



Accountability through the Courts

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Accountability through the Courts

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In the past year the possibility that nonlearners might sue the public schools for money damages has become a reality. A well-publicized suit has been filed by a high school graduate, Peter Doe,¹ who asserts that his functional illiteracy is his schools' fault. His claim for \$1 million from the San Francisco Unified School District has already led to a national conference on suits by individuals against schools,² reports of the case in educational journals and in the press,³ and a discussion of the suit at the annual convention of the National Education Association.⁴ As far back as 1970, Stuart A. Sandow foresaw suits by nonlearners against schools for *fraud* as an emerging problem in education law.⁵ In October 1972, Gary Saretsky and James Mecklenburger published the provocative article, "See You in Court," in which they sketched some of the legal arguments a class of sixth graders, most of whom had not yet learned to read, might advance in a suit against their school.⁶

Goals of Money Damage Suits

Advocates of damage suits by nonlearners against the public schools seek institutional accountability toward individual children. They define this individual accountability as encompassing the twin notions that schools should have an incentive to succeed with every child and that when the school fails the

child should be compensated for his injury—nonlearning. They believe that if the legal system makes the schooling enterprise financially responsible for its academic failures, these dual purposes will be served. The threat of liability will serve a deterrence function and provide an incentive for school success, while the availability of the damage claim in cases of failure will permit victims to be compensated for their loss.

From the viewpoint of education reform, the attractiveness of such suits lies in their potential to decrease the number of nonlearners rather than in their promise to compensate victims. Education reformers might be happy that victims are compensated if this promoted better schooling, but they would not champion lawsuits against the schools if they merely provided a means for compensating “victims.” This is not to say that compensation is not a worthy objective, but rather that it is quite apart from school reform. Some education reformers may question how damage actions will promote school efficiency. They reason that when such suits succeed a school district would have to pay damages out of its general budget. In other words, they predict that local tax revenues will not increase to cover damage costs so the schools would wind up with *less* money for running the educational system. This prospect seems likely to produce more, not fewer, nonlearners.

Proponents of such lawsuits have a different perspective. They consider public schools today very inefficient and believe that much of the money spent on educating nonlearners is wasted. They argue that because schooling is compulsory and most people are unable to afford private schools, public schools have little real incentive to be productive. If schools had the incentive of liability, they could reduce the number of nonlearners while spending even less money than they now spend.

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Education Litigation

In recent years the lawsuit has become a major weapon in the arsenal of those who wish to change American public education. Cases have been brought by blacks who were prevented from going to school with whites,⁷ by handicapped children who were prevented from going to school at all,⁸ by opponents of war in Vietnam who wanted to wear black armbands in school,⁹ by Unitarians and atheists who did not want the Bible read in class,¹⁰ and so on. These and other cases have led the courts to order major changes in American public education. Despite this judicial impact on schools, lawsuits have remained on the periphery of the learning process. Suits like Peter Doe's go to the heart of the matter.

Peter Doe's suit may be seen as the natural result of a progression of judicial incursions into the operation of the schools, but it carries with it new problems. The major problem is that judges and juries may be unable to deal with the intricacies of teaching and learning. It is not even easy for judges to decide when schools are treating black students worse than whites,¹¹ or to determine what kind of student expression (armbands, newspapers, long hair) is constitutionally protected,¹² even though the difficult problems of racial discrimination and the meaning of the First Amendment are ones with which the courts are conventionally involved and in which they have developed some expertise. In Peter Doe's case the judiciary is asked to evaluate the elusive learning process, something it may be reluctant to do.¹³

This reluctance may not be altogether justified. Judicial evaluation of similar issues is not totally unknown; in fact a suit like Peter Doe's may not dramatically extend judicial interference in educational policymaking.

The kinds of evaluations required in such a case are not very different from those demanded in cases involving handicapped and non-English-speaking children that courts are now deciding. In determining the rights of low-functioning children who had previously been excluded from school, the courts probably will be forced to deal with the details of teaching and learning. Placing a 7-year-old with an IQ of 45 in

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a regular second grade is little improvement over keeping him home. The courts have already recognized that such a child must have a program appropriate to his needs.¹⁴ Eventually the courts must decide exactly what “appropriate” means in this context. Similarly, courts will find themselves dealing with whether a particular educational program is “adequate” if they recognize the legal claims of non-English-speaking children, as they are currently being asked to do.¹⁵

In medicine, another technically sophisticated field, courts were initially reluctant to evaluate the details of treatment; by now, they are no longer so restrained. All phases of medicine are now subject to judicial scrutiny in medical malpractice cases.¹⁶ On the whole, liability for medical injuries is probably a good thing in terms both of generally improved health care and fairness to victims.¹⁷ Still, courts need not supervise all injury-causing activities or provide a forum for the complaints of all victims. Many disputes between employees and employers about plant safety are resolved through grievance procedures established through collective bargaining and not through the courts. Many issues relating to air and water pollution are resolved through the political process or through administrative tribunals rather than through the judicial process. Similarly, attention should be given to alternate routes to school reform which might reduce the need for judicial intervention.

Alternate Education Reform Prospects

Consumerism

Today students are referred to as the consumers of schooling, who may be expected to demand rights and satisfaction as do consumers of other products. Educators often talk about education as a product and not just a process. The consumer movement is not satisfied with legal remedies for individually injured consumers; instead, it emphasizes improving products, increasing consumer information about products, or ridding the market of products before injuries occur.

Some educators argue that consumerism in education should concentrate on product reform such as community control, open classrooms, individualized instruction, team teaching, and the like, rather than on lawsuits for individually injured consumers. They point to the success of lobbying efforts by Ralph Nader and others and suggest that liability plays only a small role in product improvement. I find this argument unconvincing. The law of product liability bolsters calls to eliminate dangerous products uncovered by public-interest crusaders.¹⁸ Once unsafe items are revealed, I believe the fear of damage actions greatly affects manufacturer behavior. So long as children are told to attend a particular school and in the elementary grades are assigned a particular teacher, consumerism in public education remains limited. The power held by buyers in the product market is simply not available to schoolchildren or their parents.

