The Missed Mandate of *Brown v. Board of Education*: Educationally Effective Schools With All Deliberate Speed

I. INTRODUCTION

In 1954, Chief Justice Earl Warren wrote for a unanimous Court: "Education is perhaps the most important function of state and local governments—so important that in these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[1] Warren went on to write that "[w]here a state has undertaken to provide the opportunity of an education to its citizens, that opportunity is a right which *must be made available to all on equal terms.*"[2] These compelling words were made against the backdrop of a decision that would begin alteration of the status of Blacks in American society[3] and would "[affect] the course of American educational history."[4] *Brown v. Board of Education*[5] "is a landmark that [separated] Jim Crow America from modern America."[6]

Although the *Brown* decision was handed down nearly forty years ago the problems of segregation, particularly within the field of education, remain unsettled. There is still a debate raging between proponents and opponents of the decision. Proponents see *Brown* as the ultimate remedy for lifting the so-called veil of ignorance that had been placed on Blacks by virtue of their inferior education. Opponents, however, feel that "*Brown* gave little guidance to future racial debate. [Once the schools were integrated, what then?] "*Its brevity was a mask for ambiguity.*"[7] The litigation that continues to flood the courts seeks answers to the myriad questions that *Brown* left unanswered: "(1) If segregated schools were not constitutional, what kinds of schools were constitutional? (2) Was the evil segregation itself or merely the states' imposition of it? (3) Was a color-blind society or the betterment of an oppressed race the Court's chief objective? (4) How do we achieve educational effectiveness in our schools on an equal basis?"[8]

The focus of this Note is the questions that *Brown* left unanswered. Part One will briefly explore *Brown* and its progeny. Particular attention will be paid to the lack of consistency by the courts in addressing the school desegregation issue. Part Two will look at recent attempts to establish one sex schools and reestablish one race schools and the constitutional barriers that these efforts have met. Part Three will analyze the current Title VI litigation in Mississippi and Alabama. Part Four will address what should have been the

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1. DANIEL M. BERMAN, IT IS SO ORDERED 112 (1966).
2. *Id.*
3. *Id.* at 128.
4. RAYMOND WOLTERS, THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION 281 (1984).
5. 347 U.S. 483 (1954).
6. WOLTERS, *supra* note 4, at 3.
7. J. HARVIE WILKINSON, III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 29 (1979).
8. *Id.*

legacy and proclamation of *Brown*—educationally effective schools with all deliberate speed.

II. *BROWN* AND ITS PROGENY

A. Brown v. Board of Education—*The Beginning*

On May 17, 1954, the Supreme Court rendered a decision that was comparable to a "Second Reconstruction."[9] The First Reconstruction established the basic rights of Blacks, although it did little to "ensure their political and economic rights."[10] The *Brown* decision was aimed at racial segregation in public schools. Its impact was more far-reaching than the Court could have imagined. *Brown* affected legal rights related to political participation, employment, and pursuit of equal opportunity in this country.[11] It accomplished what the First Reconstruction failed to. The primary issue in *Brown* is the focus of this Note. Precisely stated, that issue was: "does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of *equal educational opportunities*?"[12]

In *Brown*, the Court reviewed five school desegregation cases challenging the inequality in schools provided for Blacks in comparison to the schools provided for Whites. The five cases originated in Kansas, South Carolina, Virginia, Delaware, and the District of Columbia. In the Kansas case the judges agreed "unanimously that compulsory segregation did indeed impair the development of [Black] school children."[13] In spite of the terrible disparity in conditions the court refused to "rule that educational segregation therefore constituted a violation of equal protection."[14] In South Carolina petitioners sought an end to segregated schools. The South Carolina state constitution "decreed that no child of either race shall ever be permitted to attend a school provided for children of the other race."[15] Chief Justice John Parker, widely known for his segregationist views, treated segregation as a "policy that any state legislature had the right to follow."[16] Similarly, in Virginia, a unanimous court held that segregation did not harm Blacks or Whites, "it was just one of the ways of life in Virginia."[17] The decision in Delaware was in stark contrast to the above three decisions which were heard in federal courts. The Delaware case was brought in state court. Chancellor Collins J. Seity found that the Black schools were substantially inferior to the White schools.[18] In an unprecedented decision the Chancellor commanded immediate desegregation.[19] The last case arose in Washington, D.C. where Blacks had been "turned away from a White public school solely because of their

