* at 1267.

78. *Id.*

79. No. C-71-2270 at 97.

CRITIQUE

On the basis of *Berkelman*, the *Larry P.* court pronounced the following legal conclusion:

> [P]laintiffs have shown that defendants' tolerance of the disproportionate enrollment of black children into EMR classes and their use of placement mechanisms including I.Q. tests, which perpetuate that condition, violate state and federal guarantees of a right to equal protection under the laws. *These findings do not depend on a finding of intentional discrimination.*[80]

In short, *Larry P.* stands for the proposition that intentional discrimination need not be shown to demonstrate a violation of the equal protection clause when racial discrimination is charged against public schools in their placement procedures. Thus, according to *Larry P.*, any unintended action which has a discriminatory effect may violate the equal protection clause.

This holding directly contradicts relevant Supreme Court precedent. In a recent intermediate scrutiny case, *Personnel Administrator of Massachusetts v. Feeney*,[81] the Court expressly held that purposeful discrimination is an essential element in finding an equal protection violation. The issue in *Feeney* was whether a Massachusetts statute giving preference to veterans for government jobs violated the equal protection clause. Because few women are veterans, and consequently few women are eligible for the veterans preference, it was clear that the statute had a significant disproportionate impact upon women.[82] The Court applied a two question equal protection analysis, asking: Is the statutory classification in fact neutral, and if so, does the adverse discriminatory effect reflect invidious purposeful discrimination?[83] Finding that the classification was neutral and that the Massachusetts legislature did not have a discriminatory purpose in enacting the statute, the Court upheld the statute.[84] The conclusion is inescapable that the holding of *Berkelman*[85] that intent is not an element of equal protection violation when intermediate scrutiny is applied, if ever in accord with Supreme Court decisions, was overruled by *Feeney*.

Other recent Supreme Court decisions have reinforced the untent requirement. In *Columbus Board of Education v. Penick*[86] and *Dayton Board of Education v. Brinkman*,[87] the Court held that both the Columbus and

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80. *Id.* at 101 (emphasis added).

81. 442 U.S. 256 (1979).

82. 415 F. Supp. 4585, 498-99 (D. Mass. 1976).

83. 442 U.S. at 279.

84. *Id.* at 276. *See The Supreme Court, 1978 Term*, 93 HARV. L. REV. 135-41 (1979) (discussing *Feeney's* interpretation of the discriminatory purpose requirement of *Washington*). A commentator stated therein: "The majority's analysis in *Feeney* demonstrates the Court's continuing commitment to a stiff discriminatory purpose requirement." *Id.* at 138. *See also Disproportionate Impact, supra* note 51, at 1376.

85. 501 F.2d 1264 (9th Cir. 1974).

86. 443 U.S. 449 (1979).

87. 443 U.S. 526 (1979).

Dayton school systems had not performed their affirmative duties to desegregate their "dual" school systems which had existed since the 1954 decision of *Brown v. Board of Education*.[88] Finding that pre-*Brown* segregated school systems were established by design, the *Columbus* Court concluded that the school officials' failure to satisfy their affirmative duties was evidence of purposeful segregative intent, a necessary element of equal protection violation. Significantly, the Court found that knowledge of a policy's predictable effects on racial imbalance in a school system and continued adherence to that policy are factors a court may consider in determining segregative intent, but are not the equivalent of such.[89]

It is manifest that in analysing alleged equal protection violations, the *Washington v. Davis*[90] test remains the standard, the *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[91] factors are the measure, and *Feeney* has expressly adopted these cases as good precedent in the area of intermediate scrutiny analyses. In none of these cases is there any mention of the test espoused by the Ninth Circuit in *Berkelman*. Consonant with precedent, courts deciding cases with allegations similar to those presented in *Larry P.* must adopt the constitutional standard enunciated in *Washington*, *Arlington Heights* and *Feeney*[92]—if, that is, such courts must rule on these equal protection claims at all.[93] If, on the contrary, courts were to hold, as in *Larry P.*, that discriminatory intent need not be shown to prove unlawful racial discrimination by educational administrators, such courts would not only be ignoring the Supreme Court's interpretation of the Constitution but also effectuating a policy which would make it all too easy for courts to second guess educators' decisions.

THE ALTERNATIVE

Many of the problems in *Larry P.* could have been avoided had the court been content to base its decision on federal statutory grounds; for procedural reasons the court should have done just that. It is a deeply rooted practice that courts should avoid addressing constitutional questions when other grounds for decision exist.[94]

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88. 347 U.S. 483 (1954).

