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# Were it Not for Tulsa: How the 1921 Tulsa Race Massacre Influenced the Desegregation of the American Educational System

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# WERE IT NOT FOR TULSA: HOW THE 1921 TULSA RACE MASSACRE INFLUENCED THE DESEGREGATION OF THE AMERICAN EDUCATIONAL SYSTEM

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## I. INTRODUCTION

Ada Lois Sipuel Fisher grew up listening to her parents' recollections of the Tulsa Race Massacre of 1921.[1] She also learned the meaning of the term "race riot" when Henry

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1. CHERYL ELIZABETH BROWN WATTLEY, A STEP TOWARD *BROWN V. BOARD OF EDUCATION* 26 (2014).

Argo, a teenager she knew in her hometown of Chickasha, Oklahoma, became the state's last lynching victim.[2] Those experiences helped her develop "a strong sense of justice," which led her to volunteer as a test plaintiff in the lawsuit to integrate the University of Oklahoma ("OU").[3] While that lawsuit, *Sipuel v. Oklahoma,*[4] did not overturn the separate-but-equal doctrine of *Plessy v. Ferguson*, it cracked *Plessy*'s foundation[5] and was a significant step toward *Brown v. Board of Education.*[6] This article shows how the horrific events in Tulsa in 1921 and the racial injustice Fisher experienced growing up in Oklahoma ultimately influenced the desegregation of the American educational system.

The article begins with the Sipuel family's experience in Tulsa and Fisher's upbringing in Chickasha. It reviews the litigation to desegregate American education brought by the National Association of Colored People ("NAACP") and Thurgood Marshall prior to the *Sipuel* case, including their legal strategy and careful selection of test plaintiffs. The article details the *Sipuel* case, the legal machinations of the State of Oklahoma to prevent Sipuel from enrolling in OU's College of Law, and George McLaurin's suit to enroll in OU's graduate school. It concludes by examining Fisher's legacy and the national effect of the *Sipuel* case.

## II. THE SIPUEL FAMILY BACKGROUND

Fisher's parents, Travis and Martha Smith Sipuel,[7] told her how in 1918 they moved to Tulsa, Oklahoma, because they were "impressed by the well-kept residential area and the bustling black business community."[8] Her father, a minister, organized and pastored the North Greenwood Church of God in Christ, and her parents bought and furnished a home.[9] Their lives changed in 1921, however, when the clash between African Americans assembled on the courthouse green to prevent a probable lynching, and a "white group, uneasy in the presence of so many determined (and armed) blacks . . . exploded into one of the nation's earliest and bloodiest race wars."[10] Oklahoma's governor dispatched the state militia, ostensibly to preserve order, but those militiamen seized and held the Black defenders while thirty-six blocks of formerly thriving Black-owned property was totally destroyed.[11] Fisher's father was "spirited away to a holding pen" by the militiamen, and her family's home was one of the approximately 1,115 homes burned to the ground.[12] Her

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2. *Id.* at 44–45. *See* ADA LOIS SIPUEL FISHER, A MATTER OF BLACK AND WHITE: THE AUTOBIOGRAPHY OF ADA LOIS SIPUEL FISHER 44–47 (1996) (noting that five-year-old Fisher heard a rumor that there was going to be a race riot in Chickasha and thought the term meant a horse race; she soon learned differently).

3. FISHER, *supra* note 2, at 107.

4. Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631 (1948).

5. CAROLE A. WILLIAMS, THE BLACK/WHITE COLLEGES: DISMANTLING THE DUAL SYSTEM OF HIGHER EDUCATION 5 (1981).

6. Brown v. Bd. of Educ., 347 U.S. 483, 491–92 (1954) (citing Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631 (1948)); s*ee* R. Lawrence Purdy*, Awaiting the Rebirth of an Icon:* Brown v. Board of Education*,* 44 MITCHELL HAMLINE L. REV. 510, 524 (2018).

7. FISHER, *supra* note 2, at 6–7.

8. *Id.* at 10.

9. *Id.*

10. *Id.* at 11.

11. *Id.* at 11–12; ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921, at 43–44 (2002).

12. *Id.* at 12; Charles J. Ogletree, Jr., *When Law Fails: History, Genius, and Unhealed Wounds After Tulsa's*

parents left Tulsa and started over in Chickasha, Oklahoma, where Fisher was born three years later.[13]

Fisher grew up in the totally segregated town of Chickasha, where "the 'colored' folks knew their place."[14] The city park, the zoo, the swimming pool, and the golf course all "had big signs that read, 'For Whites Only,'" as did the water fountains and restrooms in the movie theater, city hall, the county courthouse, and the U.S. post office. [15] The public schools were "a lot more separate than . . . equal."[16] White students attended one of five grade schools, a middle school, and a well-equipped high school; Fisher attended a school that educated grades one through twelve, with its thirteen teachers using books and equipment handed down from the white schools.[17]

Fisher's parents told the story of the Tulsa Massacre frequently, so the event became personal to her; "they spoke of leaving Tulsa in the wake of the vicious assault on black neighborhoods and businesses."[18] Another event that made racial violence and injustice very personal to her was the lynching of Henry Argo, an African American teenager, by a white mob. She and her siblings "curled low to the floor . . . behind locked doors and drawn curtains" in her home in Chickasha, while the mob smashed a hole in the jailhouse wall and brutally murdered Argo.[19] During the unrest, her father and the adults of two other families stood guard with cocked firearms to protect their families.[20]

Her mother, Martha Sipuel, became "a major figure in Chickasha politics,"[21] and her family became close to Dr. W.A.J. Bullock, who headed Chickasha's chapter of the NAACP.[22] Martha Sipuel was active in the local NAACP branch and saw to it that Fisher was exposed to "race newspapers," such as *The Crisis*, edited by W.E.B. DuBois.[23] When Fisher was in middle school, she became inspired when Dr. Bullock brought Thurgood Marshall to speak at her school.[24] She vowed that she was "not going to be one of those people who just accept things the way they are."[25]

## III. THE NAACP'S INITIAL EFFORTS TO DESEGREGATE HIGHER EDUCATION

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."[26] It became

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*Race Riot*, *in* WHEN LAW FAILS 50, 53 (Charles J. Ogletree, Jr. & Austin Sarat, eds., 2009).

