FALLING OFF THE TRACK: HOW ABILITY TRACKING LEADS TO INTRA-SCHOOL SEGREGATION

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I. INTRODUCTION

It is often assumed in our modern society that racism is an issue of the past that has long since been abandoned. That is, however, not the case. Racism is still a prominent feature in our society; both in the form of blatant, boldly expressed racism, and covert, sometimes unrecognizable, ingrained racism. Racism is deeply ingrained in this country's public education system. Racism lives in public education through the practice of "ability tracking." Ability tracking directly leads to intra-school segregation, which is a violation of every child's right to a fair and equal education.

This article investigates the practice of racism in the public school system by way of intra-school segregation. The first section of this article is a detailed narrative about my personal observations of intra-school segregation. This section uses narrative, which is often used in the field of Critical Race Theory, to humanize the issue of racism in the public education system.

The second section of this article discusses some of the ways in which racism presents itself in the modern day public education system. This part explores how minority students are treated in schools today, as compared to how minority students were treated in schools right after they were forced to integrate.

The third section of this article discusses the landmark Court cases that outlawed school segregation. This section delves into the Courts' decisions, the rationales in those cases, and the flaws in those decisions.

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This part also suggests alternative outcomes to those cases by applying the framework the Courts should have used.

The fourth section of this article discusses the modern day case law that dealt directly with intra-school segregation occurring as a result of the practice of ability tracking. This section discusses the Supreme Court's failure to properly enforce its landmark school segregation cases in the modern day intra-school segregation cases, and the improper decisions that stemmed from that failure.

The fifth section of this article discusses the social science data that should be considered by the Courts when deciding intra-school segregation cases, as mandated by one of the Supreme Court's own landmark decisions. This section explores social science data concerning the consequences of separating students of different races. This section argues that those consequences have a significant negative impact on all children involved, especially the minority children.

The sixth section of this paper discusses again the modern era intra-school segregation cases. This section suggests what the outcome of those cases should have been if the Courts properly considered the social science data discussed in the previous section of this article.

II. A TALE OF INTRA-SCHOOL SEGREGATION

Often, people ask me about my high school experience. I almost always give them a positive response, detailing the great programs my school offered and the wonderful teachers who pushed me and made sure I succeeded; which is a truthful response. I received an exceptional education during all four years of high school. My personal experience, however, is not an accurate representation of what other students in my high school experienced.

Located in a small, urban city, my alma mater was exceptionally and refreshingly diverse. There was about the same number of White and Black students enrolled, and a fair number of Hispanic and Asian students as well. The administration prided itself on the diversity within the school; however, despite the outward appearance of diversity, my alma mater was far from the picture of equality everyone was trying to paint.

The school I attended was internally divided, in two different ways. First, the school was split into four different houses, divided by varying areas of interest. Second, each house was split into ability groups: regents, advanced regents, and honors. The students were able to choose which house they wanted to be in but were not in control of the ability group they were placed in. I chose to be in the house that focused on the fine arts. The

fine arts classrooms were in the newest wing of the school and I was very motivated to pursue as many art classes as possible.

Within the art house, I was in the honors ability group. The school placed students into ability groups using their discretion. However, in order to be placed in the honors program, students first had to take a test to qualify, a parent or guardian had to attend meetings about the program, and the student had to complete a series of summer assignments. Also, in twelfth grade there was a monetary fee to participate in some of the honors classes if the student wanted those classes to also be counted as college credits.

My honors classmates were predominately White students who were middle class or higher. There were very few minority students or poor students in the honors classes in which I was enrolled. Though I did not have any classes in the lower two ability levels, from brief observations, it appeared that the advanced regents' classes were usually racially balanced, and for the most part, an accurate representation of the racial composure of the school, and the regents' classes were composed of more minority students than not. The racial inequality in the school was very apparent to me, and therefore, should have been obvious to the administration. It was certainly clear that the highest ability track in my high school was composed of mostly White students, in a school that was just as Black as it was White, and the lowest ability tracks were composed of almost all minority students, or lower class White students.

Thus, I learned more than art, math, and science, in my high school years. I learned that intolerance and discrimination lurk in the places you least suspect. I learned that sometimes lack of equality is not visible on the surface and that to discover injustice, you have to dig a little deeper. I learned that complacency is just as damaging and dangerous, if not worse, than outright racism. My high school bragged about diversity, and yet was completely satisfied with intra-school segregation. The school boasted about student diversity, yet they turned a blind eye to the practice of keeping the minority students out of sight and without equal opportunities. There was nothing done to ensure that all students who attended my high school got the best education possible. So, while my experience was outstanding, the experiences of others were abysmal. My high school experience opened my eyes to the ways of the modern world. I can see now, like I did then, that minority children in the public education system are still not treated equally, and they are still not given the opportunities that the White students are given. It is unquestionable that this practice needs to change. Minority children need advocates, as much now as they

ever have, to speak out and fight to change the way they are treated within the public education system.[1]

III. BLINDNESS TO INTRA-SCHOOL SEGREGATION

During my time at my alma mater,[2] it was easy to see the disadvantage the minority children suffered because of ability tracking.[3] Not only were minority students underrepresented in the highest ability group, they were overrepresented in the lowest ability groups.[4] The lowest ability groups were dominated by minority students in a school that was composed equally of Black and White students. The minority students were not put on the track to succeed; they were put on the track to stay out of the way. They were put into a section of the school where the overall goal was not to do all that they could possibly do, they were just supposed to do the bare minimum and not a lot was expected of them. Nobody seemed to notice or care. Even as a high school student I could see that there was a large discrepancy between the race ratios of the school's population and the race ratios of each ability track. If this was obvious to a high school student, it must have been obvious to adults. So, people must

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[1] The personal examples contained herein are based on my memories and personal experiences, and, as such, should not be deemed infallible, but rather, should be viewed as illustrative. Narratives, such as this, have been traditionally used in Critical Race Theory academic writing as a way to emphasize and personalize the effects of racism. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1394 (1991). *See* Charles Lawrence III, *Listening for Stories in All the Right Places: Narrative and Racial Formation Theory*, 46 LAW & SOC'Y REV. 247 (2012); *see generally* Derrick Bell, *The Supreme Court, 1984 Term: Foreward: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).

[2] I attended a large public high school from September 2003 through June 2007. At the time of my attendance, there were approximately 2,500 students enrolled collectively in the grade levels taught at the school, ranging from 9th grade through 12th grade.

[3] Angelia Dickens, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469, 470 (1996) (Ability tracking is the practice of assigning groups of students to a specific curriculum based on ability. The composure of ability tracks are often determined by academic tests, teacher recommendations, and/or student performance.).

[4] In 2003, the school district of my alma mater was the subject of a federal civil rights investigation. The Federal Office of Civil Rights began the investigation when it was determined that a disproportionate number of non-White students were being labeled "emotionally disturbed" and placed into special education classes, which, in ability tracking terms, is the lowest ability track. Investigators found that some teachers referred minority students based on problems that were not as severe as problems some White students had, whom they did not refer to special education, faced. Kathleen Moore, *Special Education Changes in Motion in Schenectady*, THE DAILY GAZETTE (Nov. 19, 2013), http://www.dailygazette.com/news/2013/nov/19/1119_ special/?print.

have either been purposely ignoring the problem, or they were at peace with it.