Self-imposed Accountability

Educators might argue that the need for suits by nonlearners is mitigated by the school world's internal push for teacher accountability.¹⁹ Yet, individual lawsuits reflect impatience with the direction in which this accountability movement is going. Although still in its infant stages, teacher accountability seems to be aimed at group accountability. Even when sanctions are finally employed, teachers will be paid more or less, or promoted or fired, because their class as a whole, or students on the average, did or did not reach certain previously agreed upon objectives.²⁰ Obviously the same sanctions could apply to accomplishments or the lack of accomplishments of individual pupils, but that does not seem to be a likely development.²¹ Teacher accountability seems unresponsive to those special needs of nonlearners which lawsuits like Peter Doe's seek to have satisfied.

When Peter Doe was in school, California already had a statewide accountability rule: students were not to graduate from high school without being able to read at the eighth-grade level, although exceptions were to be made for those who participated in remedial reading programs while in high school.²² That state policy did not seem to boost reading

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achievement results. Perhaps it was because the sanction for noncompliance was against students (no graduation) and not against teachers.²³

Choice

In recent years there has been a revived interest in education-vouchers schemes.²⁴ Proponents argue that providing family choice in education will improve education. They assume that the choice process will better match a student's needs to his educational program than do current practices—incomplete guidance and counseling procedures and the neighborhood-school assignment plan. When families have a choice, schools will be under more pressure to produce good results.

At this point children are offered only a few open enrollment plans permitting them to choose among public schools,²⁵ plus one federally funded experimental program which is moving slowly to include private schools among the choices available to families.²⁶ I believe that choice *could* bring about reforms far greater than those which might result from suits like Peter Doe's, but it appears at present that widespread use of vouchers is not a realistic alternative.²⁷

An intriguing possibility is that Peter Doe's suit, more than intellectual rhetoric, might push the public school system toward large-scale experimentation with choice. I suggest this because one of the bases of Peter Doe's case is that the public schools mislead people by promising more than they can deliver. Perhaps this is inevitable in a system which relies on compulsion for its buyers and taxes for its revenues. To avoid this problem, the system may be persuaded to try switching, at least in part, to vouchers. Schools would advertise their programs and results in order to attract customers and parents would base their choices on the data provided, so they should have reasonable expectations of a school's capabilities. Parents would not be able to claim that they had to rely blindly on an unexplained educational program. Competition among schools supposedly will ensure that high expectations will be warranted under a voucher plan.

Negligence and Strict Liability Compared

A much-publicized problem is that young children eat lead paint and become sick from it. Suppose we find out that children eat lead paint because it tastes like candy and that injuries could be prevented by adding some bad tasting flavoring to the paint. If paint manufacturers are *liable* for the injuries caused to children, economic theory tells us that they will add flavoring to their paint *provided, and only provided*, that the cost of the flavoring is lower than the cost of their paying damage claims brought by child victims or their parents if these are the only options open to them. If adding the flavoring is more expensive paint manufacturers will not choose to make the paint bad tasting; they will simply pay the damage claims. Manufacturers will choose a cheaper and hence more economically efficient solution. A rule which makes paint manufacturers liable regardless of the cost of prevention pursues both compensation and efficiency goals. Since all victims are compensated, this rule of "strict liability" or "liability without fault" makes paint manufacturers insurers against injury from their products.

Instead of making paint manufacturers automatically liable when children get sick from eating paint, we might adopt a narrower rule and make them liable *only* if the cost of flavoring is cheaper than the cost of the damage claims. According to this rule, manufacturers will be liable only when they choose the less economically efficient course of action. This narrower rule defines being "negligent"—failing to take a cost-effective precaution.²⁸ Therefore, the availability of damage claims to victims under the negligence rule acts primarily as an incentive to assure that victims challenge inefficiency. Under negligence, victims who are injured in cases when the safety precaution proposed to the defendant is not cost effective are not compensated; this point is crucial to the understanding of the difference between negligence and strict liability.

We may translate these alternate bases for liability into the context of suits against schools. Assume that there are some

children for whom there are no cost-effective measures available to make them learners; I will call them "inevitable nonlearners." If schools are only liable when they are negligent, that is, when they could have done something cost effective to prevent nonlearning, lawsuits will be unsuccessful as long as the schools act efficiently. Inevitable nonlearners will neither learn nor be compensated. If schools are strictly liable whenever any child fails to learn, inevitable nonlearners still will not learn, for a rational school district will find it cheaper to pay damages to them than to try to teach them. If we impose strict liability on the schools, although we will compensate more children we probably should not expect to produce more efficient education.²⁹ Before we assume that liability of either type will reduce the incidence of nonlearning, we must determine whether the schools can introduce cost-effective methods of learning which they are not now using.

The inquiry into whether cost-effective action is possible is not limited to measures which somehow may be substituted for current expenditures. In our inquiry into the lead paint problem we do not ask whether paint manufacturers can substitute bad flavoring for a less costly paint container. Rather we assume that paint manufacturers will have to bear the *additional* cost of flavoring if that is an efficient way of reducing lead poisoning in children. This additional cost might even put manufacturers out of business unless they can pass some or all of it on to their customers. Whether or not the cost could be passed on would depend upon the market; if customers are parents who fear injuries to their children, or persons altruistically interested in paying to prevent injuries to children, or, more likely, persons who have no ready substitute for lead paint, the additional costs might be absorbed by the buyers.

