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## **Chicana/o Latina/o Law Review**

### **Title**

Hierarchy and Discrimination: Tracking in Public Schools

### **Permalink**

<https://escholarship.org/uc/item/1vj0h4ww>

### **Journal**

Chicana/o Latina/o Law Review, 15(1)

### **ISSN**

1061-8899

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### **Publication Date**

1994

### **DOI**

10.5070/C7151021048

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# COMMENTS

## HIERARCHY AND DISCRIMINATION: TRACKING IN PUBLIC SCHOOLS

### I. INTRODUCTION

We live in a society stratified by wealth, income, power, and prestige. By creating (or frustrating) goals and opportunities, education is the principal institution used to allocate people across that hierarchy.<sup>1</sup> The strength and perseverance of educational tracking stems from the very hierarchy it helps to create and maintain. Tracking is packaged in hierarchical concepts that mainstream society has learned to accept. For example, most individuals believe that certain people are "smarter" than others. Those who accept this premise are likely to regard tracking as acceptable because it makes hierarchical distinctions where they are thought to exist and are necessary; in other words, educational tracks only reflect the make up of society. After all, not everyone is smart enough to be a doctor or a lawyer or take calculus or physics.<sup>2</sup> Moreover, so the argument goes, society needs bus drivers and mechanics.<sup>3</sup> Thus, society tacitly assumes that tracking harms no one and merely prepares individuals for their niche in the hierarchy.<sup>4</sup>

The current tracking system is a discriminatory mechanism with objectives that are justifiable only to those at the apex of the current hierarchical structure. By suppressing the opportunities of the "have nots" and enhancing the opportunities of society's "haves," tracking mechanisms serve no other purpose than to

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1. I use the terms hierarchy and stratification interchangeably. I define both terms as the rank ordering of people by classifying some as "better" or "deserving" and others as "less deserving" or "inferior." I argue that the current societal hierarchy controls one's classification and therefore determines one's rank position.

2. ANNE WHELOCK, *CROSSING THE TRACKS* ix (1992).

3. *Id.*

4. See JAMES E. ROSENBAUM, *MAKING INEQUALITY: THE HIDDEN CURRICULUM OF HIGH SCHOOL TRACKING* 50 (1976); Karl L. Alexander & Edward L. McDill, *Selection and Allocation Within Schools: Some Causes and Consequences of Curriculum Placement*, 41 *AM. SOC. REV.* 963, 977-79 (1976); Note, *Teaching Inequality: The Problem of Public School Tracking*, 102 *HARV. L. REV.* 1318, 1322-23 (1989).

perpetuate the historical hierarchical status quo.<sup>5</sup> Society, in general, is worse off for this negation of opportunity when options beyond the status quo are not fully explored. Yet this stratification mechanism is not only allowed to persist but also widely used.

One reason for the pervasiveness of tracking is that the legal system has not acted to correct the wrong. In fact, the legal system has characterized tracking as a neutral, beneficial, and unavoidable stratification mechanism. That characterization permits, and indeed preserves, the hierarchy.

Nation-wide acceptance and implementation of discriminatory systems like tracking demonstrate the strength of hierarchy in our society and the immense battle faced by tracking opponents. In fact, the main controversy over tracking revolves only around the unjust results of educational stratification. In this context, opponents and proponents focus on the narrow issue of discriminatory stratification and are hesitant or unable to seek out the root causes of persistent discrimination.

The existing hierarchy can be attacked today because of the self-evident injustice of discrimination—racial and otherwise. However, any effort to remedy this injustice must focus on the illegitimacy of all differentiation mechanisms. Therefore, the remedy sought by opponents of tracking cannot be limited to equal access to the higher track. This narrow view presumes that the creation of a racially and socio-economically neutral tracking system is possible.

This Comment argues that educational tracking and its effects demonstrate that hierarchy and discrimination are two sides of the same coin. Until this intrinsic link is made, unjust differentiation mechanisms will persist. Part II describes the invidious racial and socio-economic distinctions created by tracking, and its lasting detrimental effect on the self-esteem of low-tracked children. Part III discusses the inability or unwillingness of United States courts to characterize tracking as a discriminatory stratification system. Finally, Part IV disputes the legal characterization of tracking and argues that the perseverance of tracking stems from its reliance on the concept of hierarchy.

## II. THE EVILS OF TRACKING

Many people point to success stories, namely prominent people of color and formerly poor people, to argue that inner strength is the formula for success. However, these people fail to

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5. See ROSENBAUM, *supra* note 4, at 21-22; JEANNIE OAKES, A QUESTION OF ACCESS: TRACKING AND CURRICULUM DIFFERENTIATION IN A NATIONAL SAMPLE OF ENGLISH AND MATHEMATICS CLASSES 205 (1981).

see that a stronger and more pervasive formula for failure exists. Tracking is an integral part of this formula because it limits the options of most people of color and the poor.

