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# **RIDING THE *PLESSY* TRAIN: TRACKING IN THE LOWER COURTS**

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## **INTRODUCTION: IT'S NOT ONLY THE SOUTH**

There is sometimes the misconception that microsegregation only persists in the South given that segregation was historically entrenched in the South.<sup>1</sup> However, judicially-sanctioned microsegregation goes

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<sup>1</sup> See generally Erica Frankenberg, *Assessing the Status of School Desegregation Sixty Years after Brown*, 2014 MICH. ST. L. REV. 677 (2014); Erwin Chemerinsky, *The Segregation and*

back as far as 1849 when the Massachusetts Supreme Judicial Court authorized school-level segregation in ruling that school officials have absolute authority to “arrange, classify, and distribute pupils, in such a manner as they think best adapted to their general proficiency and welfare.”<sup>2</sup> The Supreme Court of Indiana held similarly:

[T]he placing of the white children of the State in one class and the negro children of the State in another class, and requiring these classes to be taught separately, provision being made for their education in the same branches, according to age, capacity, or advancement, with capable teachers . . . does not amount to a denial of equal privileges to either, or conflict with the open character of the system required by the constitution.<sup>3</sup>

The Court of Appeals of New York unconscionably opined, in disregard of minorities rights, that:

If the right, therefore, of school authorities to discriminate, in the exercise of their discretion, as to the methods of education to be pursued with different classes of pupils be conceded, how can it be argued that they have not the power, in the best interests of education, to cause different races and nationalities, whose requirements are manifestly different, to be educated in separate places.<sup>4</sup>

Moreover, we know that, “[i]n the years immediately following legally mandated desegregation in the South, for example, some districts

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*Resegregation of American Public Education: The Courts’ Role*, 81 N.C. L. REV. 1597 (2003); Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787 (2010) (discussing Southern segregation).

<sup>2</sup> *Roberts v. City of Boston*, 59 Mass. 198, 208 (1849). In these times, courts trivialized and dismissed minorities’ desegregation suits as requests based on gratification of feelings. See, e.g., *People ex rel. King v. Gallagher*, 93 N.Y. 438, 442 (1883) (“The relator, however, complains, not but that she is receiving the highest educational advantages that the city is capable of giving her, but that she is not receiving those facilities at the precise place which would be the *most gratifying to her feelings*.”). See also *id.* at 451–52 (“It is quite impracticable for the authorities to take into account and provide for the gratification of the taste”). Courts resisted calls to use laws to redress even valid constitutional concerns while preferring to give priority to the sentiment of the majority culture. See *id.* at 448 (“but this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate.”).

<sup>3</sup> *Cory v. Carter*, 48 Ind. 327, 362 (1874). The Supreme Court of Ohio ruled likewise. See *The State, ex rel. Garnes, v. McCann*, 21 Ohio St. 198, 211 (1871).

<sup>4</sup> *Gallagher*, 93 N.Y. at 449–50.

actually separated students by race using classroom partitions and segregated lunchrooms.”<sup>5</sup>

This Article is an epilogue to our Article “Riding the *Plessy* Train: Reviving *Brown* For A New Civil Rights Era For Micro-Desegregation” published in the *Chicana/o Latina/o Law Review*. This Article examines micro-desegregation in the lower courts. It presents instances of the limited lower court micro-desegregation victories as well as lower court rulings that can serve as exemplars. The Article also discusses and critiques disappointing lower court rulings. It argues that there must be a continuing duty to desegregate as some lower courts have acknowledged. Furthermore, it calls on the Supreme Court and other lower courts to forcefully enforce this duty to ensure complete micro-desegregation. The final Part points out that time is of the essence for minorities in lower tracks and beckons the judiciary to act promptly to provide redress. It also suggests some principles for school districts and the judiciary for a consequential micro-desegregation era.

If the judiciary is, in truth, a “defender of minority rights” and “avant-garde in social justice struggles”<sup>6</sup>, it is imperative that it carry on this banner to fight this enduring bastion of school segregation. Under this civil rights era, desegregation must be mandated, “not because it will necessarily improve pupils’ scores in the three R’s, but because the Constitution requires it.”<sup>7</sup>

## I. TRACKING IN THE LOWER COURTS

### A. *Railroad Cars are not Free When you are Excluded From all but One*

Even in 1880, shades of tracking could be found in various places including the City of Ottawa (Kansas) where a school district committee

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<sup>5</sup> Charles T. Clotfelter, Helen F. Ladd, & Jacob L. Vigdor, *Segregation and Resegregation in North Carolina’s Public School Classrooms*, 81 N.C. L. REV. 1463, 1467 (2003); KENNETH J. MEIER, JOSEPH STEWART, JR., & ROBERT E. ENGLAND, *RACE, CLASS, AND EDUCATION: THE POLITICS OF SECOND-GENERATION DISCRIMINATION* 123 (1989). This is sadly not shocking given that, as Justice Brennan once observed, “[a]fter enactment of the Fourteenth Amendment the States continued to deny Negroes equal educational opportunity, enforcing a strict policy of segregation that itself stamped Negroes as inferior, that relegated minorities to inferior educational institutions, and that denied them intercourse in the mainstream of professional life necessary to advancement.” *Regents of University of California v. Bakke*, 438 U.S. 265, 371 (1978) (Brennan, J., concurring) (internal citations omitted).

<sup>6</sup> Richard Thompson Ford, *Brown’s Ghost*, 117 HARV. L. REV. 1305, 1305 (2004).

<sup>7</sup> *Hart v. Cmty. Sch. Bd. of Brooklyn*, New York Sch. Dist. No. 21, 383 F. Supp. 699, 747 (E.D.N.Y. 1974).

recommended “the colored children in rooms Nos. 1, 2, 3, 4, 5 and 6 be placed in the same school house, and a teacher of their own color be employed to instruct them; and that they be advanced into rooms Nos. 7, 8, 9, 10, 11 and 12 as fast as they make suitable proficiency, and in the same manner as the whites.”<sup>8</sup> That district zealously defended its microsegregation policy and practices to the Supreme Court of Kansas:

[T]he board has seen fit to direct that to certain of these rooms and teachers the white children of six primary grades shall go, and to a certain other room and to an equally competent teacher the colored children of these grades shall go. *Where is the exclusion?* Is it that all teachers and rooms are not equally accessible to them? They are not to the white children. Is it that *certain* rooms and teachers are not equally open to them? Neither are they to the white children. In every large graded school, pupils of exactly the same qualifications are arbitrarily separated and placed in different rooms. Yet no one thinks of calling that exclusion. . . . The board has said in its discretion that it is best to educate the races separately.<sup>9</sup>

The district rationalized its microsegregation practices with the disingenuous racial asymmetry argument that there was no constitutional foul because White students similarly did not necessarily have access to the minority classes.<sup>10</sup> As evident above, the district also eagerly endorsed arbitrary student assignments. Thankfully, even then in the 1880s, the Supreme Court of Kansas recognized that students of all races should mingle and learn together because that represents our “great world in miniature.”<sup>11</sup> The court appropriately held that “railroad cars are not *free* to a person who is excluded from all but one of them; and, on the

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<sup>8</sup> Bd. of Educ. of City of Ottawa v. Tinnon, 26 Kan. 1, 2 (1881).

<sup>9</sup> *Id.* at 4–6 (emphasis added). Similarly, the Supreme Court of California could not have been more wrong when it stated that “in the circumstances that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than of the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense.” Ward v. Flood, 48 Cal. 36, 52 (1874).

<sup>10</sup> See *Tinnon*, 26 Kan. at 10–11 (presenting plaintiff’s forceful condemnation of this district argument).

<sup>11</sup> *Id.* at 19.

same principle, schools are not *free* to a person who is excluded from all but one of them.”<sup>12</sup>

### **B. Limited Micro-Desegregation Victories**

Since that Kansas case, successful challenges to tracking have been sparse and even then very difficult to realize.<sup>13</sup> One case where such a challenge proved successful is *United States v. Yonkers*.<sup>14</sup> In that case, the United States District Court, Southern District of New York found that minorities were significantly underrepresented in honors, advanced placement and college-bound tracks of the Yonkers Public Schools’ tracking program.<sup>15</sup> While White students made up 81.82 percent of these top tracks, Hispanics made up only 7.58 percent and African Americans 9.09 percent.<sup>16</sup> In addition, the court found that “[o]ver the entire ten-year period studied, white students were 2 to 3 times more likely than minority students to be awarded a Regents diploma.”<sup>17</sup>

The court acknowledged that, even when segregative practices are not driven by intentional discrimination, discrimination can be embedded in district policies and practices.<sup>18</sup> The court found that the placement tests as well as the teacher expectations led to the racial disparities in

<sup>12</sup> *Id.* at 21.