Let us consider this point in the school setting. If schools are now so inefficient that they could produce better results for *less* money if they used different methods, liability might generate fewer nonlearners without raising the cost of schooling. However, assume that even when waste is squeezed from the school budget there are still available cost-effective tech-

niques that would add to the school's cost of preventing nonlearners. If liability were imposed when the schools did not take these expensive measures, the schools would be forced to (1) obtain more tax dollars, (2) shift resources away from students who were assured of learning, or (3) go broke.

Following the argument this far, education reformers would probably prefer negligence to strict liability, since it would be almost as effective in promoting efficiency and is cheaper to the schools. If compensation for all victims were desired, education reformers would like to see it paid from some other source. Proponents of strict liability will argue that the judicial process is very bad at deciding in particular cases whether there is a cost-effective solution available and, if so, who should provide it. They reject completely the utility of the negligence concept and are left with a choice between strict liability and no liability. Given that choice they favor strict liability when a cost-efficient, accident-preventing solution is probable and injurers have access to that solution. In the real world, they argue, this approach creates fewer mistakes than does negligence and results in a positive good if inevitable victims are compensated. Unfortunately, these strict-liability proponents have not yet made clear whether schooling is an activity for which strict liability is logical under their criteria.

The current debate over the relative merits of negligence and strict liability will surely continue.³⁰ It is necessary to understand the theoretical alternatives available in school cases when considering whether or not it makes sense to move away from the present *de facto* rule of no liability. Negligence is the basic rule in accident cases in American law, although strict liability is becoming more widely used, particularly in the consumer-goods field.

At the outset I believe that courts, if they recognized school liability at all, would only apply the negligence rule. Since courts are often hesitant when entering a new field,³¹ I suspect that they would suggest that any liability without fault in the school setting should be introduced through legislation, just as the liability-without-fault rules regarding industrial accidents were the product of workmen's compensation laws.

Practical Application of a Negligence Rule

Many observers have described Peter Doe's case as an example of "educational malpractice." The analogy to doctors is apparent. Under the rules governing professional negligence, if a patient suffers an injury because a doctor should but fails to diagnose a disease, or if he misdiagnoses the disease, prescribes the wrong treatment, fails to warn the patient of the risks of treatment, carries out the treatment improperly, or any number of other things, the doctor is likely to be liable for the injury suffered. The key to this analogy is that something akin to incompetence must be demonstrated before liability exists and a jury must conclude that a cost-effective precaution should have been taken. If doctors were liable merely because a patient died or a treatment proved ineffective, they would be under a strict-liability system. So, too, with education malpractice. Merely proving that a child has not learned would not be sufficient for him to receive damages under a negligence theory.

On the other hand, while a doctor (or school) is not required to insure that the client will get well (or learn) once he (or it) undertakes to treat (or teach), there is a legal duty to do so professionally, and expectations about probable results may effect a jury's judgment about professional competence. We assume that a doctor will be successful when treating a patient with myopia but are less certain when the patient has leukemia. So, too, with teaching. Although we may not expect the child with an IQ of 70 to master geometry, we do expect that "normal" children will eventually learn basic skills. As with the myopic who remains shortsighted after medical treatment, when a child has not gained basic skills we at least suspect incompetence in the absence of another explanation.

It is important to remember that negligence need not be proved beyond a reasonable doubt. Plaintiffs need only to convince the jury by the weight of the evidence that the defendant failed to exercise due care (failed to undertake a cost-effective solution). In addition to proving that the defendant took an unreasonable risk, the plaintiff must convince the jury that his injury occurred as a result of the defendant's

negligence; in other words, he must prove "cause." But when there is no other good explanation of the injury and the plaintiff has proven the defendant to be negligent in some respect, the jury may be willing to attribute the injury to the negligence.

I believe that the initial strategy of reform lawyers in suits against the schools will follow these guidelines: (1) the plaintiff will be a normal or typical student, in order to discount suggestions that he cannot learn or that something he did is the cause of his nonlearning; (2) plaintiffs will point to obvious school blunders which may be cured cheaply as the cause of the injury, to discount suggestions that it is too expensive to take the proposed precautions.

Peter Doe's Case

With these guidelines in mind, consider Peter Doe's story.³² Peter is described as good natured and liked by his classmates. During his twelve years in the San Francisco schools he regularly attended class and never had any special ailments or disciplinary problems. When he was in the first grade an IQ test suggested that he had about average intelligence. Yet Peter has not much academic learning to show for his years in school. Some years he made a few months' progress in reading achievement. Some years he made none at all. A few times he was put in "remedial reading" classes although they did not seem to help. Still, he was promoted with his class each year. When he graduated from high school, he was reading at the fifth- or sixth-grade level. That shocked his family. Through the years his mother had been told that Peter was doing all right, that his reading ability was not much below the school average. That average turns out to be below the national average. Did Peter realize that he was not learning to read very well? Even if he did, not knowing how to read did not seem too important. Peter even got B's in some of his courses, although at this point it is difficult to tell whether those grades were awarded for effort or achievement or arbitrarily. It was not until after his graduation when he found he was unable to

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read well enough to fill out a job application that he realized he did not get from school what he should have.

This story is meant to suggest that Peter is the kind of student we would expect to learn to read, and there is nothing about him which readily suggests that his failure to learn was due to anything but the school's incompetence. Still, in order to prove negligence, Peter must be able to identify some specific thing or things which actually tie the school's fault to his harm.

A jury might well agree with Peter that the school made some serious mistakes and could have taken not-too-expensive action to help him read. Some of the school's errors were in communication: (1) through conferences and misleading report cards, Peter and his family were told that he was making progress when he really was not; (2) he was counseled into courses that were too difficult for him rather than being informed about and counseled toward available remedial programs. Other complaints suggested by Peter Doe's story deal with procedural problems: either the school has inadequate procedures to identify students needing remedial help, or, assuming the school used proven diagnostic procedures, those procedures failed to diagnose that Peter needed reading help. While the financial burden of making these procedural changes may be greater than improving the lines of communication, a jury will probably not consider them overly costly.

