

# The Unsung Heroes of the Desegregation of American Law Schools

Gail S. Stephenson\*

## INTRODUCTION

“When I die, I want to leave this earth a member of the Florida bar.”<sup>1</sup> This was the plaintive plea of Virgil Hawkins, an African-American whose dream was to graduate from the law school at the University of Florida and become a member of the Florida bar.<sup>2</sup> He became a representative or “test plaintiff” in a lawsuit to desegregate Florida’s only public law school.<sup>3</sup> Despite the United States Supreme Court’s order that he be admitted,<sup>4</sup> the school continued to deny his admission. The Florida Supreme Court upheld the law school’s position; it found that Hawkins’s admission to the law school “would result in great public mischief.”<sup>5</sup> This Article chronicles the story of the unsung heroes—the test plaintiffs and test students who desegregated American law schools.<sup>6</sup>

Thurgood Marshall and the National Association of Colored People (NAACP) strategically chose law schools as the first targets in the fight to desegregate higher education. The battle to desegregate American higher education could not have been won without individuals like

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1. Lawrence A. Dubin, *Virgil Hawkins: A One-Man Civil Rights Movement*, 51 FLA. L. REV. 913, 951 (1999) (quoting Interview with Honorable Leander Shaw, Florida Supreme Court Justice, Tallahassee, Fla. (Aug. 8, 1999) (on file with the Florida Law Review)).

2. *Id.* at 916, 945. The lawyer who represented Hawkins in his efforts to be admitted to the Florida bar stated, “Virgil had a dream. He got his dream before Martin Luther King [had his] . . .” *Id.* at 946 (quoting Interview with James Shook, attorney, Ocala Fla. (Aug 9, 1992) (on file with the Florida Law Review)).

3. *See State ex rel. Hawkins v. Bd. of Control of Fla.*, 47 So. 2d 608, 609 (Fla. 1950).

4. *Florida ex rel. Hawkins v. Bd. of Control*, 350 U.S. 414 (1956). The Court stated, “As this case involves the admission of a Negro to a graduate professional school, there is no reason for delay. He is entitled to prompt admission under the rules and regulations applicable to other qualified candidates.” *Id.*

5. *State ex rel. Hawkins v. Bd. of Control*, 93 So. 2d 354, 360 (Fla. 1957) (quoting concurrence by Hobson, J.).

6. This Article includes accounts of test plaintiffs who sought to desegregate undergraduate and graduate schools only when their lawsuits preceded the desegregation of law schools in those states.

Hawkins. These test plaintiffs spent years engaged in time-consuming litigation, endured intimidation and humiliation, and in some cases even risked their lives for the sake of equal educational opportunities for African-Americans. Sadly, only two test plaintiffs, Donald Murray in Maryland and Ada Lois Sipuel Fisher in Oklahoma, were actually admitted to the law schools they sued to attend, graduated, and practiced law.<sup>7</sup>

Hawkins eventually obtained a law degree from an unaccredited law school in Boston but was not allowed to take the Florida bar examination.<sup>8</sup> He was finally “waived in” to the bar thirteen years after his law school graduation<sup>9</sup> but practiced only eight years; he surrendered his law license because he was facing trumped-up disciplinary charges.<sup>10</sup> He died three years later in 1988, his dream unrealized.<sup>11</sup> Later that year, however, the Florida Supreme Court posthumously reinstated Hawkins as a member in good standing of the Florida bar.<sup>12</sup>

But the test plaintiffs and “test students”—individuals who enrolled in a law school after a court ordered a university to admit African-American students to a different university program—paved the way for the students who would become the first African-American graduates of formerly all-white law schools. This Article begins by discussing the NAACP’s strategy to desegregate the American educational system. It explores the NAACP’s efforts in all seventeen states with de jure segregation, beginning with its early success in Maryland and concluding with its struggles in the deep South states that chose defiance over compliance. It examines the NAACP’s criteria for selecting test plaintiffs and test students, the legal battles that led to those students enrolling in formerly whites-only schools, the students’ experiences in the newly desegregated schools, and the factors contributing to their lack of success. Finally, the Article notes the honors bestowed on the students decades later.

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7. Cheryl Brown Wattle, *Ada Lois Sipuel Fisher: How a “Skinny Little Girl” Took on the University of Oklahoma and Helped Pave the Road to Brown v. Board of Education*, 62 OKLA. L. REV. 449, 450, 456 (2010).

8. Dubin, *supra* note 1, at 944.

9. *In re Fla. Bd. of Bar Exam’rs*, 339 So. 2d 637, 638 (Fla. 1976).

10. Dubin, *supra* note 1, at 952-53.

11. *Id.*

12. *In re Hawkins*, 532 So. 2d 669, 671 (Fla. 1988).

## I. BACKGROUND

### A. The NAACP Gets Involved

In 1909 the NAACP, a civil rights organization, was formed as an interracial endeavor to advance justice and seek “equal rights and opportunities for all.”<sup>13</sup> It became the “intellectual and logistical center for the desegregation fight.”<sup>14</sup> The NAACP supported legal action to combat discriminatory practices, including the significant disparities in the funding of Black and white schools.<sup>15</sup> It received a grant in 1930 that enabled it to hire its first staff attorney, Nathan Margold, a Romanian-born Harvard Law graduate,<sup>16</sup> to “plan and coordinate the [NAACP’s] litigation campaign.”<sup>17</sup> Margold’s first step was to draft an expansive report that focused on the unconstitutionality of the unequal allocation of school funds.<sup>18</sup> This strategy sought to force southern states to comply with *Plessy v. Ferguson*<sup>19</sup> by focusing on the “equal” part of the “separate-but-equal” doctrine.<sup>20</sup> Margold confirmed what the NAACP had determined earlier through surveys—that “the separate-but-equal doctrine as practiced was always separate but never equal.”<sup>21</sup>

The plan was “to push first for *equality* of education rather than *desegregation* of education.”<sup>22</sup> The NAACP and its lawyers would

13. JACK GREENBERG, *CRUSADERS IN THE COURTS* 14 (1994).

14. SCOTT M. GELBER, *COURTROOMS AND CLASSROOMS: A LEGAL HISTORY OF COLLEGE ACCESS, 1860-1960*, at 67 (2016).

15. ROBERT J. COTTRILL ET AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* 52-53 (2003).

16. *Id.*; MICHAEL D. DAVIS & HUNTER R. CLARK, *THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH* 64 (1992).

17. CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* 113 (2004).

18. DAVIS & CLARK, *supra* note 16, at 66-67; OGLETREE, *supra* note 17, at 113-14.

19. *Plessy v. Ferguson*, 163 U.S. 537, 544, 548 (1896) (holding that state law requiring “separate-but-equal” accommodations for whites and African-Americans did not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and noting in dicta that “the establishment of separate schools for white and colored children . . . [has] been held to be a valid exercise of the legislative power . . .”).

20. See Leland B. Ware, *Setting the Stage for Brown: The Development and Implementation of the NAACP’s School Desegregation Campaign, 1930-1950*, 52 *MERCER L. REV.* 631, 642 (2001).

21. *Id.* at 639.

22. JAMES V. ENDERSBY & WILLIAM T. HORNER, *LLOYD GAINES AND THE FIGHT TO END SEGREGATION* 46 (2016).

either “chip away at the separate or seize more of the equal . . . .”<sup>23</sup> To make the educational systems more equal, southern states would have to either significantly increase the funding of African-American schools, which would greatly increase the burden on state budgets in southern states, or desegregate the schools.<sup>24</sup> Margold’s “theory was that southern states could not afford to build equal facilities,” and thus they would be forced to integrate.<sup>25</sup>

## B. Focus on Graduate and Professional Schools

Margold’s report focused on integrating elementary and secondary schools, but Charles Hamilton Houston, who became the NAACP’s chief counsel in 1935,<sup>26</sup> was more “interested in breaking down barriers to the highest levels of education” first.<sup>27</sup> Thurgood Marshall joined Houston in 1936.<sup>28</sup> They decided to focus their desegregation litigation efforts primarily on graduate and professional schools because they believed that “[g]raduate schools were an area where the South was most vulnerable.”<sup>29</sup> They hoped that if they “pressed with sufficient vigor[,] many states would capitulate without extended litigation.”<sup>30</sup> They chose law schools as their primary target because judges were familiar with law schools and knew how to determine whether law schools were equal,<sup>31</sup> and providing more opportunities for legal education for African-Americans would produce more African-

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23. Peter Wallenstein, *Race, Law, and Southern Public Higher Education, 1860s–1960s*, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 370 (Sally E. Hadden & Patricia Hagler Minter, eds., 2013).

24. DAVIS & CLARK, *supra* note 16, at 66-67; OGLETREE, *supra* note 17, at 114.

25. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 76 (1998).

26. DAVIS & CLARK, *supra* note 16, at 67.

27. ENDERSBY & HORNER, *supra* note 22, at 40-41 (2016).

28. WIL HAYGOOD, SHOWDOWN: THURGOOD MARSHALL AND THE SUPREME COURT NOMINATION THAT CHANGED AMERICA 60 (2015).

29. OGLETREE, *supra* note 17, at 117.

30. Thurgood Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts*, 21 J. NEGRO EDUC. 316, 319 (1952).

31. COTTRILL ET AL., *supra* note 15, at 61, noting, “Judges, of course, know a great deal about law schools and how to judge them. They are law school graduates, and they spend their professional lives working with law school graduates. They have an expertise in the subject matter far beyond that which they have in other kinds of cases.” See also Ware, *supra* note 20, at 663.

American practicing lawyers who could “vindicate fundamental civil rights through litigation.”<sup>32</sup>

One of the foremost reasons for the focus on the highest levels of education was the limited number of those programs in the South.<sup>33</sup> “Segregation in graduate and professional [schools] . . . was as common in the South as segregation in elementary and secondary schools[. . .] but far fewer graduate and professional programs” existed.<sup>34</sup> Marshall noted that “at the university level no provision for Negro education was a rule rather than the exception.”<sup>35</sup> Fewer targets meant the NAACP could concentrate its efforts on those programs, producing more powerful results.<sup>36</sup>

One commentator described graduate and professional school opportunities for African-Americans at the time as “so few and so bad.”<sup>37</sup> In 1933, no public college for African-Americans in the southern states “offered any courses beyond the baccalaureate degree, nor did they contain professional schools of any kind.”<sup>38</sup> Until 1936, only 139 African-Americans had earned a Ph.D. in the United States,<sup>39</sup> and “not a single southern state admitted blacks to a Ph.D. program.”<sup>40</sup> “In 1939 . . . only seven [B]lack colleges in America offered any graduate work whatsoever; nine southern states had no provision whatsoever for [B]lack graduate education.”<sup>41</sup> In 1945, the South offered white students sixteen law schools, fifteen medical schools, fourteen pharmacy schools, seventeen engineering schools, and four

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32. Carl W. Tobias, *Brown and the Desegregation of Virginia Law Schools*, 39 U. RICH. L. REV. 39, 39–40 (2004); see also ENDERSBY & HORNER, *supra* note 22, at 48.

33. See OGLETREE, *supra* note 17, at 117–18.

34. Robert J. Cottrol et al., *NAACP v. Jim Crow: The Legal Strategy That Brought Down “Separate but Equal” by Toppling School Segregation*, AM. EDUCATOR, Summer 2004.

35. Marshall, *supra* note 30, at 319.

36. See OGLETREE, *supra* note 17, at 117.

37. David W. Levy, *Before Brown: The Racial Integration of American Higher Education*, in *BLACK, WHITE, AND BROWN: THE LANDMARK SCHOOL DESEGREGATION CASE IN RETROSPECT* 67, 69 (Clare Cushman & Melvin L. Urofsky eds., 2004).

38. U.S. COMM’N ON CIVIL RIGHTS, EQUAL PROTECTION OF THE LAWS IN PUBLIC HIGHER EDUCATION 14 (1960) [hereinafter COMMISSION].

39. Levy, *supra* note 37, at 69.

40. MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT* 41 (2007).

41. Levy, *supra* note 37, at 67.

dental schools. African-American students, however, were limited to one law school.<sup>42</sup>

The NAACP's first attempt at integrating a professional school was "a false start."<sup>43</sup> In 1933, Thomas Hocutt sued to be admitted to the University of North Carolina's pharmacy school and lost.<sup>44</sup> William Hastie, a professor at Howard, represented Hocutt, and Marshall, who was a second-year law student at the time, helped Hastie with the research.<sup>45</sup> The court found that the University of North Carolina was a private institution, even though it was financed with public funds, and that it was not obligated "to extend equal rights to all applicants."<sup>46</sup> The court also stated that Hocutt was "a reluctant colored man, poorly prepared and disqualified."<sup>47</sup> Hastie had difficulty rebutting this because the president of the North Carolina College for Negroes refused to release Hocutt's undergraduate transcript in the belief that he was protecting his school;<sup>48</sup> he feared retaliation.<sup>49</sup>

After this unfortunate beginning, the NAACP became more selective in its choices of cases to litigate. The NAACP had plenty of segregated school systems to choose from; in 1939 seventeen states—the eleven former Confederate states (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia) and the border states (Delaware,

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42. *Id.* at 69–70. Even after the NAACP began its litigation campaign and states began to spend more money on segregated African-American schools, huge disparities remained. President Harry Truman's Commission on Higher Education noted in 1948 that the seventeen segregated states had not "a single institution that approximated the undergraduate, graduate, and professional offerings characteristic of a first-class State university." Wallenstein, *supra* note 23, at 381 (quoting PRESIDENT'S COMM'N ON HIGHER EDUC., HIGHER EDUCATION FOR AMERICAN DEMOCRACY: A REPORT, §§ 1:32, 2:31 (1948)).

43. GREENBERG, *supra* note 13, at 5.

44. DAVIS & CLARK, *supra* note 16, at 60; Wallenstein, *supra* note 23, at 378.

45. DAVIS & CLARK, *supra* note 16, at 60; WILLIAMS, *supra* note 25, at 75.

46. DAVIS & CLARK, *supra* note 16, at 60–61.

47. *Id.*

48. Wallenstein, *supra* note 23, at 378; WILLIAMS, *supra* note 25, at 75.

49. Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate but Equal*, 72 MINN. L. REV. 29, 115 (1987). Marshall later referred to the college president as "a first-class Uncle Tom." WILLIAMS, *supra* note 25, at 75. A Marshall biographer explained: "'Uncle Tom' was a derisive term, culled from Harriet Beecher Stowe's novel [Uncle Tom's Cabin], used to identify [B]lacks who lacked spine and did not support the best interests of fellow [B]lacks. Such individuals greatly unnerved Marshall." HAYGOOD, *supra* note 28, at 61.

Kentucky, Maryland, Missouri, Oklahoma, and West Virginia)<sup>50</sup>—”maintained, by law, separate school systems at all levels.”<sup>51</sup> Houston and Marshall decided to shift their attacks to the border states, which offered scholarship programs that paid the tuition for African-American students to matriculate in graduate programs in other states.<sup>52</sup>

## II. THE ROAD TO INTEGRATION

### A. Maryland—The Perfect Test Plaintiff

When it came time to select test cases, Hamilton and Marshall, having learned a lesson from Hocutt’s case, “patiently waited for the best plaintiffs who were in the jurisdiction of the best possible forums.”<sup>53</sup> They found the perfect test plaintiff in Donald Gaines Murray.

Marshall learned in December 1934 that Murray, an Amherst College honors graduate, was interested in attending law school.<sup>54</sup> Murray was a young African-American from a highly respected Baltimore family; his grandfather was an African Methodist Episcopalian bishop.<sup>55</sup> Marshall convinced Murray to seek admission to the University of Maryland Law School.<sup>56</sup>

Murray requested information from the University about applying to its law school.<sup>57</sup> He received a letter from Raymond Pearson, the University president, encouraging him to apply to Princess Anne Academy, a state school for African-Americans that did not have a law school, or to apply for a scholarship to attend an out-of-state law school.<sup>58</sup> He applied to Maryland anyway in early January 1935.<sup>59</sup>

50. See COMMISSION, *supra* note 38, at xiii; Wallenstein, *supra* note 23, at 376.

51. Levy, *supra* note 37, at 68; Rufus E. Clement, *Legal Provisions for Graduate and Professional Instruction of Negroes in States Operating Separate School System*, 8 J. Negro Educ. 142, 142 (1939).

52. Kujovich, *supra* note 49, at 115.

53. OGLETREE, *supra* note 17, at 119.

54. DAVIS & CLARK, *supra* note 16, at 82; WILLIAMS, *supra* note 25, at 76.

55. DAVIS & CLARK, *supra* note 16, at 82; WILLIAMS, *supra* note 25, at 76.

56. MARSHALLING JUSTICE: THE EARLY CIVIL RIGHTS LETTERS OF THURGOOD MARSHALL 7 (Michael G. Long ed., 2011); see OGLETREE, *supra* note 17, at 136; WILLIAMS, *supra* note 25, at 76.

57. DAVIS & CLARK, *supra* note 16, at 82.

58. *Id.*

59. *Id.* at 83; Wallenstein, *supra* note 23, at 379.

Murray received a letter a month later from the registrar returning his application and required fee.<sup>60</sup> The registrar's letter stated that "the University does not accept Negro students, except at Princess Anne Academy."<sup>61</sup> Murray applied again in early March and again received a rejection letter, this time from Pearson, touting the "exceptional facilities" available at Howard Law School.<sup>62</sup>

Maryland denied Murray's admission solely because of his race, although neither Maryland nor the University had laws or rules mandating that the University of Maryland be segregated.<sup>63</sup> African-Americans were excluded from the University of Maryland simply as a matter of unwritten policy.<sup>64</sup>

Houston and Marshall filed a mandamus proceeding in Baltimore City Court to compel the University of Maryland Law School to admit Murray as a student.<sup>65</sup> They asserted that the University's refusal to admit Murray as a student was not supported by Maryland's law or constitution and violated the Fourteenth Amendment of the U.S. Constitution.<sup>66</sup> At trial, the State of Maryland stipulated for the record that, but for his race, Murray was qualified to be admitted to the law school.<sup>67</sup>

After Houston and Marshall's closing argument,<sup>68</sup> Judge Eugene O'Dunne ruled from the bench that the University of Maryland had a legal obligation to offer the same educational opportunities for African-American students as those offered to white students and that the obligation had not been fulfilled.<sup>69</sup> Hence, the judge issued a writ of mandamus ordering the University of Maryland to admit Murray.<sup>70</sup>

The University of Maryland appealed to the Maryland Court of Appeals, the state's highest court, soon after being ordered to admit

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60. DAVIS & CLARK, *supra* note 16, at 83.

61. *Id.*

62. *Id.*

63. *Id.* at 82–83; Levy, *supra* note 37, at 70–71.

64. DAVIS & CLARK, *supra* note 16, at 84.

65. *Pearson v. Murray*, 182 A. 590, 590 (Md. 1936).

66. *Id.*

67. DAVIS & CLARK, *supra* note 16, at 84; Ware, *supra* note 20, at 646.

68. Houston and Marshall split the closing argument. Ware, *supra* note 20, at 648.

69. DAVIS & CLARK, *supra* note 16, at 87; Ware, *supra* note 20, at 648.

70. DAVIS & CLARK, *supra* note 16, at 87; Ware, *supra* note 20, at 648.



Murray into law school.<sup>71</sup> One of its arguments was that the state had satisfied its legal obligations under *Plessy* by establishing a separate school for African-American students.<sup>72</sup> The court found that while *Plessy* allowed for segregated schools, “separation of the races must nevertheless furnish equal treatment.”<sup>73</sup>

The state also argued that, to the extent it was required to provide graduate educational opportunities for African-American students, establishing a scholarship fund that African-Americans could use to attend out-of-state schools legally met this obligation.<sup>74</sup> The court found, however, that the Maryland legislature had not funded the scholarships at the time Murray applied for admission.<sup>75</sup> Moreover, funds that were subsequently appropriated were inadequate to satisfy the demands of African-American students who had applied for aid.<sup>76</sup> Even if an African-American student received a scholarship, travel and living expenses not covered by the scholarship would “involve him in considerable expense.”<sup>77</sup> Thus, the court held that the state was not providing African-American students facilities substantially equal to those provided to whites at the law school because there was a “rather slender chance” for an African-American to attend a law school outside the state “at increased expense.”<sup>78</sup>

The court further determined that erecting a separate school for African-American students was not a viable alternative remedy.<sup>79</sup> The court stated, “Whatever system [Maryland] adopts for legal education now must furnish equality of treatment now. . . . And as in Maryland now the treatment can be furnished only in the one existing law school, the petitioner, in our opinion, must be admitted there.”<sup>80</sup> The court thus affirmed Judge O’Dunne’s order requiring that the University of Maryland Law School admit Murray.<sup>81</sup>

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71. *Pearson v. Murray*, 182 A. 590, 590 (Md. 1936); OGLETREE, *supra* note 17, at 136.

72. *Ware*, *supra* note 20, at 650.

73. *Id.*

74. *Pearson*, 182 A. at 591.

75. *Id.*

76. *Id.* at 592.

77. *Id.* at 593.

78. *Id.*

79. *Id.* at 594.

80. *Id.*

81. *Id.*

Although the *Murray* decision was limited in scope, it “pave[d] the way strategically for the next desegregation suits.”<sup>82</sup> The University of Maryland did not appeal to the U.S. Supreme Court, depriving Houston and Marshall of a nationally binding precedent.<sup>83</sup> Houston and Marshall had, however, garnered a judgment that challenged *Plessy* indirectly and narrowed *Plessy*’s racial barriers; *Murray* “established a model for cases going forward.”<sup>84</sup>

During the litigation, Marshall and Murray received threatening letters that they believed were from the local Ku Klux Klan,<sup>85</sup> but undeterred, Marshall made every effort to ensure that Murray’s matriculation at Maryland was successful. He arranged for a loan from the NAACP to pay Murray’s law school tuition.<sup>86</sup> When the dean suggested Murray not sit next to white students, “Marshall walked around the campus until he found two white students who agreed to tell the dean they had no problem sitting next to Murray.”<sup>87</sup> Marshall sometimes accompanied Murray to campus, “as if he dared confrontation.”<sup>88</sup> Marshall “sought out racially progressive students” to befriend Murray, reviewed Murray’s notebooks, and arranged tutoring.<sup>89</sup> Houston wrote to Marshall, “[W]hatever happens, we must not have this boy fail his examinations . . . Impress upon Murray that from now on, girls are nix until after his examinations.”<sup>90</sup>

Marshall’s efforts were successful. Black newspapers of the day reported that Murray’s “classmates were exceedingly cordial and so were professors”<sup>91</sup> and that Murray’s “relations with the Faculty of Law and his classmates have been entirely satisfactory and there has not been a single unpleasant incident.”<sup>92</sup> Houston reported, “White students sit on either side of him. He recites like any other student. He minds his

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82. Barak Atiram, *Socially-Driven Class Actions: The Legacy of Briggs*, 23 TEX. J. ON CIV. LIBERTY & CIV. RTS. 1, 12–13 (2017).

83. GREENBERG, *supra* note 13, at 63.

84. ENDERSBY & HORNER, *supra* note 22, at 50.

85. HAYGOOD, *supra* note 28, at 60; MARSHALLING JUSTICE, *supra* note 56, at 8.

86. WILLIAMS, *supra* note 25, at 78.

87. *Id.* at 79.