According to the National Commission on Children, there are several factors that place a child at educational risk in the United States. The Commission lists five factors: "being poor, belonging to a racial or ethnic minority, having limited proficiency in English, being raised in a single-parent family or by poorly educated parents, or having a disabling condition."<sup>6</sup> According to the Commission, children identified with one or more of the listed factors are very likely to be placed in a low educational track, because the methodology used for "ability grouping" is biased against these children.<sup>7</sup>

For example, over 80% of U.S. school districts utilize a standardized intelligence-quotient (IQ) test.<sup>8</sup> Many IQ tests are standardized on white, primarily middle-class, groups.<sup>9</sup> For people of color and poor children, these tests only serve to measure the level of assimilation into dominant society. Although the use of such tests in a setting integrated by both race and class is clearly inappropriate, many school districts still utilize them.<sup>10</sup> This use systematically identifies mostly white children as intelligent, while people of color and poor children are labelled "slow" or "educable retarded students."<sup>11</sup>

Further, proponents of tracking claim that the low track offers students a remedial educational program, despite studies which have shown that this is not the case.<sup>12</sup> Students who are low-tracked often receive a sub-standard education and experience various hardships associated with being labelled "slow." Receiving a sub-standard education results in further detrimental consequences for future job prospects and life choices.

#### A. *Tracking Along Socio-Economic and Racial Lines*

One commentator asserts that "equal educational opportunity is a myth."<sup>13</sup> Even when minority and low-income children are identified by an IQ test as gifted, they must often overcome

6. THE NATIONAL COMMISSION ON CHILDREN, *BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES* 181-82 (1991).

7. See also Alexander & McDill, *supra* note 4, at 972-73.

8. WARREN G. FINDLEY & MIRIAM M. BRYAN, *THE PROS AND CONS OF ABILITY GROUPING* 13 (1975); ROSENBAUM, *supra* note 4, at 41.

9. Michael S. Sorgen, *Testing and Tracking in Public Schools*, 24 *HASTINGS L.J.* 1129, 1170 (1973).

10. *Id.*

11. See OAKES, *supra* note 5, at 70, 185.

12. *Id.*

13. DELOS H. KELLY, *ORGANIZATIONAL CREATION OF SOCIAL DEVIANTS* 134 (1977); see also OAKES, *supra* note 5, at 183.

educators' preconceptions about their abilities. Thus, many are still likely to be low-tracked because of inherent prejudices.<sup>14</sup> For example, one researcher found:

80% of upper-class students, as compared to 47% of the lower class, who qualified for placement in the top track were so placed. This pattern was even more pronounced for the lower track. Only 2% of the upper-class pupils, as contrasted with 85% of the lower-class, who qualified for placement were actually placed in the low tracks.<sup>15</sup>

These statistics reaffirm the findings of other studies which conclude that the use of teachers' subjective opinions in deciding who is intelligent is flawed. For example, one court noted:

Studies have found that a teacher will commonly tend to underestimate the abilities of disadvantaged children and will treat them accordingly—in the daily classroom routine, in grading, and in evaluating these students' likelihood of achieving in the future. The horrible consequence of a teacher's low expectation is that it tends to be a self-fulfilling prophecy.<sup>16</sup>

As members of the societal hierarchy, educators are necessarily influenced by society's preconceptions and prejudices. As a result, studies have found that educators "tend to underestimate the abilities of disadvantaged children."<sup>17</sup> Many of these educators assess intelligence based on a child's appearance.<sup>18</sup> In districts where teachers alone decide who is "smart enough" to be given an IQ test for placement in a program for gifted students, the selection is often made in a discriminatory manner.<sup>19</sup> For example, in 1991 Boston had only two Latinos enrolled in calculus in 15 public schools, an improvement from the previous year when only one Latino took calculus.<sup>20</sup>

The two Latinos who enrolled in calculus are examples of what one commentator calls "intra-racial differentiation."<sup>21</sup> The term refers to educators' "frustrated concessions that we cannot educate them all [people of color], that we must settle for a few success stories. The educational mission is reduced to searching for those bright stars that outshine racial stereotypes."<sup>22</sup> According to this commentator, success is luck of the draw for people of

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14. KELLY, *supra* note 13, at 129.

15. *Id.* at 133.

16. Larry P. v. Riles, 343 F. Supp. 1306, 1312 (N.D. Cal. 1972) (citing *Hobsen v. Hansen*, 269 F. Supp. 401, 484 (D.D.C. 1967)).

17. *Id.*

18. KELLY, *supra* note 13, at 140.

19. *Id.* at 129.

20. Diego Ribadeneira, *Tracking Derails Minorities*, BOSTON GLOBE, May 20, 1991, at M9.

21. Ruben Navarrette Jr., *Life in the Academic Fast Track*, L.A. TIMES, Apr. 12, 1992, at M1.

22. *Id.*

color and the poor. Thus, tracking is a powerful tool for maintaining the hierarchical status quo since few lucky children of lower socio-economic backgrounds are given the opportunity to succeed academically.