There are other possible explanations for Peter's inability to read, but these might require additional evidence and perhaps higher costs. He might argue that the school was negligent to pass him on from one grade to the next knowing that he was unprepared for more difficult work. In order to support this theory he would have to suggest some alternatives to present practices and deal with their costs and effectiveness. Similarly, if he pointed to the faults of particular teachers, he would have to provide details. Both these substantive claims would require the testimony of experts.

Originally, in medical malpractice cases plaintiffs were frustrated in their efforts to question the professional competence of doctors by the so-called conspiracy of silence among members of the medical profession.³³ Today, this problem is not so

serious. Still, professionals continue to be judged by professional standards. They are held to a higher standard of knowledge and skill than laymen, but they may also be unduly protected by professional endorsement of their behavior.³⁴ A teacher who followed normal teaching practice, or even a slightly more innovative program, would probably not be seen as negligent regardless of how ineffective a particular teaching practice turned out to be. Hence, the fact that a teacher failed to teach new math, or perhaps failed to teach old math, would not constitute negligence. As yet, it is unclear whether Peter Doe can demonstrate unprofessional conduct on the part of any of his teachers.

Of course, plaintiffs can come into court with their teaching experts. If all the experts agreed on one method and the schools were obviously not following it, the case would be clear. But teaching reading is much more complex than this; it is because we cannot be sure of the "best" teaching method or style that Peter's problem becomes so difficult.

To mount a case of education malpractice against the teaching of individual teachers will not be easy. The organization of most of our schools makes it difficult to identify teaching incompetency; often obtaining professional testimony as to what a teacher actually did or did not do in a particular classroom would be nearly impossible. Our deference to teachers which permits them to work independently reflects the education profession's uncertainty about the most effective teaching techniques—in all subjects but especially in reading. Increased sophistication about teaching skills and social science measurement techniques, and growing consensus about what a particular child is supposed to accomplish during a given year in school may help identify bad teaching by reference to how much particular children have learned.

The reader might begin looking to the Coleman Report³⁵ or its reanalyses³⁶ at this point, but they do not seem very helpful. The Coleman Report told us that most student achievement variation occurs within schools and not between schools and, in turn, that interschool resource differences have little impact on student achievement. Yet it did not tell us about the impact of curtailing in-school malpractices. The

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Coleman Report's questioning of the cost effectiveness of school seems to assume that resources are now effectively deployed. That is the very assumption challenged by Peter Doe's suit.

The question remains whether the public can reasonably expect better conduct from the schools and, if so, whether such conduct is likely to make a difference in how much students learn. Supporters of the Peter Doe case believe they can prove that if schools corrected their mistakes many more children would learn. They point to the fact that some public schools in all kinds of locations—in ghettos, in rural America, in suburbia—do graduate nearly all of their students as learners, and, therefore, prove that children with nearly every set of characteristics can succeed in school. To move from such generalities to proof in specific cases may be difficult. We do know there are some children who do not have the intelligence to learn and some children with neurological ailments about which the school can do little. The schools may come forward and identify other children they cannot help.

Perhaps through education malpractice suits the courts will provide a forum for addressing the difficult question of the causes of learning and nonlearning. From this perspective, judicial competence to determine the cause of negligence is less of a problem. So long as plaintiffs have the burden of proof and the causes of learning failure remain obscure, many nonlearners will not be able to demonstrate that their school was at fault. This perspective assumes that in order to avoid liability, schools will probably have to admit their own limitations. A heightened realism about what schools can and cannot do could be a valuable result of such litigation. It would be a major gain if damage suits prompted schools to improve communication with a student and his family regarding his progress and what he can expect from schooling. These suits might also influence schools to identify better the special needs of students and counsel them accordingly. Even if malpractice lawsuits were unsuccessful when aimed directly at the substance of education they might very well effect substantive changes.

Uncertainty about what teaching methods “work” plus un-

certainty about what schools should do may make this an area that courts would prefer not to enter at all. Avoiding the problem will not be difficult, for proving negligence and cause is only one of the problems that nonlearners face in suits against their schools.

Limitations on Liability for Negligence

Contributory Negligence

Traditionally, "contributory negligence" by plaintiffs acts to bar their recovery in negligence cases.³⁷ Thus, even if a school is negligent, if the student is also at fault he will lose. Some students are not motivated, and as a result do not pay attention in class, become behavior problems, and so on. Is this contributory negligence? One could find an analogy in medical malpractice. It is unlikely that a doctor would be liable for a patient's injuries which result from the patient's failure to take prescribed medicine. Yet, in the school setting, despite our disappointment with a student's failure to participate in the "treatment" we might not wish to blame schoolchildren, particularly those in elementary school, for their behavior. Perhaps we would say that if the child is going to school regularly and conventional teaching methods do not succeed, the school should have an obligation to try new ways to motivate him. In evaluating whether children are contributorily negligent, we may demand of them only what we can reasonably expect from those of similar age and experience. This is a perspective taken by many courts in dealing with injuries to children.³⁸

The schools might also try to blame the parents, and in some cases with good reason. But if the school is also negligent, we should be careful not to impute the parents' negligence to the child and thereby absolve the school of its fault. If a driver races down a residential street at 60 miles an hour and runs down a young child who is standing in the road because his parents had negligently failed to supervise him, he will not be relieved of liability to that child.³⁹

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Duty

One can view the nonlearner's complaint as one of omission, and the law looks at acts of omission somewhat differently from those of commission. A person does not have a duty to aid a stranger who has fallen off a pier in front of him, even though the drowning man could be saved by a toss of a life preserver. If the man drowns and his beneficiaries sue the bystander, he is not liable even though he was negligent.⁴⁰ On the other hand, once you have undertaken to assist a person, you may thereby incur duties to him, even though your undertaking originally was purely voluntary.⁴¹ What you have "undertaken" will include both what you intend and what you have led others to rely upon. In the school setting, it seems wrong to say that the school has undertaken no action and thereby owes no duties to its pupils. Such an outlook would undermine the state's basis for compelling school attendance. But exactly what has the school undertaken to do—to provide learning opportunities; to insure that every student learns? It seems that schools have undertaken more than merely to provide opportunities but that they have not undertaken to graduate all children as certified geniuses. Is there an in-between possibility?