88. HAYGOOD, *supra* note 28, at 60; *see also* MARSHALLING JUSTICE, *supra* note 56, at 8.

89. MARSHALLING JUSTICE, *supra* note 56, at 8.

90. *Id.*

91. WILLIAMS, *supra* note 25, at 79.

92. ENDERSBY & HORNER, *supra* note 22, at 66.

business; they mind theirs.”<sup>93</sup> Murray graduated from the University of Maryland Law School in 1938.<sup>94</sup>

## B. West Virginia—Acquiescence

After the 1936 decision in *Murray*, West Virginia did not wait for a lawsuit. It had provided grants for African-American students to attend graduate school in neighboring states since 1927.<sup>95</sup> But in 1937, it began considering establishing a graduate program at West Virginia State College (WVSC), the state’s Black land-grant institution.<sup>96</sup> When WVSC’s president, John W. Davis, learned that the legislature was about to appropriate \$2,000,000 for that purpose, he suggested lawmakers instead use the money to improve graduate programs at West Virginia University (WVU), the state’s all-white, flagship university, and accept African-American students to those programs.<sup>97</sup> WVU president agreed.<sup>98</sup> So in 1938, instead of opening a “separate-but-equal” graduate-school program, WVU “took the ultimate logical step.”<sup>99</sup> It changed its policies to voluntarily admit African-American students to its graduate and professional schools, becoming the first southern or border state to do so.<sup>100</sup>

Three students entered graduate school at WVU in 1940, but no African-Americans graduated from the WVU College of Law until Charles E. Price did so in 1949.<sup>101</sup>

93. *Id.* at 50; see also RICHARD KLUGER, *SIMPLE JUSTICE* 193 (1975) (stating, “No one ever hit him, pushed him, razzed him, or otherwise made life unpleasant for him.”).

94. Taunya Lovell Banks, *Setting the Record Straight: Maryland’s First Black Women Law Graduates*, 63 MD. L. REV. 752, 756 (2004).

95. COMMISSION, *supra* note 38, at 19.

96. Crystal R. Sanders, *Katherine Johnson Should Also Be Remembered for Desegregating Higher Education*, WASH. POST (Feb. 25, 2020), <https://www.washingtonpost.com/outlook/2020/02/25/katherine-johnson-should-also-be-remembered-desegregating-higher-education/>.

97. *Id.*

98. *Id.*

99. COMMISSION, *supra* note 38, at 19.

100. *Id.*; CAROLE A. WILLIAMS, U.S. COMM’N ON CIVIL RIGHTS, *THE BLACK/WHITE COLLEGES: DISMANTLING THE DUAL SYSTEM OF HIGHER EDUCATION* 5 (1981) [hereinafter C. WILLIAMS].

101. John Fisher, *Dean’s Column, The 1940s*, WEST VIRGINIA LAWYER 10, 11 (Apr. 2003); *A Lifetime Legacy of Learning Leads to Success*, WVU TODAY ARCHIVE (May 19, 2008), <http://wvutoday-archive.wvu.edu/n/2008/05/19/6827.html>.

### C. Tennessee—Stumbling Block

Unfortunately, West Virginia was the only southern or border state that agreed to desegregate its graduate and professional schools without litigation in the decade after the *Murray* decision.<sup>102</sup> Instead, most states reacted by providing scholarships for African-American students to attend out-of-state institutions or establishing graduate programs at segregated Black colleges.<sup>103</sup> Tennessee had neither desegregated nor provided scholarships, and the NAACP sought a qualified test plaintiff to apply to the University of Tennessee (UTenn).<sup>104</sup> John Reuben Sheeler, an Athens, Tennessee, school teacher, expressed an interest in attending law school, but he vacillated between remaining a teacher and applying to law school.<sup>105</sup> Houston thought Sheeler had potential as a law school test plaintiff.<sup>106</sup> To encourage him to apply, Houston wrote to him, “The lawyer is going to be the leader of the next step in racial advancement.”<sup>107</sup>

Despite Houston’s encouragement, Sheeler opted for a career in education.<sup>108</sup> So, instead of a suit to desegregate the UTenn law school, the NAACP took up the case of William B. Redmond II, who wanted to enroll at UTenn’s pharmacy school.<sup>109</sup> That suit, however, was unsuccessful; the court rendered a decision against Redmond in April 1937 on what Marshall termed a “highly technical point”<sup>110</sup> of failure to exhaust administrative remedies.<sup>111</sup> The NAACP decided not to appeal due to Redmond’s lackluster performance at a segregated graduate

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102. Marshall stated that the campaign to desegregate graduate and professional schools moved slowly during this period for three reasons: (1) lack of full support from the African-American community in general; (2) lack of interested test plaintiffs; and (3) insufficient funds to finance litigation. Marshall, *supra* note 30, at 318.

103. See COMMISSION, *supra* note 38, at 19, 23.

104. See MARK V. TUSHNET, THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950, at 53–54 (1987) [hereinafter LEGAL STRATEGY].

105. BOBBY L. LOVETT, THE CIVIL RIGHTS MOVEMENT IN TENNESSEE 3 (2005).

106. LEGAL STRATEGY, *supra* note 104, at 53–54.

107. *Id.* at 54.

108. *Id.* Instead Sheeler became a test student in UWV’s doctoral program, becoming the first African-American to receive a doctoral degree from UWV in 1954. See *J. Reuben Sheeler Collection*, TEX. ARCHIVAL RES. ONLINE, <https://legacy.lib.utexas.edu/taro/houpub/00067/hpub-00067.html> (last visited June 1, 2020).

109. COMMISSION, *supra* note 38, at 18; LEGAL STRATEGY, *supra* note 104, at 54.

110. Marshall, *supra* note 30, at 318.

111. COMMISSION, *supra* note 38, at 18; GELBER, *supra* note 14, at 75.

school.<sup>112</sup> Walter White, executive secretary of the NAACP,<sup>113</sup> lamented the difficulty in finding “the combination . . . of competence and courage” needed for successful litigation.<sup>114</sup>

## D. Missouri—First Supreme Court Victory

### 1. Right to Legal Education Within the State

Instead of pursuing Redmond’s case in Tennessee, Marshall and Houston moved on to Missouri.<sup>115</sup> The test plaintiff was Lloyd Gaines, a 1935 graduate of Lincoln University (Lincoln), Missouri’s state-funded college for African-Americans in Jefferson City, Missouri.<sup>116</sup> Although the case led to the NAACP’s “first major federal victory,”<sup>117</sup> Gaines disappeared before the litigation was complete, greatly embarrassing the NAACP.<sup>118</sup>

In 1935, Gaines applied for admission to the law school at the University of Missouri (Mizzou), the state’s flagship university.<sup>119</sup> In response to Gaines’s application, S.W. Canada, Mizzou’s registrar, requested Gaines’s undergraduate transcript, which revealed that Gaines was a Lincoln graduate.<sup>120</sup> Gaines then received a letter giving him two options: (1) study law at Lincoln; or (2) enroll in an out-of-state public law school that admitted African-American students, with the State of Missouri paying the tuition.<sup>121</sup> Only the second option was actually viable, however, because Lincoln did not have a law school.<sup>122</sup>

Mizzou delayed officially rejecting Gaines’s application, forcing the NAACP to file a mandamus suit on Gaines’s behalf to compel Canada

112. LEGAL STRATEGY, *supra* note 104, at 54.

113. KLUGER, *supra* note 93, at 139.

114. LEGAL STRATEGY, *supra* note 104, at 54.

115. GELBER, *supra* note 14, at 75.

116. ENDERSBY & HORNER, *supra* note 22, at 12; Ware, *supra* note 20, at 654.

117. OGLETREE, *supra* note 17, at 121. Indeed, some commentators see the *Gaines* case as the beginning of school desegregation, “at least as far as the United States Supreme Court is concerned.” Peter William Moran, *Border State Ebb and Flow* 176, in WITH ALL DELIBERATE SPEED: IMPLEMENTING *BROWN V. BOARD OF EDUCATION* (Brian J. Daugherty & Charles C. Bolton eds., 2008).

118. Lucille H. Bluford, *The Lloyd Gaines Story*, 32 J. EDUC. SOC. 242, 245–46 (1959).

119. ENDERSBY & HORNER, *supra* note 22, at 2, 26.

120. *Id.* at 59–60.

121. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 342–43 (1938).

122. See Bluford, *supra* note 118, at 243–45

to fulfill his duty to make a decision on the application.<sup>123</sup> Before the judge ruled on the mandamus suit, Mizzou's Board of Curators adopted a resolution rejecting Gaines's application on the grounds that a law department could be established at Lincoln, "a modern and efficient school," and that in the meantime, Gaines could attend law school in an adjacent state with his tuition paid "out of the public treasury."<sup>124</sup> But Gaines rebuffed those options; he "wanted to study law in his own state university which the taxes of his family helped support."<sup>125</sup>

The NAACP's next move was to sue Mizzou's registrar.<sup>126</sup> The trial began on July 10, 1936.<sup>127</sup> Two weeks after the trial ended, the trial judge rendered a one-sentence judgment in the University's favor.<sup>128</sup> The NAACP appealed to the Missouri Supreme Court, which agreed to hear the case *en banc*.<sup>129</sup>

The Missouri Supreme Court upheld the trial court's ruling.<sup>130</sup> Among the court's specific findings were: (1) the Fourteenth Amendment did not forbid separate schools;<sup>131</sup> (2) had Gaines applied for admission to law school at Lincoln, the school would have been obligated to establish a law school or provide Gaines an opportunity for legal training elsewhere that was substantially equal to the opportunity provided to white students at Mizzou;<sup>132</sup> (3) Gaines could have attended law schools in adjacent states that admitted African-American students and received a "sound, comprehensive, valuable legal education";<sup>133</sup> and (4) while equality was guaranteed to citizens under *Plessy*, "equality and not identity of school advantages is what the law guarantees to every citizen."<sup>134</sup>

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123. ENDERSBY & HORNER, *supra* note 22, at 66.

124. *Id.* at 68–69.

125. Bluford, *supra* note 118, at 243.

126. ENDERSBY & HORNER, *supra* note 22, at 71–72.

127. *Id.* at 76.

128. *Id.* at 85–86.

129. *See id.* at 96.

130. *State ex rel. Gaines v. Canada*, 113 S.W.2d 783, 791 (Mo. 1937), *rev'd*, 305 U.S. 337 (1938).

131. *Id.* at 789.

132. *Id.*

133. *Id.*

134. *Id.*

The NAACP appealed that decision to the U.S. Supreme Court,<sup>135</sup> which reversed the Missouri Supreme Court.<sup>136</sup> In ruling for Gaines, the U.S. Supreme Court found that: (1) the federal constitution required that Missouri provide its African-American citizens with equal educational opportunities that could not be shifted to neighboring or adjacent states; (2) Missouri had to provide within its borders equal educational opportunities to African-Americans; and (3) because Missouri did not provide a separate-but-equal law school for Gaines to attend, Gaines had a personal right to a legal education, which required the state to furnish him a legal education at Mizzou.<sup>137</sup>

The Court did not, however, order the registrar to admit Gaines; it found that Gaines “was entitled to be admitted to the law school of the State University *in the absence of other and proper provision* for his legal training within the State.”<sup>138</sup> The Court then remanded the case to the Missouri Supreme Court for it to determine whether “other and proper” legal training was available to Gaines within the State of Missouri.<sup>139</sup>

## 2. “Other and Proper” Legal Training

The Missouri legislature quickly enacted a law to establish a law school at Lincoln.<sup>140</sup> The legislature appropriated \$200,000 to create this new school that was to be Mizzou’s equal, while at the same time appropriating \$3,000,000 to Mizzou for improvements and maintenance.<sup>141</sup> The Missouri Supreme Court held a hearing in May 1939 to determine whether Lincoln’s law school would be equal to Mizzou.<sup>142</sup> Instead of ruling on the adequacy of the new law school, however, it remanded the case to the trial court to make that determination.<sup>143</sup> It instructed the trial court to determine whether the

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135. State of Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

136. *Id.* at 352.

137. *Id.* at 349–50.

138. *Id.* at 352 (emphasis added).

139. *Id.*

140. Bluford, *supra* note 118, at 244–45; ENDERSBY & HORNER, *supra* note 22, at 161–68, 195.

141. See ENDERSBY & HORNER, *supra* note 22, at 169.

142. Bluford, *supra* note 118, at 244.

143. *Id.*

facilities were “substantially equivalent”; if not, Gaines’s writ would be granted, and he would be admitted to Mizzou.<sup>144</sup>

Lincoln Law School opened on September 20, 1939, with thirty students.<sup>145</sup> The school had a dean and three professors and shared a building with a hotel and a movie theater.<sup>146</sup> Lloyd Gaines did not enroll in that school; he continued to argue in the remanded suit that Lincoln was not equal to Mizzou.<sup>147</sup>

### 3. *Lloyd Gaines Disappears*

During the first week of October 1939, Houston came to St. Louis to take depositions in advance of the October 7 trial court hearing.<sup>148</sup> When it came time for Gaines’s deposition, he was “nowhere to be found,” and he was never seen or heard from again.<sup>149</sup> Without a plaintiff, the hearing was cancelled, and the lawsuit was dismissed on January 1, 1940.<sup>150</sup> Thus, no determination was ever made on the equivalency of Lincoln Law School.<sup>151</sup>

Theories abound as to what happened to Gaines. During the four years the lawsuit was pending, Gaines had borrowed money from the NAACP to pay tuition for a master’s degree in economics from the University of Michigan.<sup>152</sup> His brother theorized that he had disappeared because he could not repay the tuition loan and “always hated debts he could not pay.”<sup>153</sup> Some NAACP officials thought he had “walked out on them when they declined to make him certain monetary advances for his personal support.”<sup>154</sup> Others speculated that he had “accepted a

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144. ENDERSBY & HORNER, *supra* note 22, at 190–91.

145. Bluford, *supra* note 118, at 245; ENDERSBY & HORNER, *supra* note 22, at 200.

146. COTTRILL ET AL., *supra* note 15, at 68.

147. Bluford, *supra* note 118, at 245.

148. *Id.*

149. *Id.* He was last seen at the Alpha Phi Alpha fraternity house in Chicago in March 1939; the housekeeper said he went out to buy stamps one night and never returned. ENDERSBY & HORNER, *supra* note 22, at 24.

150. ENDERSBY & HORNER, *supra* note 22, at 223.

151. Bluford, *supra* note 118, at 245; ENDERSBY & HORNER, *supra* note 22, at 224.

152. WILLIAMS, *supra* note 25, at 97–98.

153. ENDERSBY & HORNER, *supra* note 22, at 230.

154. *Id.* at 219.



substantial payment to withdraw from the case.”<sup>155</sup> A 1951 story in *Ebony* magazine “paint[ed] a picture of a debt-ridden, angry man who chose to start a new life elsewhere.”<sup>156</sup>

Yet others speculated that Gaines had met with foul play. Although no evidence existed to support the stories, some suggested that the Ku Klux Klan had captured and killed Gaines.<sup>157</sup> No law enforcement agency ever investigated his disappearance because there was no evidence he had been killed.<sup>158</sup>

Gaines never studied law at Mizzou’s law school, but an article in the *New York Amsterdam News* in January 1940 indicated Gaines would have had a much more difficult time at Mizzou than Murray did at the University of Maryland. The article quoted a “spokesman for the legal fraternities” as stating, “If he’s admitted he’ll be treated like a dog; there aren’t any of us who’d like to sit by a Negro.”<sup>159</sup> Another legal fraternity spokesman said that if Gaines enrolled, “he’d be busted out.”<sup>160</sup> And the article reported that “Genteel Missourians . . . hinted darkly that they would know how to ‘welcome’ Gaines if he ever entered the University.”<sup>161</sup>

#### 4. Gaines’s Effect

The *Gaines* decision, though not all the NAACP had hoped for, led to improvements in the educational opportunities for African-Americans.<sup>162</sup> To avoid desegregation, states created graduate and professional programs at their Black colleges.<sup>163</sup> And even though *Gaines* held that states had to provide equal opportunities within their borders for African-Americans, some states created even more well-funded out-of-state scholarships.<sup>164</sup> Over the next decade, African-

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155. ENDERSBY & HORNER, *supra* note 22, at 228. One theory was that he had accepted \$2,000 to move to Mexico. WILLIAMS, *supra* note 25, at 98.

156. ENDERSBY & HORNER, *supra* note 22, at 231.

157. *Id.* at 235.

158. *Id.*

159. *Id.* at 227 (quoting *White Students Give Views on Gaines Case*, N.Y. AMSTERDAM NEWS, Jan. 27, 1940, at 4).

160. *Id.*

161. *Id.*

162. COTTROL ET AL., *supra* note 15, at 72–73.

163. *Id.*

164. *Id.* at 73.

American students in graduate and professional programs increased significantly.<sup>165</sup>

### 5. *Mizzou Finally Desegregates*

Despite the Supreme Court's decision in 1938, it took twelve long years before an African-American student enrolled at Mizzou and a quarter-century before an African-American student enrolled at the law school.<sup>166</sup> In 1950, a court ordered the University to admit its first ten African-American students,<sup>167</sup> and the University soon decided to admit African-American students from Missouri to all departments.<sup>168</sup> Gus T. Ridgel was the first of those students to graduate, earning a master's degree in economics in 1951.<sup>169</sup>

Carl Farris was the first African-American to enroll at the law school in 1963, followed by DeLawrence Beard in 1964, but neither graduated.<sup>170</sup> James H. Rollins and Harold Holliday, Jr. were the first African-Americans to enroll as freshmen in 1965.<sup>171</sup> Rollins was dismissed in his last year of law school,<sup>172</sup> but Holliday graduated in

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165. *Id.*

166. Wallenstein, *supra* note 23, at 381.

167. COMMISSION, *supra* note 38, at 34–35. In *Curators of the University of Missouri v. Bell*, a state court held that “state supported institutions of higher learning in [Missouri] are legally obligated to admit scholastically qualified resident [N]egro students to those divisions and curricula in which instruction is not immediately available at Lincoln University.” *Curators of the Univ. of Mo. v. Bell*, No. 12,240 (Cole County Cir. Ct., Mo., June 27, 1950).

168. ENDERSBY & HORNER, *supra* note 22, at 263. African-American students from other states were not admitted, however. *Id.*

169. *Faces of Progress: African American Tigers Who Helped Build a More Inclusive Mizzou*, UNIV. OF MO. (Feb. 1, 2015), <https://news.missouri.edu/2015/faces-of-progress/>.

170. E-mail from Cynthia W. Bassett, Elec. Servs. Librarian, Univ. of Mo. Sch. of Law, to the author (July 17, 2020, 8:48 a.m. CDST) (on file with author) [hereinafter Bassett email]. Beard graduated from the University of Baltimore School of Law in 1970 and became the first African-American judge in Montgomery County, Maryland. Ernesto Londo, *Circuit Judge Retires After 25 Years*, WASH. POST (Feb. 7, 2008), <https://www.washingtonpost.com/wp-dyn/content/article/2008/02/06/AR2008020602320.html>.

171. Telephone Interview with James H. Rollins (July 25, 2020).

172. *Id.*; Telephone Interview with Michael Middleton, Deputy Chancellor Emeritus and Professor Emeritus of Law, Univ. of Mo. Sch. of Law (July 17, 2020) [hereinafter Middleton interview]. According to Middleton, Rollins was arrested on dubious criminal charges and was dismissed from law school before he was charged. When Middleton protested to the dean, the dean replied, “You don’t understand. That’s the way it is.” Middleton interview.

1968.<sup>173</sup> Linwood Evans became Mizzou Law's second African-American graduate in 1969.<sup>174</sup> Michael Middleton enrolled in 1968 and graduated in 1971.<sup>175</sup> Middleton went on to become the University's first African-American professor and rose to Deputy Chancellor.<sup>176</sup>

Rollins and Middleton both said they experienced few incidents of racial harassment while at Mizzou.<sup>177</sup> Rollins said two or three times someone wrote, "Nigger go home" on the blackboard, but he would just "erase it off the board and keep on going."<sup>178</sup>

### E. Louisiana—Roadblock

After the victory in *Gaines*, Houston and Marshall's activity in graduate and professional school litigation paused during the World War II (WWII) years, probably due to the difficulty in finding plaintiffs during the war.<sup>179</sup> When thousands of WWII veterans returned home with government benefits that could be used for tuition, however, the demand for higher education increased tremendously.<sup>180</sup> Returning vets wanted to fight for racial justice at home, benefitting the push for desegregation.<sup>181</sup> One veteran noted, "[A]fter having been overseas fighting for democracy, I thought that when we got back here we should enjoy a little of it."<sup>182</sup> Thus, the NAACP found itself with "a wealth of plaintiffs from which to choose."<sup>183</sup>

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173. Robert C. Downs et al., *A Partial History of UMKC Law School: The "Minority Report,"* 68 UMKC L. REV. 511, 529 n.104 (2000). In 1948 Holliday's father, Harold Holliday, Sr., was the first African-American to enroll in the University of Missouri Kansas City, which was private at the time. *Id.* at 523–28. He graduated in 1952. *Id.* at 528.

174. E-mail from Michael Middleton, Deputy Chancellor Emeritus and Professor Emeritus of Law, Univ. of Mo. Sch. of Law, to the author (July 17, 2020, 10:58 a.m. CDST) (on file with author); Rollins interview, *supra* note 171.

175. Bassett e-mail, *supra* note 170.

176. Ashley Jones, *The Journey of MU's Mike Middleton Is Documented in a New Film*, MISSOURIAN (Sept. 9, 2019), [https://www.columbiamissourian.com/news/higher\\_education/the-journey-of-mus-mike-middleton-is-documented-in-a-new-film/article\\_d1f57202-cee6-11e9-bbb5-278e60068f6e.html](https://www.columbiamissourian.com/news/higher_education/the-journey-of-mus-mike-middleton-is-documented-in-a-new-film/article_d1f57202-cee6-11e9-bbb5-278e60068f6e.html). He came out of retirement to serve as interim president of the University of Missouri System in 2015 and interim president of the Lincoln University System in 2016. *Id.*

177. Middleton interview, *supra* note 172; Rollins interview, *supra* note 171.

178. Rollins interview, *supra* note 171.

179. GREENBERG, *supra* note 13, at 63.

180. *See id.* at 42; Ware, *supra* note 20, at 662.

181. KLARMAN, *supra* note 40, at 29.

182. *Id.*

183. OGLETREE, *supra* note 17, at 121.

But after his experience with Gaines, Marshall was very cautious about the choice of test plaintiffs. He wrote, “The lesson from [the *Murray* and *Gaines*] cases is simple. It is more important to have the proper type of plaintiff than anything else in these cases, other than the community support, which we, of course, must have in order to operate.”<sup>184</sup>

One of the first post-war cases was filed in Louisiana, with a WWII veteran as test plaintiff. In 1937, Louisiana’s Board of Education resolved that “Southern University, the state college for Negroes,” should offer graduate level courses.<sup>185</sup> In the summer of 1938, Southern University (Southern) began offering graduate courses in education for African-Americans “under general direction” of the graduate school of Louisiana State University (LSU), the state’s white flagship university located in the same city.<sup>186</sup> However, the state made no further provisions for the graduate and professional education of African-Americans until the NAACP brought litigation in 1946.<sup>187</sup>

Charles Hatfield, a graduate of Xavier University of Louisiana, applied for admission to LSU’s law school on January 10, 1946.<sup>188</sup> Two weeks later, LSU’s dean, Paul M. Hebert, wrote to Hatfield advising, “Louisiana State University does not admit colored students.”<sup>189</sup> Hebert directed Hatfield to apply to Southern.<sup>190</sup> But there was just one problem with Hebert’s advice. Felton G. Clark, president of Southern, wrote to Hatfield on February 15, 1946, that “Southern University does not have a law school.”<sup>191</sup>

Hatfield, represented by the only three African-American attorneys in Louisiana<sup>192</sup> and Thurgood Marshall, filed a state court mandamus

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184. MARSHALLING JUSTICE, *supra* note 56, at 217.