<sup>13</sup> For instance, in 1994, forty years after *Brown I*, the United States District Court, Eastern District of Arkansas, pointed out that “[t]here is no precedent in the Eighth Circuit on the questions presented herein with respect to ability grouping.” *Simmons on Behalf of Simmons v. Hooks*, 843 F.Supp. 1296, 1301 (E.D. Ark. 1994). See also *e.g.*, *United States v. Gregory-Portland Indep. Sch. Dist.*, 654 F.2d 989, 1004 (5th Cir. 1981), *Hannon*, 506 F.Supp. at 833–78, *Georgia State Conference of Branches of NAACP v. State of Ga.*, 775 F.2d 1403, 1408–16 (11th Cir. 1985), *Castaneda by Castaneda v. Pickard*, 781 F.2d 456, 462–63 (5th Cir. 1986) (dismissive of microsegregation and bias claims). Cf. *Hart*, 383 F.Supp. at 706–57.

<sup>14</sup> *United States v. Yonkers*, 123 F. Supp. 2d 694 (S.D.N.Y. 2000).

<sup>15</sup> *Id.* at 716–18.

<sup>16</sup> *Id.* at 717.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 713–15, 717. See *id.* at 717–18 (“It is not suggested, by any party that the apparent disparity in the types of courses taken by minority and non-minority students reflects any intentional segregation on the part of officials associated with the YPS[Yonkers Public Schools] . . . However, we nevertheless find that the academic tracking reflected in Dr. Weinberger’s data is the result of segregative policies and practices.”). Further, as the Supreme Court has stated, even when intent is considered, “[a]dherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.” *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465 (1979). See also *Hart*, 383 F.Supp. at 734 (“a school board, like other legal entities, must be held accountable for the natural, foreseeable, and avoidable consequences of its activities and policies.”).

the various tracks.<sup>19</sup> As the court stated, they fueled the “myth that white is smart or only white people can be smart which results in further entrenchment of segregative tracking practices.”<sup>20</sup> The court concluded that the lower teacher expectations for minorities in turn led students to have low expectations of themselves and low self-esteem.<sup>21</sup> Despite the absence of intentional discrimination, the court declared that these practices were “vestiges of segregation and must be remedied.”<sup>22</sup> This is a good model for the Supreme Court to use in enforcing micro-desegregation given that the court refused to slight or dismiss the genuine inequity concerns of minority students simply based on the artificial construct of intent.

*Hobson v. Hansen* is the most expansive lower court ruling against microsegregation.<sup>23</sup> In the case, the United States District Court, District of Columbia ordered abolition of the District of Columbia Public Schools’ tracking system.<sup>24</sup> The court exposed the district’s alarming impetus for the tracking system as resistance to desegregation: “[T]here is no escaping the fact that the track system was specifically a response to problems created by the sudden commingling of numerous educationally retarded Negro students with the better educated white students.”<sup>25</sup> What’s more, the court denounced the district tests used for track assignments.<sup>26</sup> The court found it a significant fallacy that the tests were principally standardized on White students with no relation to the minority experience.<sup>27</sup> It was thus inevitable that the tests resulted in minorities’ assignment to lower tracks and Whites to upper tracks.<sup>28</sup> In addition, teacher judgments about students’ abilities could be erroneous and very damaging to students placed in the lower tracks.<sup>29</sup> This “tragedy of misjudgments” could lead minorities to self-fulfilling prophecies

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<sup>19</sup> *Yonkers*, 123 F. Supp. 2d at 718.

<sup>20</sup> *Id.* (internal citations omitted).

<sup>21</sup> *Id.* at 722.

<sup>22</sup> *Id.* at 722.

<sup>23</sup> *Hobson v. Hansen*, 269 F.Supp. 401 (D.D.C. 1967).

<sup>24</sup> *Id.* at 407, 494, 511–15. The court concluded that the district’s tracking system was racially “tainted.” *Id.* at 443.

<sup>25</sup> *Hobson*, 269 F.Supp. at 442. *See also id.* at 443 (“It was the discovery of this large number of academically retarded Negro children in the school system that led to the institution of the track system.”).

<sup>26</sup> *Hobson*, 269 F.Supp. at 406–07.

<sup>27</sup> *Id.* at 407, 485, 514.

<sup>28</sup> *Id.* at 407.

<sup>29</sup> *Id.* at 489.

of the low expectations.<sup>30</sup> The court found more “tragedy”<sup>31</sup> in the fact that, once assigned to the lower tracks, the minority student’s “chance of escape is remote.”<sup>32</sup> This was very disappointing because “such children, so stigmatized by inappropriate aptitude testing procedures, [were] denied equal opportunity to obtain the white collar education available to the white and more affluent children.”<sup>33</sup> Instead, the minority student was prepared as a “blue collar” student.<sup>34</sup>

The court ruled that intent must not be determinative as these effects were too substantial to ignore and violative of the Equal Protection Clause.<sup>35</sup> For instance, the court concluded that “there is substantial evidence that tracking tends to thin out the number of Negroes in the higher curriculum levels, thus redistributing the racial balance in integrated schools—increasing the proportion of Negroes to whites in the lower tracks and decreasing that proportion in the upper tracks.”<sup>36</sup> As the court pointed out, the tracking system failed minority students on the promise of equal educational opportunity:

When a student is placed in a lower track, in a very real sense his future is being decided for him; the kind of education he gets there shapes his future progress not only in school but in society in general. Certainly, when the school system

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<sup>30</sup> *Id.* at 491–92, 514.

<sup>31</sup> *Id.* at 464.

<sup>32</sup> *Id.* at 407, 458, 460, 463–64, 512–13. *See also id.* at 463 (“Movement between tracks borders on the nonexistent.”).

<sup>33</sup> *Hobson*, 269 F.Supp. at 407, 494. *See also id.* at 492 (“By consigning students to specifically designated curricula, the track system makes highly visible the student’s status within the school structure. To the unlearned, tracks can become pejorative labels, symptomatic of which is the recent abandonment of the suggestive ‘Basic’ for the more euphemistic ‘Special Academic’ as the nomenclature of the lowest track. And even if a student may be unaware of labels, he cannot ignore the physical fact of being separated from his fellow students.”).

<sup>34</sup> *Hobson*, 269 F.Supp. at 407. *See also id.* at 515 (“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. Considering the tests used to determine which children should receive the blue-collar special, and which the white, the danger of children completing their education wearing the wrong collar is far too great for this democracy to tolerate.”).

<sup>35</sup> *Hobson*, 269 F.Supp. at 442–43. The court also found that “at both the elementary and junior high school levels the per cent of Negroes enrolled in the lowest track exceeds their proportionate representation in the total student body.” *Id.* at 456. “Clearly, then, race cannot be considered irrelevant in the operation of the track system. Even if the effects of tracking are not racially motivated, the Negro student nonetheless is affected.” *Id.* at 457.

<sup>36</sup> *Hobson*, 269 F.Supp. at 457.



undertakes this responsibility it incurs the obligation of living up to its promise to the student that placement in a lower track will not simply be a shunting off from the mainstream of education, but rather will be an effective mechanism for bringing the student up to his true potential. Yet in the District the limited scope of remedial and compensatory programs, the miniscule number of students upgraded, and the relatively few students cross-tracking make inescapable the conclusion that existing programs do not fulfill that promise.<sup>37</sup>

If other courts similarly realized the gravity of the failed promise and ordered detracking, many minorities languishing in lower tracks might still have the chance at equal educational opportunity. Recognizing that racial fears might hinder reform, the court urged the district and community to curtail their fears of detracking since micro-desegregation need not be detrimental to White students' education.<sup>38</sup>

*McNeal v. Tate County School District* was another paramount lower decision as it created the *McNeal* test which became the analytical framework for various subsequent lower court tracking decisions.<sup>39</sup> The test provides that an otherwise unitary school district can use tracking if it shows one of two things: (i) its tracking policies or practices are not based on the current effects of past segregation; or (ii) the tracking policies or practices will provide better educational opportunities that remedy such current results of past segregation.<sup>40</sup> As the United States Court of Appeals, Eleventh Circuit has ruled, a district that has attained unitary status must discontinue its tracking program until the district has run a unitary school system for "at least several years" if the program has a substantial racial disparate impact.<sup>41</sup> Additionally, the court set a

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<sup>37</sup> *Id.* at 473. *See id.* at 464 ("cross-tracking is track terminology for electing courses above or below an assigned curriculum level.").