Peter Doe points to the fact that he cannot read very well and that reading is a prerequisite for other learning. People do regard reading as the basic skill that schools teach and a necessary skill for full participation in adult society. The Nixon administration has even established a right-to-read program to combat reading failure.⁴² But what about a student who is able to read but cannot do mathematics? Surely the school has undertaken to teach more than reading. Most children can read a bit; it is when they read at a level well below what is normal for their age that we call them non-learners. But how much below normal must that be?

Using functional literacy as the yardstick for measuring who is a nonlearner is an appealing possibility because it would provide a standard against which learning could be measured. At a minimum, the schools have led people to believe that they have undertaken to make children functionally literate, and

the absence of functional literacy suggests financial harm. Finally, it is something which nearly all children have the potential to achieve. The problem here is that there is no consensus as to what constitutes functional literacy.⁴³ Since the concept is based on what is needed to function in the particular society in which an individual lives, functional literacy is dependent upon the cultural milieu. In addition, the concept changes over time. Today there is even little agreement as to what constitutes functional literacy in urban areas of the United States. According to some, eighth-grade reading competence may be used as a proxy for functional literacy; its importance is underscored by its frequent use as a condition of high school graduation. Yet some experts have lately been talking about tenth-grade reading competence as the proper proxy, while other standards employ fifth-grade reading competency. Obviously, these experts must have in mind different functions that a person must be able to perform in order to be functionally literate. Indeed, some educators have suggested that the idea of reading competence should be disregarded altogether and specific criterion-referenced tests should be substituted. "Competence" would be judged by whether a person could deal effectively with an election ballot, with obtaining a driver's license and following the rules of the road, with understanding job applications and job instructions.

Any external standard would mean that a child who is very talented and is performing below capacity would have no action against the school once he reaches the minimum standard of performance, even if the school were to blame for his low achievement in terms of his potential. While this might be acceptable on policy grounds since the lowest achievers need the most assistance, courts might not be happy to draw such lines between children with differing potentials. The duty question presents a very serious problem in suits against schools, reflecting our inability to describe what any particular student and his family can expect from attendance at public school. In view of this, a court may conclude that a school has no further obligation than to provide educational opportunities to students or to *try* to teach them certain skills.

One might look to statutory language to describe a school

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district's duty. Suppose a state statute provides that a district is to design its curriculum to meet the needs of its pupils. Such precatory language expresses a duty no more precise than the negligence standard. Statutes which direct that students gain vocational and citizenship skills also represent no great improvement over the functional literacy notion. If the district is not supposed to award diplomas except to those who reach certain standards of competence, it is difficult to understand how a student can complain when he receives one even though he is undeserving. Perhaps a campaign to stop schools from awarding meaningless diplomas may promote educational change by embarrassing the schools, but this seems to be a risky procedure. It may be that the value of a high school diploma will simply decline.

Damages

Part of the problem in deciding who is a nonlearner concerns the difficulty of specifying how people who are nonlearners suffer. While we can agree that it is harmful to be unable to read, it is not easy to put a price tag on that harm. It is even more difficult to put a price tag on not achieving up to potential. The conventional approach to damages suggests that a nonreader might be suing for money to pay for (1) tutoring to boost him up to the proper reading level, (2) lost wages while being tutored, and (3) pain and suffering.⁴⁴ There are problems with this approach. Unless a nonlearner has been tutored and has learned prior to bringing the suit, in the way that those with broken arms may have already healed before they bring suit, how much tutoring will be needed? We have enough experience with broken arms to know about how much they cost to cure even if they have not been cured by the time of a trial but we do not have this experience with nonlearners. To what level is the plaintiff to be tutored? And can one prove real wage losses for a person who has not yet worked?

These questions may seem unanswerable, yet juries make damage awards on the basis of such nebulous standards every day. For example, juries in California decide how much

money should be awarded for the shock suffered by a father who sees someone negligently run over his child.

In view of the problems with money damages, an alternate strategy suggests that Peter Doe should not be suing for money at all, but instead for the right to additional free schooling. The prospect of staying on at his old high school may not be very appealing to him. Interestingly enough, in California he has the right to go tuition free to a community college (although he will likely have book costs and some fees to pay). If that community college offered programs suited to his needs, some might be satisfied that sufficient relief already exists within the system. Others might be skeptical about whether community colleges are currently equipped to deal with students who read below the eighth-grade level, and might further question the fairness of making a nonlearner continue to take his training from the public system that failed him in the past.