13. RACHEL DEVLIN, A GIRL STANDS AT THE DOOR 38 (2018); WATTLEY, *supra* note 1, at 27.
14. FISHER, *supra* note 2, at 51.
15. *Id.*
16. *Id.* at 52.
17. *Id.* at 52–53.
18. WATTLEY, *supra* note 1, at 26.
19. *See id.* at 45–46. FISHER, *supra* note 2, at 45. Argo was a "slow-witted boy" who was accused of sexually assaulting a white woman based on "suspiciously little evidence of any crime at all."
20. *Id.*
21. *Id.* at 49; *see also* DEVLIN, *supra* note 13, at 39.
22. FISHER, *supra* note 2, at 50.
23. *Id.*; *see also* WILLIAM BERNHARDT & KIM HENRY, EQUAL JUSTICE: THE COURAGE OF ADA SIPUEL 27 (2006).
24. FISHER, *supra* note 2, at 50; *see* BERNHARDT & HENRY, *supra* note 23, at 28–31.
25. BERNHARDT & HENRY, *supra* note 23, at 31.
26. JACK GREENBERG, CRUSADERS IN THE COURTS 13 (1994).

the "intellectual and logistical center for the desegregation fight."[27] The NAACP supported legal action to combat discriminatory practices, including the significant disparities in the funding of Black and white schools.[28] The organization received a grant in 1930 that enabled it to hire its first staff attorney, Nathan Margold, a Romanian-born Harvard Law graduate,[29] to "plan and coordinate the [NAACP's] litigation campaign."[30] He began by preparing a 218-page strategic report that focused on the unconstitutionality of the unequal allocation of school funds.[31] This strategy sought to force southern states to comply with *Plessy v. Ferguson*[32] by focusing on the "equal" part of the "separate-but-equal" doctrine.[33] Margold confirmed what the NAACP had determined earlier through surveys—that "the separate-but-equal doctrine as practiced was always separate but never equal."[34]

The plan was "to push first for *equality* of education rather than *desegregation* of education."[35] The NAACP and its lawyers would either "chip away at the separate or seize more of the equal."[36] In order 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.[37] Margold's theory was "that southern states could not afford to build equal facilities," and thus they would be forced to integrate.[38]

*A. 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,[39] was more "interested in breaking down barriers to the highest levels of education" first.[40] Thurgood Marshall joined Houston in 1936.[41] Houston and Marshall decided to focus their

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

28. ROBERT J. COTTROL ET AL., *BROWN V. BOARD OF EDUCATION*: CASTE, CULTURE, AND THE CONSTITUTION 52–53 (2003).

29. *Id.*; MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL 64 (1992).

30. CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED 113 (2004).

31. DAVIS & CLARK, *supra* note 29, at 66–67; OGLETREE, *supra* note 30, at 113–14.

32. 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.").

33. *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).

34. *Id.* at 639.

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

36. Peter Wallenstein, *Race, Law, and Southern Public Higher Education, 1860s–1960s*, 369, 370, *in* SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY (Sally E. Hadden & Patricia Hagler Minter eds., 2013).

37. DAVIS & CLARK, *supra* note 29, at 66–67; OGLETREE, *supra* note 30, at 114.

38. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 76 (1998) [hereinafter JUAN WILLIAMS].

39. DAVIS & CLARK, *supra* note 29, at 67.

40. ENDERSBY & HORNER, *supra* note 35, at 40–41 (2016).

41. WIL HAYGOOD, SHOWDOWN: THURGOOD MARSHALL AND THE SUPREME COURT NOMINATION THAT

desegregation litigation efforts primarily on graduate and professional schools because they believed that "graduate schools were an area where the South was most vulnerable."[42] They hoped that if they "pressed with sufficient vigor many states would capitulate without extended litigation."[43] 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;[44] and providing more opportunities for legal education for African Americans would produce more African American practicing lawyers who could "vindicate fundamental civil rights through litigation."[45]

One of the foremost reasons for the focus on the highest levels of education was the limited number of those programs in the South.[46] "[S]egregation in higher education, specifically graduate and professional schools, . . . was as common in the South as segregation in elementary and secondary schools," but "[f]ar fewer graduate and professional programs" existed.[47] Marshall noted that "at the university level no provision for Negro education was a rule rather than the exception."[48] Fewer targets meant the NAACP could concentrate its efforts on those programs, producing more powerful results.[49]

One commentator described graduate and professional school opportunities for African Americans at the time as "so few and so bad."[50] 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."[51] Until 1936, only 139 African Americans had earned a Ph.D. in the United States,[52] and "not a single southern state admitted blacks to a Ph.D. program."[53] "In 1939 . . . only seven black colleges in America offered any graduate work whatsoever; nine southern states had no provision whatsoever for black graduate education."[54] In 1945, the South offered white students sixteen law schools, fifteen medical schools, fourteen pharmacy schools, seventeen

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CHANGED AMERICA 60 (2015).

42. OGLETREE, *supra* note 30, at 117.

43. 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).