185. Clement, *supra* note 51, at 144.

186. COMMISSION, *supra* note 38, at 19.

187. *See* Clement, *supra* note 51, at 145.

188. Russell L. Jones, *African American Legal Pioneers: A Biography of Vanue B. LaCour “A Social Engineer,”* 23 S.U. L. REV. 63, 71 (1995) [hereinafter R. Jones].

189. Evelyn L. Wilson, *Access to Justice: Charles Hatfield*, 50 LA. B.J. 114, 114 (2002).

190. *Id.*

191. RACHEL L. EMANUEL & CARLA BALL, SOUTHERN UNIVERSITY LAW CENTER 14 (2018).

192. *Id.* at 14–15. The three attorneys licensed to practice law in Louisiana in 1946 were Joseph Antonio Thornton, Alexander Pierre Tureaud, and Louis Berry, all Howard University law school graduates. Wilson, *supra* note 189, at 115.

action on October 10, 1946, seeking admission to LSU law school.<sup>193</sup> The court granted the writ of mandamus on October 19, 1946, ordering LSU to admit Hatfield for the 1946–1947 term.<sup>194</sup>

The victory was short-lived, however. The 1880 legislative act that created Southern permitted Southern to open both a law school and a medical school, although Southern had neither when Hatfield applied to LSU.<sup>195</sup> Three days after the mandamus was granted, the Louisiana Board of Education, in emergency session, agreed to open a law school at Southern.<sup>196</sup> In January 1947, the Board of Education approved the plans for the law school,<sup>197</sup> and in April 1947, the trial court dismissed Hatfield's case on the ground that Hatfield should have sought a mandamus against Southern rather than LSU.<sup>198</sup>

The state appropriated \$40,000 for Southern's law school, which opened in September 1947 on the second floor of the University library with four full-time faculty members and thirteen students.<sup>199</sup> Charles Hatfield was not among them. After he sued to be admitted to LSU, he received threatening telephone calls, was cursed and threatened while working as a mail carrier, and was almost lured to his death down an elevator shaft.<sup>200</sup> He moved to Atlanta to pursue a master's degree in sociology and eventually became a teacher and labor activist in New Orleans.<sup>201</sup>

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193. EVELYN L. WILSON, LAWS, CUSTOMS AND RIGHTS: CHARLES HATFIELD AND HIS FAMILY 100, 107, 129 (2004).

194. Wilson, *supra* note 189, at 116.

195. WILSON, *supra* note 193, at 145; 1880 La. Acts 110, amended by 1888 La. Acts 150, Dart's Statutes § 2459 (1946).

196. Wilson, *supra* note 189, at 116.

197. *Id.*

198. EMANUEL & BALL, *supra* note 191, at 14; WILSON, *supra* note 193, at 145–46191.

199. EMANUEL & BALL, *supra* note 191, at 17; Wilson, *supra* note 189, at 117. Because Louisiana is a civil law jurisdiction and none of the full-time faculty members were trained in civil law, professors from LSU came to Southern to teach the civil law classes to the students during the day and to the professors in the evening. R. Jones, *supra* note 188, at 72.

200. WILSON, *supra* note 193, at 129–31.

201. Wilson, *supra* note 189, at 116.

## F. Kentucky—First Federal Trial Court Victory

The NAACP won its first federal trial court victory in a higher education case in 1949 in *Johnson v. Kentucky*.<sup>202</sup> For years, Kentucky had relied on an infamous statute enacted in 1904 called the Day Law that prohibited biracial education, even in private schools.<sup>203</sup> Berea College, “a brave little college that had prided itself on its racially mixed student body since its founding in 1859,”<sup>204</sup> was convicted of “unlawfully and wil[l]fully permit[ing] and receiv[ing] both the white and [N]egro races as pupils for instruction in said college, school, and institution of learning.”<sup>205</sup> Berea appealed, but the Supreme Court affirmed the conviction.<sup>206</sup>

Lyman Johnson, a high school history teacher and civic activist, applied to the University of Kentucky (UK) in 1948 seeking a doctorate in history.<sup>207</sup> His application was rejected, and he was directed to Kentucky State College (KSC), even though it offered no graduate program in history.<sup>208</sup> Johnson, a WWII veteran with a master’s degree in history from the University of Michigan,<sup>209</sup> was just the type of plaintiff Marshall was looking for. So when Johnson contacted the NAACP Legal Defense Fund for help, Marshall “grabbed [the case] with great alacrity.”<sup>210</sup>

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202. *Johnson v. Bd. of Trustees of Univ. of Ky.*, 83 F. Supp. 707, 708–09 (E.D. Ky. 1949); MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW* 148 (1994).

203. WADE HALL, *THE REST OF THE DREAM: THE BLACK ODYSSEY OF LYMAN JOHNSON* 74 (1988). The law was named after the Kentucky legislator who sponsored it, Carl Day. *Id.*

204. KLUGER, *supra* note 93, at 87.

205. *Berea College v. Kentucky*, 211 U.S. 45, 52 (1908).

206. *Id.* at 58. Justice Harlan dissented, asking this rhetorical question:

Have we become so inoculated with prejudice of race than an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes, simply because of their respective races?

*Id.* at 69.

207. *Johnson v. Bd. of Trustees of Univ. of Ky.*, 83 F. Supp. 707, 708–09 (E.D. Ky. 1949); John Hope Franklin, *Behind the Brown Decision: A Conversation with John Hope Franklin*, 34 *STET. L. REV.* 423, 425–26 (2005).

208. *Johnson*, 83 F. Supp. at 709; Franklin, *supra* note 207, at 426.

209. HALL, *supra* note 203, at 57.

210. Franklin, *supra* note 207, at 426.

UK's response to Johnson and the NAACP was the "joint Kentucky State–University of Kentucky graduate program."<sup>211</sup> UK instructors were to drive from UK in Lexington to KSC in Frankfort to teach African-American graduate and professional students enrolled at KSC.<sup>212</sup> KSC students would then have to drive from Frankfort to Lexington to use UK's library.<sup>213</sup> Johnson rejected this arrangement and pursued his case in federal court.<sup>214</sup> The court found the joint program did not provide separate-but-equal facilities, stating:

[KSC graduate students] would not have the advantage of seminars under the supervision and guidance of resident instructors; would not have convenient library facilities for graduate study and research, and would be subject to the disadvantage of being taught by a migratory faculty whose duties and responsibilities in respect to the proposed graduate school would necessarily be secondary and subordinate to their duties and responsibilities at the University.<sup>215</sup>

UK's case so underwhelmed the court that it granted judgment in Johnson's favor without Marshall even putting on witnesses.<sup>216</sup> The court ordered that Johnson "and all other Negroes similarly qualified and situated" be admitted to UK's graduate and professional schools until the state could show training equal or substantially equal to that offered by UK was available at a separate institution.<sup>217</sup>

Johnson and thirty-one other African-Americans entered UK in the summer of 1949.<sup>218</sup> The students "were confronted with on-campus racial discrimination, including separate dining and library arrangements."<sup>219</sup> Johnson received death threats, and at least seven crosses were burned on campus that summer in an attempt to intimidate

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211. JOHN A. HARDIN, FIFTY YEARS OF SEGREGATION: BLACK HIGHER EDUCATION IN KENTUCKY: 1904-1954, at 90 (1997).

212. *Id.*; see also *Johnson*, 83 F. Supp. at 709.

213. *Johnson*, 83 F. Supp. at 709.

214. HARDIN, *supra* note 211, at 91.

215. *Johnson*, 83 F. Supp. at 709.

216. HALL, *supra* note 203, at 154; Franklin, *supra* note 207, at 427-28.

217. *Johnson*, 83 F. Supp. at 710.

218. HALL, *supra* note 203, at 155.

219. HARDIN, *supra* note 211, at 97.

the African-American students.<sup>220</sup> A radio station broadcast warnings that Johnson had better leave campus before he “had to be carried off in a sack.”<sup>221</sup> Johnson stated that most of the opposition to desegregation came not from faculty, students, or administration, but from “racists outside the university.”<sup>222</sup>

Johnson completed the summer semester at UK but did not return to finish his degree.<sup>223</sup> His suit, however, opened the door to UK’s Lexington campus for John Wesley Hatch, an African-American law student who in 1948 had enrolled in KSC under the joint program.<sup>224</sup>

Hatch started a tumultuous 1948-1949 academic year at KSC in Frankfort, with UK law professors driving from Lexington to teach Hatch.<sup>225</sup> First, Hatch’s classes moved from KSC to the state capitol,<sup>226</sup> primarily because KSC had no law library; the state capitol did.<sup>227</sup> Then, the law professors who had been driving from Lexington to Frankfort refused to continue making the drive and were replaced with Frankfort attorneys, forcing Hatch to adjust to new professors.<sup>228</sup> Finally, with four weeks left in the term, eight professors resigned en masse on the ground that the Jim Crow law school threatened UK’s accreditation.<sup>229</sup>

For his third semester, Hatch was allowed to attend classes on UK’s Lexington campus, but according to Hatch, being on campus was “not a lot better.”<sup>230</sup> In an oral interview given to the University of Kentucky in 1994, he described the conditions under which he had to try to learn the law: he had to sit at a separate table in the back of the library, he could not participate in moot court, some professors mandated that there

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220. HALL, *supra* note 203, at 155. One historian set the number of crosses burned at seventeen. HARDIN, *supra* note 211, at 97.

221. HALL, *supra* note 203, at 155.

222. *Id.* at 156.

223. *Id.* at 154.

224. *Id.* at 93.

225. Interview with John Wesley Hatch (May 1, 1994) (accessed through the Louie B. Nunn Center for Oral History, University of Kentucky Libraries) [hereinafter Interview].

226. See HARDIN, *supra* note 211, at 93.

227. Interview, *supra* note 225.

228. HARDIN, *supra* note 211, at 94.

229. *Id.* at 93-94; REINETTE F. JONES, LIBRARY SERVICE TO AFRICAN AMERICANS IN KENTUCKY 121 (2002).

230. Interview, *supra* note 225; see also UNIVERSITY OF KENTUCKY ALUMNI ASSOCIATION, THEY CAME BEFORE 7 (2016), available at [https://issuu.com/kentuckyalumni/docs/2015\\_pioneer\\_projects/1?ff&e=1313303/3367179](https://issuu.com/kentuckyalumni/docs/2015_pioneer_projects/1?ff&e=1313303/3367179).



be an empty chair between him and any white student, no white student would study with him, and no white employer would hire him for a part-time job when they found out he was “that student.”<sup>231</sup> He stated, “It wasn’t a happy time. It was fairly clear to me that it wasn’t worth it in terms of the grief I had to go through.”<sup>232</sup>

Hatch left UK after his third semester.<sup>233</sup> He described his time at UK as “difficult,” adding, “Segregation was a fact of life in Kentucky. It was a stressful situation to be set apart like that.”<sup>234</sup> Two years after Hatch left, Ollen B. Hinnant II enrolled in the UK College of Law, becoming UK’s first law school graduate in 1955.<sup>235</sup>

## G. Oklahoma—Battleground

### 1. *The Excellent Test Plaintiff—Ada Lois Sipuel Fisher*

The NAACP conducted a “careful search . . . for the right candidate” in Oklahoma.<sup>236</sup> The NAACP first approached Lemuel Sipuel, a WWII veteran<sup>237</sup> and graduate of Langston College, the state-supported school for African-American students.<sup>238</sup> He did not have the patience needed; the war had interrupted his education, and he “wanted to get on with” it.<sup>239</sup> However, his younger sister, Ada Lois Sipuel, volunteered.<sup>240</sup> Other potential plaintiffs were considered, but ultimately Marshall chose not a veteran, but a self-described “skinny little girl born on the wrong side of the tracks in . . . Chickasha,

231. Interview, *supra* note 225. Hatch talked about the “symbolism of that empty chair” but stated that not all professors followed that rule. In fact, one declared, “This [rule] is bullshit.” *Id.*

232. *Id.*

233. UNIVERSITY OF KENTUCKY ALUMNI ASS’N, *supra* note 230, at 7.

234. Robert Bruce Slater, *The Blacks Who First Entered the World of White Higher Education*, 4 J. BLACKS IN HIGHER EDUC. 47, 53 (Summer 1994) (He ultimately earned a Ph.D. from the University of North Carolina at Chapel Hill and “became an internationally recognized expert on public health issues.”).

235. UNIVERSITY OF KENTUCKY ALUMNI ASS’N, *supra* note 230, at 20.

236. LEVY, *supra* note 37, at 74.

237. ADA LOIS SPUEL FISHER, A MATTER OF BLACK AND WHITE: THE AUTOBIOGRAPHY OF ADA LOIS SPUEL FISHER 75-77 (1996); Wattlely, *supra* note 7, at 462.

238. *Sipuel v. Bd. Of Regents of Univ. of Okla. (Sipuel I)*, 180 P.2d 135, 137 (Okla. 1947), *rev’d*, 332 U.S. 631, 632 (1948).

239. FISHER, *supra* note 237, at 78.

240. *See id.*

Oklahoma.”<sup>241</sup> However, George Lynn Cross, president of the University of Oklahoma (OU), who met Sipuel on the day she applied for admission, described her as “chic, charming, and well poised . . . , and . . . an excellent choice of a student for the test case.”<sup>242</sup>

Sipuel was a Langston honor graduate.<sup>243</sup> An Oklahoma native, she knew well the evils of racism and segregation.<sup>244</sup> Her parents lived in Tulsa in 1921 and were personally affected by the event known as the Tulsa Race Massacre.<sup>245</sup> Her father was “spirited away to a holding pen,” and her parents’ home was burned.<sup>246</sup> She also knew nineteen-year-old Henry Argo, the last known lynching victim in Oklahoma.<sup>247</sup>

She applied for admission to OU’s law school on January 14, 1946.<sup>248</sup> She was denied admission “solely because of her color.”<sup>249</sup> The Oklahoma Supreme Court explained the University’s rationale for denying her admission as follows:

Since statehood . . . separate schools have been systematically maintained and regularly attended by and for the races respectively. . . . It is a crime for the authorities of any white school to admit a [N]egro pupil, likewise a crime for the authorities of any [N]egro school to admit a white pupil. . . . The law school of the University is maintained for white students and therefore the authorities and instructors thereof could not have enrolled and taught petitioner therein lest they suffer the criminal penalty therefor.<sup>250</sup>

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241. *Id.* at 78, 185.

242. LEVY, *supra* note 37, at 74.

243. MARSHALLING JUSTICE, *supra* note 56, at 158; Wattlely, *supra* note 7, at 463-64.

244. *See* Wattlely, *supra* note 7, at 453-54.

245. *See* SCOTT ELLSWORTH, DEATH IN A PROMISED LAND: THE TULSA RACE RIOT OF 1921 (1992), for more information on the massacre. *See also* TIM MADIGAN, THE BURNING: MASSACRE, DESTRUCTION, AND THE TULSA RACE RIOT OF 1921 (2001).

246. FISHER, *supra* note 237, at 12; Wattlely, *supra* note 7, at 453.

247. Wattlely, *supra* note 7, at 453.

248. *Sipuel v. Bd. Of Regents of Univ. of Okla.* (Sipuel II), 332 U.S. 631, 632 (1948); *Sipuel v. Bd. Of Regents of Univ. of Okla.* (Sipuel III), 190 P.2d 437, 438 (Okla. 1948).

249. *Sipuel II*, 332 U.S. at 632.

250. *Sipuel v. Bd. Of Regents of Univ. of Okla.* (Sipuel I), 180 P.2d 135, 137 (Okla. 1947), *rev'd*, 332 U.S. 631, 632 (1948).

Thurgood Marshall brought a mandamus action on Sipuel's behalf in Oklahoma state court.<sup>251</sup> It was undisputed that Sipuel was "as well qualified as any white student to study law."<sup>252</sup> But the trial court did not even address Sipuel's equal protection argument or reference *Gaines*.<sup>253</sup> Instead, it "ruled that the university did not have to open a [B]lack law school until it had enough applicants to make one practicable."<sup>254</sup>

On appeal, the Oklahoma Supreme Court affirmed the trial court's decision.<sup>255</sup> The Oklahoma Supreme Court held that Ada Sipuel's failure to demand that a separate law school for African-American students be established or created prevented her from demanding admission to OU's law school.<sup>256</sup> The court reasoned that the State of Oklahoma had no obligation to establish a law school for African-American students because demand was too low to justify expending funds to construct a law school.<sup>257</sup> Consequently, the court found that Sipuel's Fourteenth Amendment rights had not been violated.<sup>258</sup>

Marshall appealed that decision to the United States Supreme Court.<sup>259</sup> In his brief, Marshall attacked *Plessy*<sup>260</sup> and argued that even if two schools existed with comparable facilities, equality could never be achieved because "there can be no separate equality."<sup>261</sup>

The U.S. Supreme Court held oral arguments on January 7 and 8, 1948.<sup>262</sup> On January 12, 1948,<sup>263</sup> the U.S. Supreme Court, citing only *Gaines*, issued a unanimous unsigned per curiam decision ordering the state to provide Sipuel a legal education in conformity with the Fourteenth Amendment's Equal Protection Clause "as soon as it d[id]

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251. *Sipuel II*, 332 U.S. at 632.

252. *Sipuel I*, 180 P.2d at 137.

253. Wattley, *supra* note 7, at 469.

254. KLUGER, *supra* note 93, at 259.

255. *Sipuel I*, 180 P.2d at 144.

256. *Id.*

257. *See id.* at 139.

258. *Id.* at 144.

259. *Sipuel v. Bd. Of Regents of Univ. of Okla. (Sipuel II)*, 332 U.S. 631 (1948).

260. *See* COTTRILL ET AL., *supra* note 15, at 75. *See also* KLUGER *supra* note 93, at 259. (referring to Marshall's brief as a "frontal attack" on *Plessy*, while Kluger says the attack "was not a frontal one" but instead was an invocation of the Margold strategy: "as practiced by the segregating South, the separate-but-equal doctrine was false coin.").

261. KLUGER, *supra* note 93, at 259.

262. LEVY, *supra* note 37, at 75.

263. *Sipuel II*, 332 U.S. at 631.

for applicants of any other group.”<sup>264</sup> The Court remanded the case to the Oklahoma Supreme Court “for proceedings not inconsistent with this opinion.”<sup>265</sup>

Registration was to begin at OU College of Law on January 29, and the NAACP assumed the decision meant Sipuel would be admitted.<sup>266</sup> The Oklahoma court, however, “pull[ed] a fast one, both figuratively and literally.”<sup>267</sup> On January 17, 1948, the Oklahoma Supreme Court ordered the Board of Regents to allow Sipuel “to commence the study of law at a state institution as soon as citizens of other groups are afforded such opportunity, in conformity with . . . the provisions of the Constitution and statutes of this state requiring segregation of the races in the schools of the state.”<sup>268</sup> In other words, the court directed the Board of Regents to establish a segregated law school for African-Americans.

The Board of Regents wasted no time establishing a separate school; two days later, the Board announced the opening of Langston University School of Law.<sup>269</sup> The facility was composed of three rooms on the state capitol building’s fourth floor; two Oklahoma City attorneys and a former Oklahoma attorney general, all with full-time law practices, comprised the faculty.<sup>270</sup> Although the Board of Regents announced on January 24 that the new school was “substantially equal in every way” to OU, Sipuel declined to attend.<sup>271</sup> Instead, she returned to court seeking an order of mandamus for OU to admit her.<sup>272</sup>

The Supreme Court, however, refused to grant the mandamus.<sup>273</sup> It found that the issue of whether the establishment of a separate law school satisfied the Equal Protection Clause was not before it.<sup>274</sup> Justice

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264. *Id.*

265. *Id.* at 633.

266. COTTROL ET AL., *supra* note 15, at 75.

267. *Id.*

268. *Sipuel v. Bd. Of Regents of Univ. of Okla. (Sipuel III)*, 190 P.2d 437, 438 (Okla. 1948).

269. LEVY, *supra* note 37, at 76.

270. *See id.*; *see also* Wattley, *supra* note 7, at 480-81.

271. LEVY, *supra* note 37, at 76.

272. *See Fisher v. Hurst*, 333 U.S. 147 (1948). Sipuel married before admission to law school, and the mandamus action was brought in her married name, Fisher. COTTROL ET AL., *supra* note 15, at 76.

273. *Fisher*, 333 U.S. at 151.

274. *Id.* at 150.

Rutledge dissented, stating that, in his opinion, the Court's mandate "plainly meant . . . that Oklahoma should end the discrimination practiced against petitioner at once, not at some later time, near or remote."<sup>275</sup> He added: "Obviously no separate law school could be established elsewhere overnight capable of giving petitioner a legal education equal to that afforded by the state's long-established and well-known state university law school."<sup>276</sup>

Langston University Law School had only one student during its one-year existence,<sup>277</sup> and the "prohibitive costs for maintaining a separate school for one student caused the state to close" the school.<sup>278</sup> Because a separate Black law school no longer existed in Oklahoma, the OU College of Law was finally forced to admit Sipuel in 1949.<sup>279</sup>

Sipuel started classes two weeks late, but white students lent her notes and books and tutored her.<sup>280</sup> School officials forced her to sit four rows behind the rest of the class with a big sign overhead that said "COLORED."<sup>281</sup> The administration removed the signs by her second semester, however, and she moved to the front row.<sup>282</sup>

Sipuel graduated from the OU College of Law in 1951.<sup>283</sup> She practiced law for a few years in her hometown of Chickasha.<sup>284</sup> She then began teaching at Langston University, earned a master's degree in history from the University of Oklahoma, and ultimately retired as Langston's assistant vice president for academic affairs.<sup>285</sup>

## 2. *Handicapped by Separate Facilities—George McLaurin*

While Sipuel was biding her time, waiting for her admission to the University of Oklahoma, the NAACP worked to desegregate

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275. *Id.* at 151-52 (Rutledge, J., dissenting).

276. *Id.* at 152.

277. COTTROL ET AL., *supra* note 15, at 76.

278. OGLETREE, *supra* note 17, at 121.

279. *See* COTTROL ET AL., *supra* note 15, at 76.

280. WILLIAMS, *supra* note 25, at 179.

281. *See id.*

282. *Id.*

283. CHERYL ELIZABETH BROWN WATTLEY, A STEP TOWARD *BROWN V. BOARD OF EDUCATION* 237 (2014).

284. Bob Burke & Steven W. Taylor, *Humble Beginnings: A History of the OU College of Law*, 62 OKLA. L. REV. 383, 390 (2010).