9. Howard A. Glickstein, *The Impact of Brown v. Board of Education and Its Progeny*, 23 How. L.J. 51 (1980).
10. DERRICK BELL, RACE, RACISM AND AMERICAN LAW 34 (2d ed. 1980).
11. *Id.*
12. *Id.* at 379 (quoting *Brown*, 347 U.S. 483, 493) (emphasis added).
13. BERMAN, *supra* note 1, at 16.
14. *Id.*
15. *Id.* at 18.
16. *Id.* at 19.
17. *Id.* at 20.
18. *Id.* at 21.
19. *Id.* at 22.

race."[20] The plaintiffs did not bring the case on equal protection grounds but instead claimed that they "had been deprived of an aspect of their liberty without due process of law."[21] A decision was not rendered in the District of Columbia case because the Supreme Court wanted to hear this case along with the other four; therefore, a petition for writ of certiorari was filed.[22]

The *Brown* Court looked to the legislative history of the Fourteenth Amendment to discern the Framers' views on whether segregation itself was unconstitutional.[23] "Chief Justice Warren concluded that the evidence was inconclusive."[24] He reasoned that the educational status of Blacks had changed over time. During that era Blacks were illiterate; therefore, any views the Framers had on the subject were of little contemporary relevance.[25] Furthermore, "the separate but equal doctrine involved not education but transportation."[26] The Court decided to approach the issue of public education "in light of its whole development and its present place in American life throughout the Nation."[27]

There was stark inequality in Black and White schools. "To achieve real 'equality' in the schools it would be necessary to spend more money for [Blacks] than for White; for [Black] schools had suffered so long that equal expenditures would keep inequality alive."[28]

> The Office of Education of the U.S. Department of Health, Education and Welfare reports that, on the basis of current expenses for White children, it would cost more than $160,000,000 extra a year to make [Black] schools in the South equal to White schools. It would cost $40,000,000 to give [Black] pupils equal transportation. *The estimated total cost for equal schools for [Blacks] would be over $2,000,000,000.*[29]

Brown's mission was to address these unequal positions and the resulting subordination of a racial group. However, the Court in *Brown* decided to concentrate on segregation instead of how to achieve both equality and effectiveness in education.

The *Brown* Court held that segregation violated the plaintiff's equal protection rights. In so holding the Court stated:

> We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth.[30]

The Court in *Brown* had very laudable intentions but the decision was very ambiguous and incomplete. "*Brown* was a significant step towards school de-

20. *Id.*
21. *Id.*
22. *Id.* at 24.
23. BELL, *supra* note 10, at 378.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. HERBERT HILL & JACK GREENBERG, CITIZEN'S GUIDE TO DESEGREGATION: A STUDY OF SOCIAL AND LEGAL CHANGE IN AMERICAN LIFE 45 (1955).
29. *Id.* at 43 (emphasis added).
30. David Hall & George Henderson, *Thirty Years After Brown: Looking Ahead*, 24 WASHBURN L.J. 227, 233 (1985).

segregation, [but] the Court discovered that many other discrete issues had to be addressed before effective desegregation could be achieved."[31]

B. *The Progeny*

1. Green v. County School Board of New Kent County

Green v. County School Board of New Kent County[32] was considered as important as *Brown*. That decision swept far more broadly than did *Brown*. New Kent County, located in rural Virginia had two schools, "each a combination elementary and high school."[33] The population of the county was half Black and half White and mixed residentially. In 1965, the school board adopted a freedom-of-choice plan. The plan provided that all students would be assigned to the schools of their choice and that free transportation would be provided. The plan also provided that there was to be no racial discrimination in any element of the operation of the school system.[34]