44. COTTROL ET AL., *supra* note 28, 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 33, at 663.

45. Carl W. Tobias, Brown *and the Desegregation of Virginia Law Schools*, 39 U. OF RICHMOND L. REV. 39, 39–40 (2004); *see also* ENDERSBY & HORNER, *supra* note 35, at 48.

46. OGLETREE, *supra* note 30, at 117–18.

47. *Id.*

48. Marshall, *supra* note 43, at 319.

49. OGLETREE, *supra* note 30, at 117.

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

51. UNITED STATES COMMISSION ON CIVIL RIGHTS, EQUAL PROTECTION OF THE LAWS IN PUBLIC HIGHER EDUCATION 14 (1960) [hereinafter COMMISSION].

52. Levy, *supra* note 50, at 69.

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

54. Levy, *supra* note 50, at 69.

engineering schools, and four dental schools, while African American students were limited to one law school.[55]

The NAACP's first attempt at integrating a professional school was "a false start."[56] In 1933, Thomas Hocutt sued to be admitted to the pharmacy school at the University of North Carolina and lost.[57] William Hastie, a professor at Howard, represented Hocutt. Thurgood Marshall, a second-year law student at the time, was Hastie's research assistant.[58] 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."[59] The court also stated that Hocutt was "a reluctant colored man, poorly prepared and disqualified."[60] 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;[61] he feared retaliation.[62]

After this "inauspicious 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 states of the former Confederacy (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia) and the border states (Delaware, Kentucky, Maryland, Missouri, Oklahoma, and West Virginia)[63]—maintained segregated school systems at all levels, by force of law.[64] 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.[65]

### *B. Success in Maryland State Court*

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

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55. *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 36, at 381.

56. GREENBERG, *supra* note 26, at 5.

57. DAVIS & CLARK, *supra* note 29, at 60; Wallenstein, *supra* note 36, at 378.

58. DAVIS & CLARK, *supra* note 29, at 60; JUAN WILLIAMS, *supra* note 38, at 75.

59. DAVIS & CLARK, *supra* note 29, at 60–61.

60. *Id.*

61. Wallenstein, *supra* note 36, at 378; JUAN WILLIAMS, *supra* note 38, at 75.

62. 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." JUAN WILLIAMS, *supra* note 38, 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 blacks who lacked spine and did not support the best interests of fellow blacks. Such individuals greatly unnerved Marshall." HAYGOOD, *supra* note 41, at 61.

63. *See* COMMISSION, *supra* note 51, at 14; Wallenstein, *supra* note 36, at 376.

64. Levy, *supra* note 50, at 68; COMMISSION, *supra* note 51, at xiii; 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).

65. Kujovich, *supra* note 62, at 115.

jurisdiction of the best possible forums."[66] They found the perfect test plaintiff in Donald Gaines Murray.

Marshall learned in December 1934 that Murray, an honors graduate of Amherst College, was interested in attending law school.[67] Murray was a young African American from a highly respected Baltimore family, grandson of an African Methodist Episcopalian bishop.[68] Marshall convinced Murray to seek admission to the University of Maryland Law School.[69]

Murray requested information from the university about applying to its law school.[70] 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.[71] In early January 1935, he applied to Maryland anyway.[72]

A month later, Murray received a letter from the registrar. [73] The registrar returned his application and required fee and stated that "the University does not accept Negro students, except at Princess Anne Academy."[74] In early March, Murray re-applied and again received a rejection letter, this time from Pearson, touting the "exceptional facilities" available at Howard Law School.[75]

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.[76] As a matter of unwritten policy, the University of Maryland simply excluded African Americans.[77]

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.[78] They asserted that the university's refusal to admit Murray as a student was not supported by the law or constitution of Maryland and violated the Fourteenth Amendment of the U.S. Constitution.[79] 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.[80]

After Houston and Marshall's closing argument,[81] 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

66. OGLETREE, *supra* note 30, at 119.
67. DAVIS & CLARK, *supra* note 29, at 82; JUAN WILLIAMS, *supra* note 38, at 76.
68. OGLETREE, *supra* note 30, at 76; JUAN WILLIAMS, *supra* note 38, at 76.
69. MICHAEL G. LONG, MARSHALLING JUSTICE 7 (2011); OGLETREE, *supra* note 30, at 136; JUAN WILLIAMS, *supra* note 38, at 76.
70. DAVIS & CLARK, *supra* note 29, at 82.
71. *Id.*
72. *Id.* at 83; Wallenstein, *supra* note 36, at 379.
73. DAVIS & CLARK, *supra* note 29, at 83.
74. *Id.*
75. *Id.*
76. *Id.* at 82–83; Levy, *supra* note 50, at 70–71.
77. DAVIS & CLARK, *supra* note 29, at 84.
78. Pearson v. Murray, 182 A. 590, 590 (Md. 1936).
79. *Id.*
80. DAVIS & CLARK, *supra* note 29, at 84–85; Ware, *supra* note 33, at 646.
81. Houston and Marshall split the closing argument. Ware, *supra* note 33, at 648.

and that the obligation had not been fulfilled.[82] Hence, the judge issued a writ of mandamus ordering the University of Maryland to admit Murray.[83]

The University of Maryland appealed to the Maryland Court of Appeals, the state's highest court, soon after being ordered to admit Murray into law school.[84] One of its arguments was that the state had satisfied its legal obligations under *Plessy* by establishing a separate school for African American students.[85] The court found that while *Plessy* allowed for segregated schools, "separation of the races must nevertheless furnish equal treatment."[86]