89. 443 U.S. at 464.

90. 426 U.S. 229 (1976). *See* notes 49-54 and accompanying text *supra*.

91. 429 U.S. 252 (1977). *See* notes 60-61 and accompanying text *supra*.

92. It has even been stated that "the requirement of discriminatory purpose in constitutional cases appears to have, as a general concept, the unanimous support of the Court." *Disproportionate Impact*, *supra* note 51, at 1380 n.27.

93. The Supreme Court recently reiterated a long standing rule of constitutional adjudication in an equal protection case:

> If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable. Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105. Before deciding the consitutional question, it [is] incumbent . . . to consider whether the statutory grounds might be dispositive.

New York Transit Auth. v. Beazer, 440 U.S. 568, 582 (1979).

94. *See* note 93 *supra*.

In *Larry P.*, Judge Peckham asserted that the relevant federal statutes were not dispositive because the question remained unanswered whether they required a showing of purposeful segregative intent.[95] But, if, as argued above, an equal protection claim requires proof of discriminatory intent, and if it is assumed *arguendo* that the statutes require a showing of intent, then the question of proof is essentially identical. The burden of proof would have been no more severe under the equal protection clause than under the statutes. In both cases, the greater burden of proof would have to be met by the plaintiff. An equal protection claim would add little to the analysis, while it does allow plaintiffs to circumvent the administrative remedial channels mandated by the Education for All Handicapped Children Act.[96] Conversely, if the *Larry P.* court had decided that the pertinent federal statutes only required a showing of discriminatory impact, the standard for determining such statutory issues would be considerably clearer and the need for constitutional analysis eliminated. If Congress finds such interpretations ill-founded, it could modify the standard through legislation.

As it now stands, however, because the *Larry P.* decision is based on constitutional grounds, its value as precedent is relatively free from congressional modification. The use of IQ tests to place black children in special education classes is prohibited, and school systems are left in doubt as to whether the administrative channels they have established to place children in special education classes will be invalidated through litigation. Perhaps when it hears the appeal in *Larry P.*,[97] the United States Court of Appeals for the Ninth Circuit will recognize the pitfalls in the present path of special education in California, and reject the district court's constitutional analysis in order to clarify the statutory standards.

EDUCATIONAL IMPACT

The decision in *Larry P.* has direct impact on the thousands of school systems across the United States that are required by the Education for All Handicapped Children Act to maintain special education programs for handicapped students in order to qualify for federal assistance.[98] *Larry P.* will undoubtedly spawn significant changes in American education in the next few years.

This decision offers a major challenge to a basic part of an assessment battery used by psychologists.[99] Moreover, it has created a furor in the

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95. *See* note 47 and accompanying text *supra*.

96. 20 U.S.C. §§ 1401, 1405, 1406, 1411-1420 (1976).

97. Riles v. Larry P., No. 80-4027 (9th Cir. Jan. 14, 1980) (notice of appeal filed).

98. 20 U.S.C. §§ 1412, 1413 (1976).

99. An assessment battery consists of a variety of instruments that are used to reliably measure a student's intellectual, social, emotional, physical, linguistic, and academic growth. *See also* Condas, *supra* note 5, at 157 ("[i]t is hard for me to see the outcome of this case as anything other than the total prohibition of use of a major professional tool—in that respect alone the case may be a first—and a denial of one species of educational opportunity to children based solely on their color").

assessment process far beyond the evaluation of minorities for EMR placement.[100] Because traditional clinical and extensively researched IQ tests such as the Wechsler Intelligence Test for Children and the Stanford Binet Intelligence Test were challenged, *Larry P.* may have a fatal impact on the numerous less validated group IQ tests used by a multitude of school systems to measure overall ability of their students, both black and white. Although the *Larry P.* court did indicate that school officials could give individual IQ tests if they first obtained judicial approval,[101] it is not realistic to expect schools to seek such approval. Because courts are inevitably backlogged, such a process would result in considerable delay for a school system in placing children into special education programs. More importantly, because the court listed as discriminatory the most well known and standardized measures available, there appear to be few, if any, readily acceptable alternatives to measure ability.

Clear substitutes are not available for standardized tests; thus, highly subjective observation or behavioral measures may be implemented in lieu of statistically verifiable data.[102] Subjective measures are more susceptible to personal bias than standardized tests and can produce discrimination in diagnosing a handicap as well as in determining its severity. Ultimately, *Larry P.* may be a Pyrrhic victory.