Yet, discriminatory tracking based on inappropriate IQ testing continues. While proponents of these tests argue that they are objective, an examination of the tests themselves leads to a different conclusion.<sup>23</sup> The questions are, in fact, fatally plagued by subjectivity, because every question reflects the question-maker's particular life experience, and necessarily includes the question-maker's value-laden assumptions about which knowledge and skills are important.<sup>24</sup> In practice, this benefits white, middle-class children.<sup>25</sup>

For example, one aptitude test asked the following question: "If your mother asked you to go to the store to buy a loaf of bread and the store was out of bread, what do you do?"<sup>26</sup> The possible answers included: (a) go to another store; and (b) go home.<sup>27</sup> The test-makers decided that (a) was the correct answer based on an assumption that grocery stores are easily accessible and abundant.<sup>28</sup> Many poor, black children from large cities chose answer (b).<sup>29</sup> According to a recent examination of the protocols of these children, answer (b) is a perfectly intelligent answer; yet these children were not credited as having answered correctly.<sup>30</sup> This example demonstrates that aptitude test questions merely examine "students' exposure to literate, upper-middle-class culture during their formative years."<sup>31</sup> In one interview, a test designer for the Educational Testing Service said, "[C]hildren raised in families with the most money consistently did best on the tests, for reasons that seemed to reflect money itself as much as innate differences in talent."<sup>32</sup> These biases in intelligence testing virtually assure that white middle-class students get the highest scores.<sup>33</sup> Thus, the ranking of students based on IQ test scores is likewise an inappropriate means of differentiation.<sup>34</sup>

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23. David L. Kirp, *Schools as Sorters: the Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705, 755-56 (1973).

24. Note, *supra* note 4, at 1327-31.

25. James Fallows, *What's Wrong with Testing?*, WASH. MONTHLY, May 1989, at 12.

26. Sorgen, *supra* note 9, at 1168.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Fallows, *supra* note 25, at 12.

32. *Id.*

33. Sorgen, *supra* note 9, at 1170; OAKES, *supra* note 5, at 185.

34. Note, *supra* note 4, at 1323-25.

### B. *Self-Fulfilling Effects of the Label "Slow"*

The label "slow" is one that sticks.<sup>35</sup> Few so-called "slow" students are able to overcome such a labelling and its associated barriers to success. Furthermore, the majority of low-tracked students remain in the low tracks because remedial education does not take place.<sup>36</sup> As a result of limited movement between tracks, the tracking system becomes "a virtual caste system."<sup>37</sup> Another problem is that students subject to such a system are well aware of their own and others' positions within it.<sup>38</sup> Children understand which ones of them are considered "smart" or ones with "problems." A child who is considered "slow" is thus stigmatized, because this label "reinforces unfavorable self-conceptions which operate against motivation for scholastic achievement,"<sup>39</sup> and has a corroding effect on self-esteem.<sup>40</sup> Obviously, a child's negative self-perception adversely affects her future educational plans and goal-oriented behavior.<sup>41</sup> A student, who believes she is "slow" and then is told she is "slow," will not believe she can attain academic success nor pursue occupations considered "intellectual." Misguided educators often reaffirm such a student's negative self-perception by suggesting to the student that her niche in life is as a laborer and not a thinker.

Unfortunately, insensitive educators are also more commonly found in low track classrooms, because few teachers want to educate these children.<sup>42</sup> Likewise, low-tracked children are more often taught by less experienced teachers.<sup>43</sup> Yet another bias against low-tracked children is that teachers in these classrooms typically anticipate disciplinary problems from low-tracked children, who are also thought to lack interest in school and have behavioral problems.<sup>44</sup> Thus, these teachers tend to be more concerned with disciplining low-tracked students than with encouraging their academic achievement.

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35. Jill Rachlin, *The Label That Sticks*, U.S. NEWS & WORLD REP., July 3, 1989, at 51.

36. JEANNIE OAKES, TRACKING AND ABILITY GROUPING IN SCHOOLS: SOME CONSTITUTIONAL QUESTIONS 5 (1981); ROSENBAUM, *supra* note 4, at 36, 39.

37. KELLY, *supra* note 13, at 133-34.

38. REBA NEUKOM PAGE, LOWER-TRACK CLASSROOMS: A CURRICULAR AND CULTURAL PERSPECTIVE 86 (1991).

39. FINDLEY & BRYAN, *supra* note 8, at 15.

40. Delos H. Kelly, *Tracking and Its Impact Upon Self-Esteem: A Neglected Dimension*, 96 EDUC. 2, 2-9 (1975); OAKES, *supra* note 36, at 6; Alexander & McDill, *supra* note 4, at 976.

41. OAKES, *supra* note 5, at 179; ROSENBAUM, *supra* note 4, at 121; Karl L. Alexander et al., *Curriculum Tracking and Educational Stratification: Some Further Evidence*, 43 AM. SOC. REV. 47, 60, 63 (1978).

42. FINDLEY & BRYAN, *supra* note 8, at 12.

43. OAKES, *supra* note 36, at 4.

44. PAGE, *supra* note 38, at 33.

Another difficulty is that low-tracked children are not taught the analytical and critical tools needed to question one's role in society, nor are they given the tools necessary to examine ways for societal change that would service others like them. These children receive only minimal educational skills, or attain "functional literacy," which barely prepares these students for filling out forms, such as job applications.<sup>45</sup> Low-tracked students do not receive college-preparatory classes because they are not expected to go to college.<sup>46</sup> This educational focus in low track classrooms is a blueprint for failure.

Low tracking is characterized by various components which impede movement to a higher track. First, many educators are the strongest proponents and main administrators of tracking. When a teacher tells a parent that her child has been determined to be "average" or "slow" according to some "objective" indicator, and then offers remedial aid, the statement carries the force of authority. Pseudo-scientific test scores are used often to convince reluctant parents that their child needs the particular help being prescribed. Likewise, parents assume that educators are best qualified to decide what is best for their child. Therefore, many misinformed parents permit their child(ren) to be placed in a low or remedial track.<sup>47</sup> Parents rarely question the implications of such a decision nor the determination regarding their children's intelligence potential, especially if the parents are unfamiliar with the educational system.

