On the Road to Educational Failure: A Lawyer's Guide to Tracking

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Prologue: Everything taught in the schools isn’t listed in the curriculum guide. Schools teach (or claim to teach) every child how to read, to write, to add, subtract, multiply, and divide, and to use these tools to develop other practical, intellectual and social skills. But the schools also teach children their place.

Indeed, the schools’ major social function can be seen as that of allocating human resources for the larger society, assuring that there will not only be a sufficient number of men of knowledge and learning, but also a sufficient number of hewers of wood and drawers of water. While schools are organized to provide this service, there is more to life in society than work and education could and should be organized to service this wider range of values.

Tracking, using the term in the broader sense to include all ability grouping, represents a solution to an insoluble dilemma. While individualized instruction has long been touted as the great desideratum in American education, no one has ever been willing to pay what it would cost to give each child a different education. Educators thus devised what they considered to be the next best thing, educational units large enough to be economically viable but small enough to isolate students with what were thought to be roughly similar educational needs. These needs are determined by an unformulated formula employing “objective testing,” classroom achievement, and teacher recommendations. The effect of a particular child’s background on performance on these measures is rarely considered.

Though the system was devised to effect educational opportunity for all children, in practice the process has cumulative and severely limiting effects. At every point on the institutional path, educators select certain criteria (and in effect ignore others) as indices of educational need. Having determined need, they then provide differentiated programs on the basis of these needs and group children accordingly. A decision at one point in time limits the range of alternatives available at the next. More often than not, slow readers in the first grade graduate as slow shop students from high school, while children who were judged quick in elementary school are those who end up taking college-level courses in their senior year of high school. More often than not, the social class and race of the child involved appear to have as much to do with their placement as anything else. Class and race influence the teacher’s expectations and assessments, they affect classroom achievement (particularly when classes are themselves segregated by race or social class), and they appear to affect performance on placement tests as well. Schools cannot continue to program in this way for relative failure and still claim to function as equalizing agencies. These grouping programs, for whatever reasons, tend to harden the race and class lines drawn in the larger society. They are structurally incapable of offering equality of educational opportunity to those groups who have had it least and need it most.

The educational mechanisms producing these results come in a variety of forms. Grouping takes place within classrooms and between them. It appears in the offer of broad curriculum programs in the same high school. It distinguishes populations of entire buildings; many cities track by schools, as in “Tech High” and “Latin.” Resources allocated to the resulting units vary along every descriptive axis: different textbooks; different kinds and qualities and even numbers of teachers; different capital investment patterns; different kinds and qualities and numbers of children. At the same level, programs in different units can vary in content, emphasis, and speed of presentation. Principles of unit assignment can also differ; sometimes only “objective” measures such as intelligence tests are used; more often the more subjective measures such as teacher recommendations and grades are also employed. Nominally and superficially, every local school system differentiates its programs and children differently. Thus, in examining systems, it would be well for the observer not to permit himself to be distracted by differences in terminology, but rather to keep in mind the essential characteristics of the system.
Despite their myriad forms, these systems share a common theoretical underpinning and historical genesis.\(^2\) Furthermore, only four characteristics are critical to analysis of any system at any level where grouping is done on the basis of ability.\(^3\) First, the *inclusiveness* of a grouping scheme determines how many subsequent opportunities at any given educational level remain open to the classified individual. The test of inclusiveness is the extent to which grouping limits or expands future choices or development. In the most inclusive schemes, all children placed in the lowest first grade classification will end up nine years later in the lowest high school track. The second common characteristic is *electivity*, or the degree to which a child’s placement reflects his (or his parents’) choice. Third is *selectivity*, which comprises the nature of the chosen “index of ability” or “learning capacity” and consequently the type and degree of unit homogeneity resulting from the selection process. Finally, there is what can be called the scheme’s *comprehensiveness*, which is a measure of how complete and how long lasting is the effect of any particular classification decision on the individual student.

