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Foreword

Introduction to Gil Kujovich's *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*

Derrick Bell*

The legal status of black colleges does not stir much excitement in academic circles these days. On the surface this disinterest is odd in that the core legal issue in the debate over black colleges is their entitlement to affirmative action. The affirmative action debate has encompassed both the level of appropriations and other state support for black colleges as well as their use of race-based student admission and faculty selection standards, which are not permitted their white counterparts.

The explanation for the academic disinterest, I think, is that affirmative action as a legal concept is less concerned with what minorities are entitled to as a means of correcting actual racial disadvantage than with what society perceives whites might lose in the remediation process. Thus, most laypersons and legal professionals are only peripherally interested in whether or not black colleges can justify their mostly black existence in a legal environment that exhorts compliance with equal educational opportunity goals through racial balance standards.

And yet, far more attention to the status of black colleges is justified. The distressing history of black college funding is difficult to research, and the current legal issues are complicated and confusing. Moreover, the legal status of black colleges is more muddled than clarified by the shifting policy positions of state officials, civil rights organizations, and courts.

Cases addressing the issues of black colleges are few and for the most part unenlightening. As Professor Kujovich points

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out in the introduction to his article, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, the United States Supreme Court has directly addressed the fourteenth amendment's requirement of racial equality in higher education only once since its 1950 decision in *Sweatt v. Painter*.¹ That decision, in the *Bakke* case,² while not addressed to black colleges, inadvertently worsened their already precarious legal status. As Professor Kujovich concludes, the earlier judicial demand for conversion of " 'white colleges and black colleges to just colleges' . . . threatens to deny black colleges their continuing role in affording higher education to blacks while *Bakke* limits the ability of other institutions to assume that function."³

In my view Part II of Professor Kujovich's work is an important contribution in and of itself. Professor Kujovich provides a complete history of how black colleges were short-changed (to put it mildly) in their receipt of funding under the various federal land grant acts. Back in the mid-1960s, the NAACP Legal Defense Fund undertook a great deal of similar research intended to lead toward possible litigation against one or more southern states for violation of the separate but equal doctrine in their funding of black public colleges. After a long period of time, the project was put aside, among other reasons, because of the difficulty in obtaining records and compiling sufficient evidence of exactly what the states had done in their disparate funding of black and white colleges.

In a most impressive research undertaking, Professor Kujovich has accomplished what others have been unable to do. In 70 pages of text and 242 footnotes, he has ferreted out funding data from a myriad of sources—many of them obscure—and provided the factual basis for a horrendous record of deceit, hypocrisy, and manifest theft. I am not talking merely about the weight of citation support for his conclusions, but the data's variety, richness, and completeness. Indeed, Professor Kujovich has accomplished a herculean research triumph in the area of his subject matter that raises questions beyond the scope of his primary subject.

We know, for example, that during the "separate but

1. 339 U.S. 629 (1950).

2. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

3. Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29, 169-70 (1987) (footnote omitted) (quoting *Green v. County School Board*, 391 U.S. 430, 442 (1968)).

equal" era, blacks were believed to be intellectually and even genetically inferior to whites, a self-serving belief willingly supported by the emerging social scientists of the period.⁴ Even so, one wonders what manner of psychological justification operated during the space of almost a century when uniformly across the South, and with the easy acquiescence of the rest of the country, blacks were cheated out of their fair share of federal funding of public education. (The lower public school story is, of course, as grim as that of the public college.)

A belief in black inferiority and even simple greed are insufficient explanation for the relentlessness of the disparities, the meanspiritedness of the deprivations, and the utter devastation of hopes that the policies wreaked among blacks wanting only the schooling needed to make their own way. After all, our belief in animal inferiority has not precluded a strong defense in animals' behalf. Humans have believed themselves superior to the great whales, as their slaughter of the world's largest mammals over the decades testifies. But the defenders of black colleges—then and now—must envy the militant support they never received that is dedicated to protecting whales and other forms of animal life deemed endangered species.