The Supreme Court invalidated the plan. "The Court was unable to find racial discrimination in violation of *Brown I*, but it found unconstitutionality nonetheless and purported to find it on the basis of *Brown II*."[35] *Brown II* had made it clear that dual school systems were unconstitutional and must be abolished. *Green*, however, was just as elusive as *Brown*. Justice Brennan, who delivered the opinion of the Court, while finding New Kent's plan unacceptable, acknowledged that there was not one plan that would accomplish the mandate of *Brown* in every case. He further added that "the matter must be assessed in light of the circumstances present and the options available."[36]

2. Keyes v. School Dist. No. 1, Denver, Colorado

The question that lay at the foundation of *Keyes v. School Dist. No. 1, Denver, Colorado*[37] was whether the school desegregation standards imposed in the South would apply to Northern schools. The irony of the *Keyes* controversy was that "on the surface Colorado's racial history was exemplary, very unlike the travails of the South. Segregation was never required in Denver schools. In race relations, the state had come far on its own, without the judicial prod."[38] Colorado's constitution prohibited racial discrimination. Surprisingly, in 1895 the year before *Plessy v. Ferguson*[39] was decided, Colorado prohibited racial discrimination in public accommodations.[40]

The Black population in Denver had doubled between 1940 and 1960 and had continued steady growth.[41] In 1962, the Denver school board had appointed a committee to study the "present status of educational opportunity in

31. Grover Hankins, *The Constitutional Implications of Residential Segregation and School Segregation—To Boldly Go Where Few Courts Have Gone*, 30(3) How. L.J. 481, 482 (1987).
32. 391 U.S. 430 (1968).
33. Lino A. Graglia, Disaster by Degree: The Supreme Court Decisions on Race and the Schools 67 (1976).
34. *Id.* at 68.
35. *Id.*
36. Bell, *supra* note 10, at 385.
37. 413 U.S. 189 (1973).
38. Wilkinson, *supra* note 7, at 196.
39. 163 U.S. 537 (1896).
40. Wilkinson, *supra* note 7, at 196.
41. Graglia, *supra* note 33, at 161.

the Denver public schools, with attention to racial and ethnic factors."[42] The committee, upon completion of its study, fully embraced the neighborhood school concepts employed by the Denver School District. However, they recommended "among other things, that the board consider racial, ethnic, and socio-economic factors in establishing boundaries and locating new schools in order to create heterogeneous school systems."[43] These recommendations were adopted by the Denver school board.

In 1968, the school board realized and noted that the neighborhood school concept had resulted in a concentration of minorities in some schools. In response to this problem the board adopted three resolutions requiring: (1) integration of certain Park Hill schools; (2) creation of satellite, or noncontiguous, attendance zones; and (3) busing of Blacks of the Park Hill area to predominantly White schools and busing of Whites from other areas in.[44] These proposals were not well received by Whites. After new school board elections were held, the proposals were rescinded.

Some Blacks in Denver filed suit on two grounds. First they alleged that the cancellation of the resolutions "violated their constitutional rights and requested that they be implemented.[45] Second, the plaintiffs asserted that the Denver school system was unconstitutionally segregated, not only in regard to Blacks and Whites, but also in regard to Hispanics because the separation of these groups that existed in the schools resulted from the board's use of neighborhood assignment and from other school board actions.[46]

The Denver school board argued that any wrongdoing had only affected the Park Hill school district. The Supreme Court, however, rejected this argument. Justice Brennan, speaking for the Court, noted that "racially inspired school board actions have an impact beyond the particular schools that are the subject of those actions."[47] The Court deduced that evidence of an intentional act of segregation in one instance created a strong presumption that it had occurred in another.[48] "It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities . . . ."[49] Justice Brennan found that the school board had maintained segregation by utilizing techniques under the guise of a neighborhood school concept. This was the first time the Supreme Court had ordered busing in a Northern city.[50]

3. Milliken v. Bradley

The largest setback to school desegregation occurred ironically on the twentieth anniversary of *Brown*.[51] *Milliken v. Bradley*[52] involved the appropriateness of using suburban students to desegregate inner city schools. De-