The state also argued that to the extent it was required to provide graduate educational opportunities for African American students, establishment of a scholarship fund that African Americans could use to attend out-of-state schools legally met this obligation.[87] The court found, however, that the Maryland legislature had not funded the scholarships at the time Murray applied for admission.[88] Moreover, the funds that were subsequently appropriated were inadequate to satisfy the demands of African American students who had applied for aid.[89] Even if an African American student received a scholarship, the cost of travel and living expenses not covered by the scholarship would "involve him in considerable expense."[90] Thus, the court held that the state was not providing African American students facilities substantially equal to those provided white students 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."[91]

The court further determined that the erection of a separate school for African American students was not a viable alternative remedy.[92] 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."[93] The court thus affirmed Judge O'Dunne's order requiring that the University of Maryland Law School admit Murray.[94]

Although the *Murray* decision was limited in scope, it "pave[d] the way strategically for the next desegregation suits."[95] The University of Maryland did not appeal to the U.S. Supreme Court, depriving Houston and Marshall of a nationally binding precedent.[96]

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82. DAVIS & CLARK, *supra* note 29, at 87; Ware, *supra* note 33, at 648.
83. DAVIS & CLARK, *supra* note 29, at 87; Ware, *supra* note 33, at 648.
84. Pearson v. Murray, 182 A. 590, 590 (Md. 1936); OGLETREE, *supra* note 30, at 136.
85. Ware, *supra* note 33, at 650.
86. *Id.* at 593.
87. *Pearson*, 182 A. at 591.
88. *Id.*
89. *Id.* at 593.
90. *Id.*
91. *Id.*
92. *Pearson*, 182 A. at 594.
93. *Id.*
94. *Id.*
95. Barak Atiram, *Socially-Driven Class Actions: The Legacy of* Briggs, 23 TEX. J. ON C.L. & C.R. 1, 12–13 (2017).
96. GREENBERG, *supra* note 26, at 63.

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."[97]

During the litigation, Marshall and Murray received threatening letters that they believed were from the local Ku Klux Klan,[98] 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.[99] 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."[100] Marshall sometimes accompanied Murray to campus, "as if he dared confrontation."[101] Marshall "sought out racially progressive students" to befriend Murray, reviewed Murray's notebooks, and arranged tutoring.[102] 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."[103]

Marshall's efforts were successful. Black newspapers of the day reported that Murray's "classmates were exceedingly cordial and so were professors,"[104] 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."[105] Houston himself reported, "White students sit on either side of him. He recites like any other student. He minds his business; they mind theirs."[106] Murray graduated from the University of Maryland Law School in 1938.[107]

### *C. A Partial Victory in Missouri*

Most of the southern and border states reacted to *Murray* by funding scholarships for African American students to attend out-of-state institutions or establishing graduate programs at segregated Black colleges.[108] West Virginia, however, did not use that stalling tactic. In 1938, West Virginia University 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.[109] Thus, Marshall and the NAACP took aim at two of the other border states—Missouri and Oklahoma.[110]

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97. ENDERSBY & HORNER, *supra* note 35, at 50.
98. HAYGOOD, *supra* note 41, at 60; LONG, *supra* note 69, at 8.
99. JUAN WILLIAMS, *supra* note 38, at 78.
100. *Id.* at 79.
101. HAYGOOD, *supra* note 41, at 60; *see also* LONG, *supra* note 69, at 8.
102. LONG, *supra* note 69, at 8.
103. *Id.*
104. JUAN WILLIAMS, *supra* note 38, at 79.
105. ENDERSBY & HORNER, *supra* note 35, at 66.
106. *Id.* at 50. *See also* RICHARD KLUGER, SIMPLE JUSTICE 194 (1975) (stating, "No one ever hit him, pushed him, razzed him, or otherwise made life unpleasant for him.").
107. Taunya Lovell Banks, *Setting the Record Straight: Maryland's First Black Women Law Graduates*, 63 MD. L. REV. 752, 756 (2004).
108. *See* COMMISSION, *supra* note 51, at 19, 23.
109. *Id.*; WILLIAMS, *supra* note 5, at 5.
110. Delaware, one of the other border states, had no law school at that time. Delaware Law School,

i. Establishing a Right to Legal Education Within a State

Missouri was one of the states that established scholarships to out-of-state educational institutions.[111] The state would pay "reasonable tuition fees" for African American students to take courses in adjacent states if those courses were offered at the University of Missouri ("Mizzou"), the state's flagship university, and not offered at Lincoln University ("Lincoln"), Missouri's state-funded college for African Americans in Jefferson City, Missouri.[112]

Marshall selected Lloyd Gaines, a 1935 Lincoln graduate, as the test plaintiff.[113] When Gaines applied for admission to Mizzou's law school, S.W. Canada, Mizzou's registrar, requested Gaines's undergraduate transcript, which revealed that Gaines was a Lincoln graduate.[114] Gaines then received a letter giving him two options: (1) study law at Lincoln; or (2) accept the state's scholarship and enroll in a law school in an adjacent state that admitted African American students.[115] Only the second option was actually viable; however, as Lincoln did not have a law school.[116]

Mizzou delayed officially rejecting Gaines's application, forcing the NAACP to file a mandamus suit on Gaines's behalf to make Canada do his job.[117] 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."[118] But Gaines rebuffed those options; he "wanted to study law in his own state university which the taxes of his family helped support."[119]

The NAACP's next move was to sue Mizzou's registrar.[120] The trial judge rendered a one-sentence judgment in favor of the university.[121] The NAACP appealed to the Missouri Supreme Court, which agreed to hear the case *en banc*.[122]

The Missouri Supreme Court upheld the trial court's ruling in favor of the university.[123] Among the court's specific findings were: (1) the Fourteenth Amendment did not forbid separate schools;[124] (2) Mizzou would have been obligated to establish a law school at Lincoln or provide Gaines an opportunity for legal training elsewhere that was substantially equal to the opportunity provided to white students at Mizzou if Gaines

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Delaware's only law school, graduated its first class in 1975. *Our Story*, WIDENER UNIV. DEL. L. SCH., https://delawarelaw.widener.edu/about/our-story-2/delawares-law-school/ (last visited June 7, 2020).