A. Intra-school Segregation: A Response to Desegregation

My high school was much like the high schools that Derrick Bell discussed in *Silent Covenants*.[5] Those schools had technically been desegregated in the years after the *Brown* v. *Board of Education* decision,[6] yet the Black children were being internally segregated, either to a separate part of the classroom, or to a separate part of the school.[7] In *Silent Covenants*, Bell discussed Ray Rist's year-long observation of a desegregation program in an all-White elementary school in Portland, Oregon.[8] The observed school had a policy of racial assimilation.[9] The goal of this policy was to make the Black kids "act, speak, and behave very much like the White students."[10] Most of the Black students that Rist observed did not fare well in the newly desegregated school.[11] One of the reasons that they did not fare well was because the teachers, who were all White, physically separated the Black students from the White students within the classroom.[12] However, the parents of the Black children, Rist writes, had their children go to the newly-integrated school in Portland, not because of what the new school was, but because of what their old schools were.[13] The children were being taken away from all-Black schools that had fewer resources and opportunities than the White schools.[14] The parents of the Black children could either keep their children in schools that were terribly underfunded, understaffed, and had subpar educational resources, or they could place their children in the newly-desegregated White schools where their children would, at least potentially, have the access to educational materials and resources that were not available at their former schools.[15]

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[5] DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 121 (2004).
[6] Brown v. Bd. of Educ., 347 U.S. 483 (1954) (*Brown v. Board of Education* is the landmark Supreme Court decision in which the Court concluded that separate schools were not in fact equal. This decision declared school segregation unconstitutional. It also overruled the case Plessy v. Ferguson, 163 U.S. 537 (1896).).
[7] BELL, *supra* note 5, at 122.
[8] *Id*. at 121–23.
[9] *Id*. at 121–22.
[10] *Id*. at 122.
[11] *Id*. 122–23.
[12] *Id*. at 122.
[13] *Id*. at 123.
[14] *Id*.
[15] *See id*.

Not much has really changed since the time when Rist observed the children in that Portland school[16]. The Supreme Court has not ruled against segregation of races within schools through ability tracking. Therefore, things have remained the same. The fact of the matter is, as of 2007, when I graduated from my former high school, it was still internally segregated.[17] The administrators can boast about diversity and enrollment percentages, but those words and those numbers do not mean anything because inside the walls of the school, the Black children are struggling. They are not struggling because there is something wrong with them, or because they cannot handle the same work as the other children; they are struggling because nobody is pushing them, and nobody is telling them to become as great as they possibly can. This might seem like nothing, but to a child in school, it is everything.

B. The Criminalization of Minority Students' Behavior

In my high school career, though I skipped at least one hundred school days, possibly more, I only was punished for skipping school[18] once. I know that I was treated differently. My teachers all liked me and they never turned me in. I know that other children in my school were not as lucky. It appeared that many teachers and staff treated White children differently[19] than they treated Black children. I, like many of the other

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[16] *See generally* RAY C. RIST, THE INVISIBLE CHILDREN: SCHOOL INTEGRATION IN AMERICAN SOCIETY (1978) (discussing how Ray Rist observed Brush Elementary School in Portland, Oregon during the 1973-1974 school year).

[17] Vivian Yee, *Grouping Students by Ability Regains Favor in Classroom*, N.Y. TIMES (June 9, 2013), http://www.nytimes.com/2013/06/10/education/grouping-students-by-ability-regains-favor-with-educators.html?_r=0 (According to a recent article in the New York Times, the use of ability grouping among students has actually increased steadily since the mid-1990s. According to one study, in 2009, 71 percent of fourth grade teachers grouped students by reading ability, as compared to 1998, when only 28 percent of teachers used ability grouping to teach reading. Also, in 2011, 60 percent of fourth grade teachers practiced ability grouping for math, which is an increase from 1996, when only 41 percent of fourth grade teachers practiced ability grouping when teaching math.).

[18] The term "skipping school" refers to a child purposely leaving or being absent from school, without giving notice to the school and without permission from the child's parent or guardian. This is also known as "truancy."

[19] As I observed and experienced, White children were given much more leniency when it came to disciplinary issues, where Black children seemed to be punished more often and given harsher punishments. As a specific example, I was once caught walking away from school by the Dean of Discipline, who was riding in a police van with a police officer. When he saw me, the Dean, who was my former honors science teacher, stuck his head out of the window and told me to go back to school. After arguing for a few moments, I walked back to school. When I returned to school, I witnessed the Dean and the police officer escorting several Black male students from out of the back of the van, into the school, where

White students, got away with truancy on a regular basis. However, the minority children did not appear to be as lucky. The one time I did get in trouble for skipping, I was punished by having to spend one day in in-school suspension.[20] When I walked into the in-school suspension room, I was surprised to see the composition of the room. It was, in fact, a surprisingly accurate representation of how the prison system looks.[21] When I entered that room, I was one of only a few White students, and the other White students that were there clearly were economically disadvantaged. All of the other students in the in-school suspension room were Black or Hispanic.

The racial composition of the in-school suspension room in my alma mater reinforces the theory that public schools criminalize the behavior of minority children, and that such a criminalization sets them on the path of a lifetime of conflict with authority and confinement.[22] For many children, skipping school and the punishments that follow become a serious problem. In fact, skipping school is no longer just skipping; it has been criminalized as truancy.[23] Children who are truant[24] are now treated like they are criminals. Some towns have even implemented the use of truancy officers, also known as attendance officers.[25] In states like New York, truancy officers have the authority to arrest a child, without a

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they proceeded to walk towards the Dean's office. I, as a White student, was just told to go back to school without any consequences. The Black students clearly were escorted in a police vehicle and, presumably, were punished for their doing the same thing I was doing.

[20] *See* Brent E. Troyan, *The Silent Treatment: Perpetual In-School Suspension and the Education Rights of Students*, 81 TEX. L. REV. 1637, 1637 (2003) (In-school suspension is a form of punishment for students, in which students attend school, but instead of going to their normal classes, they are placed into one room with all the other students receiving the same punishment. They are made to stay in the one room for the entire day, while being monitored by a staff member. They are not taught by any teachers during their punishment and only sometimes have to complete academic work assigned from the classes they are missing. The time spent in-school suspension does not count as an absence from the classes that the student missed while they were being punished.).

[21] Mac Maurer & Ryan S. King, *The Sentencing Project, Uneven Justice: State Rates of Incarceration by Race and Ethnicity,* THE SENT'G PROJECT 11, 14 (July 2007), http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf (In 2005, the ratio of Black inmates to White inmates in New York State Prisons was about 9:1, while the ratio of Hispanic inmates to White inmates was about 4:1.).

[22] *See* Tona M. Boyd, *Confronting Racial Disparity: Legislative Responses to the School-to-Prison Pipeline*, 44 Harv. C.R. & C.L. L. Rev. 571, 573–74 (2009).

[23] *See* Chauncee D. Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009, 1028–29 (2009).

[24] N.Y. EDUC. LAW § 3213(2)(a) (McKinney 2013) (defining "truant" as being unlawfully absent from school).