42. *Id.* at 162.
43. *Id.*
44. *Id.*
45. *Id.* at 164.
46. *Id.* School attendance zones had been gerrymandered to preserve at least some White schools in Park Hill; optional zones had been created in transition neighborhoods, with Whites opting for White schools.
47. WILKINSON, *supra* note 7, at 198.
48. *Id.*
49. BELL, *supra* note 10, at 394.
50. WILKINSON, *supra* note 7, at 198.
51. *Id.* at 218.
52. 418 U.S. 717 (1974).

troit had a majority Black school system. In 1940, the Black student population was 9.2%; in 1960 it was 28.9%; and in 1970 it was 63.8%.[53] Like Denver, Detroit had attempted, unsuccessfully, to implement a voluntary integration plan. But this was unrealistic given that the city was comprised predominantly of poor Blacks and elderly Whites.[54] Also like Denver, the Detroit school board had adopted some policies designed to achieve a racial balance. One of these policies involved busing across district lines. This plan met statewide political opposition.[55]

In response to this opposition, a federal district court found the Detroit Board of Education guilty of the same kinds of tactics used by the Denver board. Judge Stephen Roth noted that the school board had employed optional-attendance zones, gerrymandered school boundaries, segregative transportation and school construction policies, funding policies and special legislation which fostered segregation.[56] In response to these tactics Judge Roth joined 53 of the 85 suburban schools with the city schools in an effort to integrate the school system.[57] This plan was affirmed by the Sixth Circuit Court of Appeals.

It was, however, the U.S. Supreme Court that was the conquering hero for the suburbs. The Court "allayed middle-class fears that the school bus would become the Trojan Horse of their suburban Troys."[58] White flight as an effective avoidance of integration was safe. The Court felt that Roth had wrongly included the suburbs in his desegregation plan. In an astounding opinion delivered by Chief Justice Burger the Court held:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district segregation.[59]

III. Is It Really Segregation?

When one hears the word "segregation" a negative connotation immediately comes to mind. Viewed in its historical context, it is perceived as purposeful exclusion or involuntary separation. The *Brown* Court stated that segregated schools helped to perpetuate a feeling of inferiority in Black children. Drawing on the concept of "separate but equal" the Court held that "separate facilities are inherently unequal."[60]

Discrimination had a direct correlation to that segregation. Because of the disparity in the educational facilities, Blacks were denied equal educational opportunity and equal protection of the law. The *Brown* Court concluded that

53. Graglia, *supra* note 33, at 204.
54. *Id.*
55. Act 48 was a Michigan statute enacted to abrogate the plan to change the attendance zones. It substituted a policy of voluntary open enrollment for all schools, with priority to be granted, in case of overcrowding, on the basis of residential proximity.
56. Wilkinson, *supra* note 7, at 218.
57. *Id.*
58. Bell, *supra* note 10, at 399.
59. *Id.* at 400.
60. *Brown*, 347 U.S. at 483.

in order for the "badge of inferiority" to be removed Black children must be educated with White children in an integrated setting. The Court's rationale and remedy were well-intentioned, but flawed.

Equal protection requires that all persons similarly situated be treated the same. The plaintiffs in *Brown* were primarily attacking the inequality of the schools. Because of the disparity in the schools, many Blacks sought admission to White schools. *Plessy v. Ferguson*[61] has been attacked consistently throughout history, mainly because that decision focused on "separateness" and not "equality". The *Brown* Court saw integration as the solution to this problem. "[T]he Court presumed that the elimination of segregated educational facilities would help engender equality in both a legal and a practical sense."[62] The Court perpetuated or validated the myth that it was trying to erase. "When Black children are told that they cannot receive equal educational treatment in their own schools, under the guidance of their own teachers and administrators, then, in effect, *they are being told that Black people are inferior in the eyes of the law and society.*"[63] This flaw in analysis goes back to the original reasoning in *Brown*: the suggestion that the only way to be taught or to learn is in a White or predominantly White environment. It is true that some Blacks were receiving inadequate educations. But it was not because of the quality of the educators, but rather the inequality of facilities. Blacks had, for years, successfully educated other Blacks, in spite of the odds. Prior to 1954 there were Black teachers, lawyers, doctors, and other professionals.