285. *Id.*

Oklahoma's graduate programs.<sup>286</sup> Marshall picked George McLaurin as the test plaintiff.<sup>287</sup> McLaurin was a sixty-eight-year-old professor at Langston.<sup>288</sup> He had a master's degree in education but applied to OU for its doctoral program in 1947.<sup>289</sup>

Instead of beginning in state court as in Sipuel's case, Marshall took the case to a three-judge panel in federal court.<sup>290</sup> The court swiftly ruled that any Oklahoma law prohibiting McLaurin from admission to the University of Oklahoma was "unconstitutional and unenforceable."<sup>291</sup> However, the court declined to rule that segregated facilities within the University were unconstitutional.<sup>292</sup>

The University of Oklahoma took this as license to segregate McLaurin within the school; his four courses were in the same room, and he was required to sit in an alcove on the side of the room for every class.<sup>293</sup> In the library, he was forced to sit at "a segregated desk in the mezzanine behind half a carload of newspapers."<sup>294</sup> He could eat in the cafeteria, but only at an assigned table "in a dingy alcove by himself and at a different hour from the whites."<sup>295</sup>

Marshall took the case back to the federal court, which had retained jurisdiction.<sup>296</sup> Marshall argued that McLaurin's "required isolation from all other students, solely because of the accident of birth" created "a mental discomfiture, which makes concentration and study difficult, if not impossible" and "that the enforcement of these regulations place[d] upon him a 'badge of inferiority which affect[ed] his relationship, both to his fellow students, and to his professors."<sup>297</sup>

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286. See KLUGER, *supra* note 93, at 266.

287. *Id.*

288. *Id.*; see also Levy, *supra* note 37, at 76-77.

289. See *McLaurin v. Okla. State Regents for Higher Educ. (McLaurin I)*, 87 F. Supp. 526, 527 (W.D. Okla. 1948); Levy, *supra* note 37, at 77.

290. See, e.g., GREENBERG, *supra* note 13, at 66; KLUGER, *supra* note 93, at 267.

291. *McLaurin I*, 87 F. Supp. at 528.

292. See *id.*

293. See TUSHNET, *supra* note 202, at 130.

294. See KLUGER, *supra* note 93, at 268.

295. *Id.*

296. See *McLaurin v. Okla. State Regents for Higher Educ. (McLaurin II)*, 87 F. Supp. 528, 528 (W.D. Okla. 1949), *rev'd*, 339 U.S. 637 (1950).

297. *Id.* at 530.

Marshall lost in the district court<sup>298</sup> and appealed to the Supreme Court.<sup>299</sup> In a landmark decision that affected all higher education desegregation cases, the Court found these restrictions “handicapped [McLaurin] in his pursuit of effective graduate instruction.”<sup>300</sup> It stated that “[s]uch restrictions impair[ed] and inhibit[ed] his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.”<sup>301</sup> The Court concluded that the restrictions violated his right to equal protection of the laws and that McLaurin, “having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races.”<sup>302</sup>

## H. Texas—Intangibles Matter

While Marshall and the NAACP battled the State of Oklahoma, they also wrestled with Texas in a suit to enroll Heman Marion Sweatt in the University of Texas School of Law (UT). The NAACP announced in June 1945 that it planned to sue UT.<sup>303</sup> Two previous attempts to integrate UT—in 1885 and 1938—had failed.<sup>304</sup> To ensure success this time, the NAACP searched for the perfect plaintiff—someone who had an undergraduate degree from an accredited university and was willing to attend UT after the NAACP won the suit.<sup>305</sup> “[F]ew people volunteered to have their lives disrupted—and possibly placed in jeopardy.”<sup>306</sup>

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298. *Id.* at 530-31.

299. *McLaurin v. Okla. State Regents for Higher Educ.* (McLaurin III), 339 U.S. 637, (1950) (“from a judgment of the District Court for the Western District of Oklahoma, sitting as a statutory three-judge court, Per Curiam, 87 F.Supp. 528, holding that the conditions did not deny equal protection of the laws, the plaintiff appealed”); see also KLUGER, *supra* note 93, at 268 (stating that Marshall appealed directly to the Supreme Court).

300. *McLaurin III*, 339 U.S. at 641.

301. *Id.*

302. *Id.* at 642. McLaurin never received his doctorate degree. Gene Curtis, *Only in Oklahoma: First Black Student at OU Still Faced Obstacles*, TULSA WORLD (Feb. 18, 2007), [https://www.tulsaworld.com/archive/only-in-oklahoma-first-black-student-at-ou-still-faced-obstacles/article\\_7368b2d5-921b-51f3-a444-c30ba31d71b5.html](https://www.tulsaworld.com/archive/only-in-oklahoma-first-black-student-at-ou-still-faced-obstacles/article_7368b2d5-921b-51f3-a444-c30ba31d71b5.html). According to one source, he completed all his course work, including his doctoral dissertation. *Id.*

303. Dwonna Naomi Goldstone, “*I Don’t Believe in Segregation*”: Sweatt v. Painter and the Groundwork for Brown v. Board of Education, 43 No. 2 JUDGES’ J. 19, 20 (2004).

304. *Id.* at 19-20.

305. *Id.* at 20.

306. *Id.*

The NAACP considered and rejected several candidates, and, in late September, Marshall told the NAACP members in Texas to abandon the search.<sup>307</sup> But at an NAACP meeting in October 1945, Sweatt stood up and volunteered.<sup>308</sup> Thirty-three-year-old Sweatt, a former teacher at a segregated high school, was a postal carrier.<sup>309</sup> His experience with racial discrimination in the postal system had piqued his interest in legal studies.<sup>310</sup> A WWII veteran, Sweatt had a bachelor's degree and had spent a year at the University of Michigan working on a graduate degree before returning home to Texas.<sup>311</sup> Marshall described Sweatt as “an ordinary person [who] had an extraordinary dream to live in a world in which Afro-Americans and whites alike were afforded equal opportunity to sharpen their skills and . . . their minds.”<sup>312</sup>

On February 26, 1946, Sweatt applied for admission to UT.<sup>313</sup> Sweatt “possessed every essential qualification for admission except that of race, upon which ground alone his application was denied.”<sup>314</sup> UT's rejection of Sweatt presented a monumental problem for Texas officials because no other Texas state-supported law school for African-Americans existed.<sup>315</sup> Sweatt filed a lawsuit in Texas state court on May 16, 1946,<sup>316</sup> approximately one month after Ada Sipuel sued the State of Oklahoma.<sup>317</sup>

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307. TUSHNET, *supra* note 202, at 128.

308. *E.g.*, Goldstone, *supra* note 303, at 20; WILLIAMS, *supra* note 25, at 175.

309. *See* Goldstone, *supra* note 303, at 20-21.

310. *E.g.*, TUSHNET, *supra* note 202, at 126. African-Americans could not become postal clerks, which meant they could never become supervisors. *Id.*

311. Goldstone, *supra* note 303, at 20-21. While at Michigan, Sweatt became friendly with Lloyd Gaines, who was pursuing a graduate degree there while his lawsuit in Missouri was pending. *Id.* at 21; WILLIAMS, *supra* note 25, at 175. Sweatt said that while he found Gaines committed to civil rights, “they were not that close.” ENDERSBY & HORNER, *supra* note 22, at 212. Sweatt assured the NAACP that he had less ego and a stronger personality than Gaines and would not “break under the scrutiny and frustration that come with a major lawsuit.” WILLIAMS, *supra* note 25, at 175-76.

312. Katherine L. Chapman, *Do You Remember Heman Marion Sweatt?*, 67 TEX. B.J. 364, 366 (2004) (quoting Marshall's speech on July 4, 1992, upon receiving the Medal of Honor).

313. *Sweatt v. Painter* (Sweatt I), 210 S.W. 2d 442, 443 (1948), *rev'd*, 339 U.S. 629 (1950).

314. *Id.*

315. *See* OZIE HAROLD JOHNSON, *PRICE OF FREEDOM* 2 (1954).

316. *Sweatt I*, 210 S.W.2d at 443.

317. Sipuel's suit was filed April 6, 1946. Wattley, *supra* note 7, at 466.



Judge Roy C. Archer held a hearing in June 1946.<sup>318</sup> Archer recognized that the State's action "in denying [Sweatt] the opportunity to gain a legal education while granting to others deprived" Sweatt of his constitutional right to equal protection.<sup>319</sup> Rather than granting Sweatt admission to UT, however, the trial court found that a state statute "required the establishment of a law curriculum at Prairie View University" (Prairie View)<sup>320</sup> and gave Texas six months "to supply substantially equal facilities."<sup>321</sup>

Five months later the governing body of Prairie View directed the University's administrators to develop a law curriculum.<sup>322</sup> Prairie View's president emeritus rented three rooms in the office of an African-American attorney, who was to serve as dean and professor, and classes were set to begin in Houston in February 1947.<sup>323</sup> In December 1946, Judge Archer found that the facilities in Houston were substantially equal to UT's law school.<sup>324</sup> Marshall appealed,<sup>325</sup> and in March 1947, the Texas Court of Civil Appeals remanded the case for a new trial.<sup>326</sup>

While the appeal was pending, the State of Texas took steps to bolster Judge Archer's finding of "substantial equality." To "fortify the case for preservation of segregation in Texas,"<sup>327</sup> the state legislature appropriated \$3,000,000<sup>328</sup> to create the Texas State University for Negroes (now Texas Southern University) and designated \$100,000 for

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318. *Sweatt I*, 210 S.W. 2d at 442, 446.

319. *Sweatt v. Painter (Sweatt II)*, 339 U.S. 629, 631-32 (1950).

320. Douglas L. Jones, *The Sweatt Case and the Development of Legal Education for Negroes in Texas*, 47 TEX. L. REV. 677, 682 (1969) [hereinafter D. Jones]. One historian described Prairie View, which was called "Prairie View State Normal and Industrial College for Negroes" until 1945, as "an academic hovel that offered college credit for mattress-making, broom-making, and other minimal vocation skills." KLUGAR, *supra* note 93, at 261. Prairie View is now known as Prairie View A&M University and is fully accredited. It offers all levels of graduate programs. Prairie View A&M University, *History*, [https://www.pvamu.edu/about\\_pvamu/college-history/](https://www.pvamu.edu/about_pvamu/college-history/) (last visited July 20, 2020).

321. *Sweatt II*, 339 U.S. at 632.

322. D. Jones, *supra* note 320, at 682.

323. *Id.*

324. *Id.* at 683.

325. *Id.* at 684.

326. *Sweatt v. Painter (Sweatt I)*, 210 S.W.2d 442, 446 (Tex. Civ. App. 1948), *rev'd*, 339 U.S. 629, 631-32 (1950).

327. D. Jones, *supra* note 320, at 683.

328. *Sweatt I*, 210 S.W.2d at 447. The legislature "appropriated \$2,000,000 for land, buildings and equipment and \$500,000 per annum for maintenance for the biennium ending August 31, 1949." *Id.*

the creation of a law school (now the Thurgood Marshall School of Law).<sup>329</sup> The new school was to be a “first class” institution, with “a curriculum absolutely equivalent” to UT.<sup>330</sup> One commentator noted that “[w]hile trying to prevent Sweatt from enrolling in UT Austin, a panicked Texas political establishment spent more money on what was called ‘Negro higher education’ than it had during the entire previous history of the state.”<sup>331</sup>

While the new school was being built in Houston, the state organized an interim law school in a building in downtown Austin adjacent to the state capitol.<sup>332</sup> Three UT professors were assigned to teach the African-American students, and the dean served at both UT and the interim school.<sup>333</sup> The only difficulty was that no students enrolled initially.<sup>334</sup> Two students eventually enrolled and were taught in the library, which was in the basement.<sup>335</sup>

Sweatt declined to enroll in a school that, in his opinion, was not substantially equal.<sup>336</sup> Based on Sweatt’s testimony at the full-scale trial held in May and June of 1947, the court found that Sweatt “would not register in a separate law school no matter how equal it might be and not even if the separate school affords him identical advantages and opportunities for the study of law equal to those furnished by the State to the white students of the Law School” at UT.<sup>337</sup> The trial court found, and the Civil Court of Appeals affirmed, that the law school at the Texas State University for Negroes was substantially equal to UT’s law

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329. *Id.*

330. D. Jones, *supra* note 320, at 683.

331. ENDERSBY & HORNER, *supra* note 22, at 255-56 (quoting GARY M. LAVERGNE, BEFORE *BROWN*: HEMAN MARION SWEATT, THURGOOD MARSHALL, AND THE LONG ROAD TO JUSTICE 6 (2010)).

332. JOHNSON, *supra* note 315, at 5; D. Jones, *supra* note 320, at 683.

333. D. Jones, *supra* note 320, at 683-84.

334. *Id.* at 684; Goldstone, *supra* note 303, at 22.

335. JOHNSON, *supra* note 315, at 13. According to Ozie Johnson, the first dean of the law school at the Texas State University for Negroes, the students asked to hold classes in the library because it was more convenient for them. *Id.* Johnson also stated that other African-American students who were interested in enrolling at the new law school “were either intimidated or convinced it was not in their own interest to attend.” *Id.*

336. D. Jones, *supra* note 320, at 684; *see also* JOHNSON, *supra* note 315, at 6.

337. *Sweatt v. Painter* (Sweatt I), 210 S.W.2d 442, 446 (Tex. Civ. App. 1948).

school.<sup>338</sup> When the Texas Supreme Court denied writs, Marshall took the case to the U.S. Supreme Court.<sup>339</sup>

Marshall knew the *Sweatt* case was probably destined for the U.S. Supreme Court, so he carefully crafted the record for the appeal.<sup>340</sup> He assembled an array of experts to provide social scientific evidence.<sup>341</sup> Among the experts were “sociologists, psychologists, psychiatrists, [and] educators,”<sup>342</sup> including professors and deans from some of the most prestigious law schools in the U.S.<sup>343</sup> The experts testified that segregation had “no basis in either educational or enlightened racial theory” and that there “were no ‘inherent differences in intellectual ability or capacity to learn between Negroes and whites.’”<sup>344</sup>

Oral arguments in *Sweatt* were heard on April 4, 1950.<sup>345</sup> The decisions in *Sweatt* and *McLaurin* were both announced on June 5, 1950.<sup>346</sup> In a unanimous decision, the U.S. Supreme Court ordered Sweatt to be admitted to UT, despite Texas’s establishment of a law school for African-Americans that arguably had state-of-the-art physical facilities.<sup>347</sup> The Court found that creating a separate new law school for African-Americans failed to satisfy the state’s constitutional mandate to provide equal protection for African-American residents of Texas.<sup>348</sup>

The Court relied heavily on an amicus brief written by Yale professor Thomas I. Emerson and “signed by 187 law professors from prestigious schools across the country” when it stressed the importance of intangibles such as reputation, experience, and influence.<sup>349</sup> The Supreme Court stated:

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338. *Id.* at 446-47.

339. COMMISSION, *supra* note 38, at 32.

340. See GREENBERG, *supra* note 13, at 64-65.

341. *Id.*; Ware, *supra* note 20, at 666.

342. GREENBERG, *supra* note 13, at 65.

343. COTTROL ET AL., *supra* note 15, at 105.

344. *Id.*

345. Sweatt v. Painter (Sweatt II), 339 U.S. 629, 629 (1950).

346. *Id.*; McLaurin v. Okla. St. Regents for Higher Educ. (McLaurin I), 339 U.S. 637, 638 (1950).

347. Sweatt v. Painter (Sweatt II), 339 U.S. 629, 635-36 (1950).

348. *Id.*

349. Mary Ann Connell, *The Road to United States v. Fordice: What Is the Duty of Public Colleges and Universities in Former De Jure States to Desegregate?*, 62 MISS. L.J. 285, 296-97 (1993). The entire brief is available at Thomas I. Emerson et al., *Segregation and the Equal Protection Clause*, 34 MINN. L. REV. 289 (1950).

[T]he University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.<sup>350</sup>

In addition to differences in these intangibles, the court also found the education offered at the separate law school was not substantially equal because the student body excluded “members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar.”<sup>351</sup>

The Supreme Court in *Sweatt* further found that the facilities available at the newly established law school were not equal in quantity or quality to those available at UT.<sup>352</sup> According to the Court, “In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior.”<sup>353</sup> Thus, the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment required that UT admit Sweatt to its law school, signaling the end of the creation of separate segregated law schools.<sup>354</sup>

In fall 1950, Sweatt and fifteen other African-American students enrolled at UT.<sup>355</sup> Five of the fifteen—Jacob Carruthers, Elwin Jarmon, Virgil Lott, Dudley Redd, and George Washington, Jr.—

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350. *Sweatt II*, 339 U.S. at 634.

351. *Id.*

352. *Id.* at 632-34.

353. *Id.* at 633-34.

354. *Id.* at 636.

355. Goldstone, *supra* note 303, at 24.

enrolled at the law school with Sweatt.<sup>356</sup> Unfortunately, Sweatt was not an academic success at Texas.<sup>357</sup> During the 1950-1951 academic year, he failed several courses.<sup>358</sup> He returned in the 1951 fall semester to audit the failed courses and re-enrolled as a regular student in the 1952 spring semester but left after that semester.<sup>359</sup>

Several factors contributed to Sweatt's failure in law school. Although some faculty members were friendly, others were hostile.<sup>360</sup> He endured several racist incidents, including a cross burned next to his car and slashed tires.<sup>361</sup> The NAACP was slow to provide promised funding, he had medical issues that required surgery, and his marriage broke up.<sup>362</sup> But his lawsuit had opened the door for others. In 1953, Lott became the first African-American graduate of the law school.<sup>363</sup> Washington followed in January 1954.<sup>364</sup>

## I. Arkansas—Reading the Legal Handwriting on the Wall

Although the admission of African-Americans to the University of Arkansas (UArk) law school “was a problem on which the early faculty worked and worried for years,” the first African-American student was not admitted until 1948.<sup>365</sup> After the *Murray* decision, UArk was not moved to admit African-Americans; its president “expressed his conviction that no court in Arkansas, or in any truly Southern state, would ever render such a decision.”<sup>366</sup> When Edward W. Jacko, Jr. applied to UArk School of Law in 1938, “his application was deftly

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356. Texas Law Tarlton Law Library, *The First African American Graduates of the University of Texas Law School*, <https://tarlton.law.utexas.edu/african-american-graduates/1950> (last visited July 22, 2020).

357. TUSHNET, *supra* note 202, at 149.

358. *Id.*

359. *Id.*

360. *Id.*

361. WILLIAMS, *supra* note 25, at 185.

362. *Id.* Sweatt ultimately had a successful career working for the Urban League. *Id.*

363. Texas Law Tarlton Law Library, *Virgil Lott '53*, <https://tarlton.law.utexas.edu/african-american-graduates/virgil-lott> (last visited July 22, 2020) [hereinafter Lott].

364. Texas Law Tarlton Law Library, *George Washington, Jr. '54*, <https://tarlton.law.utexas.edu/african-american-graduates/george-washington-jr> (last visited July 22, 2020).

365. ROBERT A. LEFLAR, *THE FIRST 100 YEARS: CENTENNIAL HISTORY OF THE UNIVERSITY OF ARKANSAS* 270 (1972).

366. *Id.* at 277.

turned aside”<sup>367</sup> as the University “engag[ed] in delaying tactics and obfuscation.”<sup>368</sup>

After *Gaines*, however, and with the *Sipuel* and *Sweatt* cases simmering, Dean Robert Leflar considered the law school’s possible actions.<sup>369</sup> Considering the “legal handwriting on the wall,” he persuaded the state to take a “sugar-coated integration pill.”<sup>370</sup> His plan was to admit African-American students to the law school, with segregated conditions within the school—separate classes and study rooms and duplicates of commonly used law books provided, but no “bodily access to the law library.”<sup>371</sup> A policy was prepared for ratification by the board of trustees on January 30, 1948, to admit African-American students to UArk’s graduate and professional schools, “with certain segregated teaching features.”<sup>372</sup> A story regarding the new policy appeared in the newspapers the next day, a Saturday.<sup>373</sup>

Silas Herbert Hunt, Ada Sipuel’s classmate at Arkansas Agricultural, Mechanical & Normal College (AM&N) in Pine Bluff,<sup>374</sup> had been accepted at the University of Indiana Law School.<sup>375</sup> But he and Wiley Branton, a third AM&N classmate, “thought it would be wonderful” if they could do something similar to what Sipuel was attempting in Oklahoma, so Hunt “decided to make the great try.”<sup>376</sup>

On February 2, 1948, the Monday after the new policy hit the papers, Hunt and Branton met with Leflar, and Hunt was admitted to the UArk School of Law.<sup>377</sup> Hunt was a World War II veteran who had served with the military construction engineers.<sup>378</sup> According to Guerdon Nichols, Dean of the College of Arts and Sciences at Arkansas, Hunt

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367. *Id.* at 276.

368. *Id.* at 278.

369. *Id.* at 278-79.

370. *Id.* at 279.

371. *Id.*

372. *Id.* at 281.

373. *Id.*

374. The school is now known as the University of Arkansas at Pine Bluff.

375. LEFLAR, *supra* note 365, at 283.

376. *Id.*

377. Guerdon D. Nichols, *Breaking the Color Barrier at the University of Arkansas*, ARK. HIST. Q., at 3, 17 (Spring 1968).

378. *Id.*

was the perfect test student.<sup>379</sup> He stated that “[o]ne could have searched far and long before finding a better person to break the color line at a university.”<sup>380</sup>

Hunt was not allowed to live in the dormitories; when he raised that issue, Dean Leflar “pleaded with [him] not to make an issue of segregated living facilities at that time.”<sup>381</sup> He was “forced to attend segregated classes in the law school’s basement.”<sup>382</sup> Three to five students regularly attended classes with him to show solidarity,<sup>383</sup> but Dean Nichols stated that other students were “bent on mischief and harassment.”<sup>384</sup> He could not use the student restrooms but “had to ask permission of the dean’s secretary to use the dean’s facilities.”<sup>385</sup>

Hunt finished that spring semester and began summer school, but he became gravely ill and had to withdraw from law school.<sup>386</sup> He died in April 1949 from tuberculosis.<sup>387</sup> Some thought that “the stress of his lonely and isolated existence at the university contributed to his untimely end.”<sup>388</sup>

Jackie L. Shropshire enrolled in the law school in fall 1948 and took Hunt’s place as the lone Black student in the law school.<sup>389</sup> He graduated in 1951.<sup>390</sup> For his first day of class, Shropshire was forced to sit in a corner of the room with a wooden railing around his seat, but it was removed the next day when five faculty members “protested its presence to Dean Leflar and exerted strong pressure for its removal.”<sup>391</sup> He still had to sit in an isolated corner, however.<sup>392</sup> Shropshire said there were “no overt, serious incidents from students,” but he experienced

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379. LEFLAR, *supra* note 365, at 275, 283.

380. *Id.* at 283.

381. *Id.* at 282; *see also* JUDITH KILPATRICK, THERE WHEN WE NEEDED HIM: WILEY AUSTIN BRANTON, CIVIL RIGHTS WARRIOR 41 (2007).

382. *Black University of Arkansas Law Student Gets Posthumous Degree 60 Years Later*, DIVERSE (June 24, 2008), <https://diverseeducation.com/article/11319/>.

383. LEFLAR, *supra* note 365, at 285.

384. *Id.*

385. KILPATRICK, *supra* note 381, at 41.

386. KILPATRICK, *supra* note 381, at 42; LEFLAR, *supra* note 365, at 283.381

387. Nichols, *supra* note 377, at 17.

388. *Id.*

389. LEFLAR, *supra* note 365, at 283-84.

390. *Id.* at 284.