[25] *See id*. § 3213(1)(b).

warrant, if they determine that the child is truant.[26] Once a truancy officer has a truant child in custody, he must notify the legal guardian of the child.[27] The truancy officer can bring proceedings in court against the child to have him declared a school delinquent or have the child arraigned for truancy in front of a judge that has jurisdiction over the child.[28] Truancy can also lead to additional punishments by the school, such as detention, in-school suspension, and out of school suspension.[29]

The criminalization of children who skip school is one of the beginning steps to creating a "school-to-prison pipeline."[30] The term "school-to-prison pipeline" is commonly used to refer "to the policies and practices that" lead already disadvantaged, at-risk students from the school system into the criminal justice system.[31] Education systems and programs that create a school-to-prison pipeline add to the abundance of disadvantages that minority students face.[32] The school-to-prison pipeline adds to the disadvantages that minority children face by criminalizing their behavior when they are young, which greatly multiplies[33] their chances of being sent to prison when they are adults.[34] This means that not only do children get less than the education to which they were entitled, they also suffer legal consequences that can affect their entire lives.[35]

IV. THE SUPREME COURT'S DESEGREGATION DECISIONS

The treatment of minority children in modern day schools reflects the fact that *Brown*[36] did not do nearly as much as was needed.[37] Public

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[26] *See id.*§ 3213(2)(a)-(b).
[27] *Id*. § 3213(2)(d).
[28] *Id*. § 3213(2)(a).
[29] Smith, *supra* note 23, at 1028-29.
[30] *Id*. at 1028.
[31] Boyd, *supra* note 22, at 573.
[32] *See* Smith, *supra* note 23, at 1028–30.
[33] *Id.* at 1016 (Research supports that children who are arrested during high school are two times more likely to drop out of school, and those who have to make an appearance in court are about four times as likely to drop out of school. Kathleen DeCataldo & Toni Lang, *Keeping Kids in School and Out of Court*, 83 N.Y. ST. B.J. 26, 27 (2011). It has also been shown that people who dropped out of school are three and a half times more likely to become incarcerated.).
[34] Smith, *supra* note 23, at 1016.
[35] *See id*. at 1016-17.
[36] *See* Moore, *supra* note 4 (The treatment of minority students that attend my alma mater is a prime example of the way that the *Brown* case fails to fully protect minority students from segregation. Black students at my alma mater were segregated from White students within the school by way of a system of intra-school segregation, in which Black students were highly disproportionately placed into the lowest ability track without justification, while

school districts should have to monitor the racial composition of classes, ability levels, and other lines of division within schools. The racial composition of the lowest ability tracks in my former high school should have raised serious flags for the school district. If it did, they did not act on it while I was in school.[38] Intra-school segregation is segregation. Intra-school segregation is a serious problem that comes in different forms. It manifests as the more obvious ability grouping,[39] but also in less palpable ways, such as the housing scheme at my alma mater.[40]

A. Brown v. Board of Education and What Could Have Been

Brown v. Board of Education, is one of the most well-known cases the United States Supreme Court has decided.[41] On the surface, *Brown* is a

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White students that could have more justifiably been placed into the lowest ability track were not. The *Brown* decision did not address or prevent such intra-school segregation.).

[37] *See generally* Taunya L. Banks, *Brown at 50: Reconstructing Brown's Promise*, 44 WASHBURN L.J. 31 (2004); Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1 (1992); Robert L. Hayman, Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 WIS. L. REV. 627 (1993); Leland Ware, "*Deliberate Speed": Implementing Brown's Ambiguous Mandate*, 22 DEL. LAW. 26 (2004).

[38] *See* Kathleen Moore, *Schenectady Schools Chief Working to Boost Advanced Classes*, THE DAILY GAZETTE (Apr. 21, 2014), http://www.dailygazette.com/news/2014/apr/21/0421schdyschools (In an April 2014 article, the superintendent of my alma mater's school district claimed that the school district was changing the procedures used to place students in ability levels by eliminating the requirement of teacher recommendations and instead focusing on less subjective forms of measuring academic ability. The superintendent stated that this change in procedure could help to close the achievement gap between White and minority students throughout the district.).

[39] Elia V. Gallardo, *Hierarchy and Discrimination: Tracking in Public Schools*, 15 CHICANO-LATINO L. REV. 74, 83 (1994).

[40] *See supra* Part I.

[41] The *Brown* case has been written about exhaustively since it was decided in 1954. Over fifty years later, it is still the subject of a profound number of works. BRUCE ACKERMAN ET AL., WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID (Jack M. Balkin ed., 2001); BELL, *supra* note 5; ANN E. BURNETTE ET AL., BROWN V. BOARD OF EDUCATION AT FIFTY: A RHETORICAL RETROSPECTIVE (Clarke Rountree ed., 2005); ROBERT J. COTTROL ET AL., BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION (2003); JACK GREENBERG, BROWN V. BOARD OF EDUCATION: WITNESS TO A LANDMARK DECISION (2004); MICHAEL J. KLARMAN, BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT (2007); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (2004); TIM MCNEESE & CHELSEA HOUSE, BROWN V. BOARD OF EDUCATION: INTEGRATING AMERICA'S SCHOOLS (2006); JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2002); CHARLES J. OGLETREE, ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION (2005).

revolutionary case that provided justice for minorities who struggled for so many years to gain equality; however, in the case of *Brown*, an in-depth and critical examination is required. When talking about *Brown,* it is important not just to talk about what it was, but also what it could have and should have been.[42] While many people view *Brown* as the end to a long, hard-fought battle, it was really just the beginning.

The case *Brown v. Board of Education* was a combination of four separate cases[43], from four states.[44] While the facts of each case were different,[45] all of the plaintiffs were asking the court to allow them to attend the public schools in their community on a desegregated basis.[46] All of the plaintiffs involved were Black children who were not allowed to attend public schools that were designated only for White children because there were laws mandating or allowing for segregation of public schools based solely on race.[47] The plaintiffs in *Brown*, alleged that their Fourteenth

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[42] *See generally* ACKERMAN ET AL., *supra* note 41.

[43] The cases that were combined in *Brown v. Board of Education* originated in Virginia, South Carolina, Kansas, and Delaware. Brown v. Bd. of Educ. 347 U.S. 483, 486 (1954).

[44] *Id.*

[45] *Id.* at 486 n.1 (In the Kansas case, *Brown v. Board of Education*, there was a law that permitted, but did not mandate, separate but equal schools. The defendants in that case elected to have segregated schools. The plaintiffs, elementary school children who were segregated against, argued that the law allowing for separate schools violated their rights. The United States District Court denied their claim, stating that the schools were equal and therefore the rights of the children were not violated. The case was brought to the United States Supreme Court by way of the plaintiff's direct appeal. In the South Carolina case, *Briggs v. Elliott*, high school and elementary school age children brought an action against their school district. They argued the laws that required schools to be segregated must be prohibited. The United Stated District Court in that case ordered that the separate schools be made equal, but did not strike down the law. The plaintiff's case went to the United States Supreme Court on direct appeal. In the Virginia case, *Davis v. County School Board*, the high school aged plaintiffs brought an action against the school district, claiming the laws that mandate segregation of public schools should not be followed. The United States District Court denied the plaintiffs request for relief on the basis that the separate schools were equal. The plaintiffs brought their case to the United States Supreme Court by way of direct appeal. In the Delaware case, *Gebhart v. Belton*, the plaintiffs, consisting of both elementary and high school age Black children, brought a claim against the county they lived in, asking the Delaware Court of Chancery to prohibit schools from following the laws that mandated the segregation of public schools. The court ordered that the plaintiffs immediately be admitted to the schools that were previously designated for White children only, based on the fact that the separate schools were inferior. The decision of that court was affirmed by the Supreme Court of Delaware. A writ of certiorari from the defendants, claiming that the court erred in mandating immediate admission of Black children into schools designated for White children, was granted by the United States Supreme Court.).

[46] *Id*. at 487.

[47] *Id*. at 487–88.