111. *See* Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 342–43 (1938).
112. *Id.* at 343.
113. ENDERSBY & HORNER, *supra* note 35, at 12; Ware, *supra* note 33, at 654.
114. ENDERSBY & HORNER, *supra* note 35, at 59–60.
115. Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 342–43 (1938).
116. *See* Lucille H. Bluford, *The Lloyd Gaines Story*, 32 J. EDUC. SOC. 242, 245 (1959).
117. ENDERSBY & HORNER, *supra* note 35, at 66.
118. *Id.* at 68–69.
119. Bluford, *supra* note 116, at 243.
120. ENDERSBY & HORNER, *supra* note 35, at 71–72.
121. *Id.* at 85–86.
122. *See id.* at 96.
123. State ex rel. Gaines v. Canada, 113 S.W.2d 783, 791 (Mo. 1937), *rev'd*, 305 U.S. 337 (1938).
124. *Id.* at 788.

had applied for admission to law school at Lincoln;[125] (3) Gaines could have attended law schools in adjacent states that admitted African American students and received a "sound, comprehensive, valuable legal education";[126] 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."[127]

The NAACP appealed that decision to the U.S. Supreme Court,[128] which reversed the Missouri Supreme Court.[129] 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.[130]

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."[131] 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.[132]

ii. "Other and Proper" Legal Training

The Missouri legislature quickly enacted a law to establish a law school at Lincoln.[133] The legislature appropriated $200,000 to create this new school that was to be the equal of Mizzou, while at the same time appropriating $3,000,000 to Mizzou for improvements and maintenance.[134] The Missouri Supreme Court held a hearing in May 1939 to determine whether the law school at Lincoln would be equal to Mizzou.[135] Instead of ruling on the adequacy of the new law school, however, it remanded the case to the trial court to make that determination.[136] The trial court was instructed to determine whether the facilities were "substantially equivalent"; if not, Gaines's writ would be granted and he would be admitted to Mizzou.[137]

The Lincoln Law School opened on September 20, 1939, with thirty students.[138] The school had a dean and three professors and shared a building with a hotel and a movie

125. *Id.* at 789.
126. *Id.*
127. *Id.* at 788.
128. State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 342 (1938).
129. *Id.* at 352.
130. *Id.* at 349–50.
131. *Id.* at 352 (emphasis added).
132. *Id.*
133. Bluford, *supra* note 116, at 244–45; ENDERSBY & HORNER, *supra* note 35, at 163–68, 195.
134. *See* ENDERSBY & HORNER, *supra* note 35, at 169.
135. Bluford, *supra* note 116, at 244.
136. *Id.*
137. ENDERSBY & HORNER, *supra* note 35, at 190–91.
138. Bluford, *supra* note 116, at 245; ENDERSBY & HORNER, *supra* note 35, at 200.

theater.[139] Lloyd Gaines did not enroll in that school but continued to argue in the remanded suit that Lincoln was not equal to Mizzou.[140]

iii. 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.[141] When it came time for Gaines's deposition, he was "nowhere to be found," and he was never seen or heard from again.[142] Without a plaintiff, the hearing was cancelled, and the lawsuit was dismissed on January 1, 1940.[143] Thus, no determination was ever made on the equivalency of the Lincoln Law School.[144]

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.[145] His brother theorized that he had disappeared because he could not repay the tuition loan and "always hated debts he could not pay."[146] Some NAACP officials thought he had "walked out on them when they declined to make him certain monetary advances for his personal support."[147] Others speculated that he had "accepted a substantial payment to withdraw from the case."[148] A 1951 story in *Ebony* magazine "paint[ed] a picture of a debt-ridden, angry man who chose to start a new life elsewhere."[149] 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.[150] No law enforcement agency ever investigated his disappearance because there was no evidence he had been killed.[151]

## IV. OKLAHOMA

### *A. Ada Lois Sipuel Fisher*

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

139. COTTROL ET AL., *supra* note 28, at 68.
140. Bluford, *supra* note 116, at 245.
141. *Id.*
142. *Id.* ENDERSBY & HORNER, *supra* note 35, at 213–14 (noting that 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).
143. ENDERSBY & HORNER, *supra* note 35, at 223.
144. Bluford, *supra* note 116, at 246; ENDERSBY & HORNER, *supra* note 35, at 223.
145. JUAN WILLIAMS, *supra* note 38, at 97–98.
146. ENDERSBY & HORNER, *supra* note 35, at 230.
147. *Id.* at 219.
148. ENDERSBY & HORNER, *supra* note 35, at 228; *see also* JUAN WILLIAMS, *supra* note 38, at 98 (noting one theory was that he had accepted $2,000 to move to Mexico).
149. ENDERSBY & HORNER, *supra* note 35, at 231.
150. *Id.* at 235.
151. *Id.*

than the community support, which we, of course, must have in order to operate."[152] Walter White, executive secretary of the NAACP,[153] noted how difficult it was to find "the combination . . . of competence and courage" needed for successful litigation.[154]