The *Larry P.* decision will also have impact on those black children who legitimately are mildly to moderately mentally retarded and who may not receive special programming in the absence of complete evaluation methods. With the concern over possible misclassification of black children, many specialists and teachers will be unwilling to place children in EMR classes.[103] Yet, according to federal guidelines, these youngsters do not fit other special education classifications.[104] Thus, some of the benefits of special

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100. *See* Prasse, *Reactions to the Larry P. Decision*, 8 NAT'L A. OF SCH. PSYCHOLOGISTS COMMUNIQUE 3 (Jan.-Feb. 1980) [hereinafter cited as Prasse].

101. No. C-71-2270 at 104.

102. Carol Wade (M.S. Ed. Psych.), a school psychologist who has provided invaluable assistance in the writing of this Note, suggests that there are several relatively new versions of adaptive behavior measures available, such as the Adaptive Behavior Inventory for Children and the AAMD Adaptive Behavior Scale-Public School Version. One problem with these tests is, however, a low correlation of rater reliability (*i.e.*, scores from different testers do not agree) as well as low predictability over time, suggesting that these measures are both subjective and of questionable value to predict future behavior. McCullough, *Behavior Rating Scales: Contexts and Criticisms*, 8 NAT'L. A. OF SCH. PSYCHOLOGISTS COMMUNIQUE 6 (Nov. 1979). Moreover, most adaptive behavior scales available were developed in and for institutional populations. Kicklighter, Bailey & Richmond, *A Direct Measure of Adaptive Behavior*, 9 SCH. PSYCH. REV. 169 (1980).

103. Lambert, *supra* note 28, at 5-7.

104. The federal guidelines indicate the term "handicapped children" means "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services." Education for All Handicapped Children Act, 20 U.S.C § 1401.1 (1976). These handicapping conditions are defined regardless of race. Moreover, the term "children with specific learning disabilities" means

education classes, for example, smaller classes, more teacher assistance, and special teaching methods, may be denied these youngsters; they will remain in regular classrooms where they first experienced problems.

Moreover, schools and states must now be concerned with the disproportionate placement of black students in other types of special education classes, as well as in EMR classes.[105] Although *Larry P.* considered only the EMR class, it is nevertheless apparent that a challenge to disproportionate numbers could also arise regarding other special education categories, especially those with somewhat negative labels, such as "behavior disorder."

Finally, the court's decision to limit assessment tools has significant impact on the definition of special education categories (in this case, EMR) and, hence, in the programming of handicapping conditions. This, in turn, will affect teachers, social workers, psychologists, occupational therapists, and speech therapists who work with handicapped children at all levels.[106] In reality, assessment is closely associated with the definition of the handicapping condition as well as with its programmed remedy. *Larry P.'s* reference to EMR classes as "dead-end" placements certainly sets a negative tone, one not substantiated by opinions of education professionals.[107] Alert educators and legislators need to be concerned about the quality of such programs as well as the frequency of review available to each individual child.[108]

> those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think speak, read, write, spell, or do mathematical calculations. . . . Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, or *mental retardation, of emotional disturbance, or environmental, cultural or economic disadvantage.*

Id. at § 1411 (emphasis added). Thus, black children who are developing or achieving at a slower rate may not qualify for other special education programs under the federal guidelines. Furthermore, until the question of testing is settled—and it may take years to develop and standardize new measures which are non-biased—many black children who might have benefitted from special education programming will remain in the regular classroom without special education help.

105. Lambert, *supra* note 28, at 4. MacMillan and Meyers make an even stronger assertion: "The denial of needed services to children who fail seriously over a period of time (regardless of the presence or absence of IQ information on these children) constitutes bad educational practice and is a violation of PL 94-142 [Education for All Handicapped Children Act]; to do so because a child is black constitutes racism." MacMillan & Meyers, *Larry P.: An Educational Interpretation*, 9 SCH. PSYCH. REV. 136, 143 (1980) [hereinafter cited as *An Educational Interpretation*].

106. Prasse, *supra* note 100, at 3.

107. *An Educational Interpretation*, *supra* note 105, at 141. Moreover, the concept of mainstreaming which was lauded by the *Larry P.* and by the Education for All Handicapped Children Act has come under attack by several studies which indicate that the social adjustment and educational achievement levels of EMR students are not improved by regular class placement. *Id.* at 142.