Amendment Equal Protection rights[48] were violated by these pro-segregation laws and that segregated public schools were not equal and could never be made equal.[49] In the end, the Supreme Court of the United States agreed with the Plaintiffs.[50]

In its *Brown* decision, the Supreme Court stated that public education was one of the "most important function[s] of state and local government."[51] The Court also stated that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[52] The Court also stressed that this right must be made available to every person on equal terms.[53] In deciding *Brown*, the Court looked at the issue of segregation and how it affects public education.[54] The Court concluded that segregation of public schools based only on race deprived the children of the minority segregated group of equal education opportunities, even if the schools that they were separated into were thought to be equal.[55] In the *Brown* opinion the Court states, "[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[56] By coming to this conclusion, the Court overturned its decision in *Plessy v. Ferguson,*[57] which stated that segregated schools were legal as long as they were equal.[58] In overturning *Plessy*,[59] the Court determined that "separate

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[48] Pamela W. Carter & Phoebe A. Roaf, *A Historic Overview of Brown v. Board of Education*, 51 LA. B.J. 410, 412 (2004) (In their respective cases the plaintiffs argued that the segregation laws of the states in question violated the 14th Amendment by denying persons within the states' jurisdictions the equal protection of the laws by mandating or allowing public schools to be segregated.).
[49] Brown, 347 U.S. at 488.
[50] *Id*. at 495.
[51] *Id*. at 493.
[52] *Id*.
[53] *Id*.
[54] *Id*. at 495.
[55] *See id.* at 493-94.
[56] *Id*. at 494.
[57] *See generally* Plessy v. Ferguson, 16 S. Ct. 1138 (1896), *overruled by* Brown v. Bd. of Educ. 347 U.S. 483 (1954) (In *Plessy v. Ferguson*, Homer Plessy, who was 7/8th White and 1/8th Black, refused to sit in a Louisiana railway car designated for Black occupants only. Plessy was subsequently arrested for violating the Louisiana law that required all railway cars to be segregated. Plessy challenged the law, stating that mandating the segregation of railway cars violated the Fourteenth Amendment's Equal Protection clause by denying him liberty without due process of the law. The Court disagreed, stating that Plessy was entitled to protection under the fourteenth amendment, but that the segregation of public places did not violate that right.).
[58] *Brown*, 347 U.S. at 494-95.
[59] *Id.* at 494-95. ("Any language in *Plessy v. Ferguson* contrary to this finding is rejected.").

but equal" did not have a place in the field of public education.[60] The Court looked at available social science data and concluded that those modern authorities supported the assertion that separate can never be equal.[61] Separate schools were declared "inherently unequal" institutions that deprived the segregated students of their Equal Protection rights guaranteed by the Fourteenth Amendment.[62]

After the Court in *Brown* found that segregated public schools violated the rights of the segregated children, they did not immediately issue a decree that stated how to remedy that injustice.[63] Instead, the Court asked the attorneys involved to prepare briefs pertaining to what should be done to remedy the injustices suffered by the plaintiffs.[64] The Court then restored the case to the docket.[65] So, although the Court found that segregated schools violated the Fourteenth Amendment in *Brown*, it did not issue any decree in the first *Brown* decision.[66]

Brown brought to an end the practice of having separate, and supposedly equal, public schools for children of different races.[67] The *Brown* case's declaration that the practice of segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment was the outcome that civil rights attorneys had diligently worked towards for years.[68] But *Brown* was missing an important component: a remedy.[69] The Court in *Brown*, decided that the desegregation of public schools was such a complex issue that it did not have an immediate plan of action to make it happen.[70] After all the work put into making *Brown* happen, minority children and their civil rights attorneys would have to wait for a plan to stop what the court had already ruled to be unconstitutional.[71] That plan came with the announcement of the decision, *Brown II*.[72]

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[60] *Id*. at 495.
[61] *Id*. at 494, 496 n.11.
[62] *Id.* at 495.
[63] *See id.* at 495-96.
[64] *Id*. at 495.
[65] *Id*.
[66] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).
[67] Dickens, *supra* note 3, at 472.
[68] *See* Ware, *supra* note 37 at 26 (Two decades before the *Brown* decision was decided, lawyers associated with the NAACP planned to build a base of case decisions in their favor regarding equalization of separate facilities, before directly challenging *Plessy v. Ferguson* and the separate but equal rule. After they had a strong background of equality decisions that were decided in their favor, the lawyers associated with the NAACP and proceeded to challenge separate but equal in the form of the *Brown* case.).
[69] *Id*.
[70] *Brown,* 347 U.S. at 495.
[71] *See* Ware, *supra* note 37, at 26.
[72] *Id.*

B. The Disappointment of Brown II

In the second decision under the case *Brown v. Board of Education*, henceforth known as *Brown II*, the Court stated the way in which relief for the plaintiffs would be accorded.[73] The Court declared that in order for the constitutional principles of Equal Protection violated by segregation in public schools to be remedied, there would be various solutions based on each individual situation, and a set of problems in each public school.[74] The Supreme Court stated that the lower state courts have to consider the actions of the authorities of each school and whether those actions are sufficiently compliant with the principles of the Constitution.[75] That job was given to the state courts, as opposed to the Supreme Court, because as the Court explained, the proximity of the state courts to the "local conditions and the" potential "need for further hearings" and supervision lead the Court to believe that the state courts could better handle those cases.[76] Therefore, the Court remanded each individual case to the court in which it was originally heard.[77]

Before the Court sent the cases back to the state courts, it set some guidelines for the lower courts.[78] The Court stated that the principles of the Constitution involved in this case could not be ignored by the lower courts, whether the judges agreed with them or not.[79] Furthermore, the Court announced that the lower courts must insist on "a prompt and reasonable start toward" complete compliance with the ruling in the first *Brown* decision.[80] However, the Supreme Court did say that the lower courts can give schools more time to implement the ruling in *Brown,* as long as the schools can show that more time is necessary to implement the ruling, but the schools must comply with *Brown* at the earliest possible date.[81] After the Court set out these guidelines[82], it remanded the cases to the lower courts with instructions to comply with *Brown* and *Brown II*. [83]

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[73] *Brown*, 349 at 298.
[74] *Id*. at 299.
[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] *See id.* at 300–301.
[79] *Id.* at 300.
[80] *Id*.
[81] Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955).
[82] *Id*. at 301.
[83] Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457, 459 n.4 (1997) (The Court in *Brown II* did not, however, take into account the amount of influence placed on judges by individuals and groups with anti-integration beliefs. Judges were under tremendous pressure to rule against integration. Those who spoke out in favor of integration were placed in immediate danger. For example, when a judge in South Carolina dissented to

In *Brown II*, the courts stated that desegregation of schools had to be done "with all deliberate speed."[84] The term "all deliberate speed" did not have a clear meaning and was never legally defined.[85] As Derrick Bell explained in *Silent Covenants*, for those who did not support desegregation, "all deliberate speed" was interpreted to mean never.[86] The sentiment that "all deliberate speed" meant never has been made clear over time through practices such as integrated schools maintaining a population consisting of all or mostly all students of one race, as well as integrated schools with diverse populations keeping students of different races separate, by the practice of intra-school segregation. Bell explained that there was a disappointment among Black people when *Brown* did not give any remedy to the problem of segregated public schools, and then again one year later when *Brown II* returned the cases to the state courts for enforcement.[87] Bell further explained that while Black people were disappointed by the decisions in *Brown* and *Brown II*, they were not surprised.[88]

When it came to implementing an actual, concrete timeline for schools to desegregate, the Supreme Court left that duty to the state courts.[89] It was up to each individual state to come up with a timeline and plan for the desegregation of public schools.[90] The combination of *Brown II*'s vague and unspecific language with the delegation of power to the states, paved the way for years of debates, delays, and an overall lack of cooperation.

C. Dowell's End to the Desegregation Era

After the *Brown* and *Brown II* decisions were released, there was a vast part of the population that delayed their compliance with them, or altogether ignored the ways in which the *Brown* cases were supposed to be followed.[91] This movement, known as "massive resistance," continued for years and successfully hindered the progress of desegregation.[92] The turmoil and disobedience that followed *Brown* and *Brown II* came to a head in the 1991 Supreme Court case *Board of Education of Oklahoma City*

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a decision that upheld segregation, that judge was forced to leave his home in South Carolina, and take refuge in New York, for the remainder of his life.).