391. *Id.*

392. *Id.*; KILPATRICK, *supra* note 381, at 43.

“utter loneliness, [a] bleak existence, and the pressure resulting from being a marked man with everyone pointing a finger at him.”<sup>393</sup>

Branton, Hunt’s AM&N classmate, applied to the undergraduate school when Hunt applied to law school but was rejected because the new policy did not extend to undergraduates.<sup>394</sup> He was admitted to Arkansas’s law school after graduating from AM&N and received his law degree in 1953.<sup>395</sup>

### J. Delaware—Following Arkansas

On January 31, 1948, the day Arkansas’s new policy hit the newspapers, the State of Delaware announced it would admit African-Americans to graduate programs at the University of Delaware (UD), the state’s flagship, all-white university, if those programs were not offered at Delaware State College for Negroes (DSC).<sup>396</sup> The NAACP accomplished this feat without litigation; the threat of a highly qualified plaintiff was enough.<sup>397</sup>

Delaware had no law school in 1948,<sup>398</sup> so the NAACP focused on graduate programs at UD. Louis L. Redding, NAACP local counsel in Wilmington, Delaware,<sup>399</sup> heeded well the NAACP’s policy of finding “candidates with spotless academic credentials whose denial could be based only on race.”<sup>400</sup> He reported to Marshall that he had “a strong case with a sympathetic plaintiff”—Benjamin C. Whitten, a native of

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393. LEFLAR, *supra* note 365, at 284.

394. *Id.* at 262; KILPATRICK, *supra* note 381, at 41.

395. KILPATRICK, *supra* note 381, at 49-50. Branton went on to become a noted civil rights activist and served as dean of Howard University School of Law from 1978 to 1983. *Id.* at 147, 154-55; Howard University School of Law, *Wiley A. Branton Biography*, *Wiley A. Branton/Howard Law Journal Symposium*, <http://law.howard.edu/content/wiley-brantonhoward-law-journal-symposium> (last visited June 5, 2020).

396. COMMISSION, *supra* note 38, at 29.

397. See BRETT GADSDEN, *BETWEEN NORTH AND SOUTH* 33-34 (2012).

398. Delaware Law School, Delaware’s only law school, graduated its first class in 1975. Widener University Delaware School of Law, <https://delawarelaw.widener.edu/about/our-story-2/delawares-law-school/> (last visited June 7, 2020).

399. ANNETTE WOOLARD-PROVINE, *INTEGRATING DELAWARE* 110 (2003). Redding, a Harvard Law graduate, was Delaware’s first African-American attorney and its only African-American attorney from 1929 to 1956. GREENBERG, *supra* note 13, at 39; GADSDEN, *supra* note 397, at 29.

400. GADSDEN, *supra* note 397, at 33.



Wilmington, Delaware, and a veteran already attending graduate school at Pennsylvania State College with “excellent academic standing.”<sup>401</sup>

With the *Sipuel* decision and the pending *Sweatt* case for support, Redding convinced the Delaware Board of Trustees to open UD’s graduate programs to African-American students, albeit on a limited basis.<sup>402</sup> Although Whitten applied to UD for the NAACP’s purposes, he never enrolled in UD but continued his studies at Penn State.<sup>403</sup>

### III. SEPARATE BUT EQUAL BEGINS TO CRACK

*Sipuel* demonstrated that states would be forced to desegregate when maintaining separate schools was cost-prohibitive. *McLaurin* prohibited separate facilities within those newly desegregated schools. And *Sweatt* held that intangibles such as reputation and alumni influence must be considered in determining equality. Thus, these cases “cracked the foundation of the doctrine of ‘separate but equal,’”<sup>404</sup> leading to victories for the NAACP and Marshall in Virginia and Tennessee, as well as two states where lawsuits had previously failed, Tennessee and Louisiana.

#### A. Virginia—Justice Starts Right Here

Gregory Swanson obtained his law degree from Howard University because the only public law school in his home state of Virginia, the University of Virginia School of Law (UVA), did not admit African-Americans.<sup>405</sup> He was interested in teaching law at the Robert H. Terrell Law School in Washington, D.C., but he needed an LL.M. degree to do so.<sup>406</sup> So in 1949 he committed a “radical act”—he applied to the LL.M. program at UVA.<sup>407</sup> Even though the faculty supported his admission and the Virginia Attorney General opined that the state would lose if the matter went to court, the governing body, the Virginia Board of Visitors,

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401. *Id.*

402. *See id.* at 33-35.

403. *Id.*

404. C. WILLIAMS, *supra* note 100, at 5.

405. Tobias, *supra* note 32, at 44-45, 46.

406. Eric Williamson, *The Long Walk: What Life Was Like for Gregory Swanson, the Lawyer Who Integrated UVA*, UVA LAWYER (Spring 2018) [hereinafter *Long Walk*], <https://www.law.virginia.edu/uvalawyer/article/long-walk>.

407. *Id.*

refused to admit Swanson absent a court order.<sup>408</sup> The Board's response read in part: "The applicant is a colored man. The Constitution and laws of the state of Virginia provide that white and colored shall not be taught in the same schools."<sup>409</sup> The Board then advised that its policy was to pay the tuition differential between UVA's tuition and that of "other comparable institutions for colored applicants."<sup>410</sup>

Marshall and the NAACP agreed to take on his case.<sup>411</sup> According to Swanson's nephew, some people tried to dissuade Swanson from the litigation, but he replied, "No, justice starts right here."<sup>412</sup> He filed suit in federal court, and on September 5, 1950, the court ruled that UVA could not deny Swanson admission based on race because the state provided no other state-sponsored institution that provided graduate study.<sup>413</sup> The court relied on recent U.S. Supreme Court decisions, particularly *Sweatt*, in finding the University of Virginia had denied Swanson equal protection.<sup>414</sup> Swanson registered for class ten days later, just in time for the fall semester at UVA.<sup>415</sup>

African-Americans were not allowed to live in the dormitories at UVA, so Swanson rented a room in the historically Black section of Charlottesville,<sup>416</sup> at "great expense" to him and his family.<sup>417</sup> He had to walk about a mile each way, and whites stared at him as he walked to

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408. Tobias, *supra* note 32, at 46-47; Derek Quizon, *Swanson's UVA Case, a "Triumph of the Rule of Law," Is Commemorated at Library*, DAILY PROGRESS (Charlottesville, Va.) (July 12, 2016), [https://www.dailyprogress.com/news/local/swansons-uva-case-a-triumph-of-the-rule-of-law-is-commemorated-at-library/article\\_7c8d1af6-86fa-556f-a74e-db87c2fae819.html](https://www.dailyprogress.com/news/local/swansons-uva-case-a-triumph-of-the-rule-of-law-is-commemorated-at-library/article_7c8d1af6-86fa-556f-a74e-db87c2fae819.html); see also Taj'ullah X. Sky Lark, *Unlocking Doors: How Gregory Swanson Challenged the University of Virginia's Resistance to Desegregation, A Case Study*, 5 SPECTRUM 71, 75 (2017).

409. Sky Lark, *supra* note 408, at 74.

410. *Id.*

411. Eric Williamson, "Justice Starts Right Here": Remembering Gregory Swanson, *UVA and UVA Law's First Black Student*, UVA LAWYER (Fall 2016), <https://www.law.virginia.edu/uvalawyer/article/justice-starts-right-here-remembering-gregory-swanson-uva-and-uva-laws-first> [hereinafter *Justice*]; Tobias, *supra* note 32, at 47.

412. *Justice*, *supra* note 411.

413. *Swanson v. Rector & Visitors of the Univ. of Va.*, No. 30 (W.D. Va. Sept. 5, 1950); Tobias, *supra* note 32, at 47.

414. Tobias, *supra* note 32, at 47.

415. *Long Walk*, *supra* note 406.

416. *Id.*

417. Quizon, *supra* note 408.

school.<sup>418</sup> “I should like to read their minds,” Swanson wrote in a letter to his sister Marguerite, “Sometimes I think that I do.”<sup>419</sup>

He was not segregated within the classroom, and the director of the graduate program met with Swanson at the director’s home, “just as the adviser did with white students.”<sup>420</sup> He attended “concerts, lectures, and football games but never attempted to attend any social events.”<sup>421</sup> Even though outwardly he was treated courteously, he wrote to a friend that he felt an undercurrent of hostility: “You can’t put your finger on it, but you know that it is there.”<sup>422</sup> In a ceremony honoring Swanson in 2018, UVA Dean Risa Goluboff noted, “There were limits on the community he could create. And the kindnesses that he received could never be taken for granted because of the larger context of isolation, segregation, struggle, exclusion, hostility and paternalism in which he lived. This was a white university in a segregated town.”<sup>423</sup>

Swanson completed all courses needed for his LL.M. but did not receive his degree as he failed to complete his thesis within a two-year period.<sup>424</sup> Although some commentators have theorized that he did not complete his degree because he felt “[o]stracized and isolated” on campus,<sup>425</sup> others suggest that he was busy with his law practice and no longer needed the LL.M. as the Robert H. Terrell Law School closed in 1950.<sup>426</sup>

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418. *Long Walk*, *supra* note 406.

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.*

423. Eric Williamson, *UVA, Law School, Commemorate University’s First Black Student, Gregory Swanson*, UVA TODAY (Feb. 28, 2018), <https://news.virginia.edu/content/uva-law-school-commemorate-universitys-first-black-student-gregory-swanson> [hereinafter *Commemorate*].

Even twenty years later, the environment at UVA was not welcoming for African-Americans. A 1975 UVA law graduate stated, “The environment was pretty hostile, and it was clear that we weren’t welcome. . . . I think we started with six [African-American students], and three of those left as soon as they saw those Confederate flags . . . .”; Ernie Gates, *Integrating from Behind the Scenes: The Legacy of Paul Saunier, a Deft Hand in Turbulent Times*, VIRGINIA MAG. (2017).

424. *Long Walk*, *supra* note 406.

425. Gates, *supra* note 423.

426. *See, e.g., Long Walk*, *supra* note 406. Swanson went on to have a long career as an attorney for the Internal Revenue Service. *Id.*

## B. North Carolina—Using Sweatt’s Principles

Soon after the *Gaines* decision in 1938, Pauli Murray, an African-American woman, was denied admission to the University of North Carolina School of Law at Chapel Hill (UNC),<sup>427</sup> North Carolina’s only public law school.<sup>428</sup> Although she decided not to sue, “the lack of a law school for [B]lack students had left the state vulnerable in light of the *Gaines* decision.”<sup>429</sup> So in 1939, the state decided to avail itself of the language in *Gaines* whereby the Supreme Court left open the possibility of segregation, ordering Gaines be admitted to the University of Missouri “in the absence of other and proper provision for his legal training within the State.”<sup>430</sup> Thus, the state established a law school for African-Americans at the North Carolina College for Negroes at Durham,<sup>431</sup> now known as North Carolina Central University School of Law (NCCU).<sup>432</sup>

The law school opened in fall 1940 with a class of five.<sup>433</sup> Its total enrollment by 1943, when the first student graduated, was only six.<sup>434</sup> By the 1949-1950 academic year, enrollment had grown to twenty-eight.<sup>435</sup>

Marshall and the NAACP enlisted some of these NCCU students with proven academic success records as test plaintiffs to integrate UNC.<sup>436</sup> In 1950 they filed suit on behalf of Harold Epps, Harvey Beech, and several other NCCU students.<sup>437</sup> Epps graduated from NCCU before the case came to trial, and he and Beech withdrew as plaintiffs, but

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427. Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After Brown*, 89 NW. U. L. REV. 92, 101 n.44 (1994).

428. Donna L. Nixon, *The Integration of UNC-Chapel Hill—Law School First*, 97 N.C. L. REV. 1741, 1756 (2019).

429. Douglas, *supra* note 427, at 101 n.44.

430. State of Mo. *ex rel. Gaines v. Canada*, 305 U.S. 337, 352 (1938).

431. *Epps v. Carmichael*, 93 F. Supp. 327, 328 (M.D. N. Car. 1950), *rev’d sub nom; McKissick v. Carmichael*, 187 F.2d 949, 954 (4th Cir. 1951); North Carolina Central University School of Law, *The Starting Point*, SO FAR, 2009, at 8, 9 [hereinafter NCCU].

432. NCCU, *supra* note 431, at 6.

433. *Id.* at 13.

434. *Id.*

435. *Epps*, 93 F. Supp. at 328.

436. See NCCU, *supra* note 431, at 16.

437. *Id.*; *Epps*, *supra* note 431, at 327-28.

Floyd B. McKissick, Soloman Revis, James Lassiter, and J. Kenneth Lee remained.<sup>438</sup>

The trial court found it “commendable” that the legislature was appropriating funds for permanent buildings at “these various institutions for the Negroes.”<sup>439</sup> The court denied the relief sought, finding it would be in “the best interests of the plaintiffs” for the schools to remain segregated.<sup>440</sup> Undaunted, Marshall appealed to the U.S. Fourth Circuit Court of Appeals, which reversed the trial court and remanded for further proceedings.<sup>441</sup> The court rejected the State’s argument that its efforts to “build up separate institutions for the higher education of Negroes” would “be best for all,”<sup>442</sup> stating: “The earnest effort put forth by the State to provide higher education for Negroes serves to emphasize the great difficulty and expense involved in establishing equivalent schools in the higher reaches of the educational field rather than to show substantial equality in the present instance.”<sup>443</sup> The court quoted at length from *Sweatt*, stating that the North Carolina case “differ[ed] in circumstance but not in principle from” *Sweatt*.<sup>444</sup>

The Board of Trustees voted to appeal the case,<sup>445</sup> but when the Supreme Court denied certiorari on June 4, 1951,<sup>446</sup> the state immediately admitted the four applicants.<sup>447</sup> Beech, Lee, and McKissick requested on-campus housing that first summer, as was common for law students in 1951.<sup>448</sup> They were assigned to the top floor of a building with no other students on that floor, even though there was a housing shortage.<sup>449</sup> They were allowed in the dining hall but were harassed by students knocking their food trays from their hands.<sup>450</sup> Beech and Lee had to appeal to the governor when they were issued football tickets in the segregated section of the stadium rather than the student section, and

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438. *Epps*, *supra* note 431, at 328.

439. *Id.* at 331.

440. *Id.*

441. *McKissick v. Carmichael*, 187 F.2d 949, 954 (4th Cir. 1951).

442. *Id.* at 953.

443. *Id.* at 954.

444. *Id.*

445. Benjamin R. Jacewicz, *The Tenuous Existence of UNC-CH’s Racial Harassment Policy & Procedures*, 92 ED. LAW REP. 1075, 1078 (1994).

446. *Carmichael v. McKissick*, 341 U.S. 951 (1951).

447. Jacewicz, *supra* note 445.

448. Nixon, *supra* note 428, at 1765, 1789.

449. *Id.*

450. *Id.* at 1783.

when they received student tickets, the chancellor warned them not to use them.<sup>451</sup> Armed highway patrolmen escorted them everywhere,<sup>452</sup> and they received threatening letters daily from the Ku Klux Klan.<sup>453</sup>

McKissick attended one law class at UNC that summer at Marshall's request, but he had already graduated from NCCU by the time of the Supreme Court's action.<sup>454</sup> Lassiter attended summer school along with McKissick but returned to NCCU for his degree in 1951.<sup>455</sup> Beech and Lee, along with James Robert Walker, Jr., finished law school at UNC and graduated in 1952, becoming the first African-Americans to graduate from UNC.<sup>456</sup>

### C. Louisiana—Round 2

Three years after Marshall faced defeat in Louisiana state court when the state created a *Gaines* “separate but equal” law school at Southern, Marshall and Louisiana attorney A.P. Tureaud returned, this time bringing a class action in federal court.<sup>457</sup> Roy S. Wilson applied to LSU for admission for the 1950-1951 academic year.<sup>458</sup> LSU dealt with what it referred to as “[the] Negro problem”<sup>459</sup> by advising Wilson “by letter that the State of Louisiana maintains separate schools for its white and colored students and that Louisiana State University does not admit colored students.”<sup>460</sup>

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451. *Id.* at 1766-67.

452. *Id.* at 1769.

453. *Id.* at 1783.

454. NCCU, *supra* note 431, at 17; Nixon, *supra* note 428, at 1783. McKissick became “a major national civil rights figure,” serving as the National Director of the Congress on Racial Equality in 1966. Charles E. Daye, *People: African-American and Other Minority Students and Alumni*, 73 N.C. L. REV. 675, 681-82 (1995).

455. NCCU, *supra* note 431, at 17; Daye, *supra* note 454, at 683.

456. Daye, *supra* note 454, at 681. UNC did not admit African-American students to its undergraduate program until 1955. The first African-American to earn a bachelor's degree from UNC was David M. Dansby in 1961. Robert Bruce Slater, *The First Black Graduates of the Nation's 50 Flagship State Universities*, 13 J. BLACKS IN HIGHER EDUC. 72, 82 (1996) [hereinafter *First Black Graduates*].

457. *Wilson v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll.*, 92 F. Supp. 986 (E.D. La. 1950), *aff'd*, 340 U.S. 909 (1951).

458. *Wilson*, 92 F. Supp. at 987.

459. W. LEE HARGRAVE, *LSU LAW: THE LOUISIANA STATE UNIVERSITY LAW SCHOOL FROM 1906 TO 1977*, at 122 (2004).

460. *Wilson*, 92 F. Supp. at 987.

Trial testimony focused on comparing LSU's law school with Southern's.<sup>461</sup> The court compared the value of LSU's physical plant (almost \$35,000,000) to Southern's (approximately \$2,500,000); the years in operation (ninety-one for LSU, three for Southern's law school); and the accreditations (LSU was "accredited by every recognized accrediting agency in the country" while Southern was accredited by no one).<sup>462</sup> Thus, the court found "the Law School of Southern University does not afford to plaintiff educational advantages equal or substantially equal to those that he would receive if admitted to" LSU.<sup>463</sup> Citing *Sipuel, Gaines, Sweatt, and McLaurin*, the court granted the injunction against LSU and declared that Wilson "and all others similarly qualified and situated are entitled to" enroll at LSU.<sup>464</sup> LSU appealed to the Supreme Court, but the Court affirmed in a one-sentence per curiam with citations to *Sweatt* and *McLaurin*.<sup>465</sup>

Wilson's "reward" for being a successful test plaintiff was that LSU's dean and director of student life began an investigation into his "character."<sup>466</sup> They discovered he had "a number of skeletons in his closet,"<sup>467</sup> including receiving a Section 8 discharge from the U.S. Army and being "dismissed once from Grambling State (Negro) College . . . for fighting with a classmate."<sup>468</sup> Wilson had enrolled in LSU conditionally on November 1, 1950.<sup>469</sup> He withdrew on January 17, 1951, stating he knew an investigation was in progress and the law

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461. HARGRAVE, *supra* note 459, at 151.

462. *Wilson*, 92 F. Supp. at 988. Now known as Southern University Law Center, the law school is fully accredited by the American Bar Association and the Southern Association of Colleges and Schools Commission on Colleges. See Southern University Law Center, ABA Overview, Accreditation, <http://www.sulc.edu/page/aba-overview> (last visited July 23, 2020); Southern University Law Center, SACSCOC, Accreditation, <http://www.sulc.edu/page/sacscoc> (last visited July 23, 2020).

463. *Wilson*, 92 F. Supp. at 988.

464. *Id.* at 988-89.

465. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll. v. *Wilson*, 340 U.S. 909 (1951).

466. HARGRAVE, *supra* note 459, at 151-52; Sharlene Sinegal-Decuir, *Opening the Doors: The Struggle to Desegregate LSU Law School*, AROUND THE BAR, Feb. 2017, at 10, 11.

467. ADAM FAIRCLOUGH, RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA 1915-1972, at 155 (2d ed. 2008).

468. *Roy Wilson Resigns from L.S.U.*, DAILY WORLD (Opelousas, La.), Jan. 18, 1951, at 14.

469. *Id.* The LSU dean stated that Wilson had enrolled conditionally to audit classes because LSU "did not have time under the court order to complete our investigation as to his qualifications and records." *Id.*

school would reject him.<sup>470</sup> Marshall was reported to be annoyed with Tureaud for choosing a test plaintiff who “could not boast the kind of irreproachable character that the NAACP looked for in Negro ‘firsts.’”<sup>471</sup>

That fall semester three qualified African-American students—Pierre S. Charles, Robert F. Collins, and Ernest N. Morial—applied.<sup>472</sup> “[M]ore thorough investigations of the character references for the [B]lack students were made than in the normal case,” but nothing untoward was discovered.<sup>473</sup> LSU’s president sent the dean a note “stating that if an applicant met the standards required of white students, ‘I see nothing that we can do but to accept him into the law school.’”<sup>474</sup> Charles resigned after the first semester, but Collins and Morial both graduated in 1954.<sup>475</sup>

Despite the court decision, LSU did not change its admissions policy of excluding African-Americans.<sup>476</sup> Fifteen years passed before another African-American graduated. In 1969, Bernette Joshua Johnson and Gammiel B. Gray Poindexter became the first female African-Americans to graduate from LSU Law School.<sup>477</sup> In 1978, Collins became Louisiana’s first African-American federal judge; Morial became the first African-American mayor of New Orleans;<sup>478</sup> and in 2013, Joshua became the first African-American chief justice of the Louisiana Supreme Court.<sup>479</sup>

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470. HARGRAVE, *supra* note 459, at 151-52.

471. FAIRCLOUGH, *supra* note 467, at 155.

472. HARGRAVE, *supra* note 459, at 152.

473. *Id.*

474. *Id.* at 152-53. LSU also admitted an African-American to its graduate school during this time. Charles Edward Harrington received a master’s of education in 1952, becoming LSU’s first African-American graduate. *First Black Graduates*, *supra* note 456, at 79.

475. HARGRAVE, *supra* note 459, at 153.

476. Darrell K. Hickman, *Realizing the Dream: United States v. State of Louisiana*, 50 LA. L. REV. 583, 584-85 (1990).

477. HARGRAVE, *supra* note 459, at 153.

478. GREENBERG, *supra* note 13, at 90.

479. Darrel J. Papillion, *History Part 2: Louisiana African-American Lawyers from 1950 Forward*, 53 LA. BAR J. 110, 111 (2005).



## D. Tennessee—Round 2

William Redmond's lawsuit, though unsuccessful in desegregating UTenn, spurred the Tennessee legislature to provide scholarships to Tennessee private Black colleges or out-of-state institutions for courses offered only at UTenn.<sup>480</sup> The scholarships were restricted, however. The student receiving the scholarship had to attend the nearest university he could lawfully attend, and the legislature failed to provide any special appropriations for the scholarships.<sup>481</sup> Instead, funds had to be secured from appropriations to the Agricultural and Industrial College for Negroes.<sup>482</sup> As one commentator noted wryly in 1939, "Needless to say, few scholarships are actually available for Negroes in Tennessee."<sup>483</sup>

In 1950, four African-American students applied to UTenn: two, Gene Mitchell Gray and Jack Alexander, to graduate programs, and two, Lincoln Anderson Blakeney and Joseph Hutch Patterson, to the College of Law.<sup>484</sup> They were denied admission solely because of race; the state contended it was "enjoined from permitting any white and Negro children to be received as scholars together in the same school."<sup>485</sup> The state further contended that "provision ha[d] been made by Tennessee Statutes to provide professional education for colored persons not offered to them in state colleges for Negroes but offered for white students in the University of Tennessee."<sup>486</sup>

Marshall brought suit on their behalf.<sup>487</sup> The court, citing *Gaines*, *Sipuel*, *Sweatt*, and *McLaurin*, found the plaintiffs had been denied equal protection and were entitled to be admitted to UTenn.<sup>488</sup> The case made its way to the Supreme Court, but during oral argument, UTenn's attorney "rose . . . to say that university trustees had agreed" to admit the students.<sup>489</sup> Before the Court's decision was rendered, plaintiffs'

480. COMMISSION, *supra* note 38, at 18-19; LOVETT, *supra* note 105, at 4.

481. Clement, *supra* note 51, at 146.

482. *Id.*

483. *Id.*

484. Gray v. Bd. of Trustees of Univ. of Tenn., 100 F. Supp. 113, 114 (E.D. Tenn. 1951), *vacated*, 342 U.S. 517 (1952).

485. *Id.*

486. *Id.*

487. Gray v. Univ. of Tenn., 97 F. Supp. 463 (E.D. Tenn. 1951), *vacated*, 342 U.S. 517 (1952).

488. *Id.* at 468.