108. Furthermore, a determination of the guidelines for quality in the Individual Educational Plan, a unique plan for each child's educational program, should be developed at the federal level to insure programs that are challenging and appropriate to each child's development. Presently, an IEP must include:

LEGAL IMPACT

While the repercussions of *Larry P.* will shake educational systems throughout the country for some time to come, its effect on the legal profession also will be considerable. The case should engender a great deal of litigation as parents of special education children find attorneys to advocate the civil rights of their children.[109]

One major well spring of litigation in the decision is the court's procedural finding that the exhaustive remedies provided in the Education for All Handicapped Children Act need not be pursued before an individual action can be brought.[110] An impartial hearing procedure that includes an appeal to the State Board of Education is mandated in the Education for All Handicapped Children Act.[111] This avenue was necessarily pursued when parents disagreed with special education placement.[112] Now, however, at least in this case, the individual did not need to first proceed through mandated hearing procedures before bringing a court action, implying that the tremendous time and expense spent in administrative hearing procedures to produce resolutions will be afforded little recognition by the courts. Moreover, student placement decisions will be made increasingly less often by educational professionals and increasingly more frequently by judicial order.[113]

A second incentive for litigation is the lesser burden of proof adopted by *Larry P.*[114] If Judge Peckham's conclusion of law, that a violation of the

> (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

Education for All Handicapped Children Act, 20 U.S.C. § 1401.19 (1976).

109. In a similar Chicago case, a federal district court commented upon its view of Judge Peckham's decision in *Larry P*: "[T]he witnesses and the arguments which persuaded Judge Peckham have not persuaded me. Moreover, I believe the issue in the case cannot properly be analysed without a detailed examination of the items on the tests. It is clear that this was not undertaken in the *Larry P.* case." Parents in Action on Special Education v. Chicago Bd. of Educ., No. 79-C-3586 at 115 (N.D. Ill. July 8, 1980). *See* note 1 *supra.*

110. No. C-71-2270 at 52. *See* note 43 *supra.* It is interesting to note, however, the wording of the Education for All Handicapped Children Act regarding a civil action. Briefly, the Act states that a decision made in a due process hearing shall be final except that a party may bring a civil action if "aggrieved by the findings and decision" of the hearing procedure. 20 U.S.C. § 1416(e)(2) (1976). Thus, it appears that this Act, unlike Section 504 or Title VI, has well established guidelines for exhaustive remedies which should be used before civil action is commenced.

111. 20 U.S.C. §§ 1401, 1405, 1406, 1411-1420 (1976).

112. The Education for All Handicapped Children Act provides that parents or guardians have the right to an impartial due process hearing if they disagree with special education administrative decisions. These hearings are conducted by the local educational agency and may be appealed to the state educational agency. 20 U.S.C. § 1415(b)-(c) (1976).

113. *See* note 43 *supra.*

114. *See* note 80 and accompanying text *supra.*

equal protection clause need not rest on a finding of intentional discrimination, is not reversed, then plaintiffs can avoid the onerous task of showing purposeful segregative intent. Discriminatory effect may be shown by simple numbers,[115] while presenting evidence that reveals school officials' intentions requires costly and time consuming discovery. Thus, an attorney's reservation with bringing an action should be abated, and concerned individuals may be prompted to litigate more cases.

CONCLUSION

There are, no doubt, cases in which the civil rights of minority students have been violated and these cases require judicial attention. On the other hand, it cannot be denied that some courts have been all too willing to judge zealously the ubiquitous allegations of discrimination in our schools. In time, perhaps, federal judges will come to realize that public education is not an appropriate hunting ground for dragons, monsters, and other chimeras. In the decade of the seventies, courts have entered areas where St. George would have feared to tread. In rendering their decisions, they universally issue disclaimers that they have entered dark, entangled forests of social arguments and issues from which they wish to escape.[116] Since Congress appears so cowardly, however, courts feel compelled to go forward. Perhaps a tempering of this impetuosity and a greater regard for congressional caution can save American education from being deprived of important assessment tools, such as IQ tests, and from being assailed from all sides by those who want more from it than it may be able to provide.

Daniel L. Wade

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115. For the Supreme Court's use of statistical evidence as probative of purposeful discrimination, see Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 270 (1979); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976).

116. For example, in Hobson v. Hanson, 269 F. Supp. 401 (D.D.C. 1967), Judge Wright offered these parting words of regret:

> *It is regrettable, of course, that in deciding this case this court must act in an area so alien to its expertise.* It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government. But these are social and political problems which seem at times to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance. So it was in *Brown v. Board of Education, Bolling v. Sharpe,* and *Baker v. Carr.* So it is in the South where federal courts are making grave attempts to implement the mandate of *Brown.* So it is here.

269 F. Supp. at 517 (emphasis added). *See also* No. C-71-2270 at 108.

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