[84] *Brown,* 349 U.S. at 301.

[85] BELL, *supra* note 5 at 18.

[86] *Id.*

[87] *Id*.

[88] *Id*. at 19.

[89] *Brown*, 349 U.S. at 300.

[90] *Id*.

[91] Ware, *supra* note 37, at 26.

[92] *Id*.

Public Schools v. Dowell.[93] In this case, the Supreme Court ruled that as long as the school districts took all "practicable" steps to eliminate segregation from schools, they would be in compliance with the law, even if segregation still existed within the schools.[94] This case put an end to many *Brown* compliance practices, including busing children to schools outside of their districts in order to ensure that all schools were desegregated.[95]

In the case *Board of Education of Oklahoma City Public Schools v. Dowell,* a desegregation plan that involved busing students was put into place for Oklahoma City in order to get rid of their segregated school system.[96] After the plan was in place for five years, the court closed the case and ended their formal supervision of the schools of Oklahoma City.[97] The district court closed the case of *Oklahoma City* because they were satisfied with the process that the school had made in integrating their schools, and the court felt that the schools would not fall back into segregation.[98] Seven years after the court closed the *Oklahoma City School District* case, the school district changed the way they determined which child attended which school.[99] The schools completely stopped busing students from kindergarten through fourth grade.[100] Instead, these children were assigned to their school based on the neighborhood that they lived in.[101] For children in fifth grade and up, busing continued.[102]

When the new school plan went into effect, a motion was filed to reopen the *Dowell* case.[103] The respondents alleged that the new way of determining which child went to which school led the school district back to segregation.[104] They argued that since neighborhoods were largely segregated, the majority of the Oklahoma City schools would, again, become segregated.[105] The District Court denied the request to reopen the case and ruled that the district had achieved unitary status and that the educational facilities within the district were not segregated.[106] The Supreme Court in this case agreed with the District Court, and stated that as

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[93] *See generally* Bd. of Educ. v. Dowell, 498 U.S. 237 (1991).
[94] *Id*. at 249–50.
[95] *Id.* at 242.
[96] *Id*. at 241.
[97] *Id.*
[98] *Id*. at 241–42.
[99] *Id.* at 242.
[100] *See Id*.
[101] Bd. of Educ. v. Dowell, 498 U.S. 237, 242 (1991).
[102] *Id*.
[103] *Id*.
[104] *Id*.
[105] *Id.*
[106] *Id*. at 242–43.

long as the school district was making a good faith effort to remedy the segregation of the past, the school district did not have to be under the supervision of the District Court, and the case would not have to be reopened.[107] The Court did not strike down the Oklahoma City School District's abandonment of the busing system, for a system that determined school assignment by residential neighborhood.[108]

Dowell is a highly detrimental case for several reasons. It put an end to any actual efforts by districts to actively ensure that their schools were desegregated. By issuing the decision in *Dowell*, the Court stepped away from the decision that they made in *Brown II*, which asserted that all states must desegregate within a reasonable time.[109] *Dowell* does not stress the importance of desegregation, but the decision seems to say that a reasonable effort is enough, and if desegregation does not happen, then it just does not happen.[110] In a sense, a case like *Dowell* could put some schools farther back than they were before *Brown*. After *Dowell*, desegregation was not a necessity, and the lower quality schools that were still primarily attended by minorities did not even have the hollow rule of "separate but equal" to fall back on.[111]

D. The Consequences of Dowell

In *Silent Covenants*, Derrick Bell discussed what he thought was the actual reasoning behind the *Dowell* decision.[112] Bell discussed how *Dowell* showed the sentiment of the Court at the time of the decision.[113] As Bell discussed, the Court was fatigued and overwhelmed with the amount of litigation and supervision the desegregation cases before the Court required.[114] The schools that were still involved in desegregation cases required active supervision by the courts involved, which was hard for the courts to manage.[115] Because of this, Bell stated, the Court seemed to jump at "every opportunity to release school[s]" from the court-ordered obligation of desegregation.[116] This occurred even when there was still a great racial imbalance in schools, and it was likely that re-segregation of

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[107] *See id*. at 249–50.
[108] *See id*. at 250.
[109] Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955).
[110] Bd. of Educ. v. Dowell, 498 U.S. 237, 260 n.5 (1991).
[111] *See id.*
[112] *See* Bell, *supra* note 5, at 126.
[113] *Id*.
[114] *Id*.
[115] *See id*.
[116] *Id*.

schools would occur.[117] Bell also discussed how the Court's refusal to consider residential segregation as a need for an active desegregation plan has allowed for segregated schools to remain.[118] This is one of the biggest flaws in *Dowell.* Racial housing patterns can clearly be a result of housing discrimination. If a county has a distinct pattern of housing discrimination, and school attendance is determined by where each child lives, schools can easily become, at the least, dominated by one race, and at worst, racially segregated. This is a problem that the Court should have addressed and stopped.

Dowell is a disappointing decision that has allowed for many minorities in this country to continue to receive a subpar education. *Dowell* paved the way for the high rates of minority high school drop outs and proportionally low rates of minority college graduates. *Dowell* is a case that settled for the lack of full compliance with *Brown II*, which was customary throughout the country. The Court in *Dowell*, could have forced states to fully comply with *Brown II*, instead of accepting that some states just were not going to do everything they could to make sure schools were truly desegregated.

V. MODERN DAY INTRA-SCHOOL DESEGREGATION

The lackluster enforcement of the Supreme Court's early desegregation cases has led to a stream of new modern-day segregation cases.[119] These cases have primarily arose from issues involving schools using techniques to keep students segregated while still complying with the Court's mandated desegregation of public schools.[120] Many modern segregation cases have involved the issue of intra-school segregation as a side effect of the schools' programs and policies.[121]

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[117] *Id*.
[118] *See id*. at 126–27.
[119] *See generally* Montgomery v. Starkville Mun. Separate Sch. Dist., 665 F. Supp. 487 (N.D. Miss. 1987) (holding that the disparity between White students and Black students in the "high achievement" and "low achievement" groups support an inference of discrimination); *see generally* Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750 (5th Cir. 1989) (holding that the District Court did not err in determining that the grouping system was not intended to have "significant racial impact upon the makeup of the classrooms").
[120] *See Montgomery*, 665 F. Supp. at 496; *see also Quarles* 868, F.2d at 754.
[121] *See generally Montgomery*, 665 F. Supp. 487; *see generally Quarles*, 868 F.2d 750; *see generally* McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950); *see generally* United States v. Yonkers Bd. of Educ., 123 F. Supp. 2d 694 (S.D.N.Y. 2000).