Four Characteristics

Each of these characteristics translates painlessly into matters of constitutional concern and statistical debate. If the duty of equal protection is read as an obligation to provide “equal opportunity,” then the focus of constitutional interest in the system’s inclusiveness falls on its limiting or liberating effects over time. A low first-grade ability group that is genuinely compensatory in nature and has the effect of improving achievement, thereby increasing student options at the next allocation stage, will attract more legal sympathy than one which tends to lock students into a pattern of declining performance, thereby constraining later alternatives. Longitudinal data, following the pattern of grouping decisions in the educational lives of particular children, has never been gathered, but would go a long way in establishing whether early classification decisions tend to be self-fulfilling at later stages of the process. The limited descriptive studies available bear out this widespread belief, but their evidence is as yet merely suggestive and not conclusive.\(^4\)

Electivity raises more difficult equal protection issues to which I return later. It suffices to say here that many free-choice plans leave less to initiative and freedom (which would absolve the state of responsibility for any imposed classification) than to overt or subtle forms of social and educational discrimination. Most school systems, for example, allow entering high-school students a fairly free choice of three basic curriculums: college, general, or vocational. But the student comes to that decision with the collected residue of nine years of previous schooling which will have an obvious and often determinative effect on the options realistically and psychologically available to him. And recent administrative studies have found that support services designed to aid in the exercise of what is left of that free-choice function more to reinforce early school decisions about the student’s prospects than they do to expand his alternatives.\(^5\)

Analysis of a plan’s selectivity goes to the heart of a different and more direct constitutional requirement: rationality in the means chosen to a legitimate end. A system whose “classifying fact”\(^6\) or ordering criterion relates to ability, for example, must as a minimum include a rational procedure for measuring ability and making judgments accordingly. In equal protection terms of justifying its different treatment of individuals and groups, the state may be required to demonstrate rationality in the plan’s implementation as a prerequisite to approval of its substance. Enter the maze of contradictory evidence about the fairness of intelligence tests and the growing data suggesting that even if the tests are fair, their use as a decision-making tool is not. Any plan which either fails to measure ability accurately or to make even-handed grouping decisions accordingly has lost most of its purpose and justification.

That possibility will prove greatest where the effect of the classification decision is most comprehensive. A grouping assignment permanent in time, encompassing in curriculum, and unchanging in class composition may encourage more serious constitutional objections than a plan whose consequences are more limited. The degree of pupil mixing in different classes or subjects, the flexibility for purposes of transfer and promotion, and the provision of ongoing evaluation of assignment decisions will prove preeminent factors in any constitutional analysis of the scope and rigidity of a grouping plan.

But does it work?

The justification of even the most flexible plan may also disappear if it meets all of these mechanical tests and simply does not work, even on its own terms. The rationale for institution of plans like ability grouping relies heavily on the proposition that students in tracked systems increase their capacity to learn (and their educational achievement) as a consequence of the differentiated programs to which they are assigned. Legal and educational issues converge in the controversy centered around the question of whether ability grouping leads to greater educational achievement by any or all of the group of children affected.

Studies in this area are as numerous as they are inconclusive; grouping research tries hard to make up in bulk what it lacks in hard findings.\(^7\) Many of the most recent reports with more sophisticated methodology focus on comparisons of groups of similar students, half assigned randomly to classrooms and half sent to classes of students of similar ability. The problem posed: Do children grouped homogeneously achieve better over a given limited period of time—usually not more than two years—than children who are grouped heterogeneously, all other things being equal. Answer: Usually not. Further, there is some evidence that while homogenous grouping has no particular effect on children of high or middle ability, it measurably adds to the disadvantage of children of low ability. At the least, the
research has never validated the educational rationale of grouping, that everyone benefits.

Recent critics of the major studies have argued that the results are inconclusive, either because the situation is ambiguous, or more likely, because their operating assumptions are unsophisticated. Most studies make the simplifying assumption that there is a direct link between the structure of the unit and its member's achievement, ignoring the possibility that the mere fact of being in a low track may have more meaning than whatever measure was used to place the child in a particular track.