489. *Along the N.A.A.C.P. Battlefield*, 59 CRISIS 115, 115 (1952).

counsel filed a motion stating that Gray had been admitted to UT but the other three “were, because of changed circumstances, unable to avail themselves of the opportunity at present.”<sup>490</sup> Thus, the Court ordered that the district court dismiss the case as moot.<sup>491</sup>

Despite a statement UTenn’s attorneys made to reporters after the Supreme Court oral argument that “all qualified Negroes w[ould] be admitted to ‘similar courses,’”<sup>492</sup> UTenn continued to accept African-American students “only for courses of study not offered at the Negro State colleges” until at least the fall of 1959.<sup>493</sup> R.B.J. Cambelle became the first African-American admitted to the UTenn College of Law in 1953, graduating in 1956.<sup>494</sup> The Nashville Bar Association described him as having a “pioneering spirit and perseverance in the face of a hostile environment.”<sup>495</sup>

#### IV. DEEP SOUTH DEFIANCE

By 1954, twelve of the seventeen southern and border states allowed African-American students to attend graduate and professional schools at formerly all-white schools, although in some cases only if the same courses were not offered at the state’s public African-American colleges.<sup>496</sup> Five states, however—Alabama, Florida, Georgia, Mississippi, and South Carolina—“chose defiance over compliance”<sup>497</sup> and continued to maintain complete segregation.<sup>498</sup>

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490. *Gray v. Bd. of Trustees of Univ. of Tenn.*, 342 U.S. 517, 518 (1952).

491. *Id.*

492. *Along the N.A.A.C.P. Battlefront*, *supra* note 489, at 115.

493. COMMISSION, *supra* note 38, at 60. Even though both state and federal courts had ruled by September 1956 that all of Tennessee’s school segregation laws were invalid, the state board of education continued to delay through “legal and other maneuvers.” *Id.* at 62.

494. University of Tennessee College of Law, *11th Annual Blackshear Gala a Success*, TENN. L., Spring 2011, at 1, 23.

495. Resolution of the Nashville Bar Association, Nov. 16, 1989, at 1. He helped open the first Legal Services office in Nashville and became an authority on juvenile justice while teaching criminal justice at Middle Tennessee State University. *Id.* at 2-3; *Honoring the Past and Building a Future*, LEGAL AID SOC’Y OF MIDDLE TENN. AND THE CUMBERLANDS, 2013, at 1, 9.

496. C. WILLIAMS, *supra* note 100, at 6; *see also* Marshall, *supra* note 30, at 326.

497. Hadley Scott Herman, *A Tribute to an Invincible Civil Rights Pioneer (Part I)*, CRISIS, July 1994, at 42, 43.

498. C. WILLIAMS, *supra* note 100, at 6.

In 1952, Marshall predicted that “the time when the universities in these states will be opened to Negroes depend[s] solely upon when qualified Negroes apply to those universities, and are refused admission and bring suit against these universities. As soon as that is done they will be opened up.”<sup>499</sup> Time proved that Marshall was overly optimistic.

### A. Florida—Virgil Hawkins—“Member of the ‘Bar of Heaven’”<sup>500</sup>

Virgil Hawkins’s dream was to receive a juris doctorate from the University of Florida School of Law (UF) and become a member of the Florida Bar Association.<sup>501</sup> If ever there was a dream deferred, it was his.<sup>502</sup> Hawkins was admitted to the Florida Bar Association in 1976, twenty-eight years after he first applied to law school in 1949,<sup>503</sup> and received his law degree from UF posthumously in 2001.<sup>504</sup>

Hawkins, born in 1906,<sup>505</sup> received a bachelor’s degree from Bethune-Cookman College, where he later worked as the school’s Director of Public Relations.<sup>506</sup> He had an interest in becoming a lawyer since childhood,<sup>507</sup> but the options in Florida were limited for African-Americans. UF, home of the state’s only public law school, admitted only white students, and the state’s only public college for African-Americans did not have a law school.<sup>508</sup> Even though the Supreme

499. Marshall, *supra* note 30, at 327.

500. University of Florida, *The Virgil Hawkins Story*, Celebrating the Fiftieth Anniversary of the Integration of the University of Florida/Constitution Day 2008 (program), Sept. 17, 2008.

501. Dubin, *supra* note 1, at 916, 951-52.

502. See 3 LANGSTON HUGHES, *Dream Deferred*, in THE COLLECTED WORKS OF LANGSTON HUGHES 145 (Arnold Rampersad ed., University of Missouri Press 2001).

503. Algia R. Cooper, *Brown v. Board of Education and Virgil Darnell Hawkins: Twenty-eight Years and Six Petitions to Justice*, 64. J. NEGRO HIST. 1, 13 (1979).

504. Larry O. Rivers, “*Leaning on the Everlasting Arms*”: *Virgil Darnell Hawkins’s Early Life and Entry into the Civil Rights Struggle*, 86 FLA. HIST. Q. 279, 308 (2008).

505. Herman, *supra* note 497, at 42. When Hawkins argued before the Florida Supreme Court on November 9, 1983, he stated: “On the 28th of this month I’ll be 77 years old.” See Darryl Paulson & Paul Hawkes, *Desegregating the University of Florida Law School: Virgil Hawkins v. The Florida Board of Control*, 12 FLA. ST. UNIV. L. REV. 59, 71 n.57 (1984).

506. Herman, *supra* note 497, at 42. 1

507. See Rivers, *supra* note 504, at 294-96; Larry Johnson et al., *African Americans and the Struggle for Opportunity in Florida Public Higher Education, 1947-1977*, 47 HIST. EDUC. Q. 328, 333 (2007).

508. The Buckman Act of 1905 created three public institutions of higher learning in Florida: UF, for white men; Florida State College, for white women, which became a coed institution, Florida State University, in 1947; and the Normal School for Colored Students, now

Court ruled in *Gaines* in 1938 that a state is “bound to furnish [African-Americans] within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race,”<sup>509</sup> in 1949 the State of Florida still offered only one option: a scholarship to an out-of-state school.<sup>510</sup> But Hawkins did not want to go to school out of state. He stated, “I wanted *Florida*. . . . [M]y daddy paid taxes here.”<sup>511</sup> In an interview with the dean of Morehouse College in 1958, he further explained, “I didn’t want to go out of the state to study law. . . . The white boys with whom I had played didn’t have to go off.”<sup>512</sup>

In 1949 the NAACP was ready to challenge Florida’s segregated higher education system.<sup>513</sup> According to Horace Hill, an NAACP lawyer in Florida, Hawkins was the “perfect plaintiff: college-educated, employed, active in the community, no serious run-ins with the law, and happily married to a very supportive spouse,” as well as “a stubborn individual who would not give up for anything in the world.”<sup>514</sup> So with the NAACP’s support, forty-two-year-old Hawkins<sup>515</sup> applied to UF in April 1949.<sup>516</sup> His application was forwarded to UF’s governing body, the Board of Control (Board), which offered him a scholarship to study out of state.<sup>517</sup> He declined the scholarship, and the Board quickly denied his application.<sup>518</sup>

The NAACP then began what would become a nine-year struggle, resulting in what one commentator called “a judicial embarrassment of the highest order.”<sup>519</sup> The NAACP filed a mandamus action with the

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known as Florida Agricultural & Mechanical University. See Rivers, *supra* note 504, at 299-300; Johnson et al., *supra* note 507, at 331-32.

509. Missouri *ex rel.* *Gaines v. Canada*, 305 U.S. 337, 351 (1938).

510. Rivers, *supra* note 504, at 304.

511. *Id.*

512. B.R. Brazeal, *Some Problems in the Desegregation of Higher Education in the “Hard Core” States*, 27 J. NEGRO EDUC. 352, 356 (1958).

513. See Rivers, *supra* note 504, at 303-04.

514. *Id.* at 304-05.

515. Other authors have listed Hawkins’s age when he applied as thirty-nine or forty-three. However, as he was born in November 1906, his age was forty-two in April 1949.

516. Dubin, *supra* note 1, at 916.

517. State *ex rel.* *Hawkins v. Bd. of Control of Fla.* (Hawkins I), 47 So. 2d 608, 609-10 (Fla. 1950); Cooper, *supra* note 503, at 3; Rivers, *supra* note 504, at 305.

518. Cooper, *supra* note 503, at 3.

519. David J. Garrow, *Bad Behavior Makes Big Law: Southern Malfeasance and the Expansion of Federal Judicial Power, 1954-1968*, 82 ST. JOHN’S L. REV. 1, 14 (2008).

Florida Supreme Court to compel UF to admit Hawkins on May 25, 1949.<sup>520</sup> The court took its time, rendering a decision on August 1, 1950,<sup>521</sup> which gave the Board time to authorize a law division at Florida's only Black public institution of higher learning, Florida Agricultural & Mechanical College (FAMU).<sup>522</sup>

The Florida Supreme Court found that Hawkins met "all the scholastic, moral and other qualifications, except as to race and color, prescribed by the laws of Florida,"<sup>523</sup> and further found that scholarships to attend out-of-state schools did not pass constitutional muster.<sup>524</sup> However, the court denied the relief Hawkins sought, finding that FAMU was ready and willing to admit Hawkins as soon as he applied, and at FAMU "courses of study will be provided for [Hawkins] on a basis and under conditions equal to those at any tax-supported institution of higher learning for white students in the State, as soon as these courses can be actually and physically set up and placed in operation."<sup>525</sup> Hawkins, however, had no intention of attending FAMU.<sup>526</sup> He explained: "Florida A. & M. has a make-shift law school which was put up for me to go to. . . . This school has no prestige . . ." <sup>527</sup>

While Hawkins's suit was pending, he was subjected to multiple forms of intimidation.<sup>528</sup> He was fired from one job, and "pressure [was] brought to bear" on Bethune-Cookman College when it hired him.<sup>529</sup> Stores and banks that had previously extended credit to Hawkins wanted immediate repayment and no longer extended credit.<sup>530</sup> He received

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520. On May 25, 1999, the Florida Supreme Court and Governor Jeb Bush recognized the fiftieth anniversary of Hawkins's suit being filed. Dubin, *supra* note 1, at 954-55.

521. *Hawkins I*, 47 So. 2d 608.

522. The Board of Control authorized the law division on December 21, 1949. *Id.* at 610. While the law division was authorized in 1949, no funds were allocated for it at that time. Cooper, *supra* note 503, at 15 n.30. In 1953, to bolster its case, the Board changed the school's name to Florida Agricultural & Mechanical *University*. Johnson et al., *supra* note 507, at 339 (emphasis added).

523. *Hawkins I*, 47 So. 2d at 609.

524. *Id.* at 611-12.

525. *Id.* at 613.

526. Brazeal, *supra* note 512, at 357.

527. *Id.*

528. *Id.*

529. *Id.*

530. *Id.*; Herman, *supra* note 497, at 42.

hate mail,<sup>531</sup> and police treated him “like a wanted man.”<sup>532</sup> To protect his wife, they publicly separated and pretended to be divorced, secretly meeting at night after a fifty-mile drive across rural Florida.<sup>533</sup> When his family asked why his hair turned white almost overnight, he replied, “While you’re in your beds sleeping at night, I’m running, ducking, dodging and hiding under houses.”<sup>534</sup>

Despite the intimidation, Hawkins persisted. Ten months later, Hawkins again appeared before the Florida Supreme Court seeking admission to UF but was rudely rebuffed as the justices literally turned their backs on Hawkins’s attorney during the oral argument.<sup>535</sup> The court again denied mandamus, stating Hawkins had not “brought himself within the principles enunciated in” the first case, i.e., he had not applied to FAMU.<sup>536</sup>

Ever persistent, after fourteen months Hawkins returned to the Florida Supreme Court a third time.<sup>537</sup> The Florida court had retained jurisdiction with the intent that Hawkins would enroll in FAMU and then return to court to attempt to prove that the facilities at FAMU and UF were unequal, which thwarted Hawkins’s ability to appeal to the U.S. Supreme Court.<sup>538</sup> This time, the court rendered a final judgment finding unsound Hawkins’s contention that he had a constitutional right to attend UF; in the eyes of the court, FAMU was “substantially equal.”<sup>539</sup> The U.S. Supreme Court then granted Hawkins’s writ but deferred action on it for two years<sup>540</sup> until it handed down *Brown v. Board of Education of Topeka, Kansas* in May 1954.<sup>541</sup> One week later

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531. Dubin, *supra* note 1, at 917.

532. Herman, *supra* note 497, at 42.

533. *Id.*

534. Rivers, *supra* note 504, at 306.

535. State *ex rel.* Hawkins v. Bd. of Control (Hawkins II), 53 So. 2d 116 (Fla. 1951); Dubin, *supra* note 1, at 926 (statement of Horace Hill) (“I was arguing to just the curtain so to speak.”).

536. *Hawkins II*, 53 So. 2d at 119.

537. State *ex rel.* Hawkins v. Bd. of Control (Hawkins III), 60 So. 2d 162 (Fla. 1952), *vacated*, 347 U.S. 971 (1954).

538. *Id.* at 163-64; *see* Dubin, *supra* note 1, at 926.

539. *Hawkins III*, 60 So. 2d at 165.

540. Herman, *supra* note 497, at 43.

541. *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954).

the Supreme Court vacated the judgment of the Florida Supreme Court in a two-sentence per curiam opinion.<sup>542</sup>

Over a year later, and more than six years after Hawkins first applied to UF, the Florida Supreme Court took up his case for the fourth time.<sup>543</sup> The U.S. Supreme Court had supplemented the *Brown* decision on May 31, 1955, and held that local schools could apply equitable principles in deciding how to best implement *Brown* in elementary and secondary schools.<sup>544</sup> The Florida Supreme Court stated, “The ‘implementation decision’ of May 31, 1955, . . . does not impose upon [UF] a clear legal duty to admit the relator to its Law School immediately, or at any particular time in the future.”<sup>545</sup> The court then appointed a commissioner to take evidence regarding the “grave and serious problems” presented by desegregating UF so as to “greatly decrease the danger of serious conflicts, incidents and disturbances.”<sup>546</sup>

Hawkins then went back to the Supreme Court, which vacated the Florida court’s judgment, explaining that graduate schools did not have problems with implementation that elementary and secondary schools did and that there was “no reason for delay”; Hawkins was “entitled to prompt admission under the rules and regulations applicable to other qualified candidates.”<sup>547</sup>

Despite the order of the U.S. Supreme Court, Hawkins did not fare any better on his fifth trip to the Florida Supreme Court.<sup>548</sup> The court

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542. Florida *ex rel.* Hawkins v. Bd. of Control, 347 U.S. 971 (1954) (“The judgment is vacated and the case remanded for consideration in the light of the Segregation Cases decided May 17, 1954, . . . and conditions that now prevail.”).

543. State *ex rel.* Hawkins v. Bd. of Control (Hawkins IV), 83 So. 2d 20 (1955).

544. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 299-300 (1955).

545. *Hawkins IV*, 83 So. 2d at 24.

546. *Id.* at 25. This decision is perhaps best known for the outrageous dissent of Justice Terrell in which he invoked the laws of nature in support of segregation:

[S]egregation is not a new philosophy generated by the states that practice it. It is and has always been the unvarying law of the animal kingdom. The dove and the quail, the turkey and the turkey buzzard, the chicken and the guinea, it matters not where they are found, are segregated; place the horse, the cow, the sheep, the goat and the pig in the same pasture and they instinctively segregate; the fish in the sea segregate into ‘schools’ of their kind; when the goose and duck arise from the Canadian marshes and take off for the Gulf a Mexico and other points in the south, they are always found segregated; and when God created man, he allotted each race to his own continent according to color, Europe to the white man, Asia to the yellow man, Africa to the [B]lack man, and America to the red man . . .” *Id.* at 27-28 (Terrell, J., dissenting).

547. Florida *ex rel.* Hawkins v. Bd. of Control, 350 U.S. 413, 414 (1956).

548. Florida *ex rel.* Hawkins v. Bd. of Control (Hawkins V), 93 So. 2d 354 (Fla. 1957).

invoked the doctrine of states' rights, stating that it could not "assume that the Supreme Court intended to deprive the highest court of an independent sovereign state of one of its traditional powers," defined as "the right to exercise a sound judicial discretion as to the date of the issuance of its process in order to prevent a serious public mischief."<sup>549</sup>

The court then denied Hawkins's request for admission until he could "present testimony showing that his admission can be accomplished without doing great public mischief."<sup>550</sup> One attorney sardonically explained that this ruling meant Hawkins "merely had to prove that Ku Klux Klan and other assorted Yahoos would not burn down Gainesville, in order to obtain the benefit of the U.S. Supreme Court order and equal protection of the law."<sup>551</sup> The U.S. Supreme Court denied certiorari "without prejudice to the petitioner seeking relief in an appropriate United States District Court."<sup>552</sup>

Undeterred, Hawkins filed a class action in federal district court seeking his immediate enrollment for the fall semester 1957.<sup>553</sup> The court refused to allow Hawkins to admit evidence and refused to issue the requested injunction.<sup>554</sup> In April 1958, the U.S. Fifth Circuit Court of Appeals reversed and remanded for a hearing.<sup>555</sup> But the Board had one more trick up its sleeve. Before the hearing, it implemented new admission standards, setting a score on the Law School Admission Test higher than Hawkins's score.<sup>556</sup> Despite the Florida Supreme Court's finding in 1950 that Hawkins met "all the scholastic, moral and other qualifications, except as to race and color,"<sup>557</sup> the Board challenged

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549. *Id.* at 358.

550. *Id.* at 360. Justice Terrell wrote another of his outlandish dissents supporting segregation, even invoking Hitler in support of his argument. He emphasized the historic nature of segregation, stating:

[S]egregation is as old as the hills. The Egyptians practiced it on the Israelites; the Greeks did likewise for the barbarians; the Romans segregated the Syrians; the Chinese segregated all foreigners; segregation is said to have produced the caste system in India and Hitler practiced it in his Germany, but no one ever discovered that it was in violation of due process until recently. *Id.* at 360-61.

551. Herman, *supra* note 497, at 43.

552. Florida *ex rel.* Hawkins v. Bd. of Control, 355 U.S. 839 (1957).

553. COMMISSION, *supra* note 38 *supra* note 38, at 79.

554. *Id.*

555. Hawkins v. Bd. of Control of Fla., 253 F.2d 752 (5th Cir. 1958).

556. See COMMISSION, *supra* note 38, at 79.

557. State *ex rel.* Hawkins v. Bd. of Control of Fla. (Hawkins I), 47 So. 2d 608, 609 (Fla. 1950).



Hawkins's scholastic and moral qualifications, dredging up unsubstantiated claims from twenty years earlier.<sup>558</sup> In a compromise that allowed the court to enter an order on the class action without a trial on Hawkins's individual qualifications, Hawkins selflessly agreed to withdraw his personal claim so that judgment could be rendered on the class action, allowing other African-Americans to be admitted to UF.<sup>559</sup>

Hawkins eventually obtained a law degree from New England School of Law in Boston in 1964, scrubbing toilets at an all-white men's club to pay his tuition.<sup>560</sup> He fought for admission to the Florida Bar Association for twelve years, finally succeeding in 1976.<sup>561</sup> But just as the Board had sought to keep Hawkins out of UF with unsubstantiated allegations of moral unfitness, now the Bar Association began a campaign to show that Hawkins was unfit as a lawyer.<sup>562</sup> Hawkins's dream became a nightmare, his health failed, and in 1985 he closed his office and surrendered his law license.<sup>563</sup> He suffered a paralyzing stroke in 1987, died in 1988, and was buried in a pauper's grave.<sup>564</sup>

UF finally admitted its first African-American student, George Starke, in the fall semester 1958.<sup>565</sup> "[T]he physical and emotional pressures of being the only African-American student at UF took their toll" on Starke.<sup>566</sup> He left after three semesters, which UF's current law dean attributes to "the disgraceful behavior of leaders at this institution and leaders in this community."<sup>567</sup> Willie George Allen entered UF in 1960 and became its first African-American graduate in 1962.<sup>568</sup>

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558. Herman, *supra* note 497, at 43.

559. COMMISSION, *supra* note 38, at 79; Dubin, *supra* note 1, at 941.

560. Harley Scott Herman, *A Tribute to an Invincible Civil Rights Pioneer (Part II)*, CRISIS, Aug./Sept. 1994, at 22, 22 [hereinafter Herman II].

561. *In re. Fla. Bd. of Bar Exam'rs*, 339 So. 2d 637 (Fla. 1976).

562. See Herman II, *supra* note 560, at 23-24; Dubin, *supra* note 1, at 951-53.

563. Herman II, *supra* note 560, at 24.

564. Dubin, *supra* note 1, at 953.

565. *Id.* at 942.

566. UF Law, *George H. Starke, Jr. Receives Honorary Degree* (May 3, 2019), <https://www.law.ufl.edu/law-news/george-h-starke-jr-to-receive-honorary-degree>.

567. Giovanna Kubota, *George Starke Jr. Celebrated for Ending UF's Segregation in 1958*, WUFT (Nov. 9, 2018), <https://www.wuft.org/news/2018/11/09/george-starke-jr-celebrated-for-ending-ufts-segregation-in-1958/>.

568. COMMISSION, *supra* note 38, at 80; Herman II, *supra* note 560, at 22.

## B. Georgia—Masters of Delay

The Georgia Board of Regents (Regents), the governing body for the University of Georgia (UGA), proved itself just as adept as the Florida Board of Control at delay tactics. Horace T. Ward applied to UGA's School of Law in September 1950, after the NAACP's victories in *Sweatt* and *McLaurin*, seeking admission for the June 1951 term.<sup>569</sup> Regents denied his application "upon the ground that he was not qualified as to attitude and character."<sup>570</sup> Regents offered him an out-of-state scholarship instead, which he refused.<sup>571</sup>

Six weeks after Ward applied to UGA, Regents adopted a lengthy multi-step appeal process.<sup>572</sup> Ward complied with the process but was denied at each step.<sup>573</sup> Then in 1952, Regents adopted even more onerous requirements that were virtually impossible for African-American applicants to meet—an applicant had to provide recommendations from two UGA Law School alumni and a judge of the superior court of the applicant's residence.<sup>574</sup> Of course, UGA Law had no African-American alumni, nor did Georgia have any African-American superior court judges.<sup>575</sup>

Ward refused to comply with these ex post facto admission requirements and instead filed suit in federal district court in June 1952.<sup>576</sup> Georgia Governor Herman Talmadge sought to stop Ward, first by hiring a private detective to investigate him "to find some bad

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569. *Ward v. Regents of the Univ. Sys. of Ga.*, 191 F. Supp. 491, 492 (N.D. Ga. 1957); see also Maurice C. Daniels & Cameron Van Patterson, *(Re)Considering Race in the Desegregation of Higher Education*, 46 GA. L. REV. 521, 540 (2012).