<sup>38</sup> *Hobson*, 269 F.Supp. at 419.

<sup>39</sup> *McNeal v. Tate Cty. School Dist.*, 508 F.2d 1017 (5th Cir. 1975). This test from the United States Court of Appeals, Fifth Circuit, seems to have gained wide acceptance in the lower courts. *See, e.g.*, *United States v. Gadsden Cty. Sch. Dist.*, 572 F.2d 1051, 1052–53 (5th Cir. 1978) and *Simmons on Behalf of Simmons v. Hooks*, 843 F.Supp. 1296, 1302–03 (E.D. Ark. 1994) (applying the *McNeal* test).

<sup>40</sup> *McNeal*, 508 F.2d at 1020. *See Holton v. City of Thomasville Sch. Dist.*, 490 F.3d 1257, 1260 (11th Cir. 2007) (characterizing it as the *McNeal* standard/test).

<sup>41</sup> *Georgia State Conference of Branches of NAACP v. State of Ga.*, 775 F.2d 1403, 1413 (11th Cir. 1985). *Accord Lemon v. Bossier Parish Sch. Bd.*, 444 F.2d 1400, 1401–02 (5th Cir. 1971).

judicial example for micro-desegregation in declaring that “[c]hallenges to official action by a local school district which has not achieved unitary status can be successful without proof of discriminatory intent.”<sup>42</sup>

In *Simmons on Behalf of Simmons v. Hooks*, the plaintiff confronted the racially-disproportionate placement of minorities in special education and lower tracks as well as the significant underrepresentation of minorities in the gifted and talented track.<sup>43</sup> The African American mom who filed suit against the Augusta School District No. 10 (Arkansas) alleged that her three children faced discriminatory action through placement in lower tracks and special education.<sup>44</sup> This mom had also faced microsegregation when she was a student, having been assigned first to the low ability track and subsequently special education.<sup>45</sup> District placements were based on teacher and principal recommendations, standardized test scores, and grades.<sup>46</sup> The United States District Court, Eastern District of Arkansas, found that “[t]he low ability groups have a disproportionate number of black students. The percentage of black students in the low ability groups has been as follows in recent years: 1991–92, 72.1%; 1990–91, 80.9%; 1989–90, 76.6%; 1988–89, 81.6%; 1987–88, 75.9%; 1986–87, 72.5%.”<sup>47</sup>

Additionally, the court found that “[t]he percentage of black special education students has been as follows in recent years: 1992–93, 62%; 1991–92, 62%; 1990–91, 61%; 1989–90, 69%; 1988–89, 67%; 1987–88, 63%. . . . there were twenty-one students identified in the ‘MR’ or ‘mental retardation’ category. Of these, nineteen were black and two were white.”<sup>48</sup> The Arkansas Department of Education was so concerned that it sent a missive to the district pointing out that the district needed to address the fact that the African American special education enrollment “exceeded a standard deviation (referring to the difference in percentage in special education and percentage of overall student population) of 8.3 and was significantly higher than the district’s overall percentages of minority students.”<sup>49</sup>

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<sup>42</sup> *Georgia State Conference of Branches of NAACP*, 775 F.2d at 1414.

<sup>43</sup> *Simmons on Behalf of Simmons v. Hooks*, 843 F.Supp. 1296, 1297–98 (E.D. Ark. 1994).

<sup>44</sup> *Id.* at 1297–98.

<sup>45</sup> *Id.* at 1297.

<sup>46</sup> *Id.* at 1299.

<sup>47</sup> *Id.* at 1300.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (internal quotation marks omitted).

Even though no court had ever granted the district unitary status with respect to macrosegregation, the district was an otherwise unitary district.<sup>50</sup> The court found that the district had done much that could qualify it for macrosegregation unitary status; however, the district could not be granted unitary status with respect to microsegregation in light of the racial disparities in the tracking system.<sup>51</sup> Had a court granted the district unitary status, the court would have required the plaintiff to prove intentional discrimination in order to meet the burden of proof.<sup>52</sup> However, as discussed earlier, the requirement of intent for desegregation is an imprudent decision. Fortunately, the court did not entertain the intent requirement as an obstacle to ruling for the plaintiff.<sup>53</sup>

Moreover, as an otherwise unitary district governed by the *McNeal* test, the court concluded that the district's microsegregation was the current effect of past segregation.<sup>54</sup> In addition, under the *McNeal* test, the tracking system was not providing better educational opportunities to remedy the current effects of past segregation since it stigmatized minority students in the low track.<sup>55</sup> Even more, the court concluded that there was no "credible educational justification" for the district's low/high ability tracking system.<sup>56</sup> Regrettably, despite this holding regarding the low ability track, the court found no constitutional violation in the district's special education track (despite the segregation therein).<sup>57</sup> The court reasoned that the district had made improvements in special

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<sup>50</sup> *Id.* at 1302.

<sup>51</sup> *Id.* ("the Court cannot hold that the district has achieved unitary status with respect to classes.").

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1302, 1304 ("[T]he plaintiff has established by a preponderance of evidence that the Augusta School District intended to discriminate against black students when it adopted the ability grouping policy that became effective at the same time the dual system terminated. The plaintiff's evidence, which the defendants have not rebutted, shows clearly that the implementation of the plan resulted in a continuation of racial segregation by class in the low ability groups.").

<sup>54</sup> *Id.* at 1302.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1302–03. *Accord* Tonya L. Nelson, *Tracking, Parental Education, and Child Literacy Development: How Ability Grouping Perpetuates Poor Education Attainment within Minority Communities*, 8 GEO. J. ON POVERTY L. & POL'Y 363, 366 (2001) (observing that "many education policy experts, school administrators, and parents question the merits of ability grouping generally").

<sup>57</sup> *Simmons on Behalf of Simmons*, 843 F.Supp. at 1303–04.

education placements and those placements were based on federal and state regulations.<sup>58</sup>

*United States v. Gadsden County School District* presented a case where tracking placed Whites students in higher tracks and African Americans in lower tracks in a district with 78 percent African American enrollment.<sup>59</sup> The United States Court of Appeals, Fifth Circuit, criticized Gadsden County School District's (Florida) tracking practices:

Within these five schools, from these statistics, there is similarity of pattern to the extent that the grouping has resulted in a concentration of white students in the upper sections and black students in the lower levels. In many instances, the upper levels are heavily white, and in other instances, the lower sections are all black or virtually all black.<sup>60</sup>

Pursuant to the *McNeal* test, the court found that the district adopted the tracking system after being ordered to desegregate and so the tracking system was a current effect of past segregation.<sup>61</sup> There was also no evidence that the tracking system would provide better educational opportunities that would redress effects of past segregation.<sup>62</sup> It was distressing to find that minorities had no meaningful opportunity to move into the upper tracks, cementing the fact that the tracking system would not provide better educational opportunities to redress past segregation's effects.<sup>63</sup>

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<sup>58</sup> *Id.* at 1303. The court similarly found no constitutional discrimination in the district's gifted and talented program due to improvements in minority assignments to the program as well as the absence of intent to discriminate. *Id.*

<sup>59</sup> *United States v. Gadsden Cty. School Dist.*, 572 F.2d 1051 (5th Cir. 1978).

<sup>60</sup> *Id.* at 1050. The statistics the court referenced revealed that, "at Munroe Elementary School, which was about 68% Black . . . , 20 of 29 students enrolled in the first section of the first grade were white; only 1 of the 24 students enrolled in the fourth section of the first grade was white. At the sixth grade level, 20 of 30 students assigned to the first section were white, while only 3 of the 24 students assigned to the fourth section were white." *Id.* at 1051.