A. The Major Segregative Effect in Starkville

The problems associated with intra-school segregation, like the issues similar to those that my high school faced, have been discussed in some modern school segregation cases.[122] In *Montgomery v. Starkville Municipal Separate School District*, the schools were equally populated by White and Black children.[123] However, the classrooms within the schools did not represent the racial makeup of the student body.[124] The schools in the Starkville School District used the method of achievement grouping, which separated students into different levels of classes.[125] The plaintiffs in this case argued that achievement grouping led to racial segregation within the schools.[126] In the Starkville schools, the class levels were low, average, or high ability.[127] The plaintiffs based their argument on the fact that about 80% of the high achievement classes were composed of White students and about 80% of the low achievement classes were made up of Black students.[128] The average level classes were about equal parts White and Black.[129] This system of achievement grouping was used from first grade through sixth grade.[130] The defendants argued that since the students had the ability to move up levels based on their performance, the system of achievement grouping did not discriminate against minorities.[131]

The Court in this case ruled that "grouping in the Starkville Schools [had] a minimal segregative effect."[132] The Court came to this conclusion based on the fact that the grouping was only applied to "grades one through six", which was half of the student population, and that the students were only broken into those groups for about 40% "of the school day."[133] The Court also relied on the fact that the racial proportionality of the middle level in the achievement group was not disproportionate.[134] The Court in this case concluded that the "minimal segregative effect" caused by the achievement grouping was "outweighed by better educational opportunities

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[122] *See generally Montgomery*, 665 F. Supp. 487; *see generally Quarles*, 868 F.2d 750.
[123] *Montgomery*, 665 F. Supp. at 495.
[124] *Id*. at 495–96.
[125] *See id*.
[126] *See id*. at 489–90.
[127] *Id*. at 496.
[128] *Id.*
[129] *Id.*
[130] *Id*. at 502.
[131] *See* Montgomery v. Starkville Mun. Separate Sch. Dist., 665 F. Supp. 487, 500 (N.D. Miss. 1987).
[132] *Id*. at 502.
[133] *Id*.
[134] *See id*.

afforded the students" by the achievement grouping program.[135] The Court found that either students were able to move up in the achievement program, or they were able to better learn and understand "the basic course materials" being taught to them.[136] The Court was convinced that the school district used "achievement grouping for the purpose of assisting the students' ability to learn", not to maintain a segregative dual system of education.[137] The Court did state that tracking within a school for the sole purpose of segregating the students by race would not be constitutional.[138] The Court also recommended that the Starkville School District use "teacher and counselor input" when determining the placement of students in ability levels to try to "safeguard against improper placement of students."[139] However, the Supreme Court did not mandate that the school follow its recommendation.[140]

The Court in the *Starkville* case missed a large opportunity. In the *Starkville* case, the Court could have determined that any program that has an overwhelmingly negative effect on Black children should not be allowed in public schools.[141] In this case, the Court failed to fully consider the program in question. The Court acknowledged that the lowest level of the achievement grouping program was predominately composed of Black children.[142] Yet, the Court failed to see that fact as segregation.[143] In its decision, the Court cited the opportunity of students to get to higher levels in the achievement system.[144] Yet, the Supreme Court failed to consider that even though students could rise to different levels within the system, the lowest level stayed predominately Black and the highest level stayed predominately White.[145]

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[135] *Id*.
[136] *Id*
[137] *Id*.
[138] *Id.* at 491.
[139] Montgomery v. Starkville Mun. Separate Sch. Dist., 665 F. Supp. 487, 502 (N.D. Miss. 1987).
[140] *See Id*.
[141] Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (If the Court made such a determination, it would be in line with the rationale of *Brown v. Board of Education*. In *Brown*, the Supreme Court said that psychological information must be considered when deciding school segregation cases. In that same decision, the Court stated that psychological evidence shows that segregation negatively affects the educational opportunities that minority children have, as well as their self-perception and self-esteem. The court in *Starkville* should have produced an opinion that was in accordance with the rationale in *Brown* instead of seemingly ignoring it.).
[142] *Montgomery*, 665 F. Supp. at 496.
[143] *Contra* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).
[144] *Montgomery*, 665 F. Supp. at 502.
[145] Brown v. Bd. of Educ. 347 U.S. 483, 494 (1954) (The Court failed to consider, as the Court considered in *Brown*, that this continued separation of children of different races of

The Court in *Starkville*, also failed to consider the psychological effect that achievement grouping can have on both White and Black students.[146] Taking Black students out of the regular school population and putting them into low achievement classes for part of the school day could easily lead to a disinterest in school work and a lack of motivation in those students.[147] It could give the children a sense of not belonging and also feelings of inferiority.[148] Such feelings could affect the children for the rest of their lives.[149] The children could be less successful in life because they were made to believe as young children that they belonged in the lowest achievement group and were not offered any helpful way of getting out of that group.[150] On the other hand, it can also negatively affect White children placed into the high achievement classes.[151] Those children could develop a sense of superiority and a skewed and incorrect view of the Black children.[152] If the young White children are used to seeing the low achievement classes filled with mostly Black children, they may make conscious or subconscious conclusions that Black children will generally always belong in the lowest achievement groups, and that they are less intelligent. This can be damaging to the White children because it gives them an incorrect view of how intelligence and achievement should be measured.

In *Montgomery v. Starkville Municipal Separate School District*, the Court failed to strike down a program that clearly segregated the majority of the Black children away from the White children.[153] This is a highly detrimental decision that failed to protect the interests of all of the children involved.[154] The Court was correct in stating that education tracking based on race was unconstitutional, but it was incorrect in stating that the case at hand involved a program that had only minimal segregative effects, and therefore did not violate any of the students' rights.

"similar age and qualification" would most likely have an unrepeatable, substantial, negative impact on the segregated children.).

[146] *Contra Id.*

[147] *Id*.

[148] *Id*.

[149] *Id*.

[150] *Id*.

[151] *See* Kimberly C. West, *A Desegregation Tool that Backfired: Magnet School and Classroom Segregation*, 103 YALE L.J. 2567, 2578 (1994).

[152] *See id*.

[153] *Contra* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

[154] *Contra id*.

B. Quarles' Disproportionately Negative Education Tracking

A similarly detrimental decision was made in *Quarles v. Oxford Municipal Separate School District*.[155] In *Quarles*, appellants argued that the school district's use of a grouping system violated the Fourteenth Amendment and state laws, by discriminating against Black students.[156] Even though ability grouping has been upheld as an effective and legal way to teach students at different levels of learning, such programs can be challenged if it can be demonstrated that they are being used to turn the school into a dual system where the children become resegregated.[157] However, even if the plaintiffs in a case can show a significant segregative effect that is a result of the use of achievement grouping, the school in question can still use the system.[158] The school district can justify the continued use of a segregative achievement grouping system by showing "that its practices (1) are not based on the present results of past discrimination *or* (2) will remedy such present results through better educational opportunities."[159] In the *Quarles* case, the school district used traditional achievement grouping from third grade through eighth grade.[160] The students in the third grade through the students in the eighth grade were placed in different levels of classes for "language arts and mathematics".[161] In those classes, the highest level consisted of mostly White students, while the lowest level was comprised of mostly Black students.[162] Those classes not determined by achievement level were a proportionate representation of the racial ratio of students that attended the schools.[163] Once the children reached high school, there was a different form of education tracking.[164] In the Oxford School District High School, there were regular, accelerated, or advanced placement classes.[165] In the accelerated and advanced placement classes, the students were predominately White.[166] While the appellants argued that the disproportionality of those classes showed clear racial

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[155] *See generally* Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750 (5th Cir. 1989) (holding that the school district's grouping did not discriminate against Black students).
[156] *Id*. at 753.
[157] *Id*. at 754.
[158] *Id*.
[159] *Id*.
[160] *Id*.
[161] *Id*.
[162] *Id*.
[163] Quarles v. Oxford Mun. Sep. Sch. Dist., 868 F.2d 750, 754 (5th Cir. 1989).
[164] *Id.*
[165] *Id.*
[166] *Id*.

discrimination, the Fifth Circuit Court of Appeals ruled that since the classes were technically open to anybody, there was no discrimination.[167]

The court in *Quarles* could not deny that there was "a high concentration of White students in the upper level groups and" a high concentration "of Black students in the lower level groups."[168] However, the *Quarles* court determined that the present unequal impact that the current grouping system had on White and Black children was not a result of the school's former segregated school system, which met the requirements previously stated by the Supreme Court.[169] The court also upheld the grouping system based on the fact that students could move to a higher level, based on test scores, the recommendation of a teacher, or the written request of a parent, after the parent has met "with the student's teacher and principal."[170] For the reasons previously stated, the Fifth Circuit concluded that Oxford School District's achievement grouping program did not have the actual or intended "effect of having a significant racial impact upon the" composure of the classes within the district.[171] The court upheld the program, and concluded that it did not violate any of the petitioners' constitutional rights.[172]