However, parents must be concerned with tracking because of the dangers of abuse and misclassification. According to James Ysseldyke and Martha Thurlow of the Institute for Research on Learning Disabilities at the University of Minnesota, there is no reliable way to distinguish students who are learning disabled from students who are low achievers.<sup>48</sup> Therefore, under the current system where most schools have implemented tracking systems, low achievers are identified as learning disabled and vice versa. In addition, the standards for track placements used by most school districts remain ambiguous.<sup>49</sup> Many districts have no formal policy regarding tracking criteria or have a policy that is not followed.<sup>50</sup>

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45. Sheila Tobias, *Tracked to Fail*, PSYCHOL. TODAY, Sept. 1989, at 54; OAKES, *supra* note 5, at 187.

46. Tobias, *supra* note 45, at 54.

47. Sorgen, *supra* note 9, at 1180; *see also* ROSENBAUM, *supra* note 4, at 122.

48. James Barron, *The Average Student*, N.Y. TIMES, Nov. 5, 1989, at 4A.

49. KELLY, *supra* note 13, at 131.

50. OAKES, *supra* note 36, at 7.



### C. *Past and Present Aims of Tracking*

In use since the early 1900s, tracking focused on bringing students up to a "uniform standard" during the 1920s and 1930s.<sup>51</sup> This focus *did* benefit the lower track, but only slightly.<sup>52</sup> Early on there were many criticisms of tracking,<sup>53</sup> criticisms which have not been delegitimized or remedied by current tracking systems.

In the 1960s, tracking once again returned to favor. However, the 1960s tracking systems did not focus on the lower tracks as did their earlier counterparts.<sup>54</sup> Educators claimed that tracking facilitated and improved the education system. In light of the findings that existed against tracking in the 1960s (its damaging effects and racial disparities), this justification appears to be a subterfuge for an ulterior motive.

Several researchers have offered unsettling explanations for the switch from disfavor to near universal use. In their work, Warren G. Findley and Miriam M. Bryan claim that the acceptability of ability grouping is linked to the United States' battle to be "number 1" technologically.<sup>55</sup> The Cold War and the successful Soviet launching of Sputnik destroyed the United States' *Pax Americana* sense of security. They argue that the creation of an intellectual elite became an important goal, and tracking became a convenient mechanism for reaching this goal.<sup>56</sup> Any concern for the defects and harmful consequences of educational tracking gave way to hegemonic interests.

Kenneth Meier, Joseph Stewart, and Robert England suggest that the renewed popular use of tracking systems is tied to the efforts by school districts to circumvent the Supreme Court's decision in *Brown v. Board of Education*.<sup>57</sup> Studying over 180 urban school districts, they found "evidence that ability grouping was used to reduce racial heterogeneity in the classroom and halt 'white flight.'"<sup>58</sup> Once the dominant society lost the separate-but-equal argument, they implemented the together-but-unequal

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51. FINDLEY & BRYAN, *supra* note 8, at 13.

52. *Id.*

53. Note, *supra* note 4, at 1323:

In the late 1930's, interest in tracking waned as educators responded to studies showing little or no achievement gains from ability grouping and to arguments that low placements could have negative effects on students. As a result, the prevalence of ability grouping appears to have declined somewhat between 1935 and 1955.

54. See FINDLEY & BRYAN, *supra* note 8, at 13.

55. *Id.*

56. Note, *supra* note 4, at 1323.

57. Ronald Smothers, *In Pupil 'Tracks,' Many See a Means of Resegregation*, N.Y. TIMES, Feb. 18, 1990, at 5.

58. *Id.* at 5.

system. According to Hank Sanders, a state senator who represents the Selma area, tracking permitted students to enter the same school doors only to be segregated once inside.<sup>59</sup> Thus, tracking became a tool for maintaining the existing hierarchical status quo.

Another justification for tracking that still remains is the claim that this process facilitates and improves teaching. Over 80% of the nation's schools implement "ability grouping" because "it is regarded as the easiest way to teach youngsters of differing aptitude."<sup>60</sup> Do the costs of tracking outweigh the facilitating and academic benefits of its use? Several studies have found no verifiable benefits to students grouped as academically "gifted,"<sup>61</sup> while other studies have found an immense detrimental effect for students labelled "slow."<sup>62</sup>

### III. LEGAL FRAMING OF THE ISSUE: DISCRIMINATION

Like the educational controversy, the legal controversy surrounding tracking has focused primarily on the issue of race and discrimination. Every case challenging tracking has been brought by people of color and has focused on the racially discriminatory impact of tracking.

Yet, the framing of the legal argument reaffirms society's inability to see beyond the hierarchical system that exists. It has precluded a thorough examination of the role that hierarchy plays in perpetuating evils like discrimination. Instead of questioning the role of hierarchy in preserving the unjust differentiation method, the legal system does not acknowledge tracking as a discriminatory system. The legal system, in fact, goes beyond ignoring the injustices of tracking by asserting that stratification mechanisms can be fair and neutral.