Test plaintiffs needed "an unyielding belief in the principle that all persons . . . are entitled to the same education [and] a steadfast conviction in the righteousness of their fight," as well as maturity and emotional security to withstand all the "racist animosity, hatred, and venom aroused by" the lawsuits.[155] They needed financial stability because if employed, they were likely to be fired, and if looking for employment, they were not likely to be hired.[156] They needed impeccable credentials and a penchant for public speaking as "they were assuming the role of representative" of the entire African American community.[157] Finally, they needed patience and endurance as segregated states used delaying tactics as psychological warfare to wear down the test plaintiffs.[158] The NAACP anticipated "a long and probably bitter controversy" in Oklahoma.[159]

The NAACP conducted a "careful search . . . for the right candidate" to apply for admission to the University of Oklahoma ("OU").[160] The NAACP first approached Lemuel Sipuel, a World War II veteran[161] and graduate of Langston College, the state-supported school for African American students.[162] However, he did not have the patience needed; the war had interrupted his education for three years, and he "wanted to get on with" it.[163] Nevertheless, his younger sister, Ada Lois Sipuel Fisher, volunteered.[164]

Fisher understood all the risks of being a test plaintiff, including the "risks of physical harm, abduction, or even lynching" while attending school at OU in Norman, Oklahoma, a town that did not permit African Americans within its borders after sundown.[165] However, Fisher's past experiences—growing up listening to accounts of the Tulsa Massacre, feeling terror the night Henry Argo was lynched, living through the daily injustices arising from living in a segregated town, fighting unsuccessfully for better conditions at Langston College—"gave her the desire and determination to challenge the system."[166]

A 1945 Langston College graduate with academic honors in English, Fisher had

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152. LONG, *supra* note 69, at 217.

153. KLUGER, *supra* note 106, at 139.

154. MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950, at 54 (1987).

155. WATTLEY, *supra* note 1, at 72–73.

156. *Id.* at 73.

157. *Id.*

158. *Id.*

159. DEVLIN, *supra* note 13, at 41.

160. Levy, *supra* note 50, at 74.

161. FISHER, *supra* note 2, at 75–77; Cheryl Brown Wattley, *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, 462 (2010).

162. 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).

163. FISHER, *supra* note 2, at 78; *see also* DEVLIN, *supra* note 13, at 41.

164. *See* FISHER, *supra* note 2, at 78.

165. WATTLEY, *supra* note 1, at 76; *see also* FISHER, *supra* note 2, at 77.

166. WATTLEY, *supra* note 1, at 75–76.

been involved in many extracurricular activities, including round-table and panel discussions on race relations and religion, and was a member of the NAACP.[167] She had little threat of financial pressures because her husband was in the military and her father was a bishop in the Church of God in Christ.[168] Roscoe Dunjee, editor of Oklahoma City's newspaper *The Black Dispatch* and president of the Oklahoma NAACP, interviewed Fisher and asked her whether she had the courage, patience, and stamina to serve as a test plaintiff and to travel the state raising money for the lawsuit.[169] Fisher replied that she did, and Dunjee then recommended her to Marshall.[170]

Fisher described herself as a "skinny little girl born on the wrong side of the tracks in . . . Chickasha, Oklahoma."[171] However, Dunjee called Fisher a "natural" with "nearly perfect" scholastic credentials.[172] President George Lynn Cross of OU, who met Fisher 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."[173]

Fisher applied for admission to OU's law school on January 14, 1946.[174] She was denied admission "solely because of her color."[175] 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.[176]

Thurgood Marshall brought a mandamus action on Fisher's behalf in Oklahoma state court.[177] It was undisputed that Fisher was "as well qualified as any white student to study law."[178] But the trial court did not even address Fisher's equal protection argument, nor did the opinion mention the *Gaines* case.[179] Instead, it "ruled that the university did not have to open a black law school until it had enough applicants to make one practicable."[180]

On appeal, the Oklahoma Supreme Court affirmed the trial court's decision.[181] The Oklahoma Supreme Court held that the failure of Ada Sipuel Fisher to demand that a

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167. *Id.* at 75.

168. *Id.* at 77.

169. *Id.*

170. DEVLIN, *supra* note 13, at 42. Although the NAACP officials were looking statewide for test-plaintiff candidates, Professor Devlin states "it is safe to conjecture that there were few if any other volunteers," given the NAACP's difficulty in finding test plaintiffs in other states.

171. *See* FISHER, *supra* note 2, at 78, 185.

172. DEVLIN, *supra* note 13, at 42.

173. Levy, *supra* note 50, at 74.

174. 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).

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

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

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

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

179. Wattley, *supra* note 161, at 469.

180. KLUGER, *supra* note 106, at 259.

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

separate law school for African American students be established or created prevented her from demanding admission to OU's law school.[182] 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 the expenditure of funds to construct a law school.[183] Consequently, the court found that Fisher's Fourteenth Amendment rights had not been violated.[184]

Marshall appealed that decision to the United States Supreme Court.[185] In his brief, Marshall attacked *Plessy* and argued that even if two schools existed with comparable facilities, equality could never be achieved because "there can be no separate equality."[186]

The U.S. Supreme Court held oral arguments on January 7 and 8, 1948.[187] On January 12, 1948,[188] the U.S. Supreme Court, citing only *Gaines*, issued a unanimous unsigned *per curiam* decision ordering the state to provide Fisher a legal education in conformity with the Fourteenth Amendment's Equal Protection Clause "as soon as it d[id] for applicants of any other group."[189] The Court remanded the case to the Oklahoma Supreme Court "for proceedings not inconsistent with this opinion."[190]