The now-famous "Pygmalion effect" adds a psychological dimension to the structural one. In this experiment, children were given tests and teachers were informed that certain children would do well and that others would do poorly. This, in fact, proved to be the case, even though the good and poor risks had been chosen at random; only the teacher's expectations have been changed. A reanalysis of the Coleman Report data indicates that classroom race and class composition has a more important effect on student achievement than school race and class composition. So long as grouping is carried on according to the current standard operating procedures, most integrated schools will be segregated by classroom as a result of purportedly neutral selection processes. These selection processes, however, have a strong negative influence on achievement. At this point, debates about the validity of the Coleman data and the precise holding in Brown and its progeny will be narrowed to an investigation of the composition of particular classrooms.

These findings are all partial and suggestive; no one has yet added together all that is known. But the picture that might emerge is almost sure to show what has always been supposed, that all the different problems isolated by these studies converge on a single social (and racial) class, with local variations. Those harmed in the various ways the studies describe turn out to be the poor, the black (or Latin, or Indians, or migrant children) and in general those for whom educational success is a matter of survival rather than of supplementation of what they otherwise come by at home. If this convergence at the bottom in fact occurs, then grouping becomes more than an educational practice of undemonstrated worth. It becomes a mechanism through which judicially favored classes, the poor and members of racial and ethnic minorities, are being denied equal access to an education, a government service that is gradually gaining status as a fundamental right.

**Institutional Mismatch**

On precisely such grounds, Judge Skelly Wright enjoined the operation of the Washington, D.C., tracking system, going further than any other judicial approach to grouping. The court first gathered a huge amount of data on the mechanics of the four-track scheme devised and operated by then Superintendent of Schools Carl Hansen, noting the great scope, rigidity, and inclusiveness of its operation. Of particular interest to the court was the system's comprehensiveness, the way in which assignment to a track often proved to be inflexible and of long

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**NOTES ON CONTRIBUTORS**

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Race and class data established a high correlation between track assignment and the background of the affected child. Wright went on to rule that when state-imposed classifications dealing with critical personal rights—as he ruled education to be—operated in a way that placed the heaviest burdens on the poor and culturally disadvantaged—as assignment to lower tracks seemed to—then the state had to come forward and show a compelling reason for proceeding as they did.

When Washington school officials offered the results of standard aptitude tests as the reason for their grouping practices, Wright ruled those results meaningless, measuring nothing more than the background from which the students came. Since the classifying criteria had nothing to do with relative abilities to learn black and poor children assigned to lower ability groups where less education was offered or expected than in higher ones, were being systematically undereducated.

Hobsen thus represents a successful attack on the selective mechanism used in the Washington tracking plan, not a frontal assault on the idea of differentiated services for students with differing educational needs. Wright enjoined the operation of the system not because of its theoretical purpose but because there was no constitutionally legitimate way to match different students to programs offering them greater or lesser amounts of education. Neither the judge nor the plaintiffs insisted that all grouping schemes were impermissible. But without its testing program school administrators could not justify assignment of some children to fast classes and others to slow ones.

The Quest for a Remedy

Heterogenous grouping would have been the inevitable—though unintended—result if the circuit court of appeals had not worked the miracle of affirming Wright’s district court order and at the same time cutting the substance out of his tracking decree. While upholding his rulings on Washington’s tracking scheme, it limited their applicability to the system as it operated up to 1968. Local school officials could continue to track on the basis of a testing program, but they could not do so if the new system bore too close a programmatic resemblance to the system Wright had ordered stopped. This hurdle was leaped with alacrity (and very little difficulty). Washington schools continue to track as usual, but with different lines on the chart and different labels on all the little boxes.