<sup>61</sup> *Gadsden Cty. Sch. Dist.*, 572 F.2d at 1052–53. As discussed earlier, many districts adopted tracking as a way to resist desegregation. See Harvard Law Review, *Teaching Inequality: The Problem of Public School Tracking*, 102 HARV. L. REV. 1318, 1323 (1989) ("Many southern school districts adopted tracking as a means of circumventing desegregation orders. Finally, northern cities responded to a large migration of blacks by increasing the amount of ability grouping in their systems.").

<sup>62</sup> *Gadsden Cty. Sch. Dist.*, 572 F.2d at 1052–53.

<sup>63</sup> *Id.* at 1052 ("the evidence before the court fails to disclose that, during these past years when such grouping has been employed, any meaningful number of students moved upward in these group sections, either during the year or from year to year.").

*Moore v. Tangipahoa Parish School Board* is one of the more poignant microsegregation rulings available.<sup>64</sup> In that case, the Tangipahoa Parish School District (Louisiana) superintendent incredulously argued that “if, in a building housing two first grades, classroom assignments resulted in a black first grade and a white first grade, the school would in his view be a desegregated school, since it taught children of both races.”<sup>65</sup> Admirably, the United States District Court, Eastern District of Louisiana unequivocally decried this thinking.<sup>66</sup> The court righteously noted that a “school composed of white classes and black classes is not desegregated. Students must be assigned to classes, even as they must be assigned to schools, in a racially nondiscriminatory fashion, and no classes may be racially identifiable.”<sup>67</sup>

Congruently, the United States Court of Appeals, Fifth Circuit, held that micro-desegregation must be enforced for the Constitution does not require Whites to merely share building facilities with minorities:

It goes without citation that a school board may not direct or permit the segregation of students within the classrooms. If this were allowed, a school that was 50% black and 50% white might nevertheless have classes that were strictly segregated. The Constitution requires substantially more than mere contemporaneous use of school facilities. It requires a unitary school system. Notwithstanding convincing evidence of the existence of a pattern of such segregation, the Court below declined to issue an injunction because of the assurance of the board that such practices were no longer true. Given the long history of opposition to the unitary school concept in Rankin County, the Court may no longer accept the verbal assurances of the parties that they will comply with the mandate of the Constitution. Accordingly, a mandatory order is required.<sup>68</sup>

On the contrary, in *Morales v. Shannon*, the United States Court of Appeals, Fifth Circuit, refused to endorse challenge to the Uvalde School District’s (Texas) tracking system.<sup>69</sup> Instead, the court characterized

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<sup>64</sup> *Moore v. Tangipahoa Parish Sch. Bd.*, 304 F.Supp. 244 (E.D. La. 1969).

<sup>65</sup> *Id.* at 249.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 249, 252.

<sup>68</sup> *Adams v. Rankin Cty. Bd. of Ed.*, 485 F.2d 324, 327 (5th Cir. 1973).

<sup>69</sup> *Morales v. Shannon*, 516 F.2d 411 (5th Cir. 1975).

the tracking system as “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>70</sup> The court justified this decision in the plaintiff’s failure to provide direct or inferential proof of discrimination.<sup>71</sup> Likewise, the court found no discrimination in the tests, grades, and teacher recommendations used for track assignments.<sup>72</sup>

Similarly, in *People Who Care v. Rockford Board of Education*, School District # 205,<sup>73</sup> the United States Court of Appeals, Seventh Circuit, rebuffed a challenge to the Rockford Board of Education, School District # 205’s (Illinois) tracking system.<sup>74</sup> This decision is disappointing, especially in light of the court’s conclusion that “[t]he well-known correlation between race and academic performance makes tracking, even when implemented in accordance with strictly objective criteria . . . a pretty effective segregator.”<sup>75</sup> The court egregiously excused the tracking system as a valid way to ensure that “better students” stay in the public schools.<sup>76</sup> Although the court acknowledged tracking resulted in racial segregation,<sup>77</sup> it disingenuously acted as if the tracking system nonetheless offered Latinos and African Americans equal access as Whites to the higher tracks:

To abolish tracking is to say to bright kids, *whether white or black*, that they have to go at a slower pace than they’re capable of; it is to say to the parents of the brighter kids that their children don’t really belong in the public school system; and it is to say to the slower kids, of whatever race, that they may have difficulty keeping up, because the brighter kids may force the pace of the class.<sup>78</sup>

This illusion of access was convenient sophistry the court used to uphold the tracking system. Interestingly, the court did not even realize it was

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<sup>70</sup> *Id.* at 414.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528 (7th Cir. 1997). For a very good analysis of the *People Who Care* decisions, see Vanessa G. Tanaka, *People Who Care v. Rockford Board of Education and the Spectrum of Race-Conscious Remedies*, 1999 Wis. L. REV. 347 (1999).

<sup>74</sup> *People Who Care*, 111 F.3d at 536.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 535–36.

<sup>78</sup> *Id.* at 536 (emphasis added).

revealing its sophistry when it then used deficit thinking in stating that compensatory education programs are “designed largely although not entirely for minority students, because they have on average more educational deficits.”<sup>79</sup>

Another case which resulted in an unsuccessful constitutional challenge to tracking is *Holton v. City of Thomasville School District*.<sup>80</sup> The Middle District of Georgia as well as the Eleventh Circuit ruled against the African American parents’ challenge to the tracking system in the City of Thomasville School District (Georgia);<sup>81</sup> despite the fact that the tracking system was concededly adopted after termination of de jure segregation.<sup>82</sup> As discussed earlier, various school districts conveniently chose to introduce tracking after de jure segregation was deemed unconstitutional as tracking offered a coy way to maintain segregation. Unfortunately, the district and appellate courts did not discern or decry this pretense even in the face of judicial acknowledgment that the tracking system created racial imbalances.<sup>83</sup> Instead, the Eleventh Circuit saw a sanitized system that relied on standardized tests and teacher

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<sup>79</sup> *Id.* at 538.

<sup>80</sup> *Holton v. City of Thomasville Sch. Dist.*, 490 F.3d 1257 (11th Cir. 2007) (*Holton II*).

<sup>81</sup> *Thomas Cty. Branch of N.A.A.C.P. v. City of Thomasville Sch. Dist.*, 299 F.Supp.2d 1340 (M.D. Ga. 2004); *Holton II*, 490 F.3d at 1259.

<sup>82</sup> *Holton II*, 490 F.3d at 1259.

<sup>83</sup> *Thomas Cty. Branch of N.A.A.C.P.*, 299 F.Supp.2d at 1358–59, 1367; *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1346–47 (11th Cir. 2005) (*Holton I*); *Holton II*, 490 F.3d at 1259–60. In fact, even while acknowledging that many children were still waiting to realize the promise of *Brown I* and *Brown II*, the United States District Court for the Middle District of Georgia concluded:

Fifty years ago the Supreme Court decided *Brown v. Board of Education*. During this golden anniversary year, celebrations, conferences, and symposia will appropriately commemorate this landmark decision. Politicians will pontificate. Professors will educate. Many will reminisce. Much progress has been made. Legislatures no longer codify racial segregation in the statute books. Governors do not stand in schoolhouse doors. Black and white children share desks, teachers, and water fountains.