#### A. *Brown v. Board of Education*<sup>63</sup>

The 1954 landmark decision in *Brown* ended generations of unconstitutional segregation. The Supreme Court in *Brown* stated that racial segregation "generates a feeling of inferiority [in black children] as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."<sup>64</sup> The Court accepted evidence from psychologists dem-

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59. *Id.*

60. Ribadeneira, *supra* note 20, at M9.

61. OAKES, *supra* note 5, at 4.

62. Ribadeneira, *supra* note 20, at M9; OAKES, *supra* note 5, at 183.

63. 347 U.S. 483 (1954).

64. *Id.* at 494.

onstrating that separate education is inherently unequal because of the stigmatizing effects of the separation.<sup>65</sup>

*Brown* is one of the few cases that alludes to the unjust nature of hierarchy, but it limited its criticism to early tracking and only within the framework of discrimination. Although the criticism is limited, the reasoning of *Brown* is directly applicable to the issue of ability grouping. Under a *Brown* analysis, ability grouping systems are as detrimental as segregation. As with segregation, tracking "teach[es] students insidious lessons about where they fit into society and how to behave accordingly."<sup>66</sup> Tracking reaffirms a sense of racial inferiority because minorities disproportionately populate the low tracks.<sup>67</sup> Minorities internalize this sense of inferiority and therefore accept other inequalities in the world as natural.<sup>68</sup> All the unacceptable hierarchical by-products of segregation are present in tracking, yet *Brown* has received little if any attention in tracking cases.

Segregation demonstrates that differentiation mechanisms are predisposed to distortion. The unjust implementation of differentiation mechanisms like the separate-but-equal doctrine is a pervasive trend that has plagued our history. A reasonable effort to address this injustice should include an examination of hierarchy and its effects on society, but this issue has escaped post-*Brown* courts. In fact, legislation implemented as a result of *Brown* has focused only on the issue of impermissible discrimination and has not, in any way, challenged the concept of hierarchy.

The Civil Rights Act states that "[d]esegregation means the assignment of students to public schools and within such schools without regard to race, color, religion, sex or national origin."<sup>69</sup> On its face, the Act permits hierarchical assignments based upon any other so-called "non-discriminatory" ground. Since the Supreme Court decided *Brown*, courts have repeatedly stated that schools may segregate students by ability, but not by race.<sup>70</sup> In doing so, courts have "distinguished between classifications by ability that are seen as neutral and objective and racial classifications that are seen as insidious and irrational,"<sup>71</sup> although, in effect, grouping by either classification produces similar results.

Thus, the law contributes to the perpetuation of this unjust system of differentiation and in effect legitimizes discrimination. This is particularly troubling in light of the claim that ability

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65. *Id.* at 495 n.11.

66. Note, *supra* note 4, at 1332.

67. *Id.*

68. *Id.*

69. 42 U.S.C. § 2000c(b) (1989).

70. See discussion *infra* part III.C.

71. Note, *supra* note 4, at 1320.

grouping was implemented to circumvent *Brown*.<sup>72</sup> In a sense, the courts have taken with one hand (the refusal to read *Brown* as applicable to *any* segregating mechanism), what was given with the other (the seemingly progressive step against discrimination in *Brown*).

### B. *The Choice: Resegregation or Integration*

The issue raised in litigation has been discrimination; hierarchy has been a non-issue or has been used to justify educational stratification. *Hobson v. Henson*<sup>73</sup> was the first and possibly the strongest case challenging tracking and desegregation. In *Hobson*, African-American and poor students challenged the ability grouping system utilized by the District of Columbia, which the court found to be a "self-evident" wrong.<sup>74</sup> The court made the following findings of fact:

The aptitude tests used to assign children to the various tracks [were] standardized primarily on white middle class children. Since these tests d[id] not relate to the Negro and disadvantaged child, track assignment based on such tests relegate[d] Negro and disadvantaged children to the lower tracks from which, because of the reduced curricula and the absence of adequate remedial and compensatory education, as well as continued inappropriate testing, the chance of escaping [wa]s remote.<sup>75</sup>

The *Hobson* Court noted the stigmatization low-tracked students could experience by being segregated from the educational mainstream. It stated: "Even in concept the track system is undemocratic and discriminatory. Its creator admits it is designed to prepare some children for white-collar, and other children for blue-collar jobs."<sup>76</sup> Although the appellate court upheld the lower court order to abolish the tracking system, it did so noting a "caveat that the order prohibit[s] only the particular tracking system in question rather than all tracking systems."<sup>77</sup>

This caveat severely limited the holding by giving future courts the option to follow *Hobson* or create a new approach. Thus, the appellate court sanctioned hierarchy as an acceptable social structure by suggesting that while this stratification system is unfair, another system may be developed and judicially upheld. Like *Brown*, *Hobson* has had virtually no impact, even in the

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72. See discussion *infra* part II.C.

73. 269 F. Supp. 401 (D.D.C. 1967), *cert. dismissed*, 393 U.S. 801 (1968).

74. *Id.*

75. *Id.* at 407.

76. *Id.* at 515.