570. *Ward*, 191 F. Supp. at 492.

571. COMMISSION, *supra* note 38, at 89; Daniels & Van Patterson, *supra* note 569, at 541.

572. Anne S. Emanuel, *Turning the Tide in the Civil Rights Revolution: Elbert Tuttle and the Desegregation of the University of Georgia*, 5 MICH. J. RACE & L. 1, 9 (1999).

573. See COMMISSION, *supra* note 38, at 90.

574. COMMISSION, *supra* note 38, at 90.

575. *Id.*; see also ROBERT A. PRATT, WE SHALL NOT BE MOVED: THE DESEGREGATION OF THE UNIVERSITY OF GEORGIA 18 (2002) (stating that one UGA faculty member, in a letter to the dean, described these new measures as "the prostitution of educational standards.").

576. COMMISSION, *supra* note 38, at 90; Destiny Peery, *Session IV: A Conversation with Judge Horace Ward: Dr. King's Lawyer in Georgia*, 10 NW. J. L. & SOC. POL'Y 657, 660 (2016).

character to use as an excuse to keep him out of the law school.”<sup>577</sup> When the detective found nothing, the Governor’s Office called the draft board and had Ward sent to Korea; he was drafted into the Army less than thirty days before the federal court hearing.<sup>578</sup>

After a two-year stint in the military, Ward returned to Georgia in 1955 and, with Marshall’s help, resumed his suit.<sup>579</sup> Regents delayed the suit with procedural maneuvers so that it was not set for trial until December 1956.<sup>580</sup> In the meantime, Ward, tired of waiting, had gained admission to Northwestern University School of Law in Chicago and successfully completed his first semester.<sup>581</sup> When the court finally ruled in February 1957, over six years after Ward first applied, it dismissed his case for failure to exhaust administrative remedies, stating that he “did not swear that it was his intention to file with defendants an application as a transfer student in the future.”<sup>582</sup>

For the next two years students attempted to enroll at various Georgia public colleges but were all rejected for dubious reasons.<sup>583</sup> Ward graduated from Northwestern in 1959, returned to Georgia to practice law, and in 1960 became co-counsel in Charlayne Hunter and Hamilton Holmes’s federal suit for admission to UGA.<sup>584</sup>

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577. *A Historical Gathering with Governor Samuel Ernest Vandiver, Jr. and Others, St. Simons Island, Georgia, January 20, 2004*, 14 J. S. LEGAL HIST. 11, 18 (2006) [hereinafter *Historical*] (John Sammons Bell described the efforts of Jimmy Bentley to keep Ward out of UGA); see also Interview by Jack Bass & Walter De Vries with Jimmy Bentley, former Controllor General of Georgia, in Atlanta, Ga. (Apr. 29, 1974) available at <https://dcr.lib.unc.edu/record/uuid:80ce1eb6-da03-4764-81c6-baf31013116c> (Bentley discusses being Governor Talmadge’s Executive Secretary in 1956).

578. See *Historical*, *supra* note 577, at 19. In the oral history interview, Bell stated: “[T]hey were afraid they were going to lose the case. So they called his draft board to draft him. . . . [T]hat is what got the delay for them.” *Id.* Ward had previously been exempt from military service because of a hernia, but he had the hernia surgically corrected before he was drafted. PRATT, *supra* note 575, at 12, 23-24; see also COMMISSION, *supra* note 38, at 91.

579. Daniels & Van Patterson, *supra* note 569, at 542-43.

580. COMMISSION, *supra* note 38, at 91.

581. Peery, *supra* note 576, at 662.

582. Ward v. Regents of the Univ. Sys. of Ga., 191 F. Supp. 491, 494-95 (N.D. Ga. 1957).

583. See COMMISSION, *supra* note 38, at 92-95.

584. Daniels & Van Patterson, *supra* note 569, at 544-45. Ward became Georgia’s first African-American trial court judge in 1974. Stephanie Schupska, *Horace Ward to Receive Honorary UGA Degree*, UGA TODAY (Mar. 20, 2014), <https://news.uga.edu/horace-ward-to-receive-honorary-uga-degree/>. Herman Talmadge, the governor who worked so hard to keep Ward out of UGA, became a U.S. Senator and nominated Ward for a federal judgeship. *Historical*, *supra* note 577, at 18. One of Talmadge’s associates believed that by nominating Ward for the judgeship, “they felt they kind of made up with him.” *Id.* President Jimmy Carter

The NAACP recruited Hunter and Holmes from their high school as test plaintiffs.<sup>585</sup> They were ideal—outstanding students, committed, “psychologically strong and stable,” “[g]ood looking and well dressed.”<sup>586</sup> They applied to UGA multiple times in 1959 and 1960 but were always rejected.<sup>587</sup> The NAACP filed suit in federal court on their behalf on September 2, 1960.<sup>588</sup> After multiple trips to court, they enrolled on January 11, 1961.<sup>589</sup>

The night before they enrolled, students burned crosses on campus,<sup>590</sup> and the night of their enrollment, a riot involving a “howling, cursing mob” of up to 2,000 students broke out outside Hunter’s dormitory.<sup>591</sup> She and Holmes were suspended from UGA “in order to protect all students.”<sup>592</sup> The court ordered them readmitted, however.

Although they were “shunned . . . as if they were pariahs,”<sup>593</sup> Holmes and Hunter graduated in 1963, having opened the door for other African-American students.<sup>594</sup> Chester C. Davenport enrolled in the UGA School of Law in fall 1963, thirteen years after Horace Ward first applied.<sup>595</sup> He was the only African-American at UGA Law during his three years of study.<sup>596</sup> Robert Benham followed in 1967; he was also the sole person of color during his entire three years of law school.<sup>597</sup> Benham, who became a justice on the Georgia Supreme Court, “noted

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appointed Ward to the federal district court in Georgia in 1979. Sam Roberts, *Horace Ward, U.S. Judge Who Triumphed Over Bias, Dies at 88*, N.Y. TIMES (Apr. 27, 2016), <https://www.nytimes.com/2016/04/28/us/horace-ward-georgias-first-black-federaljudge-dies-at-88.html>.

585. Patrick Emery Longan, “*You Can’t Afford to Flinch in the Face of Duty*”: Judge William Augustus Bootle and the Desegregation of the University of Georgia, 48 STETSON L. REV. 379, 382 (2019).

586. Emanuel, *supra* note 572, at 5.

587. See Longan, *supra* note 585, at 383-88.

588. *Holmes v. Danner*, 191 F. Supp. 385 (M.D. Ga. 1960).

589. See *id.*; *Holmes v. Danner*, 191 F. Supp. 394, 416-17 (M.D. Ga. 1961); *Danner v. Holmes*, 364 U.S. 939 (1961) (denying motion to vacate and stay).

590. PRATT, *supra* note 575, at 85.

591. PRATT, *supra* note 575, at 93.

592. *Holmes*, 191 F. Supp. at 417.

593. PRATT, *supra* note 575, at 115.

594. Daniels & Van Patterson, *supra* note 569, at 548.

595. See *Reflections on the Integration of Georgia Law and the Impact of Brown v. Board of Education*, ADVOCATE MAGAZINE 6, 6 (Spring/Summer 2004), <https://digitalcommons.law.uga.edu/advocate/vol38/iss2/7>.

596. *Id.*

597. *Id.* at 7.

that there were friendly faces and unfriendly faces and that there were classmates who never spoke to him,” but that overall, his law school experience was enjoyable.<sup>598</sup>

### C. Mississippi—Blatantly Hostile

#### 1. *The First Attempts*

Mississippi was “blatantly hostile” to school desegregation and thus the University of Mississippi (UMiss)<sup>599</sup> law school was one of the last to admit African-American students.<sup>600</sup> The NAACP delayed filing suits in Mississippi because of the difficulty in finding “plaintiffs prepared to face the very real risks involved.”<sup>601</sup>

All attempts by African-Americans to enroll in whites-only Mississippi colleges were unsuccessful in the 1950s. The first known African-American applicant to UMiss was Charles Dubra in 1953.<sup>602</sup> Dubra, who applied to the law school, did not want to cause trouble; he offered to live off campus and avoid publicity.<sup>603</sup> The Board of Trustees of the State Institutions of Higher Learning (the Board)<sup>604</sup> rejected his application because his undergraduate degree was from Claflin College in South Carolina, which was unaccredited, even though Dubra also had a master’s degree from Boston University, which should have qualified him for admission.<sup>605</sup> Dubra did not pursue the matter further.<sup>606</sup> The following year, 1954, Medgar Evers applied to the law school.<sup>607</sup> The Board responded with “delay and duplicity” until Evers gave up the

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598. *Id.*

599. The author is aware that the common shorthand or nickname for the University of Mississippi is “Ole Miss.” That appellation has been avoided as many consider the term racist. *See, e.g.,* Marc Parry, *The Trouble with ‘Ole Miss,’* CHRON. OF HIGHER EDUC. (Nov. 8, 2019), <https://www.chronicle.com/interactives/11082019-OleMiss>.

600. Brazeal, *supra* note 512, at 364.

601. GREENBERG, *supra* note 13, at 226.

602. DAVID G. SANSING, MAKING HASTE SLOWLY: THE TROUBLED HISTORY OF HIGHER EDUCATION IN MISSISSIPPI 141-42 (2008).

603. *Id.* at 142.

604. The Board is a body established by the Mississippi Constitution “vested with the management and control of all Mississippi’s colleges and universities.” *Meredith v. Fair*, 305 F.2d 343, 348 (1962).

605. SANSING, *supra* note 602, at 142.

606. *Id.*

607. *Id.*

fight and assumed the position of field secretary for the Mississippi branch of the NAACP.<sup>608</sup>

The next two attempts were met with “drastic countermeasures.”<sup>609</sup> Clennon King, a history professor at Mississippi’s Alcorn Agricultural & Mechanical College, attempted to enroll at UMiss for the 1958 summer session, seeking a doctorate in history.<sup>610</sup> King arrived in person to apply.<sup>611</sup> At the governor’s direction, highway patrolmen forced him into a car and took him to a commitment hearing, at which newspaper reporters and King’s attorneys were ejected.<sup>612</sup> He was ordered committed to “the colored asylum for the insane,” where he remained for thirteen days while his wife instituted habeas corpus proceedings for his release.<sup>613</sup>

Perhaps a worse story is that of Clyde Kennard, which one historian described as “a dark, sorry episode in Mississippi’s history.”<sup>614</sup> After he applied to Mississippi Southern College in December 1958, the governor and various African-American leaders attempted to get him to withdraw his application.<sup>615</sup> Financial pressure was applied; the local agricultural co-operative foreclosed on his poultry farm and repossessed his chickens.<sup>616</sup> After meeting with the college president in September 1959, he was arrested for reckless driving and illegal possession of whiskey, which “appeared to be a frame-up.”<sup>617</sup>

Ten days later, an even more serious frame-up occurred; Kennard was arrested as an accessory to the burglary of twenty-five dollars worth

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608. *Id.* at 144. Evers became “one of the most prominent and well-respected leaders of the civil rights movement in the South.” Margaret M. Russell, *Cleansing Moments and Retrospective Justice*, 101 MICH. L. REV. 1225, 1236 (2003). He died from an assassin’s bullet in June 1963. *Id.* at 1238.

609. COMMISSION, *supra* note 38, at 81.

610. *Id.*; SANSING, *supra* note 602, at 145.

611. SANSING, *supra* note 602, at 145.

612. *Id.* at 146; COMMISSION, *supra* note 38, at 81.

613. E. CULPEPPER CLARK, *THE SCHOOLHOUSE DOOR* 156-57 (1993). One journalist quipped, “[A]ny [B]lack man who thought he could get into Ole Miss was obviously out of touch with reality.” Camille A. Nelson, *Breaking the Camel’s Back: A Consideration of Mitigatory Criminal Defenses and Racism-Related Mental Illness*, 9 MICH. J. RACE & L. 77, 137 (2003) (quoting ROBERT WHITAKER, *MAD IN AMERICA: BAD SCIENCE, BAD MEDICINE, AND THE ENDURING MISTREATMENT OF THE MENTALLY ILL* 215 (2002)).

614. SANSING, *supra* note 602, at 148.

615. *Id.* at 149-52.

616. *Id.* at 152.

617. *Id.* at 152-53.

of chicken feed and received the maximum sentence of seven years in the state penitentiary.<sup>618</sup> Within a year after his incarceration he developed intestinal cancer, and with the lack of medical care in prison, his condition quickly deteriorated, leading to his death in July 1963.<sup>619</sup>

## 2. *A Man with a Mission*

It finally took James Meredith, a man whom Judge John Minor Wisdom described as “a Mississippi [N]egro in search of an education” and “a man with a mission” to crack the color barrier at UMiss.<sup>620</sup> In January 1961, Meredith began his quest for admission to UMiss.<sup>621</sup> Medgar Evers suggested Meredith contact Thurgood Marshall and the NAACP Legal Defense Fund for legal guidance, which he did.<sup>622</sup> Meredith’s letter to Marshall exhibited the courage and determination necessary to become a successful test plaintiff; he wrote, “I am familiar with the probable difficulties involved in such a move as I am undertaking, and I am fully prepared to pursue it all the way to a degree from the University of Mississippi.”<sup>623</sup>

On May 31, 1961, Meredith filed a class action suit in federal court.<sup>624</sup> After two district court hearings finding no racial discrimination and two trips to the U.S. Court of Appeals for the Fifth Circuit, the district court finally ordered UMiss to admit Meredith on September 13, 1962.<sup>625</sup>

Instead of admitting Meredith, however, UMiss and the Board engaged in machinations to keep him out. Throughout the month of September, the parties went back and forth through the courts, and U.S.

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618. *Id.*

619. *Id.* at 153.

620. *Meredith v. Fair*, 305 F.2d 343, 344, 358 (5th Cir. 1962). Judge Minor’s full description of Meredith was “a man with a mission and with a nervous stomach” based on a psychiatrist’s report in Meredith’s military medical records. *Id.* at 356-58. Meredith told a psychiatrist that his nervous-stomach symptoms were “intensified whenever there is a heightened tempo in the racial problems in the US ....” *Id.* at 356. Judge Wisdom found that “certainly understandable” and added, “There must be a good many Negroes stateside with similar abdominal reactions.” *Id.* at 357.

621. SANSING, *supra* note 602, at 158.

622. HAYGOOD, *supra* note 28, at 142.

623. GREENBERG, *supra* note 13, at 319.

624. SANSING, *supra* note 602, at 162.

625. GREENBERG, *supra* note 13, at 321. See Denny Chin & Kathy Hirata Chin, *Constance Baker Motley, James Meredith, and the University of Mississippi*, 117 COLUM. L. REV. 1741, 1747-73 (2017) for a detailed description of the court proceedings.

Attorney General Robert Kennedy negotiated with the Mississippi governor.<sup>626</sup> President John F. Kennedy even called the governor.<sup>627</sup> Finally, on September 30, 1962, President Kennedy issued a proclamation directing “all persons to cease and desist obstruction of justice against court orders that required Meredith’s admission,” and an executive order directed the Secretary of Defense to “take all appropriate steps” to enforce the court orders.<sup>628</sup> U.S. Marshals then accompanied Meredith to a dormitory room.<sup>629</sup>

Violence and bloodshed erupted that night as a mob of students and outside agitators battled U.S. Marshals and National Guardsmen all night, injuring hundreds and killing two.<sup>630</sup> Meredith registered the next morning, October 1, 1962.<sup>631</sup> To keep order, 23,000 troops eventually “crowded into tiny Oxford to protect one [B]lack student.”<sup>632</sup> Until he graduated in August 1963, armed guards lived with Meredith in his campus suite and accompanied him wherever he went.<sup>633</sup>

Meredith’s roommate at UMiss was Cleve McDowell, who obtained a court order to enter the UMiss law school in summer 1963.<sup>634</sup> All federal protection withdrew when Meredith graduated, and McDowell felt vulnerable when he entered the fall semester of 1963.<sup>635</sup> He was jeered at and taunted as he walked across campus, rocks were thrown at his car, and he was almost run off the road once.<sup>636</sup> To protect himself, he purchased a small handgun, even though he knew it was against

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626. See GREENBERG, *supra* note 13, at 320-26 for the full story of the court battles and negotiations; SANSING, *supra* note 602, at 177-92.

627. SANSING, *supra* note 602, at 186.

628. GREENBERG, *supra* note 13, at 330.

629. *Id.*

630. GREENBERG, *supra* note 13, at 330-31; KLARMAN, *supra* note 40, at 202; see also Chin & Chin, *supra* note 625, at 1773.

631. Chin & Chin, *supra* note 625, at 1773.

632. CLARK, *supra* note 613, at 158. Oxford, Mississippi, is the home of the University of Mississippi.

633. Chin & Chin, *supra* note 625, at 1773; GREENBERG, *supra* note 13, at 331.

634. See Mary Ann Connell, *The Road to United States v. Fordice: What Is the Duty of Public Colleges and Universities in Former De Jure States to Desegregate?*, 62 MISS. L.J. 285, 308 (1993); Frank Lambert, *The Black Students Who Followed in the Footsteps of James Meredith at Ole Miss*, 66 J. BLACKS HIGHER EDUC. 58, 58 (2009-10); *About*, UNIV. OF MISS. SCH. OF LAW, <https://law.olemiss.edu/about/history/> (last visited July 19, 2020).

635. Lambert, *supra* note 634, at 58.

636. *Id.*



school policy to have a gun on campus.<sup>637</sup> On September 3, 1963, he stopped by the U.S. Attorney's office to ask for protection, which made him late for class.<sup>638</sup> As he ran up the stairs to his class, the gun fell from his pocket.<sup>639</sup> Two law students reported him; he was arrested that day and expelled the next.<sup>640</sup>

After McDowell's expulsion, Cleveland Donald, Jr. was admitted through a court order in fall 1964; he became UMiss's second African-American graduate.<sup>641</sup> Reuben V. Anderson applied to the law school that year, but his application was rejected because he could not provide five letters from UMiss alumni recommending him,<sup>642</sup> even though the Fifth Circuit explicitly held in 1962 that "the University's requirement that each candidate for admission furnish alumni certificates is a denial of equal protection of the laws, in its application to Negro candidates."<sup>643</sup> Instead of challenging the denial in court, he entered Southern's law school in Baton Rouge.<sup>644</sup>

After a year at Southern, in 1965 he was able to transfer to UMiss thanks to a new, Yale-educated dean.<sup>645</sup> He described his law school experience at UMiss as "two of the most difficult years of my life" due to the "jeers, racial slurs, and insults" he was met with and the harassment inflicted by many of his professors, who "shamelessly refused to acknowledge [his] presence."<sup>646</sup> After a football game where UMiss lost badly, white students threw rocks and ice at Anderson and the other seven African-American students, chasing them from the stadium.<sup>647</sup> Yet he persevered and became the first African-American graduate of UMiss School of Law.<sup>648</sup>

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637. *Id.* at 59.

638. *Id.* at 58-59.

639. *Id.* at 59.

640. *Id.*

641. *Id.*

642. Reuben V. Anderson, *Reflections—My Experience at the University of Mississippi Law School*, 74 *Miss. L.J.* xxvii, xxix-xxx (2004).

643. *Meredith v. Fair*, 298 F.2d 696, 701 (5th Cir. 1962).

644. Anderson, *supra* note 642.

645. *Id.*

646. *Id.* at xxx-xxxi.

647. *Id.* at xxxi-xxxii.

648. *Id.* at xxxiii; S. Res. 518, Reg. Sess. (Miss. 2020). He also became the first African-American justice on the Mississippi Supreme Court and the first African-American president of the Mississippi Bar Association. *Id.*

## D. Alabama—Last Segregated Law School

Alabama “combined legal foot-dragging by public officials with violence by obdurate whites” to prevent desegregation, even in the face of court orders.<sup>649</sup> Its law school was the last in the U.S. to desegregate.

### 1. *Atherine Lucy—A Girl with Guts*

The first known African-American who sought to apply to the University of Alabama (UA) was Nathaniel S. Colley in 1946.<sup>650</sup> The state bar president advised the dean that if Colley pursued his application through the courts, he could possibly get a court order to be admitted.<sup>651</sup> However, while UA was dragging its feet, Colley obtained a law degree from Yale.<sup>652</sup>

The second known African-American who tried to apply to UA was Wilbur H. Hollins in 1950.<sup>653</sup> He asked for an application form for the law school, which the school provided.<sup>654</sup> A letter explaining the assistance the state provided for “colored students who desired to engage in the study of law to obtain opportunities for entering high grade institutions located elsewhere” accompanied the form.<sup>655</sup> The letter concluded: “We hope you can persuade yourself not to file your application for admission here.”<sup>656</sup> Hollins must have been persuaded, as he did not submit the application.<sup>657</sup>

The NAACP had difficulties finding test plaintiffs in Alabama, as few “wished to run the gauntlet of threat and intimidation, and the brightest students saw no need to compromise a certain future that included opportunities to study out of state.”<sup>658</sup> With no potential law

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649. TUSHNET, *supra* note 202, at 239.

650. CLARK, *supra* note 613, at 12.

651. *Id.* at 13.

652. *Id.* at 14.

653. U.W. Clemon & Bryan K. Fair, *Making Bricks Without Straw: The NAACP Legal Defense Fund and the Development of Civil Rights Law in Alabama 1940-1980*, 52 ALA. L. REV. 1121, 1139-40 (2001).

654. *Id.* at 1140.

655. *Lucy v. Adams*, 134 F. Supp. 235, 238 (N.D. Ala. 1955), *aff'd*, 228 F.2d 619, 619-20 (5th Cir. 1955), *writ denied*, 351 U.S. 931 (1956).

656. *Id.*

657. Clemon & Fair, *supra* note 653, at 1140.

658. CLARK, *supra* note 613, at 17.

school applicants, in 1952 the NAACP settled on Pollie Myers Hudson and her friend Autherine Lucy.<sup>659</sup> In 1952 Alabama, the most important attribute for a test plaintiff was courage, and Marshall commented about Lucy, “That girl sure has guts.”<sup>660</sup>

Both Hudson and Lucy applied to UA in September 1952.<sup>661</sup> They spent the next year “in fruitless administrative proceedings” and eventually filed suit in federal court, both individually and as a class action.<sup>662</sup> The case was finally heard in federal court on June 29, 1955.<sup>663</sup>

During the delays, UA employed a detective agency to “dig[] up dirt” on the two women.<sup>664</sup> UA’s attorney used the information the detectives found to show that Hudson had been pregnant but not yet married when she applied for admission.<sup>665</sup> The court ignored this information as irrelevant and immaterial and ruled in favor of Hudson and Lucy.<sup>666</sup> Two days later, the court ruled on the class action; it amended the ruling to apply to all “others similarly situated.”<sup>667</sup> On December 30, 1955, the U.S. Fifth Circuit Court of Appeals affirmed in a three-paragraph opinion, finding itself “in complete agreement” with the trial court’s “well considered opinion.”<sup>668</sup>

A month later, Lucy received a notice of admission from UA.<sup>669</sup> Four crosses were burned on campus that night, but Lucy enrolled the next day, February 1, 1956.<sup>670</sup> White supremacists spent the rest of the week burning crosses and fomenting unrest among the students and locals.<sup>671</sup> On Monday, February 6, a crowd of up to three thousand gathered, egged on by members of the Klu Klux Klan and Citizens’ Councils from out of town.<sup>672</sup> They trapped Lucy in a classroom for hours until she

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659. *See id.*; COMMISSION, *supra* note 38, at 84.