The court in *Quarles v. Oxford Municipal Separate School District*, made many of the same mistakes that the Court in *Montgomery v. Starkville Municipal Separate School District*, made.[173] However, in *Quarles*, the Court also made the mistake of concluding that the system of achievement grouping was fair, because the parents of the children in the district could submit a written request that the child be moved to a higher level course after meeting with the teacher involved and the principal of the school.[174] The court in this case did not take into account the children who either have parents who cannot leave their jobs to come to a meeting at the school, or the children who have parents that are not interested, nor concerned with their child's education. In deciding that the previously stated option was enough to make the ability grouping fair, the court allowed for discrimination against poor children, or children with parents that are not

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[167] *Id*.
[168] *Id.*
[169] *Id*.
[170] *See id*. at 755.
[171] Quarles v. Oxford Mun. Sep. Sch. Dist., 868 F.2d 750, 755 (5th Cir. 1989).
[172] *Id.*
[173] *See generally id.* at 153 (upholding the District's achievement grouping program in spite of an undisputed finding that a high concentration of White students were in the upper level groups, as compared to Black students in the lower level groups); *see generally* Montgomery v. Starkville Mun. Sep. Sch. Dist., 665 F. Supp. 487, 502 (N.D. Miss. 1987) (finding in favor of the District's grouping achievement program with a history of discrimination).
[174] *Quarles*, 868 F.2d at 755.

concerned about their education. Within this class of children, there could be a disproportionate amount of Black children, and poor children. This gives an unfair advantage to the children who have parents that either do not work, or that do not or have a flexible work schedule. The court in *Quarles*, should have at least mandated that children have a choice to move into a higher achievement class, without the consent of their parents or teachers. However, even if that option was also included, the system still could lead to discrimination, because if a child is in a low achievement class, it is unlikely that they will ask to be switched to a higher one. When children are in third grade, eighth grade, high school, or anywhere in between, it is unlikely that they will ask for harder work to do at school, even if they would be able to do it. Children in elementary school are unlikely to be able to decide what is best for them and what their potential is. Additionally, high school children who have been told their whole lives that they belong in the low achievement classes could start to believe that they belong in those classes, or that there is no way out of their low ability group.

Education tracking and achievement grouping systems are inherently unfair and promote discrimination. Even with loopholes and other arrangements, these programs still have a disproportionately negative effect on minority children. The Courts in *Montgomery v. Starkville Municipal Separate School District*, and *Quarles v. Oxford Municipal Separate School District*, both failed to strike down inherently racist programs when they had the chance and there was clear evidence that the systems in question disproportionately had a negative effect on minority children.[175] The only way to fix this impact is to completely get rid of achievement grouping, and any other form of education tracking, that obviously leads to racial tracking and intra-school segregation.

VI. SOCIAL SCIENCE DATA DISPROVES MINIMAL SEGREGATIVE EFFECT

The Courts in *Montgomery v. Starkville Municipal Separate School District*, and *Quarles v. Oxford Municipal Separate School District*, incorrectly concluded that the intra-school segregation taking place in those cases only had a "minimal segregative effect."[176] The Courts in *Starkville*, and *Quarles*, failed to take into account modern social science data concerning the impact of intra-school segregation on the children in those

[175] *See generally Montgomery,* 665 F.Supp. 487; *see generally Quarles*, 868 F.2d 750.
[176] *Montgomery,* 665 F.Supp. at 502; *Quarles*, 868 F.2d at 755.

schools.[177] If they had properly considered all relevant data, the Courts could not have concluded that the separation of students in *Starkville*, and *Quarles*, was only causing a minimal segregative effect.

The Court in *Brown v. Board of Education*, made it clear that psychological consequences of the circumstances in each case must be considered when determining whether there was a segregative effect, by stating that their opinion was clearly supported by modern psychological authority.[178] The Court gives the implication that any findings concerning segregative effects should be supported by modern social science, and psychological authorities.[179] In accordance with *Brown*, the Courts must make use of modern authority, and take advantage of the available psychological and sociological knowledge.[180] The Courts clearly failed to consider this important data in *Starkville,* and *Quarles*.

In the cases of *Starkville*, and *Quarles*, the presiding Courts should have considered the sociological and psychological effect that ability tracking, which leads to racial segregation, has on children within the school. The Courts in both of these cases failed to recognize the psychological and sociological importance of being part of the whole school community.[181] Having the same part in a school's community as all other students is vital to the overall success of the student. Each student in a school must have the same opportunity to engage in activities, and to not be separated from other students. This gives each student equal access to friends, teachers, administrators, alumni, and other networking connections. When a group of students is kept from the same opportunities as the entire school community, those students suffer the sociological loss of friendship opportunities, and connections with teachers and administrators. Those students also suffer the psychological damage of low self-esteem, and feelings of not belonging with the general school population. When the sociological and psychological damages caused by education tracking that leads to intra-school racial segregation are properly considered by the Courts, the Courts cannot correctly conclude that tracking has only a minimal segregative effect.

In the case *Sweatt v. Painter*, the Supreme Court found that Black students could not be forced to attend a newly formed law school in Texas,

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[177] *But see* Brown v. Bd. of Educ., 347 U.S. 483, 493-94 (1954) (giving significant consideration to modern authority, which supports the detrimental social affect segregative qualifications based on race have on children in grade school, based on social science data).
[178] *Id.* at 494.
[179] *See id.* at 493-94.
[180] *See id*.
[181] *See id*. (calling attention to the psychic harm done to students by school segregation, the Court in *Brown v. Board of Education* mandates that we pay attention to that psychic harm, and that is what the Court in *Starkville* and *Quarles* has failed to do).

for Black students only, instead of the well-established University of Texas Law School.[182] The Court in this case found the newly developed all-Black law school did not have a law school community that was comparable to the community of the University of Texas Law School, which had developed throughout the school's history.[183] The University of Texas Law School had nationally recognized teachers, an expansive law library, several legal clubs and organizations on campus, and their alumni network expanded throughout the state of Texas, and the entire country.[184] At the time, the all-Black law school did not have any of those resources.[185] By the time the case was brought to the Supreme Court, the school had only one alumnus admitted to the Texas Bar, had only twenty-three students, and was still not accredited by the American Bar Association.[186] The Court in this case, ruled that being part of the community of the University of Texas Law School, was an important aspect of the law school.[187] The school experience was not measured only by what was being taught to the students, but also the opportunities for interaction between students and their peers, professors, and alumni.[188] Being a part of the community of the law school was something vital to the success of the students that attended the school, and the community could not be duplicated, nor replaced by other opportunities.[189] The Courts should have made a similar determination in the cases of *Starkville*, and *Quarles*. Even though the students in those cases were in the same school, they were segregated from the rest of the population[190]. By keeping those students out of the main community of the school, the students lost out on vital interactions that are needed in order for students to be as successful as possible.[191] Those connections and opportunities cannot be recreated, nor substituted. Therefore, the Courts should have the decision in *Sweatt v. Painter*, and should have determined that the segregated sub-groups created by tracking in the *Starkville*, and *Quarles*, cases infringed on the rights of the segregated students, to have equal access and opportunity to be a part of their school's community.

In the cases *Montgomery v. Starkville Municipal Separate School District*, and *Quarles v. Oxford Municipal Separate School District*, the

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[182] Sweatt v. Painter, 339 U.S. 629, 635-36 (1950).
[183] *Id*. at 633-34.
[184] *Id.*
[185] *Id*. at 633.
[186] *Id*.
[187] *Id*. at 634.
[188] *Id.* at 633-34.
[189] *Id*.
[190] *See generally Montgomery,* 665 F.Supp. 487; *see generally Quarles*, 868 F.2d 750.
[191] *See* West, *supra* note 151, at 2577 n.47.