Over the past few years there have been major efforts by Blacks to reestablish one race and/or one sex schools. Proponents of these efforts argue that the focus is on effective education, providing role models, and countering significant drop out rates. Opponents, however, argue that such schools violate equal protection. "*Brown* I and II encourage[d] Blacks to forsake their own ethnic identity, values, and culture in order to blend into the dominant society. *This is a blatant violation of the notion of equal protection.*"[64]

A. *One Sex Schools*

Recent attempts to establish one sex schools have met much opposition. Opponents assert that such schools are discriminatory and violate equal protection rights. A vast majority of these one sex schools would be located in inner-cities which are most often predominantly Black, poor, or minority. To attack the severe problems of inner-city boys, all-male, all-Black academies have been proposed in New York, Milwaukee, Detroit, and Miami, and discussed in other major cities.[65] These schools have not been proposed for the purpose of discriminating. On the contrary, the proposals have a much more laudable purpose.

There is one central mission for the one sex schools. That purpose is to fill a gap in America's large cities. Inner-city youth are faced with problems

61. 163 U.S. 537 (1896).

62. Donald E. Lively, *Separate But Equal: The Low Road Reconsidered*, 14 HASTINGS CONST. L.Q. 43, 45 (Fall 1986).

63. Hall & Henderson, *supra* note 30, at 239 (emphasis added).

64. *Id.* at 237.

65. Susan Chira, *Educators Ask if All-Girl Schools Would Make a Difference in Inner Cities*, N.Y. TIMES, Oct. 23, 1991, at B5.

that are indigenous to big cities. There are phenomenal drop out rates that are steadily increasing. Teen pregnancies have reached all time highs. Then there is the most alarming problem: our urban youth killing each other. The purpose of these schools is to help disadvantaged youth overcome all of these seemingly insurmountable problems.

The all-male schools have been designed to address the high drop out rate.[66] They would have male faculties to serve as positive role models for these young men. Most of the young men are from single parent homes and have never experienced the presence of a positive male role model. They have not had relationships with successful Blacks who made it without resorting to drugs, gangs, and violence.

Recently, a United States District Judge in Detroit ruled "that Detroit's proposed all-male schools were discriminatory and ordered the schools to admit girls. Judge Woods said the three all-male schools "violated laws guaranteeing equal opportunities to girls."[67] Like many, Judge Woods failed to focus on the objective of these schools—to effectively educate.

Ironically, a debate still rages in Chicago over "whether girls' often-ignored problems require all-girl schools."[68] Proponents of the all-girl school see their mission as promoting leadership for women.[69] Drop out rates are similar for both girls and boys. However, "girls who drop out are far more likely to end up poor than boys."[70] Professor Michelle Fine, a professor of education at the University of Pennsylvania states that "statistics show 62% of the black girls who drop out live below the poverty line compared with 37% of black males."[71] Most of the studies on the positive benefits of all-girl schools have been conducted on middle-class all-girl schools. However, a few studies have found similar positive benefits in inner-city single-sex settings.[72]

Ironically, a federal court decision recently upheld the right of the Virginia Military Institute to admit only men.[73] Judge Jackson L. Kiser relied heavily upon "a substantial body of exceedingly persuasive evidence [that] supporte[d] V.M.I.'s contention that some students, both male and female, benefit from attending a single-sex college."[74]

What is noteworthy about the V.M.I. case is that there the benefits of single-sex education were heralded. The fact that it was a public university was of no consequence. But, when the same is proposed for Black students, the programs are stopped dead in their tracks. In the V.M.I. case experts espoused the view that "*one does not sacrifice quality to achieve diversity.*"[75]

66. *U.S. Judge Blocks Plan for All-Male Public Schools in Detroit*, N.Y. TIMES, Aug. 16, 1991, at A10.