A related problem is whether lawsuits would be limited to those who, like Peter Doe, are no longer in the school system. A functional literacy standard obviously does not apply to young children. Assume that, through the school's negligence, a 10-year-old boy reads at the first-grade level when he should read at the third- or fourth-grade level. Does it make sense to allow education malpractice suits but to make such a child wait eight years until he graduates before he can sue? Should we say that parents who recognize a severe learning problem during their child's early years have adequate remedies available by moving their residence, enrolling the child in a private school, or applying political pressure? If younger victims, as well as already graduated ones, seem to need judicial assistance, perhaps it could be established that when a child falls substantially behind his peers through the school's failure, he should be able to obtain a year's tuition at a private school. After that year, the court could decide whether the alternate experience had been helpful. If it were, then the court would have to decide whether to keep the child in the private school because it was working or return the child to the public school because he is cured. If one prefers the first alternative, we must face the fact that courts generally make only one-time

damage awards rather than periodic awards. There may be a way out of this in some cases, for many states already provide tuition vouchers for educationally handicapped children who are not well served by the public schools.⁴⁵ Perhaps the slow reader in this example could be placed in this voucher program by the court. Another solution would be to permit the young nonlearner to sue to be transferred to another *public* school of his choice.

Damage Suits against Public Agencies

In most cities there are private vocational schools. Suppose one advertises "Come to our school and learn horseshoeing. You have a wonderful career ahead of you." If a student reasonably relies on that claim but learns later that cars have replaced horse-drawn carriages and the market for blacksmiths has virtually disappeared, he might understandably institute a fraud action. Most cities also have private foreign-language schools. Suppose one advertises "Come to our school and you will be speaking German within three weeks." Unless there is some qualification in that promise, a lawsuit by someone who needed to speak German for a job opportunity but who still cannot speak German after the designated time period would be quite understandable. Finally, suppose that a private typing school tries to teach students to type by tying one arm behind their backs and that this method not only fails to produce typists but also causes the students' hands to atrophy. Again, a lawsuit would seem in order. In each of these cases the student could at least reasonably ask for his money back. In addition, we would expect that he might ask for further damages as well.

When a student sues a public school he cannot ask for his money back because it is not really his money. Some might argue, therefore, that since he has no "contract" he should have no claim at all, suggesting that what is really at issue in the public school setting is nonperformance of an unenforceable promise by a public agency. From this perspective an aggrieved student's remedy lies in the political process or perhaps in legal proceedings aimed at public officials, either to

force them to act affirmatively or to restrain them from doing certain things—but not in a damage action.

Even if Peter Doe's claim is the sort for which damages for negligence might be awarded if the defendant were a private party, difficulties develop when government is the defendant. Originally, sovereign immunity prevented suits against the state altogether. Suits against local government depended upon whether the action was governmental or proprietary, with suits available only in the latter case. As immunity generally was worn down in the courts, legislatures adopted so-called Tort Claims Acts, which permit damage suits against government and government officials only under certain conditions. These acts permit negligence claims, but many preclude from challenge as negligence those acts which are "discretionary." This could exclude a number of the complaints about schools made by nonlearners. Even in California, where this exception has been narrowly interpreted, some of the complaints about schools will still be seen as discretionary because they concern policymaking which is exempt from suit, rather than the administration of policies which is not.⁴⁶

A further problem with suits against government in the negligence area is that, unlike businesses that have economic incentives to continue what they are doing, government operates under a special set of incentives. In contrast to a business, the government might redefine its functions and thereby avoid taking cost-effective action under pressure from dominant political forces. In short, schools may either give up on or toughen up on children rather than to try harder to teach them.

Responses to Successful Suits

Student Responses

Will suits like Peter Doe's serve as incentives for students not to learn? If damages are awarded accurately, there should be no incentive to fail since the student would be compensated only for losses suffered. Actually, he would not be compen-

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sated for his attorney's fees, and this should dissuade deliberate nonlearning. People today do not go around hoping to be in accidents so that they can be paid for work they miss while recovering.

What if the student pretended to be a nonlearner when he was not? Fraudulent claims are well known to defense lawyers, and where the injury is not obvious, as is a broken leg, it is important to have some confidence that the jury will not be making awards to too many undeserving plaintiffs. This should not be a great fear in cases like Peter Doe's because schools regularly test and observe students. Long-term concealment of achievement would be difficult for students, particularly young ones.

School Responses

If education malpractice suits are allowed, how might the life of students in school be changed? Some complain that teachers would concentrate only on reading and neglect teaching. But is this something to complain about? Are there activities the school might sacrifice that are more important than teaching reading? Some might argue that enjoyment might be taken out of learning but I believe more enjoyment will have to be put into learning if nonlearners are to be helped. Would the school shift attention away from high achievers and concentrate on nonlearners? Assuming limited resources for education, this is the practice favored by advocates of "compensatory" education. If this truly happened, suits by nonlearners would cause the schools to alter their priorities dramatically, something that neither federal nor state legislation has been able to accomplish. Whether a person approves of such a shift in priorities depends in large measure on his perception of what constitutes a just society. In any event, it seems unlikely that high achievers will be ignored. Strong political forces would assure that good students be considered, even if it means taxing local residents more heavily.

At the other extreme, there is fear that some schools would sort out slow-learning children as ineducable (particularly

“culturally disadvantaged” children), announce that nothing could be done for them, and then give up on them. This would stigmatize slow learners and make it standard policy to ignore them. But would it be allowed? In a number of recent cases, courts have blocked districts from dumping children, particularly ethnic minority children, into classes for the mentally retarded.⁴⁷ Hence, invalid screening devices that supposedly sort out nonlearners but actually discriminate against ethnic or racial minorities would not be allowed. If functional literacy were to become the standard against which schools were measured, most “culturally disadvantaged” children clearly could not be slandered as “nonachievers.” Some children will never become functionally literate, and unless a school were required to set and try to achieve realistic goals for these children, they might indeed be ignored. Continued testing to determine a child’s progress and prospects might be introduced by some schools; students should be able to protect themselves against continued grade failure on the theory that it is negligent to make a child continually repeat the same experience.

Lawsuits like Peter Doe’s may make us more realistic about what schools can and cannot do. We should recognize that the schools cannot solve all of society’s problems. These suits may generate more concrete statements of the goals of schooling than those we find today. We should not expect schools to fade away. They probably will be willing to accept the responsibility of determining each student’s special needs and helping him master at least the basic skills needed for independence.