77. Note, *supra* note 4, at 1324.

District of Columbia.<sup>78</sup> One author explains: "School[s] . . . have limited the applicability of the district court order to the existing tracking system while . . . retaining the full panoply of student differentiation by simply changing tracking labels."<sup>79</sup> Not only have other courts veered away from *Hobson*, but also District of Columbia school officials have circumvented the order by making superficial changes. Thus, while the plaintiffs won their case and its appeal, they did not receive a remedy.

*Larry P. v. Riles*<sup>80</sup> is another example of the courts' inability or unwillingness to attack ability grouping as an unjust stratification mechanism. *Larry P.* questioned the discriminatory nature of the criteria used for placing students in Educable Mentally Retarded (EMR) classes. The presiding judge in *Larry P.* made strong statements against this kind of tracking and the disproportionate number of minorities in the track. District Judge Peckham noted:

The law has a special concern for minority groups for whom the judicial branch of government is often the only hope for redressing their legitimate grievances; and a court will not treat lightly a showing that educational opportunities are being allocated according to a pattern that has unmistakable signs of invidious discrimination. Defendants, therefore, have a weighty burden of explaining why the poor and the Negro should be those who populate the lower ranks of the track system.<sup>81</sup>

This court found that the defendants did not carry their burden because they could not prove that an "inherited difference in intelligence exists among the races."<sup>82</sup>

Judge Peckham went on to reject the use of IQ tests as a mechanism for grouping. He stated that "[t]he absence of any rational means of identifying children in need of such treatment can hardly render acceptable an otherwise concededly irrational means, such as the I.Q. test as it is presently administered to black students."<sup>83</sup> The finding that IQ tests are an irrational method for classifying children has broad implications because most schools utilize IQ tests to group EMR children. *Larry P.*

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78. Kirp, *supra* note 23, at 753.

79. *Id.*

80. 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974).

81. *Id.* at 1310 (citing *Hobson*, 269 F. Supp. at 513).

82. *Id.* According to Judge Peckham, the defendants suggested that "since black people tend to be poor, and poor pregnant women tend to suffer from inadequate nutrition, it is possible that the brain development of many black children has been retarded by their mother's poor diet during pregnancy." *Id.* Judge Peckham responded by stating that because "the court cannot take judicial notice of such matters, there can be no basis for assuming otherwise than that the ability to learn is randomly spread about the population." *Id.* at 1310-11.

83. *Id.* at 1313.

held that California schools could not use IQ tests to identify African-Americans as educable mentally retarded.<sup>84</sup> Although Judge Peckham's order was narrow in scope, targeting only African-Americans in EMR programs, the opinion resulted in the rejection of IQ tests by many schools (except for identifying students of any race for gifted and talented programs).<sup>85</sup>

The *Larry P.* decision is significant for other reasons. First, the vast majority of tracking cases challenge systems implemented by school districts in the southern United States. In these cases, the lingering effect of past segregation is usually examined as a possible explanation for the disparate impact of tracking.<sup>86</sup> In *Larry P.*, the San Francisco School District's tracking system and its discriminatory effects were on trial. Although forms of legalized discrimination occurred nationwide, San Francisco did not have a "history of maintaining dual school systems."<sup>87</sup> Therefore, the *Larry P.* court "assessed the harm to be a result not of prior segregation but rather of procedures now in use."<sup>88</sup>

Second, the procedures for tracking were examined and discredited as illogical and unjustifiable in *Larry P.*. That examination provides an empirical and logical formula for other courts to follow in examining tracking procedures. Judge Peckham began his analysis by scrutinizing the impact of EMR tracking, which he found to be racially and socio-economically discriminatory.<sup>89</sup> He then placed the burden of justifying the system on the San Francisco School District,<sup>90</sup> a burden which it was unable to meet.<sup>91</sup>

Unfortunately, the significance of Judge Peckham's decision was limited by an argument in favor of stratification and, ironically, equal opportunity. In 1986, Judge Peckham again extended his ruling to include African-American students who are tested for special education or other remedial classes. This extension was in response to California school districts' efforts to circumvent the *Larry P.* ruling by changing the name of EMR programs.

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84. *Larry P.*, 495 F. Supp. 926 (N.D. Cal. 1979). However, the EMR track survived this litigation because, as with *Hobson*, tracking proponents circumvented Judge Peckham's order by simply renaming the EMR track.

85. Jean Merl, *Court Ban on IQ Tests for Blacks Sparks Parents' Suit*, L.A. TIMES, Aug. 5, 1991, at A3.

86. See discussion *infra* part III.C.

87. JEANNIE OAKES, *KEEPING TRACK* 187 (1985).

88. *Id.*

89. *Larry P.*, 343 F. Supp. at 1311-12.

90. *Id.* at 1311.

91. *Id.* at 1314.