Education in Washington is no better than it was, but it is doubtful that the alternative implicitly settled on by Wright would have improved the situation much. Treating all children alike in the services delivered to them has never been thought the apogee of effective education. Random grouping in any urban system produces such a wide range of ability differences within each class that teachers are obliged either to pay no attention to some children or to sub-divide the class according to her own perceptions of the children’s differing needs, thus reproducing in classroom miniature the problems raised by school-wide grouping.

In the classroom, the lowest level of school organization, no traditional legal solution for possible grouping abuses can offer much help for sensitive and fundamental change. Granting the wisdom of the “new” equal protection approach Wright used to reach the result he did (which many courts and commentators refuse to do14), the problem with his implicit remedy of equal services was that it was no remedy at all. No alternative, short of abandonment of the idea of different services for different children, followed from the Hobsen opinion.

What did emerge, however, were some negative standards, which suggests that courts may play an important function in circumscribing grouping options available to school administrators who feel that it is educationally necessary to make some kinds of distinctions between children. If Hobsen did not say what would work, it did indicate what couldn’t even be tried, namely grouping plans which tend to isolate poor and black children in lower tracks institutionally designed to offer less education than that given other groups in the same school system. Where such plans are tried, courts will presumably continue to give the wide latitude normally given to administrative actions, but will also require them to give some greater demonstration of the necessity of proceeding as they wish to, a demonstration of worth sufficiently compelling to overcome the harm worked by the systematic undereducation of the socially and racially segregated under track. Such a demonstration is hard to imagine.

Court involvement deeper than this may be foreclosed by the nature of judicial interventions themselves. The flexibility of a fluidly designed system which met individual needs and reflected individual preferences could only be hampered by a court ruling, necessarily prescriptive and rigid. Many of the most important ways in which children are harmfully classified are found either within the single classroom or occur as the result of other non-specific institutional arrangements, such as neighborhood schools. A court-imposed remedy is particularly unsuited to reach practices within classrooms involving thousands of possible forms and relating to the most sensitive human situations. How do you order a teacher to expect more from his students? Would he obey? How would you know if he hadn’t?

Changing the Rules

Beyond the institutional mismatch between a court of law and a set of infinitely variable classrooms, there is a further deeper problem with the thrust of equal protection approaches to differential educational services. It is the same problem that promises to make most of the tracking research irrelevant before it produces any hard results. Both equal protection and statistical analysis must
accept the most fundamental operating assumptions of grouping schemes before either can apply whatever angle of vision is deemed relevant—be it resource input, educational output, or discriminatory individual level effects—to test the system's relative impact on different student groups.

That is to say, the educational battle is lost from either the statistical or Fourteenth Amendment viewpoint before the logical war is begun. On a practical level, acceptance of the premises of the argument for ability grouping—that some children can absorb more education than others—leaves no room for proof to the contrary; the system is structured in a way to guarantee that result, no matter what the validity of the initial determination. On a theoretical level, both the statistician and the equal protectionist tend to focus their attention on the points of commonality between tracks for it is at these points that inequalities are most obvious. A change of focus to the principles around which the differentiations are built may be revealing. The emphasis on comparisons between programs can yield only a reduction in their differences. An emphasis on principles yields the insight that what the situation really demands is more differences, not just differences in quantity, but differences in approach, in measure of achievement, in the very definition of education. The failure to consider a broader range of alternatives in the principles on which differential programs are devised makes it highly improbable that any inquiry—judicial, scientific, or otherwise—will yield a better, more complete, and less restrictive way of organizing sub-units.

Differential educational services within particular schools raise educational problems not because they are too different in quantity, but because they do not differ enough in quality. No one seriously doubts that diverse student populations “need” varied educational services. What is being questioned here is the notion that if one portion of geography is desirable for average students, then it follows that slow students should receive three-quarters of a portion while fast students should have one-and-a-quarter portions. But this is what will happen so long as variations in services are controlled by single institutions.

The major function of schools can be seen as that of allocating human resources for the larger society.
and guided by single, restrictively narrow achievement standards. The inevitable yield is differences in children ranging only from better to worse, from smart to dumb, from more educated to less educated.