67. *Id.*

68. Chira, *supra* note 65.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *3 Education Researchers Played Key Role in Decision to Uphold All-Male Policy at Va. Military Institute*, CHRONICLE OF HIGHER EDUC., July 3, 1991, Vol. (42), at A1.

74. *Id.* at A11.

75. *Id.* (The researchers in the V.M.I. case heralded the legacy of all-male programs such as the one at V.M.I. They pointed to the success of men who graduated from such colleges. They asserted that the quality of education for men would be hurt by admitting women. Mr. Richardson, one of the researchers, stated that "civil rights laws were intended to insure that women and minority group

But, since the *Brown* decision such has been the fate of Black schools. When the program will be beneficial for Blacks it is too costly. But when the benefit will be bestowed upon Whites it receives top priority funding.

To illustrate the disparity in funding I looked at statistics for public school funding in the State of Alabama in 1953-54. During that period the state capital expenditures for Whites was $65,928,680; for Blacks it was $29,826,527. The capital outlay showed an even greater disparity and answers one of the underlying questions from *Brown*, why the unequal facilities? Capital outlay is money spent for grounds, building upkeep, and improvement. In 1953 the capital outlay for White schools was $7,770,894; for Black schools it was $2,194,197. Another important expenditure involved teachers' salaries. In 1953-54 the average expenditure for White teachers' salaries was $41,906,673; for Black teachers it was $20,300,041.[76] Most inner cities are still predominantly Black and the status of the funding is still unequal.

B. *One Race Schools*

W.E.B. DuBois wrote that: "American [Blacks] have, because of their history, group experiences and memories, a distinct entity, whose spirit and reactions demand a certain type of education for its development."[77] Since *Brown* our children have been shuffled from school to school often miles away from their homes. *Brown's* stated aim was to achieve quality education for Blacks. Since that decision Black students have been faced with low achievement levels, tracking, ability-grouping, discipline problems, and high drop out rates.[78] In 1935, DuBois in his prophetic manner wrote:

> A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning Black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad. Other things being equal, the mixed school is a broader, more natural basis for the education of all youths. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. *But other things seldom are equal, and in that case,* Sympathy, Knowledge and Truth, outweigh all that the mixed school can offer.[79]

The achievement of an integrated society is an ideal goal. In America, unfortunately, the achievement of that goal was at the expense of the effective education of our children. Because of the increasing problems faced by Black students, many Black parents and educators recognized the need to reestablish community based schools. They recognized the value of these schools. "They [instill] within Black children valuable qualities and characteristics that White institutions were not providing. They provided a sense of belonging, self-

members have opportunities to get good education, not to destroy the last of the species" of single-sex colleges. However, in 1982, our Supreme Court in Mississippi University for Women v. Hogan, 458 U.S. 718 (1982), held that a state-supported university which from its inception limited its enrollment to women violated the Equal Protection Clause of the Fourteenth Amendment.

76. ALA. STATE BD. OF EDUC. & STATE SUPERINTENDENT OF EDUC., DEPT. OF EDUC. ANNUAL REPORT—STATISTICAL AND FINANCIAL DATA 190-97 (1953-1954).

77. W.E.B. DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 333 (1935).

78. Tracking refers to the educational practice of separating students based on abilities that are determined by standardized test scores, academic achievement, and less formal teacher assessments.

79. DuBois, *supra* note 77, at 335.

worth, spirit, purpose and self-control."[80]

Unfortunately for many who did experience the mandated integration of *Brown*, they found that "racism did not end when racial balance was attained."[81] During the past twenty years considerable racial mixing has taken place in schools, but research has produced little evidence of dramatic academic gains for children and some evidence of genuine stress for them.[82]

For those students who remain in predominantly Black schools parents and educators are seeking to produce "classes of students able to meet national standards on standardized achievement tests."[83] Parents are becoming more involved in the learning process. "The serious educational problems facing [these students are being] effectively addressed by refocusing the power and responsibility for the education of students in the hands of parents, educators and children of the African-American community itself."[84] *Brown* made the underlying assumption that there were no circumstances whereby Black educational institutions could be equivalent to White institutions.[85] Given the disparate funding patterns that persist and the constant, baseless criticism of Black institutions of learning, particularly Black colleges, this perception will never change.