Courts failed to recognize the importance of social interaction and friendship. Socializing and friendship are central parts of a student's experience at school.[192] What the Courts failed to recognize in *Starkville*, and *Quarles*, is that tracking students in a way that leads to racial segregation greatly limits the range of friendships, opportunities, and social interactions that children have with other children of different racial, social, and economic backgrounds.[193] This is harmful to children because they do not gain a sense of what the real world is like. Limiting students' friendships and social interactions to other children who have been put in the same tracking level as they have hurts the students' ability to have an understanding of the differences in people that they will encounter throughout their lifetime. It also limits the connections that students will have to different opportunities in the future.[194] Limiting the friendship and social circles of students can also give some students feelings of superiority, while giving other students feelings of inferiority.[195] These unjustified feelings are harmful to all parties involved.[196]

Equal friendship opportunities and social integration within a school can be promoted by erasing academic tracks that correlate with race.[197] In order for students to have a fully integrated social experience in school, all students should be placed on the same track, instead of students being placed into different tracks that segregate students.[198] When students are in a segregated school setting, friendship opportunities are limited, and friendship is generally controlled by race.[199] However, in a truly integrated setting where students are not segregated into tracks, race is not the relevant controlling factor when friendships develop between students.[200] Instead, students form friendships based on shared interests and common activities.[201] When students are given the opportunity to be around those who share their interests, they develop friendships based on shared activities and common interests, not race.[202] When students share common interests and spend time in each other's company, those students are more

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[192] *See* James Moody, *Race, School Integration, and Friendship Segregation in America*, 107 AM. J. SOC. 679, 707
(2001).
[193] *See id*. at 687.
[194] *See* West, *supra* note 151, at 2576-77.
[195] *Id*. at 2577.
[196] *See id*. at 2578-79.
[197] Moody, *supra* note 192, at 685.
[198] *Id.*
[199] *Id.* at 690.
[200] *Id.*
[201] *Id.* at 711.
[202] *Id*.

likely to develop a friendship than children who do not share common interests, nor spend time in each other's presence.[203] Allowing all students to be in one track, instead of confining children to ability tracks that tend to segregate students, allows the students to develop relationships with other children from different races, classes, and backgrounds.[204] This gives children an enriched social experience that benefits the children, and gives them an understanding of the world outside of school.[205]

The Courts in *Starkville*, and *Quarles*, did not consider the importance of friendship and social interaction. The Courts in those cases should have instead, followed the Supreme Court's decision in the case *McLaurin v. Oklahoma State Regents for Higher Education*. In the *McLaurin* case, the Court ruled that a school could not physically separate the one Black student enrolled in the school, away from all of the other White students.[206] In *McLaurin*, the one Black student was made to sit at a desk outside of the classroom the where White students were, use a separate desk designated for him in the library, and eat lunch at a separate table during a time different from all other students.[207] The Court ruled in this case that the physical separation of McLaurin from other students put him at a disadvantage because his ability to engage with other students and exchange ideas with them was greatly impaired by his physical separation.[208] In deciding *McLaurin*, the Court stated that the school could not deny the lone Black student the opportunity to interact with his fellow students.[209] In deciding this case, the Court showed that interaction between students is vital to students' school experiences.[210] The *McLaurin* case also shows that students have the right to not be physically separated from the general school population, and to not be denied the opportunity to socially interact with other students.[211]

The education tracking that led to racial segregation in *Starkville*, and *Quarles*, is what was occurring in *McLaurin*, but on a larger scale.[212] The students in *Starkville*, and *Quarles*, were being physically separated

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[203] *Id.*
[204] *See id.*
[205] Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577, 588 (2009).
[206] McLaurin v. Okla. St. Regents for Higher Educ., 339 U.S. 637, 641–42 (1950).
[207] *Id.* at 640.
[208] *Id.* at 641.
[209] *Id.* at 641-42.
[210] *See id.* at 641.
[211] *Id*. at 640–42.
[212] *See generally* McLaurin v. Okla. St. Regents for Higher Educ., 339 U.S. 637 (1950); *see generally* Montgomery v. Starkville Mun. Separate Sch. Dist., 665 F. Supp. 487 (N.D. Miss. 1987); *see generally* Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750, (5th Cir. 1989).

from students of other races, social status, and economic backgrounds.[213] They were not given the appropriate opportunities to socialize and form friendships with people beyond their tracking level. The students in these cases were denied the rights emphasized in *McLaurin*.[214] There is little difference between segregating one student away from the school population and segregating almost an entire race away from the entire school population. The Courts in *Starkville*, and *Quarles*, failed to properly consider the effects the physical separation had on students' social and friendship circles.[215] The Courts in those cases said that the racial segregation caused by education tracking had only a "minimal segregative effect;"[216] however, the Courts failed to consider that outside of the classrooms students were still segregated within social and friendship circles, which are formed by being placed in the same academic setting.[217] The rulings in *Starkville*, and *Quarles*, lead to questions concerning what would be considered a non-minimal segregative effect. If physically separating almost an entire race population within a school, away from the rest of the school community, is only a minimal segregative effect then segregation will continue to run rampant throughout this country's education system, without being checked by the Supreme Court.

VII. *STARKVILLE*, *QUARLES*, AND WHAT SHOULD HAVE BEEN

The Courts in *Starkville*, and *Quarles*, should have made decisions similar to what the United States District Court of New York decided in *U.S. v. Yonkers Board of Education*[218]. In the *Yonkers* case, there was a school district that had previously segregated students.[219] Years after the district was mandated to desegregate the students, the schools within the district began to separate students into groups based on student abilities.[220] The court concluded that the ability grouping was segregative in nature.[221] The *Yonkers* court said that since ability grouping in the district was based on teacher's attitudes and expectations that could be traced to prior segregation, the ability groups themselves were a form of segregation.[222] In

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[213] *See generally Montgomery*, 665 F. Supp. 487; *see generally Quarles*, 868 F.2d 750.
[214] *Id.*
[215] *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).
[216] *Montgomery*, 665 F. Supp. at 502; *Quarles*, 868 F.2d at 755.
[217] Moody, *supra* note 192, at 680.
[218] United States v. Yonkers Bd. of Educ., 123 F. Supp. 2d 694, 695 (2000).
[219] *Id.*
[220] *Id.* at 718.
[221] *Id.*
[222] *Id.*

Starkville, and *Quarles*, the Courts should have taken a similar stance. The Courts in these two cases should have recognized that the disproportionate racial composition of the different ability groups were the result of continued attitudes and practices that survived the original desegregation cases, but still promoted segregation and inequality. The Courts should have taken the stance that any segregative practices, whether minimal or not, were segregative practices that the schools were supposed to discontinue. The schools in *Quarles*, and *Starkville*, should not have been allowed to continue any practices that were in any way segregative.

VIII. CONCLUSION

After graduating from high school, I went on to community college, university, and law school. At each institution I attended, I saw signs of systematic racism. These problems may have originated within each institution, but they may also have been related to the adversity that minority students faced during their formative high school years. Those early challenges deter and sometimes completely prevent many minority students from ever receiving a higher education.

Every student deserves the same educational opportunities that I was afforded. Once every child receives equal educational opportunities, it is then up to them to choose their path. However, until all minority students are given the basic foundation of a fair, non-biased education, their future options and opportunities will remain limited, and the racist public education practices and procedures that I have witnessed will continue to thrive and prevail. Until there is a complete overhaul of the public education system, there will be no justice, there will be no peace, and there will be no equality.