Real differences in real children are far richer than the narrow range of skills that aptitude tests tap, far more varied than grouping on that basis can allow, and much more neutral with respect to the values one can legitimately attach to them than current school classification systems can structurally admit.

Others have approached the organizational implications of this issue implicitly in arguments advanced for the concept of resource specificity, the idea that different children need different resources to achieve the same educational ends. If this is true, then current grouping schemes are self-defeating and discriminatory.

Simplistically, children (and, at least in the early years, their parents) would be encouraged either to form their own educational units within their schools or to select others that were offered to them. Each child would bring to that unit a per capita entitlement which would be aggregated in that unit and expressed as the total dollar resources available to it. Compensatory funds would follow compensatory children. Advocate planners would provide compensatory political services to parents and children unaccustomed to manipulating the school environment to their own advantage. The sub-units thus formed would then bargain with the central school administrator for the services they thought most appropriate to themselves. The process would culminate in a contract between the school and the sub-group describing the resources to be assigned and specifying the educational program to be pursued with them. In this context, the usual voucher system emerges as nothing more than an idiosyncratic method of bookkeeping which gives only purchasing power without granting the power of enforcement.

The scheme is not as far-fetched as it first appears. Some schools in the north have begun to develop attenuated forms of it already in that sub-units within them have been constructed around divergent educational principles. It involves a radical decentralization of the power to differentiate but alters neither the basic economics or structure of a single public school. It merely penetrates the heretofore monadic classroom. Consider the single classroom + teacher as a school district for the purpose of delivering services. As a core unit which can be expanded or contracted as dictated by the program pursued the classroom as presently constituted is large enough to be economically independent. Teacher salaries consume 80 to 90 per cent of the instructional budget in most systems. Since capital investment patterns are affected not at all, for more than 90 per cent of its activities there will be no savings to the system as a whole in marrying one sub-unit to others. And the classroom has a special integrity as a control unit since most of the activities which make critical educational differences occur there.

In this system, academic achievement is relegated to the status of only one of many possible educational goals. Thus, the notion of relevant differences again expands and the points of relevant comparison further contract. Educational units which are the beneficiaries of resource specificity and which have the ability to vary their choice of resources on the basis of divergent goals will soon become as different as the proverbial apples and pears. But the range of differences in children is at least that great and so is the range of their preferences.

Equality would not become irrelevant or disappear from a system of sub-units pursuing wildly different aims by wildly different means. The focus for discerning equality would simply shift away from the substance of educational resources to the power to purchase them, away from the output of the unit and towards the fairness of the process.

What can be done now?

The problems posed by differentiated educations for different children are political problems and tracking is a political solution. So too is the system suggested here. It is not a system that will commend itself, to say the least, to either school personnel as an immediately worthwhile structural reform or to judges as a court-imposed remedy to specific institutional abuses in tracking schemes. But while waiting for this revolution in American education, lawyers can play a critical role in breaking down the current school practices which allow and even cause the abuses in current tracking schemes.

First, lawyers can police current grouping practices on their own terms, making sure that they operate in ways that are true to their own declared intentions and principles, thus building badly needed accountability into an allocation system that has never allowed for it. By acting as surrogates for power that may someday devolve on the sub-units actually affected, lawyers can serve worthwhile notice on school administrators that the power to control the amount of education a child will be exposed to is not absolute. Arbitrary and sometimes punitive shifts in grouping assignments have definite legal implications. Children having nothing more than a personality conflict with their teacher are demoted to groups where provision of less education is expected to resolve that conflict, as though a disagreement with a teacher constituted resistance to being educated. Information about the way particular school systems make grouping decisions is rarely available to the public. Indeed, parents are rarely aware that the system is organized to provide more education to some children than to others; nor are they aware that their own children have been subject to such decisions; they are not aware because the system has made no effort to inform them. Such decisions are of critical interest to parents and children; if the school system chooses to channel children in these ways, then, at the very least, it should be required to make the process as open as possible. Lawyers can assert that right for parents and so begin to establish communication between the school and the parents while exposing one critical aspect of education to the light.
districting statutes and that these statutes operate, there- 
fore, to deny plaintiffs and their class equal educational opportunity in violation of the Fourteenth Amendment. It is 

further alleged that the statutes not only perpetuate existing segregation in Hartford, but contribute to it by 

fostering a population Exodus of non-minority group mem-

bers from the town. "Such population movement has the 
effect of creating a segregated municipality whose govern-

ment, social institutions and population as well as school 
enrollment are becoming almost entirely composed of 

minority group members."