Notwithstanding this progress, many poor children are still waiting on the promise of *Brown*—a promise of educational opportunity for every American. Regrettably, as some of the evidence in this case demonstrates, this promise has not been fulfilled for many children who find themselves trapped in an educational system that cannot meet their needs. . . . No matter how tempted the Court may be to intervene and attempt to ‘fix the system,’ a court is ill-equipped for such a task. Moreover, it does not have the authority to act as a super-school board or social scientist, even if it was arrogant enough to believe that it possessed the ability. *Thomas Cty. Branch of N.A.A.C.P.*, 299 F.Supp.2d at 1367–68.

recommendations based on perceptions of student ability and student grades.<sup>84</sup> Dealing a blow to the African American plaintiffs, the court stated that “although ability-grouping practices may have the *effect* of creating racial imbalances within classrooms, we have consistently stated that ability grouping is not per se unconstitutional.”<sup>85</sup> The court followed up this misguided conclusion with another when it noted that “ability-grouping programs are permissible in spite of any segregative effect they may have if the assignment method is not based on the present results of past segregation or will remedy such results through better educational opportunities.”<sup>86</sup>

Applying the *McNeal* test, the court concluded that the microsegregation was not the present effect of past segregation even though plaintiffs presented “some statistical data suggesting that race rather than ability explains many of the black students’ lower placements.”<sup>87</sup> The court instead deferred to the district court conclusion that the teacher evaluation of the “lesser-perceived ability of black students was based upon impoverished circumstances more than anything.”<sup>88</sup> If microsegregation is going to be reversed, courts must stop minimizing data on discriminatory practices and cease discounting microsegregation as mere racial imbalance without remedy.<sup>89</sup>

### C. *Exemplars in Lower Court Rulings*

Courts should appropriate the Eastern District of Texas position that “[t]he existence of unconstitutional discrimination is not determined solely by intent, and the State is prohibited from *any* act abridging the constitutional rights of children to equal education opportunities whether attempted *directly or by evasive schemes*.”<sup>90</sup> Even more profoundly, this court ruled that:

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<sup>84</sup> *Holton II*, 490 F.3d at 1259. However, as the United States District Court, District of Delaware, stated, racially-neutral means should not be equated with constitutional compliance. *Coal. To Save Our Children v. Buchanan*, 744 F. Supp. 582, 586 (D. Del. 1990).

<sup>85</sup> *Holton II*, 490 F.3d at 1262 (internal quotation marks and citations omitted).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1263, 1261. The court indicated that “sole cause” is not the standard but rather “substantial cause.” *Id.* at 1263. The court also conceded that there were “some instances in the record of intentional segregation.” Yet, the court effectively discounted the importance of this evidence. *Id.* at 1263.

<sup>88</sup> *Holton II*, 490 F.3d at 1262 (internal quotation marks omitted).

<sup>89</sup> The court did not address the other prong of the *McNeal* test.

<sup>90</sup> *United States v. State of Tex.*, 330 F.Supp. 235, 244 (E. D. Tex. 1971) (emphasis added).



Quite clearly, it is unconstitutional to assign students to classrooms on the basis of race, and it should be equally clear that where the State Agency can determine from complaints, accreditation visits or from any other source, that such discriminatory in-school assignments exist, the Agency should treat such practices as tantamount to discriminatory student assignment to schools and should act accordingly to eliminate such in-school discrimination wherever it is found.<sup>91</sup>

This ruling should become the prototype for other courts as it precludes hiding behind intent rulings to deny minorities the right to micro-segregation. Likewise, the judiciary must declare, as the Eastern District of New York did, that “benign neglect is as illegal as malign intent—both are unconstitutional.”<sup>92</sup>

*Larry P. v. Riles* is another example of a case the judiciary can use as a standard for addressing microsegregation.<sup>93</sup> In that case, six African American elementary school students brought suit against the state and other defendants on behalf of themselves and all African American students in California classified or likely to be classified as educable mentally retarded (EMR) based on I.Q. test scores.<sup>94</sup> The Northern District of California found that the EMR classes were “conceived of as dead-end classes. Children are placed there, generally at about eight to ten years of age, because they are thought to be *incapable* of learning the skills inculcated by the regular curriculum.”<sup>95</sup> The district court found that “even more than segregated schools, disproportionate enrollment of minorities in EMR classes stigmatizes those in the classes and serves inevitably to perpetuate invidious stereotypes based on the superiority or inferiority

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<sup>91</sup> *Id.* at 249 (internal citations omitted) (citing *Johnson v. Jackson Parish Sch. Bd.*, 423 F.2d 1055 (5th Cir., 1970)); *Jackson v. Marvell Sch. Dist.*, 425 F.2d 211 (8th Cir., 1970). This ruling is profound given that there has been a paucity of judicial courage of conviction to enforce micro-segregation.

<sup>92</sup> *Hart v. Cmty. Sch. Bd. of Brooklyn, New York Sch. Dist. No. 21*, 383 F. Supp. 699, 755 (E.D.N.Y. 1974).

<sup>93</sup> *Larry P. v. Riles*, 495 F.Supp. 926, 941–42 (N.D. Cal.1979), *aff'd in part, rev'd in part*, 793 F.2d 969 (9th Cir. 1984) (internal quotation marks omitted).

<sup>94</sup> *Larry P. By Lucille P. v. Riles*, 793 F.2d 969, 974 (9th Cir. 1984). The EMR classes were designed “for schoolchildren of retarded intellectual development who are considered incapable of being educated through the regular educational program, but who could benefit from special educational facilities to make them economically useful and socially adjusted.” *Id.* at 973.

<sup>95</sup> *Larry P.*, 495 F.Supp. at 941–42 (emphasis added); *Crawford v. Honig*, 37 F.3d 485, 488–89 (9th Cir. 1994).

of ‘racial stocks.’”<sup>96</sup> Defendants argued that district consideration of parental consent in the placement process mitigated discrimination in the placements.<sup>97</sup> Rejecting this argument, the court pointed out that “consent is rarely withheld, particularly by minorities, since the mystique of teacher authority and I.Q. scores tends to overwhelm parents.”<sup>98</sup>

The district court granted a permanent injunction against the defendants’ use of standardized tests to identify and place African American students into EMR classes.<sup>99</sup> The court harshly criticized use of the I.Q. tests because “the tests were never designed to eliminate cultural biases against black children; it was assumed in effect that black children were less intelligent than whites.”<sup>100</sup> The court additionally required the defendants to discontinue the disproportionate assignment of African American children to EMR classes.<sup>101</sup> It is very disconcerting that defendants settled into “a complacent acceptance of those disproportions, and that complacency was evidently built on easy but unsubstantiated assumptions about the incidence of retardation or at least low intelligence among black children.”<sup>102</sup> To promote accountability from the defendants, the district court ordered the school districts to prepare an annual report for inclusion in a statewide report on racial assignments to EMR classes.<sup>103</sup> Any school district that had African American EMR enrollment of one standard deviation more than the district rate for White EMR enrollment was required to present a plan that would cut the discrepancy within three years.<sup>104</sup> In a fatal blow to the defendants’ claims, the court concluded that the plaintiffs “were not retarded” and thus should not have been placed in EMR classes at all.<sup>105</sup> The Ninth Circuit agreed with the district court conclusions.<sup>106</sup>

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<sup>96</sup> *Larry P.*, 495 F.Supp. at 979.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 950, n.51.

<sup>99</sup> *Id.* at 989.

<sup>100</sup> *Id.* at 956–57. *See also id.* at 955 (“the experts have from the beginning been willing to tolerate or even encourage tests that portray minorities, especially blacks, as intellectually inferior.”).

<sup>101</sup> *Larry P.*, 495 F.Supp. at 990.

<sup>102</sup> *Id.* at 983.

<sup>103</sup> *Id.* at 990.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 988; *Larry P. By Lucille P.*, 793 F.2d at 978.

<sup>106</sup> *Larry P. By Lucille P.*, 793 F.2d at 972–78. The appellate court faltered, however, in relying on intent as the measure of constitutional violation, *id.* at 984, for as discussed earlier in this Article, intent should not be a litmus test. In launching an official civil rights era for

In *Moses v. Washington Parish School Board*, the Eastern District of Louisiana ordered micro-desegregation of the Franklinton Elementary School (Louisiana) after finding “evil” in the school’s tracking program.<sup>107</sup> The court was very upset after discovering the extent of microsegregation:

Eighty-two percent of the white students in the system . . . were assigned to one of the top three sections in each grade while an average of 63% of all black students were assigned to the bottom three or four sections. Ninety percent of the students assigned to lower sections (D and below) over the past two years are black and significant percentages of the black enrollment of the school . . . have been assigned to all-black classes (generally the lowest two sections of each grade).<sup>108</sup>

Disgusted with the discriminatory practices, the court chastised the school district: “These figures reflect another evil of the ability-achievement homogeneous grouping as practiced in Franklinton Elementary—the minimal amount of fluidity within the system. . . . This lack of mobility tends to lock students, especially those in the bottom sections, into the same section throughout grammar school. Since black students comprise the bulk of the lower sections, they tend to be most adversely affected by this lack of mobility.”<sup>109</sup> As this court did, others need to call out microsegregation for what it is—evil that is very deleterious to minorities.