It is unlikely that individual teachers would be required to pay damages in a successful suit like Peter Doe’s, even when the harm is attributable to a specific person. As in most enterprises, the employer would be liable and would pay.⁴⁸ But teachers might well pay in other ways. If they can be identified, teachers who cause the school district to be liable might be fired or demoted. The costs of damage awards might be borne by teachers in the form of lower salaries.

Many teachers would welcome some of the changes sought by students who bring malpractice suits, for they are as upset

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and disappointed with the school bureaucracy and some of their fellow teachers as are Peter Doe and his family. If they are going to bear some of the burden of malpractice suits, teachers too will probably demand changes to increase school productivity. Under the correct circumstances, teachers could become the students' best allies.

Those who favor Peter Doe's suit are asking a great deal from the judicial system, and some people doubt whether it can deliver. It must be remembered that courts have been slow to accomplish school desegregation, even where the rights of blacks are very clear. With complex malpractice suits, one can have only limited confidence in a jury's ability to decide accurately the "cause," "negligence," and "damages" questions.

We will have only a vague idea about how many education malpractice victims there are until people agree on the nature of the school's duty. For the Peter Does of this country, what are the alternatives? Most children, by necessity, are dependent on adult decisions and actions. Today, only those families with the financial ability to purchase private schooling or to move to neighborhoods with better schools have an effective choice in their children's education. The political process has so far provided only the existing system with all of its limitations. Since, fortunately, most children are learners, the political muscle of families of nonlearners is limited. In effect, nonlearners may be seen to form a "discreet and insular" minority of the type whose interests the judiciary is peculiarly designed to protect.⁴⁹

1. Doe is a fictitious last name. The practice of using fictitious last names in California in cases involving children is common.

2. Entitled "Suing the Schools for Fraud: Issues and Legal Strategies," it was held in March of 1973 in Washington, D.C. A transcript of the conference has been published and is available from Syracuse University Research Corporation, Educational Policy Research Center, 1206 Harrison Street, Syracuse, New York 13210.

3. G. Saretsky, "The Strangely Significant Case of Peter Doe," *Phi Delta Kappan* (May 1973), p. 589; "Suit for Poor Reader Stirs Many Questions in Schools," *Minneapolis Tribune*, July 23, 1973, p. 6B.

4. The discussants were Judge Haskell Freedman, judge of the Probate Court of Middlesex County, Mass., and the author of this article.

5. Stuart A. Sandow, "Emerging Education Policy Issues in Law: Fraud" (Syracuse, N.Y.: Educational Policy Research Center, November 1970). Sandow

hypothesized a suit by a student who graduated from high school and read at seventh-grade level. He polled persons with various interests in law and education for their reactions and described the reactions in his report. I do not restrict myself here to "fraud" theories. Indeed, I suspect that the state of mind required in fraud cases will not be demonstrable in the typical case against the schools. Rather, I concern myself more generally with liability for damages in tort, that is, liability for injury causing conduct.

6. Gary Saretsky and James Mecklenburger, "See You in Court," *Saturday Review*, October 14, 1972, p. 50.

7. See *Brown v. Board of Education*, 347 U.S. 483 (1954).

8. See *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972).

9. See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

10. See *Abington School District v. Schempp*, 343 U.S. 203 (1963).

11. The United States Supreme Court has still not confronted "de facto" segregation head on.

12. The "disruption" standard articulated by the Supreme Court in *Tinker* (n. 9 above) has been difficult to apply. See *Guzick v. Drebus*, 431 F.2d 594 (6 Cir. 1970), where the court concluded that political buttons could be banned by the school even though students claimed that button wearing was an exercise of free speech.

13. See *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *affd sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969), where the lower court concluded that a constitutional requirement on the state to provide education in accordance with a student's needs would be judicially unmanageable.

14. See *Mills* (n. 8 above) and *Pennsylvania Association for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971).

15. See *Lau v. Nichols*, 483 F. 2d 791 (9 Cir. 1973) and *Serna v. Portales Municipal Schools*, 351 F. Supp. 1279 (D.N. Mex. 1972).

16. See A. McCoid, "The Care Required of Medical Practitioners," *Vanderbilt Law Review* 12 (1959): 549.

17. See R. Keeton, "Compensation for Medical Accidents," *University of Pennsylvania Law Review* 121 (1973): 590.

18. See, for example, *Larsen v. General Motors Corp.*, 391 F. 2d 495 (8 Cir. 1968), one installment of the so-called Corvair litigation involving alleged design negligence.

19. For some discussion see *Proceedings of the Conference on Educational Accountability*, Washington, D.C., and Hollywood, California, March 1971 (Princeton, N.J.: Educational Testing Service, 1971).

20. One reason for this group approach has to do with the use of standardized tests for measuring student achievement (see the remarks by Frederick McDonald, director of educational studies at the Education Testing Service, reported in the transcript of the conference on "Suing the Schools for Fraud").

21. The "performance contract" experience of recent years reflects a preference for group rather than individual measures of achievement on the part of both the school and private contractors.

22. See former California Education Code, sections 8574 and 8575 and the administrative guidelines set out pursuant to 5 California Administrative Code, section 10,000.

23. This condition for graduation has been repealed, and instead the state legislature has directed the state board of education to prepare various model

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graduation requirements which *may* be adopted by school districts (see California Education Code, section 8574).

24. See M. Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), p. 85; J. Areen and C. Jencks, "Education Vouchers: A Proposal for Diversity and Choice," *Teacher's College Record* 72 (1971): 327; and J. Coons and S. Sugarman, *Family Choice in Education: A Model State System for Vouchers* (Berkeley, Calif.: Institute of Governmental Studies, 1971).