1. *Black Colleges and Their Struggle for Survival*

"Black educational institutions enabled Black children to achieve *in spite* of the societal barriers of White supremacy and legal racial segregation."[86] *Brown* seems to imply that Blacks can only be afforded equal protection if they attend White institutions.[87] Many recent court decisions, civil rights laws and current litigation[88] pose a serious threat to the more than one hundred historically Black colleges and universities.[89] Many opponents of Black colleges argue that the "continued existence of Black colleges is inconsistent with the ideal of a racially integrated society."[90] Yet a federal judge recognized in the aforementioned V.M.I case that quality should not be sacrificed to obtain diversity. The challenges to Black colleges are premised on the continuing perception by many Whites that Blacks and their institutions are inferior.

When Whites denied Blacks education we found a way to attain it in spite of those barriers. They are a harbor of learning for Black children and a model of Black excellence for our nation.[91] Opponents assert that because "Black colleges remain racially identifiable [they] are constitutionally obso-

80. Hall & Henderson, *supra* note 30, at 234.
81. BELL, *supra* note 10, at 425.
82. *Id.* at 427.
83. *Id.* at 428.
84. DERRICK BELL, MANUAL OF SUPPLEMENTS AND SUGGESTIONS FOR RACE, RACISM AND AMERICAN LAW 92 (2d ed. 1980 with 1984 Supp.) [hereinafter Bell Supplement].
85. Hall & Henderson, *supra* note 30, at 233-34.
86. *Id.*
87. *Id.*
88. Title VI is spending power legislation. It rests on the principle that "taxpayer money, which is collected without discrimination, shall be spent without discrimination." 110 CONG. REC. 7064 (1964) (statement of Sen. Ribicoff); *see also* United States v. State of Alabama, 828 F.2d 1532 (11th Cir. 1987).
89. BELL, *supra* note 10, at 458.
90. *Id.*
91. DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 104 (1987).

lete."[92] They always seem to overlook the educational effectiveness and continued need for these institutions.

Although historically White universities are no longer "segregated," Blacks still comprise only 5-10% of the population on these campuses. "Black students are kept out of the historically White universities by admissions requirements that set a minimum score on a standardized admission test that most black high school students . . . cannot meet."[93] In 1977, the U.S. Department of HEW found that at one time 80% of all Blacks with college degrees received those degrees from Black colleges; and that currently 40% of all Blacks who receive college degrees attend Black colleges. Black colleges have never excluded White students. Today, Whites comprise 40 to 50% of some historically Black professional schools.[94]

In the 1970s and early 1980s Black students headed to White institutions. The Black colleges saw a dramatic drop in enrollment. "But for the past six years, Black colleges have been riding a wave of popularity. In greater and greater numbers, high achieving students . . . are forsaking Ivy league institutions and other selective universities for Black colleges."[95] A big part of this exodus can be attributed to a marked increase in racist incidents at predominantly White colleges.[96] Yet many still feel that Black colleges have no place in a "desegregated" world.

Recent Title VI litigation in Mississippi and Alabama has challenged the continued maintenance of what many perceive as dual educational systems in those states. In Alabama, the current Title VI litigation involves predominantly Black Alabama State University and Alabama A&M University and predominantly White Troy State University, Auburn University in Montgomery, and the University of Alabama in Huntsville. The complaints which were filed by the United States and a class representing students, graduates, and faculty of the predominantly Black universities allege that the defendants "have failed to take affirmative steps to remove the vestiges of the dual system of higher education that resulted from the State's past policy of racial segregation."[97]

Opponents question the alleged "segregation" at the predominantly Black institutions. They maintain that the state should not have to fund dual school programs, two of which are all Black. Alabama State University, which is located in Montgomery, Alabama, was established in 1874. Auburn University in Montgomery was established in 1967 pursuant to Act 403 by the Alabama State Legislature. Alabama A&M University, which is located in Huntsville, Alabama, was established in 1873. The University of Alabama in Huntsville was established in 1967.