Orders to micro-desegregate do work even if gradually. Where there is slower pace implementation, courts have to intervene to enforce speedy accountability as occurred, for instance, in *Montgomery v. Starkville Municipal Separate School District*.<sup>110</sup> In that case, the District Court for the Northern District of Mississippi observed that, after it ordered micro-desegregation, “students were reassigned and desegregated. Facilities and educational programs were opened up to all students

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micro-desegregation, the Supreme Court should declare, as did the *Montgomery* district court, that “[i]f the results of achievement grouping are statistically abnormal, an inference of discrimination may be drawn.”

*Montgomery v. Starkville Mun. Separate Sch. Dist.*, 665 F. Supp. 487, 496 (N.D. Miss. 1987), *aff’d*, 854 F.2d 127 (5th Cir. 1988).

<sup>107</sup> *Moses v. Wash. Parish Sch. Bd.*, 330 F.Supp. 1340, 1343, 1345 (E.D. La. 1969) (*Moses II*).

<sup>108</sup> *Id.* at 1343.

<sup>109</sup> *Id.* at 1343–44.

<sup>110</sup> *Montgomery v. Starkville Mun. Separate Sch. Dist.*, 665 F.Supp. 487 (N.D. Miss. 1987).

regardless of color, and desegregation in the Starkville schools commenced.”<sup>111</sup> The court also ordered school officials to submit biannual reports that would facilitate judicial monitoring of progress.<sup>112</sup> The court observed that without the tracking program the classrooms would have reflected the proportional representations of the various races in the district: “The student population in Starkville is roughly divided equally among blacks and whites. Concededly, a random distribution of students would find this ratio reflected in the classrooms. Under achievement grouping, however, classes involving skill mastery have a degree of racial identification.”<sup>113</sup>

#### **D. Continuing Duty to Desegregate**

“Segregation perpetuates the barriers between the races; stereotypes, misunderstandings, hatred, and the inability to communicate are all intensified.”<sup>114</sup> Therefore, courts must aggressively confront microsegregation. As the Fifth Circuit has ruled, “[p]ublic school officials have a *continuing* duty to eliminate the *system-wide* effects of earlier discrimination and to create a unitary school system untainted by the past.”<sup>115</sup> Judicial enforcement of this continuing obligation for systemwide eradication should include tracking, because tracking is part of a school system’s policies and practices.

In interpreting and applying the Supreme Court desegregation jurisprudence to tracking, courts should heed the words of Chief Judge Lawrence of the Southern District of Georgia that “[u]nder latter-day Fourteenth Amendment interpretation, scholastic aptitude means nothing. *Total* integration of schools, regardless of consequences to the [school] system, [is] all that counts.”<sup>116</sup> “The fact that in many schools the equivalent of token integration has been carried out is of no legal moment; the Constitution is not appeased by tokenism.”<sup>117</sup>

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<sup>111</sup> *Id.* at 490. An Office of Civil Rights (OCR) complaint also led to the Starkville Schools abandoning teacher and counselor recommendations as criteria for placements due to their subjectivity. *Id.* at 496–97. Subsequently, the court found that the district had implemented better safeguards to allow reinstatement of teacher and counselor recommendations for placements. *Id.* at 502.

<sup>112</sup> *Montgomery*, 665 F.Supp. at 491.

<sup>113</sup> *Id.* at 495.

<sup>114</sup> *Hobson v. Hansen*, 269 F.Supp. 401, 504–05 (D.D.C. 1967).

<sup>115</sup> *Castaneda by Castaneda v. Pickard*, 781 F.2d 456, 461 (5th Cir. 1986) (emphasis added).

<sup>116</sup> *United States v. Bd. of Ed. of Lincoln Cty.*, 301 F. Supp. 1024, 1029 (S.D. Ga. 1969) (emphasis added).

<sup>117</sup> *Hobson*, 269 F.Supp. at 502.

With respect to nonunitary schools, courts should adopt the Fourth Circuit ruling that shifts in demographics should not excuse segregation: “Until a school system has discharged its duty to liquidate the dual system and replace it with a unitary one, the school’s duty remains in place. Until a unitary system is created, a school system is not absolved from this duty by reason of demographic changes.”<sup>118</sup> In fact, in the case of microsegregation, courts should extend this to unitary school systems since microsegregation has not had its plenary civil rights epoch. A blanket order regarding racially-identifiable classrooms should be imposed on all schools practicing microsegregation. This blanket order should state that “[a]ll classroom assignments shall be made on a racially non-discriminatory basis and in such a manner that no class is racially identifiable.”<sup>119</sup> This would be a quintessential order as it would not rest on intent, and its aversion to racially-identifiable classrooms is commendable.

We have Supreme Court precedent stating that “[s]chool boards have the *affirmative* duty to take *whatever* steps may be necessary to convert to a unitary system in which discrimination is eliminated.”<sup>120</sup> It is due time for courts across the country to rally to enforce this duty within America’s public schools to address classroom segregation.

## CONCLUSION AND IMPLICATIONS

It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long,

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<sup>118</sup> *Vaughns by Vaughns v. Bd. of Educ. of Prince George’s Cty.*, 758 F.2d 983, 988 (4th Cir. 1985) (citing *Lee v. Macon Cty. Bd. of Educ.*, 616 F.2d 805, 810 (5th Cir.1980)). *Accord Moses v. Wash. Parish Sch. Bd.*, 330 F.Supp. 1340, 1344–45 (E.D. La. 1969) (*Moses II*).

<sup>119</sup> *Moses v. Washington Parish Sch. Bd.*, 302 F.Supp. 362, 366 (E.D. La. 1969) (*Moses I*). This United States District Court, Eastern District of Louisiana ruling is notable as it is an absolute all-encompassing order. Another positive order could be patterned in Justice Harlan’s words: “Such relief . . . should consist of an order providing measures for achieving disestablishment of segregated school systems, and should, if appropriate, include provisions for *pupil and teacher reassignments, rezoning, or any other steps necessary to accomplish the desegregation of the public school system.* . . . Such relief shall become effective immediately after the courts, acting with dispatch, have formulated and approved an order that will achieve *complete* disestablishment of *all* aspects of a segregated public school system.” (Harlan, J., concurring) (emphasis added).

<sup>120</sup> *Board of Educ. of Lincoln Cty.*, 301 F.Supp. at 1030 (emphasis added).

the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.<sup>121</sup>

–Justice Marshall

In this vein of wisdom, we must confront as a nation the reality of tracking. The reality is that tracking is hurting minority students. The reality is that tracking perpetuates racial stereotypes of minority intellectual inferiority. The reality is that tracking leads to confirmation bias of inferiority through test scores as well as teacher and counselor recommendations and expectations. The reality is that tracking is condemning minority students to life sentences of poverty, limited opportunities and vicious cycles. The reality is that tracking is depriving minorities of equal educational opportunities. “The reality is that you can't close the achievement gap until you close the curriculum gap that is created by tracking. We have learned from experience that when teachers teach the same high-level rigorous curriculum to all students, the achievement gap narrows.”<sup>122</sup>

Schools should detrack into heterogeneous classrooms that use instructional strategies that work well with diverse students in heterogeneous classrooms. Such strategies include acceleration as well as cooperative learning models such as small-group teaching, Jigsaw, and Student Teams-Achievement Divisions (STAD).<sup>123</sup> Teachers should incorporate differentiated instruction models such as active processing activities, flexible grouping, concept maps, cue cards to scaffold learning, silent reading with purpose, extension activities, multiple entry points, individual conferences, differentiated questions, constructivist learning, and varied journal prompts.<sup>124</sup> Teachers should be provided professional

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<sup>121</sup> *Regents of University of California v. Bakke*, 438 U.S. 265, 401–02 (1978) (Marshall, J., concurring) (emphasis added).

<sup>122</sup> CAROL CORBETT BURRIS & DELIA T. GARRITY, *DETRACKING FOR EXCELLENCE AND EQUITY* 33 (2008).

<sup>123</sup> See BURRIS & GARRITY, *supra* note 122, at 105, 149–50 and MEIER ET AL., *supra* note 5, at 146 for more on these cooperative learning models.