25. In Berkeley, for example, families have a choice of a wide number of alternate public schools at all grade levels. In Minneapolis, parents in some neighborhoods have substantial choice among elementary schools. In New York City, students can choose from among a number of high schools. Nevertheless, choice is clearly the exception rather than the rule in American public education today.

26. Alum Rock Union School District near San Jose, California, is the district participating in this widely publicized experiment. As a condition of its participation, Alum Rock agreed to include private schools in the plan if legally possible. Recent California legislation will permit this to a limited extent.

27. Although substantial efforts were made to expand the federally funded experiment to include more districts than Alum Rock and a number of feasibility studies were undertaken in various school districts, at the time of this writing no other voucher experiment has begun.

28. See R. Posner, "A Theory of Negligence," *Journal of Legal Studies* (1972): 29. I am indebted to Professor Posner's illuminating observations.

29. I say "probably" because of the possibility of *bribes* combined with the tendency of children and their parents to make inefficient decisions.

30. See Posner, n. 28 above, and "Strict Liability: A Comment," *Journal of Legal Studies* 2 (1973): 205; G. Calabresi and J. Hirschoff, "Toward a Test for Strict Liability in Torts," *Yale Law Journal* 81 (1972): 1055.

31. For years the doctrine of charitable immunity would protect charitable hospitals from liability in suits by patients who contracted hepatitis from blood transfusions received while in the hospital. As charitable immunity wore away, the courts began to recognize liability for negligence of the hospitals. Today, some courts are applying strict liability to hospitals (see M. Franklin, "Tort Liability for Hepatitis: An Analysis and Appraisal," *Stanford Law Review* 24 [1972]: 429).

32. While Peter Doe is in many respects the kind of client a lawyer would want for a test case charging school malpractice, he was not sought out by reform lawyers. Rather, he came to the Youth Law Center in San Francisco only after his claim for damages had been turned down by the San Francisco School District's administrative process. His story has been gleaned from his formal complaint, news accounts, and remarks made by his lawyer at various public gatherings.

33. The unwillingness of doctors to testify against each other leads courts to put the burden of proof to plaintiff victims (see, for example, *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P. 2d 687 [1944]).

34. Courts may defer to professional standards because they fear incompetence or bias from the jury, because of their confidence in professional organizations, and because of their desire to stimulate entry into worthwhile professions.

35. J. Coleman et al., *Equality of Educational Opportunity* (Washington, D.C.: Government Printing Office, National Center for Educational Statistics, 1966).

36. See F. Mosteller and D. Moynihan, eds., *On Equality of Educational Opportunity* (New York: Random House, 1972).

37. In some states a rule of "comparative negligence" is applied and the plaintiff may not be barred recovery if the defendant is also negligent. Damages are reduced.

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38. *Charbonneau v. MacRury*, 84 N.H. 501, 153 Atl. 457 (1931); F. James, "The Qualities of the Reasonable Man in Negligence Cases," *Missouri Law Review* 16 (1951): 1.

39. Dean William L. Prosser, formerly dean of the Law School at Berkeley, has said, "Another old rule, of particularly hideous character, imputed the contributory negligence of a parent to his child. . . . This barbarous rule, which denied to the innocent victim of the negligence of two parties any recovery against either, and visited the sins of the fathers on the children, was accepted in several American states . . . but it is now abrogated . . . [nearly] everywhere" (see W. Prosser, *Handbook of the Law of Torts*, 4th ed. [Saint Paul, Minn.: West Publishing Co., 1971], p. 490).

40. The reason lies in the common law's respect for individual freedom. In some jurisdictions in the United States under certain circumstances and in a number of foreign countries "rescue" is a legal duty.

41. In *Zelenko v. Gimbel Bros.*, 158 Misc. 904, 287 N.Y. Supp. 134 (Sup. Ct. 1935) a woman was taken ill in the defendant's store. The court assumed that the store had no duty to come to her assistance, but once it did, when it took her off to its infirmary and left her there for six hours without any medical care, it then became responsible for her subsequent death. It is often suggested that in cases like this it is important that the plaintiff be worse off as a result of the rescue attempt than he would have been without the rescue effort. One might be tempted to say that in the school setting, the child starts off ignorant, and so if he ends up ignorant he is no worse off. I suggest that a key underlying assumption in the Peter Doe type of suit is that if students and their families had not relied on the schools they would have taken independent action, and further that the school's claim to legitimacy lies in its ability to have families rely on it.

42. For one perspective on the program see S. Canning, "Right to Read," *Saturday Review of Education* (February 1973), p. 25.

43. See D. Harmon, "Literacy: An Overview," *Harvard Educational Review* 40 (May 1970): 2.

44. Pain and suffering might include the loss of self-esteem felt by a nonlearner when his classmates are learners and the shame he feels when classmates go on to college or jobs and he cannot. It may be particularly painful to be a nonlearner since he may be blamed for his own condition. Peter Doe's claim for \$1 million appears to be aimed at the newspapers rather than the court. I suspect that \$10,000 is a more likely figure of what his claim may be. It might be noted that San Francisco now spends more than \$1,500 a year on its pupils, so twelve years of public schooling costs about \$18,000.

45. California has such a program (see section 6870 of the California Education Code).

46. See *Johnson v. State*, 73 Cal. Rptr. 240, 447 P. 2d 352 (1968).

47. See *Larry P. v. Riles*, 343 F. Supp. 306 (N.D. Cal. 1972), which challenges the placement of black students in educable mentally retarded classes in San Francisco on the basis of IQ tests.

48. I have seen teacher liability insurance policies which cover liability for "malpractice." If this is the general pattern, then individual teachers apparently would not bear the financial burden of such lawsuits even if the claim were pursued against both employee and employer.

49. See *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), where Justice Stone explores the importance of judicial protection for minority groups.