Registration was to begin at OU College of Law on January 29, and the NAACP assumed the decision meant Fisher would be admitted.[191] The Oklahoma court, however, "pull[ed] a fast one, both figuratively and literally."[192] On January 17, 1948, the Oklahoma Supreme Court ordered the Board of Regents to afford Fisher the opportunity "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."[193] 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 the Langston University School of Law.[194] The facility was composed of three small committee rooms on the state capitol building's fourth floor.[195] Two Oklahoma City attorneys and a former Oklahoma attorney general, all with full-time law practices, comprised the faculty.[196] Although the Board of Regents announced on January 24 that the new school was "substantially equal in every way" to

182. *Id.*
183. *Id.* at 139.
184. *Id.* at 144.
185. Sipuel v. Bd. of Regents of Univ. of Okla. (*Sipuel II*), 332 U.S. 631 (1948).
186. KLUGER, *supra* note 106, at 259.
187. Levy, *supra* note 50, at 75.
188. *Sipuel II*, 332 U.S. at 631 (1948).
189. *Id.* at 632.
190. *Id.* at 633.
191. COTTROL ET AL., *supra* note 28, at 75; JUAN WILLIAMS, *supra* note 38, at 177.
192. COTTROL ET AL., *supra* note 28, at 75.
193. *Sipuel III*, 190 P.2d at 438.
194. Levy, *supra* note 50, at 76; WATTLEY, *supra* note 1, at 131–32.
195. Levy, *supra* note 50, at 76; WATTLEY, *supra* note 1, at 136.
196. Levy, *supra* note 50, at 76; Wattley, *supra* note 161, at 480–81.

OU, Fisher declined to attend,[197] becoming the only graduate-school test plaintiff "to say no—immediately and unequivocally—to the state's offer to set up a separate 'Negro law school.'" Her decision was met with "shock and celebration in quick succession."[198] Instead of registering for the newly created law school, she returned to court seeking an order of mandamus for Oklahoma to admit her.[199]

The Supreme Court, however, refused to grant the mandamus.[200] It found that the issue of whether the establishment of a separate law school satisfied the Equal Protection Clause was not before it.[201] Justice 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."[202] 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."[203]

On May 24, 1948, Fisher and Marshall returned to state court in Oklahoma to litigate whether Langston Law School was equal to OU.[204] Despite overwhelming testimony, including that of the dean of OU, that the facilities were not equal, the trial court ruled on August 2, 1948, that the first-year instruction at Langston was substantially equal to the first-year program at OU.[205] On December 29, 1948, Marshall filed an appeal with the Oklahoma Supreme Court, hoping to eventually get the United States Supreme Court to hear the case again.[206]

Langston University School of Law had only one student during its one-year existence,[207] and the "prohibitive costs for maintaining a separate school for one student caused the state to close" the school on June 27, 1949.[208] Knowing that the separate law school for African Americans was about to close, on June 17, 1949, OU President Cross ordered the registrar to admit Fisher to OU.[209]

Fisher started classes at OU on June 20, 1949, two weeks late, but white students lent her notes and books, and tutored her.[210] School officials forced her to sit four rows behind the rest of the class in a solitary chair with a big sign overhead that said

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197. Levy, *supra* note 50, at 76; WATTLEY, *supra* note 1, at 141.

198. DEVLIN, *supra* note 13, at 61.

199. Fisher v. Hurst, 333 U.S. 147 (1948). The original suit was filed in Fisher's maiden name, Sipuel, because it matched the name on her Langston diploma; the mandamus action was brought in her married name, Fisher. WATTLEY, *supra* note 1, at 145.

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

201. *Id.* at 150.

202. *Id.* at 151–52 (Rutledge, J., dissenting).

203. *Id.* at 152.

204. WATTLEY, *supra* note 1, at 165–66.

205. *Id.* at 171, 189. One OU law professor, Henry Foster, Jr., "lost his temper while on the stand and charged that the creation of a separate law school for Fisher was 'cheap, political chicanery.'" Bob Burke & Steven W. Taylor, *Humble Beginnings: A History of the OU College of Law*, 62 OKLA. L. REV. 383, 389 (2010).

206. WATTLEY, *supra* note 1, at 191–92.

207. COTTROL ET AL., *supra* note 28, at 76.

208. OGLETREE, *supra* note 30, at 121; WATTLEY, *supra* note 1, at 227.

209. WATTLEY, *supra* note 1, at 228.

210. *Id.*; JUAN WILLIAMS, *supra* note 38, at 179.

"COLORED."[211] Students removed the signs, however, and by the second semester she moved to the front row.[212]

Fisher graduated from the OU College of Law in 1951.[213] She was admitted to the Oklahoma bar in 1952, becoming the only test plaintiff besides Donald Murry to graduate from the school she sued to attend and practice law.[214] Other well-known test plaintiffs failed academically,[215] never finished degree requirements,[216] or transferred to or graduated from another school while the suit was pending.[217] But Fisher persisted.

*B. George McLaurin*

While Fisher was biding her time, waiting for her admission to the University of Oklahoma, the NAACP worked to desegregate Oklahoma's graduate programs, using the Supreme Court's decision in *Sipuel* as authority.[218] Marshall picked George McLaurin as the test plaintiff.[219] McLaurin was a sixty-eight-year-old professor at Langston.[220] He had a master's degree in education but applied to OU for its doctoral program in 1947.[221]

Instead of beginning in state court as in Fisher's case, Marshall took the case to a three-judge panel in federal court.[222] Relying on the Supreme Court's decision in *Sipuel*, the court swiftly ruled that any Oklahoma law prohibiting McLaurin from admission to the University of Oklahoma was "unconstitutional and unenforceable."[223] However, the court declined to rule that segregated facilities within the university were unconstitutional.[224]

On October 14, 1948, McLaurin became the first African American to be admitted to OU.[225] But OU took the federal court's non-decision on segregated facilities as license to segregate McLaurin within the school; his four courses were in the same room, and for

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211. JUAN WILLIAMS, *supra* note 38, at 179.