<sup>124</sup> For more on these differentiated instruction models see BURRIS & GARRITY, *supra* note

development that teaches and coaches them how to work effectively with students of all races using these and other strategies in heterogeneous classrooms. Professional development should also be offered to retrain educators and to educate them on minority cultures so as to eliminate the low expectations paradigm ingrained in the tracking system. Similarly, lesson plans and extracurricular activities should be designed to teach students to value their peers of all races and to see them as coequals.

As Jeannie Oakes found in her extensive research, “heterogeneous grouping, reflecting not only the full range of student achievement and aptitudes but also the socioeconomic and ethnic diversity of schools would provide more equitable educational experiences than does a system of tracking.”<sup>125</sup> Indeed, detracking has been shown to improve student achievement—almost entirely closing the racial achievement gap in the Rockville Centre School District (New York), and earning South Side High School (New York) the Department of Education’s Blue Ribbon School of Excellence.<sup>126</sup>

School-community activities should be planned to bring families together from various racial backgrounds to foster interracial understanding and appreciation. These activities should feature curricular and extracurricular performances by students of various races so that parents can be educated about the potential and intelligence of students of all races.<sup>127</sup> Without this education, it would be difficult to get some parents to embrace detracking:

[D]etracking won’t seem logical to either teachers or parents unless credible school leaders counter some deeply held cultural beliefs: that innate ability is more important than schooling, that only some students can benefit from accelerated instruction, and that beliefs must be brought into teachers’ work as they revise the curriculum, design lessons, and develop assessments.<sup>128</sup>

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122, at 93, 100–02, 104 (Figure 6.1), 105–13, 114–18, 126–28, 150, 163–65.

<sup>125</sup> JEANNIE OAKES, *KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY* 206 (2d ed. 2005).

<sup>126</sup> BURRIS & GARRITY, *supra* note 122, at viii, 26.

<sup>127</sup> See *Hobson v. Hansen*, 269 F.Supp. 401, 419 (D.D.C. 1967) (“Negro and white children playing innocently together in the schoolyard are the primary liberating promise in a society imprisoned by racial consciousness. If stereotypic racial thinking does set in, it can best be overcome by the reciprocal racial exposure which school integration entails.”).

<sup>128</sup> BURRIS & GARRITY, *supra* note 122, at ix.

Community hostility to desegregation should never excuse microsegregation nor should it dictate the court's willingness to condemn the practice.<sup>129</sup> In the fight for micro-desegregation, more courts must take a resolute stand as did the Eastern District of Texas, which emphatically stated that "this Court remains undeterred by the opposition of popular opinion."<sup>130</sup> Righteousness and justice should not flinch, ripple, or whisper based on popular or unpopular opinion. We agree with Justice Sotomayor that "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination."<sup>131</sup> We must, without fear, guilt, derision, or shame, engage in racial conversations that will thwart the institutionalization of racism.

As the Supreme Court has ruled, "[t]he measure of any desegregation plan is its effectiveness."<sup>132</sup> If we are to truly address racial injustice and racial segregation in schools, we must confront them with race-conscious measures. Relying on race-neutral measures merely puts a Band-Aid on a gaping wound.<sup>133</sup> "This employment of race may be compared to the building of a back fire as a means of containing a conflagration. Skillfully done, carefully controlled, the back fire will work to extinguish the greater blaze and not function to increase the

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<sup>129</sup> See *United States v. State of Tex.*, 330 F.Supp. 235, 241 (E. D. Tex. 1971) ("Moreover, as has been established by the Supreme Court, community hostility to desegregation may not be permitted to interfere with the vindication of the constitutional right of children to receive equal educational opportunities." (citing *Cooper v. Aaron*, 358 U.S. 1 (1958))).

<sup>130</sup> *State of Tex.*, 330 F.Supp. at 241.

<sup>131</sup> *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting).

<sup>132</sup> *Davis v. Bd. of Sch. Com'rs of Mobile Cty.*, 402 U.S. 33, 37 (1971). See also *United States v. Lawrence Cty. Sch. Dist.*, 799 F.2d 1031, 1044–45 (5th Cir. 1986) ("a federal court's power to remedy segregation is not exhausted by its issuance of a decree that promises to, but does not, work.").

<sup>133</sup> See, e.g., Girardeau A. Spann, *Disintegration*, 46 U. LOUISVILLE L. REV. 565, 612 (2008) ("the suggestion that colorblind race neutrality could ensure equality simply ignores the centuries of baseline inequalities that preceded the Court's new commitment to colorblindness."). See also *id.* at 616 ("The Court was trying to advance a race-neutral agenda, that was rooted in the claim that race does not matter. However, it was trying to do so in a culture that has always been based on the core conviction—whether stated or unstated—that race really does matter a lot."); see also Derek W. Black, *In Defense of Voluntary Desegregation: All Things Are Not Equal*, 44 WAKE FOREST L. REV. 107, 138 (2009) ("ignoring race simply allows historical stigma to persist.").



devastation.”<sup>134</sup> The Constitution does not require school officials to exhaust “every conceivable race-neutral alternative” before using race-conscious measures.<sup>135</sup>

Courts need to view tracking for what it is—a vestige of notions and assumptions that underscored historical racial segregation. As Professor Rush reminds us, “dominant cultures largely control children’s education and impose identities on all of them.”<sup>136</sup> Tracking is a vehicle for the imposition of an inferior-identity complex for minorities. Moreover, tracking helps “dominant cultures that purportedly support the equality of all people nevertheless define equality in ways that promote their privileged status.”<sup>137</sup> If the dominant culture is truly dedicated to equality, then it is due season to root out microsegregation.

Abstention from desegregation reform, difficult conversations, and judicial engagement is not an option as classroom segregation will only continue to fuel racial arrogance, ignorance, discord, incivility, and distrust.<sup>138</sup> As Professor David Kirp remonstrates, “[t]hat segregated school districts historically offered an inferior education to black students does not justify maintaining such status differentials through the device of tracking.”<sup>139</sup> The longevity and tradition of historical practices should never countenance sentencing minority students to educational and intellectual penitentiary. Further, that the practices are subtle does not excuse overlooking or tolerating them. The Supreme Court acknowledges as much:

Yet it must be acknowledged that the potential for discrimination and racial hostility is still present in our country, and its

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<sup>134</sup> *Ho by Ho v. San Francisco*, 147 F.3d 854, 864 (1998). See also Elia V. Gallardo, *Hierarchy and Discrimination: Tracking in Public Schools*, 15 CHICANO-LATINO L. REV. 74, 82 (1994) (“The legal system, in fact, goes beyond ignoring the injustices of tracking by asserting that stratification mechanisms can be fair and neutral.”).

<sup>135</sup> *Grutter v. Bollinger*, 539 U.S. 306, 339. See Harvard Law Review, *supra* note 61, at 1321 (“concepts such as ability and intelligence have been deeply shaped by racism and . . . deference to professional expertise in these areas allows discrimination to operate through neutral channels.”).

<sup>136</sup> Sharon E. Rush, *Identity Matters*, 54 RUTGERS L. REV. 909, 911–12 (2002); Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease*, 78 CORNELL L. REV. 1, 5–6, 11–15, 35–41 (1992).

<sup>137</sup> Rush, *supra* note 136, at 912.

<sup>138</sup> Elizabeth S. Anderson, *Racial Integration as a Compelling Interest*, 21 CONST. COMMENT. 15, 22 (2004).

<sup>139</sup> David L. Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705, 763 (1973).

manifestations may emerge in new and subtle forms after the effects of de jure segregation have been eliminated. It is the duty of the State and its subdivisions to ensure that such forces do not shape or control the policies of its school systems. Where control lies, so too does responsibility.<sup>140</sup>

The time for patience has run out. As Professor Willis Hawley admonishes, “waiting out the demise of prejudice and discrimination is waiting for a miracle.”<sup>141</sup> It is time for the judiciary to earnestly rectify the injustice.<sup>142</sup> The march against microsegregation must start now so that, very soon, the “discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.”<sup>143</sup> To promptly ensure this, the judiciary must rethink its “decision to limit the ambit of the equal protection guarantee to calculated discrimination and thus exclude the less visible but equally harmful and more pertinent forms of unconscious racial aversion”<sup>144</sup>; otherwise the judiciary could be complicit in discrimination.<sup>145</sup>

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<sup>140</sup> *Freeman v. Pitts*, 503 U.S. 467, 490 (1992).