In 1988, the 1986 extension was challenged in *Crawford v. Honig*.<sup>92</sup> The initial plaintiff in this case was a part African-American, part Latino child. The child's school informed his mother that her child was having academic problems and that they believed he was learning disabled. The parent was also told that children usually are given an IQ test in order to identify them as learning disabled and to place them in a remedial or lower track.<sup>93</sup> However, because of Judge Peckham's ruling, her child could not be tested. She was told that she could re-register her child as Latino and then the test could be implemented, but that African-Americans could not be tested.<sup>94</sup>

The child's mother was confused and insulted at the overt racial distinction Judge Peckham's ruling imposed. She said, "What was I supposed to do? Deny he ha[s] a black father and make him ashamed of half his heritage? I really don't think color should have anything to do with it."<sup>95</sup> The child's mother did not question whether her child would be fairly tested. She was told by school officials that her child needed help and testing would get him this help.<sup>96</sup> She filed a complaint asserting that her child's rights were not adequately represented in the 1986 extension of *Larry P.*<sup>97</sup> Her legal representative claimed that the litigation's purpose was "to provide equal access to testing for any and all black families who think it may benefit their children."<sup>98</sup> This parent sought to have the school administer to her child a test, which had been found to be ethnically and socio-economically biased.

Judge Peckham reversed his 1986 position.<sup>99</sup> While *Crawford* nullified the 1986 extension, it continues to bind the named defendants in *Larry P.* (with exceptions devised for *Crawford* parents). *Crawford* has left many fearing that *Larry P.* may be the next target of attack. Harold E. Dent, a psychologist who specializes in testing and was an expert witness for the plaintiffs

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92. Nos. C-89-0014, C-71-2270 (N.D. Cal. Aug. 31, 1992).

93. Merl, *supra* note 85, at A3.

94. *Id.*

95. *Id.*

96. Judge Peckham had warned that parents are particularly susceptible to this kind of misinformation:

Defendants' contention that I.Q. tests are not responsible for the racial imbalance in EMR classes because parental consent is a necessary prerequisite to placement in such classes can be analyzed similarly. Clearly, if fully-informed parental consent is sought in every case, plaintiffs have nothing to complain of. However, parents are likely to be overawed by scientific-sounding pronouncements about I.Q..

*Larry P.*, 343 F. Supp. at 1313.

97. Merl, *supra* note 85, at A3.

98. *Id.*

99. *Crawford*, Nos. C-89-0014, C-71-2270 (N.D. Cal. Aug. 31, 1992).

in *Larry P.*, stated "concern[ed] about the *Crawford* case because he believes it is a very pernicious effort to undermine the 1979 ruling."<sup>100</sup> In sum, the legal system has not taken a firm stand against tracking and its damaging effects nor has it questioned other factors that have contributed to the current educationally discriminatory system utilized in the United States.

### C. *The Majority View*

The predominant legal and societal view of hierarchy and discrimination can be seen in the holding of *McNeal v. Tate County School District*.<sup>101</sup> *McNeal* holds that:

School districts ought to be, and are, free to use such grouping whenever it does not have a racially discriminatory effect. If it does cause segregation, whether in classrooms or in schools, ability grouping may nevertheless be permitted in an otherwise unitary system<sup>102</sup> if the school district can demonstrate that its assignment method is not based on the present results of past segregation or will remedy such results through better educational opportunities.<sup>103</sup>

This view maintains that racial discrimination no longer plagues our educational system nor our society, and therefore, present effects of past racial discrimination are close to nil. According to *Castaneda v. Pickard*,<sup>104</sup> close judicial scrutiny should be limited to those school systems that adopt ability grouping and "are in the process of converting to a unitary school system or have only recently completed such a conversion."<sup>105</sup> This court concludes that this transitional stage implementation of a tracking system could have disparate results reflecting "either lingering effects of past segregation or a contemporary segregative intent."<sup>106</sup> According to the court's logic, these concerns diminish once unitary status is achieved. In other words, after a few years of maintaining unitary status, educational adversities created and institutionalized by centuries of slavery and segregation are somehow miraculously erased. In these cases, ability grouping can be upheld "despite segregative effects."<sup>107</sup>

100. Merl, *supra* note 85, at A3.

101. 508 F.2d 1017 (5th Cir. 1975).

102. "A school system which is not desegregated is clearly not unitary. Once a school district implements a desegregation order, pursuant to the mandate in *Brown* and its progeny, it may be referred to as 'unitary' or 'de facto unitary.'" *Montgomery v. Starkville*, 665 F. Supp. 487, 497 n.16 (N.D. Miss. 1987), *aff'd*, 854 F.2d 127 (5th Cir. 1988).

103. *McNeal*, 508 F.2d at 1020.

104. 648 F.2d 989 (5th Cir. 1981).

105. *Id.* at 996. *Accord McNeal*, 508 F.2d at 1020 (quoting *Singleton v. Jackson Mun. Separate Sch. Dist.*, 419 F.2d 1211 (5th Cir. 1969)).

106. *Castaneda*, 648 F.2d at 996.

107. *Id.* at 994-96.



Since the majority view does not acknowledge discrimination as the reason for the disparate impact of tracking, courts have implicitly adopted the view that the poor and people of color are inherently less intelligent. In *McNeal*, the district's tracking system resulted in one to four all-black sections in every elementary grade and a few all-white sections in the advanced grades.<sup>108</sup> The district also failed to comply with an earlier order barring segregated classrooms.<sup>109</sup> Yet a prima facie case of impermissible discrimination was not accepted as the explanation. Instead, the court remanded to allow the defendant school district the opportunity to demonstrate that its assignment method was not based on present results of past segregation.<sup>110</sup>

In *Morales v. Shannon*,<sup>111</sup> the court concluded:

Given that ability groupings are not unconstitutional per se, the statistical results of the groupings here are not as abnormal or unusual in any instance as to justify an inference of discrimination. The record shows no more than the use of a non-discriminatory teaching practice or technique, a matter which is reserved to educators under our system of government.<sup>112</sup>

Since tracking disproportionately places poor and people of color in the lower tracks and the lingering effects of past racial discrimination were not accepted as an explanation for this disparate impact, the majority view's conclusion is that ability grouping merely makes distinctions where they exist. In addition, the majority view characterizes ability grouping as a neutral mechanism again declaring that any disparate impact is merely a measure of actual differences.