660. MARSHALLING JUSTICE, *supra* note 56, at 332.

661. Clemon & Fair, *supra* note 653, at 1140.

662. COMMISSION, *supra* note 38, at 85.

663. CLARK, *supra* note 613, at 41.

664. *Id.* at 41-42.

665. *Id.* at 43.

666. *Id.* at 43-44.

667. *Lucy v. Adams*, 134 F. Supp. 235, 239 (N.D. Ala. 1955);38.

668. *Adams v. Lucy*, 228 F.2d 619, 619-20 (5th Cir. 1955), *cert. denied*, 351 U.S. 931 (1956).

669. CLARK, *supra* note 613, at 56. Hudson’s application was denied based on “unsatisfactory conduct and marital status.” COMMISSION, *supra* note 38, at 86.

670. CLARK, *supra* note 613, at 58.

671. *See id.* at 62, 64-69.

672. *See id.* at 73.

escaped with the aid of police and University officials.<sup>673</sup> That night the Board of Trustees (Trustees) voted to expel Lucy from the University, “claiming that the threat of violence was too great for the school to handle.”<sup>674</sup>

Marshall and the NAACP attorneys filed contempt proceedings against UA, and the judge ruled UA had to readmit Lucy.<sup>675</sup> But immediately after the judge ruled, the Trustees voted to permanently expel Lucy for statements in the legal pleadings it deemed defamatory.<sup>676</sup> The NAACP did not appeal.<sup>677</sup>

## 2. Vivian Malone and James Hood—Good People

For the next seven years, UA used delay, obfuscation, and intimidation to exclude African-American students.<sup>678</sup> A favorite tactic was using private detectives, as was done with Pollie Myers.<sup>679</sup> Finally, the NAACP settled on two students with unassailable backgrounds, Vivian Malone and James Hood.<sup>680</sup> One of the top investigators hired to research Malone could conclude only that “Vivian was good people.”<sup>681</sup> Another federal suit was filed in 1963, and Governor George Wallace “reached an understanding” with the U.S. Justice Department.<sup>682</sup> On June 11, 1963, Wallace made a grand gesture of blocking the schoolhouse door but then stepped aside in the face of federalized Alabama National Guardsmen, allowing Malone and Hood to enter.<sup>683</sup>

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673. *See id.* at 75-78.

674. WILLIAMS, *supra* note 25, at 248. One student demonstrator was reported to have said, “Well, we won. It took her four years and the Supreme Court to get her in, and it took us only four days to get rid of her.” CLARK, *supra* note 613, at 79-80.

675. CLARK, *supra* note 613, at 102.

676. *Id.*

677. MARSHALLING JUSTICE, *supra* note 56, at 351-52. In 1989, UA lifted Lucy’s permanent expulsion and invited her to re-enroll, which she did. GREENBERG, *supra* note 13, at 226. She and her daughter graduated together in 1992. *Id.*

678. *See* CLARK, *supra* note 613, at 117-18.

679. *Id.* at 117.

680. *See* CLARK, *supra* note 613, at 175-177.

681. *Id.* at 205, 209.

682. COTTRON ET AL., *supra* note 15, at 198; *see also* CLARK, *supra* note 613, at 208.

683. *See* COTTRON ET AL., *supra* note 15, at 198; *see also* CLARK, *supra* note 613, at 208; Phillip Scott Arnston, *Thirty Years Later, Is the Schoolhouse Door Still Closed? Segregation in the Higher Education System of Alabama*, 45 ALA. L. REV. 585, 586 (1994).

Hood withdrew from UA on August 11, but Malone persisted, and by spring 1965 ten African-American students were enrolled at UA.<sup>684</sup> She “maintained outstanding grades” and graduated from UA in 1965.<sup>685</sup> That fall, Booker Forte, Jr. enrolled.<sup>686</sup> In 1969, Forte was one of only two African-Americans in UA’s graduating class.<sup>687</sup> He then became one of three African-Americans to enroll in UA’s law school.<sup>688</sup> In 1972, twenty-five years after Nathaniel Colley first applied, three African-Americans—Forte, Michael Figures, and Ronald E. Jackson—graduated from UA Law School.<sup>689</sup>

### E. South Carolina—The Last Segregated Flagship

South Carolina was the last state to desegregate its public universities<sup>690</sup> and “the University of South Carolina was the last flagship southern state university” to desegregate.<sup>691</sup> The 1895 state constitution established segregated schools.<sup>692</sup> At that time, the state had five public, whites-only universities, including South Carolina College (now, University of South Carolina, or UofSC), the state’s flagship university established in 1801,<sup>693</sup> and Clemson Agricultural College of South Carolina (Clemson), established in 1889 as an all-male military

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684. CLARK, *supra* note 613, at 249.

685. *Id.*

686. *Obituary of Attorney Booker T. Forte, Jr. 1948-2019*, LEGACY OBITUARIES (Dec. 3, 2019), <https://www.legacy.com/obituaries/tuscaloosa/obituary.aspx?n=booker-t-forte&pid=19459976>.

687. *Id.*

688. *UA Law School to Commemorate 45<sup>th</sup> Anniversary of First African-American Graduates*, U. ALA.: A NEWS CENTER (Mar. 27, 2017), <https://www.ua.edu/news/2017/03/ua-law-school-to-commemorate-45th-anniversary-of-first-african-american-graduates/>.

689. *Id.*

690. See Jesse Leo Kass, *James L. Solomon and the End of Segregation at the University of South Carolina*, 67 NOTICES AM. MATHEMATICAL SOC’Y 678, 681 (2020).

691. HENRY H. LESESNE, A HISTORY OF THE UNIVERSITY OF SOUTH CAROLINA, 1940-2000, at 143 (2001).

692. *Wrighten v. Bd. of Trs. of Univ. of S.C.*, 72 F. Supp. 948, 949 (E.D. S.C. 1947).

693. See *Timeline*, U. OF S.C.: UNIVERSITY HISTORY (last visited July 5, 2020), [https://www.sc.edu/about/our\\_history/university\\_history/timeline/index.php](https://www.sc.edu/about/our_history/university_history/timeline/index.php). UofSC was “the only southern state university to enroll and grant degrees to [B]lack students during the Reconstruction era,” LESESNE, *supra* note 691, at 2. The school was later closed to “purge it of Radical influences” and reopened in 1880 as a whites-only institution. *Id.*

school.<sup>694</sup> In 1896, the state provided for segregated higher education by establishing the Colored Normal Industrial Agricultural and Mechanical College (State College).<sup>695</sup> State College had all African-American administrators and faculty, but an all-white board of trustees controlled it.<sup>696</sup>

The first African-American applicant to UofSC's law school was Charles Bailey in 1938.<sup>697</sup> His application and appeals were denied.<sup>698</sup> The NAACP furnished encouragement but no legal assistance, and Bailey eventually gave up his dream of law school and became a postman.<sup>699</sup> The second applicant, John Wrighten, also failed to gain admission to UofSC, but with the help of Marshall and the NAACP, his lawsuit forced the creation of a law school for African-Americans.<sup>700</sup>

The state had foreseen a lawsuit such as Wrighten's. After *Gaines*, the state began looking into establishing graduate and professional programs at State College,<sup>701</sup> and when an African-American applied for admission to the graduate school at UofSC, the legislature in 1946 appropriated \$25,000 to create a graduate school at State College.<sup>702</sup> It also appropriated \$60,000 for a "Graduate and Law School" and authorized State College "to establish graduate Law and Medical Departments."<sup>703</sup> The legislature's move coincided with John Wrighten's 1946 application and subsequent suit in federal court for admission to UofSC's law school.<sup>704</sup> In 1947, while Wrighten's suit was pending, the legislature directed State College to "use so much of the

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694. *The Clemson Story: History*, CLEMSON U. (last visited July 5, 2020), <https://www.clemson.edu/about/history/>. Clemson became coeducational and "civilian" in 1955, and the name was changed to Clemson University in 1964. *Id.*

695. Alfred D. Moore III, *Thorn in the Side of Segregation: The Short Life, Long Odds, and Legacy of the Law School at South Carolina State College* 24 (June 30, 2016) (unpublished Ph.D. dissertation, University of South Carolina) (available at <https://scholarcommons.sc.edu/etd/3373/>).

696. *Id.*

697. *Id.* at 32.

698. *Id.*

699. *Id.* at 32-33.

700. *See id.* at 35-36, 40.

701. *See id.* at 25, 30-31.n

702. *Id.* at 31; *see also* *Wrighten v. Bd. of Trs. of Univ. of S.C.*, 72 F. Supp. 948, 951 (E.D. S.C. 1947).

703. *Wrighten*, 72 F. Supp. at 951.

704. *See* COMMISSION, *supra* note 38, at 23. Wrighten applied to UofSC in July 1946. *Moore, supra* note 695, at 35.

[\$60,000] fund appropriated for Graduate and Law School, as is necessary to maintain and operate a law school during the coming fiscal year.”<sup>705</sup>

On July 12, 1947, Judge Waties Waring, following *Gaines*, gave the state two options: (1) furnish Wrihten “and others in like plight law school facilities equal to that at the University of South Carolina, either at the University itself, or State College, or . . . [(2)] furnish none to any one.”<sup>706</sup> If the state chose to create a new law school at State College, Judge Waring gave it only until the start of the next semester in September 1947.<sup>707</sup>

Because the state had complete control over State College, “it was the ideal site to hastily create a law program within the time span of one summer.”<sup>708</sup> When the law school opened that September, it had three professors, 7,500 library books, and nine students.<sup>709</sup> Marshall called it a “\$10,000 law school in a \$1.50 university.”<sup>710</sup>

Wrihten was not one of the nine students. Marshall wanted Wrihten to continue to fight to gain admittance to UofSC, but by 1948 Wrihten was “nearly destitute” as white employers would not hire him because of the lawsuit, and his friends considered him a troublemaker.<sup>711</sup> He hung in through a hearing in 1948 in which Judge Waring found that the new law school at State College was equal to UofSC and dismissed Wrihten’s suit.<sup>712</sup> Wrihten enrolled in State College’s law school in 1949 and graduated in 1952.<sup>713</sup>

After Wrihten’s suit was dismissed, fifteen years passed before an African-American student entered UofSC.<sup>714</sup> A successful suit by

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705. *Wrihten*, 72 F. Supp. at 951.

706. *Id.* at 953.

707. *Id.* Even though Judge Waring did not directly order the desegregation of UofSC, the locals were not pleased. Two congressmen called for his impeachment, a “nighttime mob burned a cross in front of [his] home,” his home was vandalized, and he “was ostracized by his friends, his city, and his state.” John Cannon Few, *The Courage of a Lawyer*, 39 No. 1 LITIGATION 51, 52 (2013).

708. Moore, *supra* note 695, at 25.

709. *Id.* at 45.

710. MARSHALLING JUSTICE, *supra* note 56, at 211.

711. Moore, *supra* note 695, at 45-46.

712. *Id.* at 47.

713. *Id.* Marshall advised Wrihten not to attend the new school, which Marshall termed “the Jim Crow law school.” MARSHALLING JUSTICE, *supra* note 56, at 211.

714. During this time, the state tolerated no activities by university faculty or administrators in support of desegregation. For example, Chester C. Travelstead, the Dean of the College of

Harvey B. Gantt to enter Clemson preceded the desegregation of UofSC;<sup>715</sup> Gantt enrolled in Clemson in January 1963.<sup>716</sup>

While *Gantt* was pending, the NAACP took up the case of Henrie Monteith, Robert Anderson, and James Solomon in a class action in federal court in October 1962.<sup>717</sup> On July 10, 1963, the federal district court ordered UofSC to admit African-American students for the fall 1963 semester.<sup>718</sup> Unlike the experience of the first African-American students at Alabama, Georgia, and Mississippi, their enrollment occurred “entirely peacefully.”<sup>719</sup>

The trio’s experience at UofSC was better than that of the students in Mississippi and Alabama, but as the UofSC president tactfully put it, they were “not fully welcomed on campus.”<sup>720</sup> The courage of the three students opened the door for eleven more African-American students the following year, including Paul Cash, who enrolled in the law school.<sup>721</sup> Monteith graduated in 1965 and was the first African-American to earn a degree from UofSC since Reconstruction.<sup>722</sup>

In 1965, Jasper Cureton transferred from State College; with African-American students now enrolled at UofSC, the state closed the law school at State College in 1966.<sup>723</sup> Cash did not finish his law degree,<sup>724</sup> but Cureton graduated from UofSC in 1967.<sup>725</sup> I.S. Leevy Johnson entered UofSC School of Law in 1965 and in 1968 became the first African-American to graduate after attending all three years there.<sup>726</sup>

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Education at UofSC, was fired in 1955 for making a speech favoring integration. Brazeal, *supra* note 512, at 372.

715. *Gantt v. Clemson Agric. Coll. of S.C.*, 320 F.2d 611, 614 (4th Cir. 1963), *writ denied*, *Clemson Agric. College of S.C. v. Gantt*, 375 U.S. 814 (1963).

716. LESESNE, *supra* note 691, at 143.

717. Moore, *supra* note 695 at 168.

718. *Id.*

719. LESESNE, *supra* note 691, at 146.

720. Kass, *supra* note 690, at 682.

721. LESESNE, *supra* note 691, at 149.

722. *Id.*

723. WILLIAM C. HINE, *SOUTH CAROLINA STATE UNIVERSITY: A BLACK LAND GRANT COLLEGE IN JIM CROW AMERICA* 273 (2018).

724. LESESNE, *supra* note 691 at 149.

725. HISTORY OF HIGHER EDUCATION ANNUAL: 2003-2004, at 14 (Roger Geiger ed., 2005). Cureton became South Carolina’s first African-American appellate judge. S. Res. 747, 115th Leg., Reg. Sess. (S.C. 2003).

726. LESESNE, *supra* note 691, at 149.



### V. BETTER LATE THAN NEVER

Decades after the test plaintiffs' and test students' struggles, universities and professional associations have begun honoring them, often posthumously. Although this late recognition may seem like too little, too late, it holds significant meaning to the recipients and their families.

When the Florida Supreme Court posthumously reinstated Virgil Hawkins as a member of the Florida Bar Association in 1988, Hawkins's sister Hallie Williams expressed her pleasure with the reinstatement, commenting: "I think it's good. He doesn't know it. But we know it."<sup>727</sup>

Many universities have awarded honorary degrees to the individuals whose courageous actions led to the eventual desegregation of their universities—OU to Sipuel in 1991,<sup>728</sup> Mizzou to Gaines in 2006,<sup>729</sup> UArk to Hunt in 2008,<sup>730</sup> UGA to Ward in 2014,<sup>731</sup> and UF to Starke in 2019.<sup>732</sup> In 2002, a month before he died, Charles Hatfield received an honorary law degree.<sup>733</sup> Ironically, the degree was awarded not by LSU, the school he sought to attend, but by Southern University Law Center, the law school created to circumvent his admission to LSU.<sup>734</sup> Eric Hatfield, Charles Hatfield's grandson, described it as "the last high point of his life."<sup>735</sup> Eric Hatfield wrote that this "well deserved recognition of both a significant contribution to a better society and symbol of a lifetime of service to the causes of equality and fairness for all Americans" created "a bittersweet moment for the family."<sup>736</sup>

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727. Sandy Coleman, *Court Allows Hawkins Back in Florida Bar*, ORLANDO SENTINEL (Orlando, Fla.) (Oct. 21, 1988), <https://www.orlandosentinel.com/news/os-xpm-1988-10-21-0070440261-story.html>.

728. FISHER, *supra* note 237, at 186 (awarded Honorary Doctorate in Humane Letters).

729. Christina Asquith, *For Missing Civil Rights Hero, a Degree at Last*, DIVERSE (May 4, 2006), <https://diverseeducation.com/article/5827/>.

730. *Black University of Arkansas Law Student Gets Posthumous Degree 60 Years Later*, DIVERSE (June 24, 2008), <https://diverseeducation.com/article/11319/>.

731. See Schupska, *supra* note 584; Roberts, *supra* note 584

732. UF Law, *supra* note 566.

733. EMANUEL & BALL, *supra* note 191, at 22.

734. *Id.*

735. Email from Eric Hatfield to the author (May 28, 2020) (on file with author).

736. *Id.*

Several schools have established scholarships to honor the test plaintiffs and students, including Mizzou for Gaines in 1995;<sup>737</sup> UK for Hinnart in 2015;<sup>738</sup> and UArk for Hunt in 2004.<sup>739</sup> Others have created symposia and awards, such as UT's annual symposium on civil rights in honor of Heman Sweatt<sup>740</sup> and its Virgil C. Lott Award annually "in recognition of significant contributions to the legal profession and to the improvement of understanding among all peoples."<sup>741</sup>

Schools have also honored the pioneers by naming programs or buildings after them or erecting sculptures. In 1989 UF named its civil legal clinic after Virgil Hawkins.<sup>742</sup> UArk named its administration building Silas Hunt Hall in 1993.<sup>743</sup> OU and UArk have erected sculptures memorializing Sipuel and Hunt, respectively.<sup>744</sup> And the county in Texas where Sweatt sued to enter UT honored him by renaming its seat of justice the "Heman Marion Sweatt Travis County Courthouse" in 2005.<sup>745</sup>

Other organizations and schools have been creative with honors. In 1992 the governor of Oklahoma named Sipuel to the University of Oklahoma Board of Regents, the same organization that fought her admission to its law school.<sup>746</sup> The governor stated it was a "completed cycle."<sup>747</sup> In 2006, the Missouri state bar awarded Gaines a (probably)

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737. Asquith, *supra* note 729.

738. UNIVERSITY OF KENTUCKY ALUMNI ASSOCIATION, *supra* note 230, at 20.

739. *Sculpture Honors the Life and Legacy of Silas Hunt*, UNIVERSITY OF ARKANSAS NEWS, (Aug. 30, 2012), <https://news.uark.edu/articles/18990/sculpture-honors-the-life-and-legacy-of-silas-hunt> [hereinafter *Sculpture*].

740. Ken Bridges, *Heman Sweatt and the Desegregation of the UT Law School*, WEATHERFORD DEMOCRAT (Weatherford, Tex.), (July 6, 2019), [https://www.weatherforddemocrat.com/opinion/columns/heman-sweatt-and-the-desegregation-of-the-ut-law-school/article\\_a2cdde3c-eca3-5d08-8536-e179885ecdff0.html](https://www.weatherforddemocrat.com/opinion/columns/heman-sweatt-and-the-desegregation-of-the-ut-law-school/article_a2cdde3c-eca3-5d08-8536-e179885ecdff0.html).

741. Lott, *supra* note 363.

742. Dubin, *supra* note 1 at 954.

743. *Sculpture*, *supra* note 739.

744. Shortly after Fisher's death in October 1995, the University dedicated the Ada Lois Sipuel Fisher Garden on its campus. Bob Burke & Steven W. Taylor, *Humble Beginnings: A History of the OU College of Law*, 62 OKLA. L. REV. 383, 390 (2010). In 2012, UArk erected the Silas Hunt Memorial Sculpture in a prominent place on the campus. *Sculpture*, *supra* note 739.

745. *The Courthouse*, TRAVIS COUNTY ARCHIVES, <https://www.traviscountyhistory.org/the-courthouse/> (last visited July 14, 2020).

746. Burke & Taylor, *supra* note 744, at 390.

747. *Id.*

posthumous law license.<sup>748</sup> In 2007 the Arkansas Legislature designated February 2, the day Hunt enrolled at the University, as “Silas Hunt Day,”<sup>749</sup> “a memorial holiday which the governor will commemorate by issuance of an appropriate proclamation.”<sup>750</sup>

Gregory Swanson died in 1992, but his nephew, Evans D. Hopkins, made certain he was not forgotten.<sup>751</sup> Through the efforts of Hopkins and members of the Charlottesville-Albemarle Bar Association, a large bronze plaque commemorating the decision in *Swanson v. Rector* was installed in 2016 in the public library that now occupies the site of the federal court where that judgment was rendered.<sup>752</sup> The Virginia General Assembly passed a joint resolution “commemorating the life and legacy of Gregory Hayes Swanson” on March 7, 2016.<sup>753</sup> And in 2018, UVA unveiled a portrait of Swanson to be permanently displayed in the law library and announced the creation of an annual award named for Swanson for 2L students “to recognize students with traits that Swanson embodied, including a commitment to justice within the community.”<sup>754</sup> Hopkins described the posthumous honors for his uncle as “both social and poetic justice.”<sup>755</sup> As Jennifer McClellan, General Assembly delegate, said as she presented the resolution to the family, “This is over 50 years late, but better late than never.”<sup>756</sup>

## CONCLUSION

These test plaintiffs and students were undoubtedly heroes. They endured so much to create equal opportunities for all African-Americans, exhibiting perseverance and courage and emerging stronger

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748. David Stout, *Quiet Hero of Civil Rights History: A Supreme Triumph, Then into the Shadows*, N.Y. TIMES, July 12, 2009, at A21; ENDERSBY & HORNER, *supra* note 22, at 267. As Gaines was never seen again after he disappeared, no one knows if he was still alive in 2006.

749. Act of Mar. 19, 2007, No. 374, 2007 Ark. Acts 374, codified as ARK. CODE ANN. § 1-5-106 (2) (2020). Ironically, the same statute recognizes memorial holidays for Jefferson Davis and Robert E. Lee. ARK. CODE ANN. § 1-5-106(9), 106(12) (2020).

750. Brian Pipkin, *Survey of Legislation 2007 Arkansas General Assembly*, 30 U. ARK. LITTLE ROCK L. REV. 607, 607 (2008).

751. Quizon, *supra* note 408.

752. Samantha Baars, “Poetic Justice:” *First Black UVA Student Celebrated*, C-VILLE WEEKLY (Charlottesville, Va.) (July 19, 2016), <https://www.c-ville.com/poetic-justice-first-black-uva-student-celebrated/>.

753. Va. House joint resolution No. 489 (Mar. 7, 2016).

754. *Commemorate*, *supra* note 423.

755. *Justice*, *supra* note 411.

756. Baars, *supra* note 752.

for the experience. While only two of the law school test plaintiffs graduated from the schools they sued to enter and practiced law, many, such as Judge Horace Ward in Georgia and Floyd McKissick in North Carolina, obtained law degrees elsewhere and went on to have highly successful careers.

At a time when the nation is struggling with issues of social and racial justice, it is important to remember these heroes. In the words of Justice Thurgood Marshall, “It is useful . . . to recall their stories, not to dwell on the past, but to see concrete evidence of what was in order to gain inspiration for what can be.”<sup>757</sup>

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<sup>757</sup>. Thurgood Marshall, *We Must Dissent*, reprinted in SUPREME JUSTICE: SPEECHES AND WRITINGS: THURGOOD MARSHALL, at 311 (J. Clay Smith, Jr. ed., 2003).