<sup>141</sup> Willis D. Hawley, *The Need for a Comprehensive Multi-Year Strategic Plan for Ending Racial and Ethnic Discrimination: A Focus on Schools*, 67 OHIO ST. L.J. 145, 145 (2006).

<sup>142</sup> In fact, “all governmental agencies, whether Federal or State, and whether through their executive, judicial or legislative functions, must act, at *all* times, to guard and secure the rights of all the people—regardless of race, color, or national origin—to enjoy equality and justice under the law.” *United States v. State of Tex.*, 330 F.Supp. 235, 250 (E. D. Tex. 1971) (emphasis added). Justice Sotomayor’s following exhortation to the judiciary is apropos to a call for judicial earnestness on micro-desegregation: “As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race does matter.” *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting).

<sup>143</sup> *Regents of University of California v. Bakke*, 438 U.S. 265, 403 (1978) (Blackmun, J., concurring).

<sup>144</sup> Donald E. Lively, *The Effectuation and Maintenance of Integrated Schools: Modern Problems in a Post-Desegregation Society*, 48 OHIO ST. L.J. 117, 125 (1987).

<sup>145</sup> *See, e.g., Spann, supra* note 133, at 608 (“I have argued in the past that the Supreme Court’s *invalidation of affirmative action plans* has had the effect of *freezing* the advantages that whites have impermissibly secured over racial minorities in the distribution of societal resources. When the Court permits whites to acquire resources through race-conscious discrimination, but then prohibits minorities from reclaiming a share of those resources through race-conscious remedies, it is like enacting a law that prohibits a runner from ever overtaking another runner who has received an illegal head start in a race. The current distribution of societal resources is simply built into the existing baseline, and the Court reads the Constitution as prohibiting race-conscious efforts to upset that baseline by redistributing those resources.”

Unless the Court has equivocated, deference and local control are “not sacrosanct” and must yield in obeisance to the Fourteenth Amendment.<sup>146</sup> Courts must be willing to step in when school districts are not upholding justice and the rights of minorities.<sup>147</sup> Courts should demand accountability from microsegregated schools by requiring such schools to give regular reports on the racial breakdown of students assigned to each classroom for every grade level.<sup>148</sup> Compliance monitors should be judicially-appointed to invigilate school’s microsegregation policies and practices.<sup>149</sup>

Standards for assigning students to classrooms should be entirely reformed to avoid racially-identifiable classrooms.<sup>150</sup> This is extremely important because “[n]othing in schools leaves children behind more systematically than tracking and ability grouping.”<sup>151</sup> Tracking continues to perpetuate a dual education system through microsegregation as does the testing used to assign students.<sup>152</sup> Mired in this injustice, the vicious

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(emphasis added)). See also Robinson, *supra* note 1, at 792, 797–804, 809–39 (providing examples of judicial complicity).

<sup>146</sup> Milliken v. Bradley, 418 U.S. 717, 744 (1974). Further, as the United States District Court, Eastern District of Louisiana, rightly observed, the “unmistakable” duty the Supreme Court imposes on school districts in granting local control is to abolish segregation and to exercise the local control on a “constitutionally valid basis.” Moore v. Tangipahoa Parish Sch. Bd., 304 F.Supp. 244, 246–47 (E.D. La. 1969). See Coal. To Save Our Children v. Buchanan, 744 F. Supp. 582, 587 (D. Del. 1990) (“Compliance alone cannot be the basis for preventing the court from acting if it turns out that the remedial decrees do not achieve their goal.”).

<sup>147</sup> *State of Tex.*, 330 F.Supp. at 242 and Hart v. Cmty. Sch. Bd. of Brooklyn, New York Sch. Dist. No. 21, 383 F. Supp. 699, 755 (E.D.N.Y. 1974) (affirming this and stating that courts have broad powers when they step in to address the constitutional violations). See also *Buchanan*, 744 F.Supp. at 590 (“The Third Circuit Court of Appeals has emphasized in this case that ‘[h]aving once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.’” (citing *Evans v. Buchanan*, 555 F.2d 373, 379 (3d Cir. 1977) (quoting *Davis v. Board of Sch. Com’rs*, 402 U.S. 33, 37 (1971))).

<sup>148</sup> The United States District Court for the Eastern District of Louisiana once required this and it is something other courts should be encouraged to embrace. *Smith v. St. Tammany Parish Sch. Bd.*, 302 F.Supp. 106, 110 (E.D. La. 1969); *Moore*, 304 F.Supp. at 253.

<sup>149</sup> The United States District Court for the Northern District of California endorsed this approach in *Diaz v. San Jose Unified Sch. Dist.*, 633 F.Supp. 808, 823–25 (N.D. Ca. 1985).

<sup>150</sup> Courts need to do this if the legislatures will not, in order to avoid continued microsegregation. The United States District Court, Middle District of Louisiana, did just that in *Carter v. School Bd. of West Feliciana Parish*, 569 F.Supp. 568, 572 (M.D. La. 1983) (“shall adopt non-discriminatory standards for the assignment of students and faculty to classrooms.”).

<sup>151</sup> OAKES, *supra* note 125, at 296. Professor Oakes came to this conclusion after several years of intensive and extensive tracking research.

<sup>152</sup> Testing should not be allowed for student assignment when it furthers resegregation.

cycle continues from tracked parents to their tracked children; and “[b]y foreclosing the chance for parents to challenge ability grouping successfully, the courts are denying African American [and Hispanic] children the opportunity to attain the high quality education their parents were refused.”<sup>153</sup> The analysis above shows that there is already enough legal foundation in the Court’s desegregation jurisprudence to enforce micro-desegregation. The Court need only enforce the constitutional justice and righteousness in its own words explored earlier herein. The Supreme Court must uphold the “affirmative responsibility” of school districts to ensure that “pupil assignment policies . . . are not used and do not serve to perpetuate or re-establish the dual school system.”<sup>154</sup>

Minority students have waited too long for the judiciary and school boards to act in equity in compliance with *Brown I*<sup>55</sup>—accordingly, an accelerated timeline for dismantling in-school segregation must be imposed and enforced. “The later the start, the shorter the time allowed for transition.”<sup>156</sup> This is no time for deliberate speed. Micro-desegregation deserves its own time in the limelight.

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Moses v. Wash. Parish Sch. Bd., 330 F.Supp. 1340,1345 (E.D. La. 1969) (*Moses II*).

<sup>153</sup> Nelson, *supra* note 56, at 375.

<sup>154</sup> Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 538 (1979) (*Brinkman II*) (citing Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 460 (1979)). See Coal. To Save Our Children v. Buchanan, 744 F. Supp. 582, 588 (D. Del. 1990) (“So long as the Board continues to have an affirmative duty to eliminate the vestiges of prior intentional segregation, it must do more than merely abandon its prior discriminatory purpose.” (citing *Brinkman II*, 443 U.S. at 538)). See also Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1, 778 F.2d 404, 410 (8th Cir. 1985) (“Moreover, the Supreme Court has held that [e]ach instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment.” (citing *Penick*, 443 U.S. at 459 and *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 413–14 (1977) (*Brinkman I*))).

<sup>155</sup> Courts must sound an urgent clarion call, as in *Diaz* when the United States District Court, Northern District of California, stated that “the court is nevertheless mindful of its *overriding* duty to ensure effective desegregation of a school system in which plaintiffs have been denied their constitutional rights for over fourteen years.” *Diaz v. San Jose Unified Sch. Dist.*, 633 F. Supp. 808, 827 (N.D. Cal. 1985) (emphasis added). Justice must no longer wait. Justice can no longer wait.

<sup>156</sup> *Lockett v. Board of Educ. of Muscogee Cty.*, 342 F.2d 225, 228 (5th Cir. 1965), *overruled in part* by *United States v. Jefferson Cty. Bd. of Educ.*, 380 F.2d 385 (5th Cir. 1967); *United States v. Bd. of Ed. of Lincoln Cty.*, 301 F. Supp. 1024, 1030 (S.D. Ga. 1969).