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92. BELL, *supra* note 10, at 458.

93. Linda Greenhuse, *Justices Weigh Bias Legacy at Colleges*, N.Y. TIMES, Nov. 14, 1991, at A18.

94. BELL, *supra* note 10, at 468.

95. *As Black Colleges Grow More Selective, Some Worry They Are Becoming Elitist*, CHRONICLE OF HIGHER EDUC., July 3, 1991, Vol. XXXVI (42), at A1.

96. Steve France, *Hate Goes to College*, J. ABA, July 1990, at 44 ("At the University of Michigan the student-run radio station broadcasts a racial joke. At the University of Wisconsin a fraternity holds a mock slave auction. At Stanford a picture of Beethoven is given fuller lips and dark frizzy hair, and then posted in a dormitory. Swastikas, epithets and Ku Klux Klan imagery poison the environment of many a campus.").

97. United States v. State of Alabama, 828 F.2d 1532, 1534 (11th Cir. 1987).

Since there were already state colleges in Montgomery and Huntsville why open a second state college with duplicate programs? A safe assumption would be probably because the colleges already in place were predominately Black. So who is responsible for the dual system? Who continues to perpetuate the inequality? Certainly not the Black colleges. Blacks do not look at predominantly White institutions with a student population that is usually 5-10% Black and call them segregated institutions and consistently challenge their constitutionality. What they challenge, in the case of state funded Black colleges, is the disparity in funding and the maintenance of *Plessy's* separate but unequal doctrine.

When I look at *Brown* and its legacy, I see the attempted destruction of Black culture and established Black institutions. By asserting that Black children could only be effectively educated in White institutions, the Court seemed to imply that association would bring about assimilation. The primary need of the Black child, which was and still is effective education, was completely ignored in order to espouse a policy of assimilation disguised as integration.

IV. CONCLUSION—THE MISSED MANDATE OF *BROWN*: EDUCATIONALLY EFFECTIVE SCHOOLS WITH ALL DELIBERATE SPEED

It is unfortunate that DuBois' pre-*Brown* urgings went unheeded. His basic premise was that Blacks needed education.[98] "He suggested that effective schooling for Black children might be possible even though the socializing aspects of integrated classrooms were not available."[99] Robert Carter, who played a major role in planning the school desegregation strategy, in reflection wrote: "if [I] were preparing *Brown* today, instead of looking principally to the social scientists to demonstrate the adverse consequences of segregation, [I] would seek to recruit educators to formulate a concrete definition of the *meaning of equality in education.*"[100] He stated that he would seek to convince the Court that instead of deciding solely the constitutional dimensions of equal education, they should also look to educators to succinctly define equality in education.[101] Carter, who is now a federal judge, summed up the missed mandate of *Brown* in one sentence: "*to equate integration with the effective education Black children need . . . was a mistake.*"[102]

"The basic purpose of the equal protection mandate [is] to eliminate a system that fosters racial subordination and provide the best possible educational opportunity for all children."[103] What *Brown* attempted to achieve was integration which was to have the end result of effective education. But residential patterns and other legalized tools to counter desegregation prevailed. Many inner-city youth are still in all-Black schools that are still poorly funded. One of the primary arguments in favor of integration is that "by associating with people of other colors our children [will] shed their

98. DuBois, *supra* note 77.
99. BELL, *supra* note 10, at 411.
100. BELL, *supra* note 91, at 110 (emphasis added).
101. *Id.*
102. *Id.* at 111.
103. *Keyes*, 413 U.S. at 253 (Powell, J., concurring and dissenting).

prejudices."[104] With all of the focus on integration, we lost sight of the primary purpose of our schools which is education, not socialization. *"Education is the key to the whole problem, because it leads to jobs; jobs lead to achievement and achievement reduces discrimination."*[105]

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104. BELL Supplement, *supra* note 84, at 102.
105. Hall & Henderson, *supra* note 30, at 240.

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