All of the surrounding towns have low concentra-

tions of minority group students in their schools (ranging 

from 1.8% in Westerfield to 18.3% in Bloomfield), and it 

appears that the only possible way to eliminate the social 

segregation which now exists in Hartford is through some 

arrangement under which urban and suburban students 

would attend the same schools. The plaintiffs are saying, 

however, that the state statute in question stands in the 

way of any such scheme. Plaintiffs argue that the the-

oretical possibility of merger, which would create 

integrated school districts does not remove the constitu-
tional objection. "Laws making the integration of schools 

and the provision of equal educational opportunities de-

pend upon majority vote or acts of discretion on the 

part of public officials are unconstitutional."

Oral arguments were recently held before a three-

judge panel on defendants’ motion to dismiss. No ruling on 

that motion has come down as of this writing. Plaintiffs are 

represented by Douglas M. Crockett, Raymond B. Marcini, 

and Douglas Eldridge of Neighborhood Legal Services, Inc. 
of Hartford.

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Lawyers can also move against those differenti-
ating principles, such as aptitude tests, which inform the 
allocation process and without which compulsory tracking 
assignments could not be legitima-
ted. Suits challeng ing the 

complex legal issues they raise. But nothing else so chills 
tools which allow him to mete out differ-

ent amounts of 

the cockles of an administrator’s heart as an attack on those 

recent attempts at attacking tests are any indication, there 

fairness of tests are both time-consuming and complex. 


If 

would consider inter-

vention.

A successful legal attack on either the grouping 
system as administered or the grouping system as conceived 

will not yield and educationally appropriate remedy. But it 

will not create a vacuum. More room to maneuver means 

more room for critically needed reform.

FOOTNOTES

1. There are many analyses of this problem. A good, short, general 
description is Christina Tree, "Grouping Pupils in New York City," The Urban Review, September 1968.


8. See Sorenson.


10. J. McPartland, "The Segregated Student in Desegregated Schools," Report No. 21, Center for the Study of the Social Organization of Schools, The Johns Hopkins University, 1968. This study has been questioned on methodological grounds.


12. Hobson v. Hansen, 269 F. Supp. 401 (D.D.C., 1967) aff’d sub nom Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir., 1969). See Inequality in Education Number One, p. 11, for a list of other cases on the constitutionality of grouping plans. In no other case have the plans themselves been ruled on per se; in all cases the court required at least that there be some showing of actual harm before it would consider intervention.

13. The problem of testing is complex. Not only are the tests biased, but the manner in which they are administered can also have profound effects on scores. These questions will be discussed in a subsequent issue of Inequality in Education.

14. As noted, Judge Wright considered the fact that the Washington grouping scheme disadvantaged the poor and black as classes in tandem with the fact that the disadvantage occurred in the educational sphere and reached an equal protection requirement for "rationality" which was much tougher than that traditionally used by courts to scrutinize legislative distinctions between citizens. Some critics claim the higher standard is unwarranted; others claim it makes no sense. For an example of the latter point of view, see F. Michelman, "The Supreme Court, 1968 Term, Foreword: On Protecting the Poor through the Fourteenth Amendment," 83 Harvard Law Review 7 (1969).

15. See S. Michelson's articles in Inequality in Education Number Two, p. 4, and in this issue, p. 7.

16. This system of collective bargaining for educational goods will be discussed in greater detail in a subsequent issue of this bulletin.