Since the majority view concludes "that the disproportionate placement of minorities into low tracks derives from ability and not from race," courts have given great deference to educators.<sup>113</sup> Under this approach, a judicial inquiry can be satisfied once an educator claims that the practice is "genuinely motivated by educational concerns and not discriminatory motives."<sup>114</sup>

Further, courts have not addressed socio-economic implications of tracking. In *NAACP v. Georgia*,<sup>115</sup> in order to refute the claim of racial discrimination, an expert witness for the school district testified that the "factors impacting academic achievement were 'family background' and 'hard work' rather than

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108. *McNeal*, 508 F.2d at 1018.

109. *Id.*

110. *Id.* at 1021.

111. 516 F.2d 411 (5th Cir. 1973), cert. denied, 423 U.S. 1034.

112. *Id.* at 414.

113. Note, *supra* note 4, at 1319.

114. *Castaneda*, 648 F.2d at 996.

115. 775 F.2d 1403 (11th Cir. 1985).

race."<sup>116</sup> In *Montgomery v. Starkville*,<sup>117</sup> the school district expert explained that "schools are like hospitals, which must take patients as they come."<sup>118</sup> This statement is disturbing and insulting, especially because the cause of many students' ailments has been the educational system itself.

Allowing this racist and classist stratification mechanism to persevere by characterizing it as neutral demonstrates the strength of the concept of hierarchy in our society. Jeannie Oakes, one of the foremost experts on tracking, states:

The focus of the courts has been on the issue of legal precedent . . . and not on the more educational [issues], those dealing with the questions of equity in educational access, treatments and outcomes for all students . . . No court has yet ruled that the practice of ability grouping in itself constitutes a violation of equal educational opportunity.<sup>119</sup>

#### IV. REFRAMING THE ISSUE: HIERARCHY

Hierarchy breeds discrimination because it differentiates people based upon standards determined by those at the apex of the hierarchy. Our society has historically oppressed certain groups in order to preserve the hierarchical structure. Not only is success in our society measured by the altitude of one's status on the hierarchical scale, but also opportunities for success increase proportionally with one's position on this scale. Although it fosters inequality, society has nonetheless sanctioned hierarchy.

Although all methods for measuring intelligence should be suspect in light of the ambiguity of "intelligence" and "ability grouping" as concepts, most school districts still choose to quantify intelligence (usually by utilizing IQ tests).<sup>120</sup> Schools have assumed, with little justification, that the distribution of intelligence forms a bell curve,<sup>121</sup> with the capacity to accommodate a relatively small number of "smart" people, many "average" people, and a small number of "not smart" people. This intellectual hierarchy, however, is not supported by any reliable evidence.<sup>122</sup>

Tracking has had destructive effects on people of color and the poor by systematically and historically denying these groups an adequate education. Yet opponents of tracking have them-

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116. *Id.* at 1419.

117. 854 F.2d 127 (5th Cir. 1988).

118. *Id.* at 130.

119. OAKES, *supra* note 36, at 19.

120. See FINDLEY & BRYAN, *supra* note 8, at 13; see also Ribadeneira, *supra* note 20, at M9.

121. Fallows, *supra* note 25, at 12.

122. *Id.*; see also WHEELOCK, *supra* note 2, at x.

selves been unable or unwilling to explore the role of hierarchy in maintaining unjust stratification mechanisms. In fact, many opponents of tracking use hierarchical language and concepts to argue against current methods of tracking. These opponents limit their arguments to the disparate impact tracking has on people of color and the poor. In doing so, they assume that proportional representation of people of color, the poor, and whites in high, middle and low tracks is an attainable goal.

The need to be "better" than others is a strong force in our society. Our current hierarchical structure continues to nurture this need, but not in an unbiased manner. Certain sectors of society have historically been delegated lower societal status and this delegation has left its mark on these sectors.

Will critics of tracking begin to question the actual causes of its discriminatory results? Will the critics of tracking continue to focus only on the implementation of a more "neutral" stratification mechanism? Or will society be willing to accept a system that does not stratify at all, such as a universal socialized education system? Such an approach would require a complete rethinking of current societal values. It would entail a rejection of the concept of hierarchy and of certain privileges that are currently considered private rights.

## V. CONCLUSION

Anne Wheelock has written that "[u]ntracking is a daunting task."<sup>123</sup> In *Crossing the Tracks*, she describes various efforts by schools to untrack.<sup>124</sup> These efforts have recognized the evils and inappropriateness of hierarchical distinctions in educational systems and structured programs with a *new* emphasis on excellence and equity.<sup>125</sup> This emphasis must become the rule in all social structures and not the exception.

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123. WHEELOCK, *supra* note 2, at xii.

124. *See generally id.*

125. *Id.* at 7.

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