In fact, Professor Kujovich's data unearth a ruthless dedication to the denial of any semblance of compliance with the separate but equal standard. The unswerving determination to deprive blacks, revealed in Part II's separate but equal exposé, ventured far beyond the border of rationality into the realm of paranoia. In the years since 1954, that drive has taken new and more sophisticated forms, but it is nonetheless recognizable in the decades-long litigation reviewed in Part III of the article. Kujovich notes that because victory in the courts did not significantly alter the relative status of black public colleges, "[t]he legacy of segregation and discrimination would survive the demise of the constitutional doctrine."⁵

So it has. And the lasting marks of oppression on black colleges and their administrations and faculties are perhaps the worst and most damaging effect of the long decades of deprivation. Exhibiting in Part IV perhaps more commitment to his scholarship than prudence would advise, Professor Kujovich reviews the old segregation-bred problems and their contemporary by-products of poor administration, impediments to schol-

4. See, e.g., G. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND* 230-82 (1971).

5. Kujovich, *supra* note 3, at 140.

arship, and all the handicaps, great and small, of isolation, insecurity, and lack of self-esteem. Appropriately though, Professor Kujovich does not neglect the many accomplishments of black colleges. These institutions imbued pride in generations of students amid surroundings in which there were few opportunities to be proud. In addition, they preserved black history and culture until a time when the nation would recognize the black legacy as the invaluable part of the American story that it is.

The basic dilemma, carefully set out in the Kujovich article but present throughout the black experience in America, is that society places all manner of barriers in the way of black aspirations and then castigates failures as proof that blacks are not ready, not able, and, in a word, not equal. When, on occasion, blacks pull themselves together and achieve at a high level despite the barriers, the predominant response from white America is one of suspicion and hostility. The abominable performance of more than one black college president has been due to their realization over time that the whites they had to look to for funding and support were more pleased by evidence of a meek incompetence than any indication that the school and its students were capable of impressive academic achievement or white-threatening independence.

As in so many other areas of endeavor, it is less that the performance of black colleges is inferior to that of their white counterparts, than that their need for a high level of academic excellence is so much greater. Given the barriers, we must applaud the achievements of those who are committed to realizing the potential of black colleges and help them attain their goals. These institutions remain a major academic avenue for poor blacks. Moreover, they are increasingly the academic antidote for black middle-class children, who are exploited more than educated in desegregated public schools that produce paranoia rather than pride and instill insecurity and self-doubt rather than confidence and competence.

As the reader might guess, I applaud the general direction of an effort to establish a special standard of desegregation for public colleges and universities. Desegregation plans for state colleges that simply emulate the "systems without a 'white' school and a 'Negro' school, but just schools" formula⁶ threaten the survival of black colleges, including in particular those that most deserve to remain open. But the task of the civil rights

6. *Green v. County School Bd.*, 391 U.S. 430, 442 (1968).

lawyer in the higher education litigation that continues is not easy. On the one hand, these lawyers correctly urge retention of the unique aspects of black colleges, noting their major cultural contributions and their role in the black community. To come within the desegregation rubric of *Brown*,⁷ however, civil rights lawyers feel constrained to urge elimination of access barriers and a reallocation of resources that will make black colleges attractive and open to members of both races.

Alas, while a worthwhile goal, the integration of black colleges poses a difficult dilemma given society's continuing and deepening racism. Operating as the stepchildren of state higher educational systems, most traditional black colleges will remain less than ideal places of learning. Even under too familiar handicaps, they will continue serving their unique roles in education and in preserving the black community and culture. Experience indicates, though, that when a black college reaches a point of real quality, whites gravitate to the school in numbers that soon become a majority. Inevitably, the majoritarian influence transforms policy making to meet the needs of the white majority. The easy though usually erroneous assumption follows that the college is still meeting the needs of blacks. Through this process, black colleges are integrated out of existence.

Of course, black college officials have been contending with paradoxes of this kind for a very long time. Professor Kujovich's article charts no royal road out of the societal labyrinth that plagues black schools. Nevertheless, he uncovers the historic barriers erected during a century of separate but unequal education. Ultimately, *The Era of Separate But Equal* provides a reason to believe that contemporary black colleges, although faced by challenges of integration that threaten their mission, will not do less well than their predecessors for which segregation was both the reason for their existence and the chief obstruction to their success.

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