212. *Id.*; WATTLEY, *supra* note 1, at 231.

213. WATTLEY, *supra* note 1, at 237.

214. Wattley, *supra* note 161, at 450.

215. *See, e.g.*, MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW 149 (1994) [hereinafter MAKING CIVIL RIGHTS LAW] (Heman Sweatt was academically dismissed from the University of Texas School of Law after three semesters.).

216. *See, e.g.*, Eric Williamson, *The Long Walk: What Life Was Like for Gregory Swanson, the Lawyer Who Integrated UVA*, UVA LAW. (2018), https://www.law.virginia.edu/uvalawyer/article/long-walk (Gregory Swanson failed to complete his thesis for an LL.M. at the University of Virginia.).

217. *See, e.g.*, Destiny Peery, *Session IV: A Conversation with Judge Horace Ward: Dr. King's Lawyer in Georgia*, 10 NW J. L. & SOC. POL'Y 657, 662 (2016) (Gregory Ward was admitted to Northwestern University while the University of Georgia dragged its feet.); Donna L. Nixon, *The Integration of UNC-Chapel Hill—Law School First*, 97 N.C. L. REV. 1741, 1783 (2019) (Floyd McKissick graduated from North Carolina Central University by the time the court ordered the University of North Carolina to admit him.).

218. *See* KLUGER, *supra* note 106, at 266.

219. *Id.*

220. *Id.*; Levy, *supra* note 50, at 76–77.

221. Levy, *supra* note 50, at 77; McLaurin v. Okla. St. Regents for Higher Educ. (*McLaurin I*), 87 F. Supp. 526, 527 (1948).

222. *See* KLUGER, *supra* note 106, at 267; GREENBERG, *supra* note 26, at 66.

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

224. *Id.*

225. WATTLEY, *supra* note 1, at 211.

every class he was required to sit in an alcove on the side.[226] In the library, he was forced to sit at "a segregated desk in the mezzanine behind half a carload of newspapers."[227] 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."[228]

Marshall took the case back to the federal court, which had retained jurisdiction.[229] 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 places upon him a 'badge of inferiority which affects his relationship, both to his fellow students, and to his professors.'"[230]

Marshall lost in the district court[231] and appealed to the Supreme Court.[232] 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."[233] 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."[234] 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."[235]

## V. FISHER'S LEGACY

### *A. Fisher's Personal Influence*

Unlike McLaurin, who became reluctant to interact with the press and withdrew from OU after the Supreme Court decided his case,[236] Fisher became a media darling and the "universally acclaimed school desegregation crusader of the pre-*Brown* era."[237] Her case infused new energy into the NAACP's legal battle for desegregation, arousing public interest and focusing national attention on the struggle.[238] She became "a new face and fresh voice" as "the symbol of the crusade against the repressive and unjust system of

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226. MAKING CIVIL RIGHTS LAW, *supra* note 215, at 130.
227. KLUGER, *supra* note 106, at 268.
228. *Id.*
229. *McLaurin I*, 87 F. Supp. at 528.
230. McLaurin v. Okla. St. Regents for Higher Educ. (*McLaurin II*), 87 F. Supp. 528, 530 (1948), *rev'd*, 339 U.S. 637 (1950).
231. *Id.* at 53–31.
232. *Id.*; KLUGER, *supra* note 106, at 268.
233. *McLaurin III*, 399 U.S. at 641.
234. *Id.*
235. *Id.* at 642.
236. DEVLIN, *supra* note 13, at 64. He 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.
237. DEVLIN, *supra* note 13, at 35.
238. WATTLEY, *supra* note 1, at xiii.

segregation."[239]

Fisher attended "countless meetings, public events, fund-raisers, [and] court hearings."[240] Two days after McLaurin entered OU, Fisher participated in a national radio broadcast.[241] She "performed the role of school desegregation pioneer" with finesse, "communicat[ing] a disarming excitement about her case alongside a steely determination to vanquish the University of Oklahoma."[242] She was interviewed and "quoted extensively by both the white and black press."[243] She even managed to win over the white newspaper the *Daily Oklahoman* with her "seasoned political acumen" when she returned from Washington, D.C., after the Supreme Court argument in her case.[244] It published a positive story with a half-page flattering picture.[245]

*B. The Influence of the Sipuel Case*

The *Sipuel* case demonstrated that states would be forced to desegregate when maintaining separate schools was cost-prohibitive. The effects of the case were felt throughout the south, beginning with Arkansas. After the Supreme Court granted writs in *Sipuel* on November 10, 1947,[246] the dean of the University of Arkansas, Robert A. Leflar, read the "legal handwriting on the wall" and persuaded the Arkansas Board of Trustees to ratify a policy to admit African American students to the law school, which it did on January 30, 1948.[247] Fisher had attended Arkansas Agricultural, Mechanical & Normal College ("AM&N") in Pine Bluff, Arkansas,[248] for one year before she transferred to Langston.[249] One of her AM&N classmates was Silas Hunt, who "thought it would be wonderful if [he] could do something similar to what Fisher was attempting in Oklahoma."[250] He was admitted to the University of Arkansas School of Law on February 2, 1948.[251]

Delaware immediately followed Arkansas in admitting African American students to its formerly all-white graduate schools. 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, the state's flagship university, if those programs were not offered at Delaware State College for Negroes.[252]

In the desegregation cases that followed, the courts relied on *Sipuel* for the principle that under the Equal Protection Clause of the Fourteenth Amendment, African Americans

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239. *Id.*
240. DEVLIN, *supra* note 13, at 36.
241. WATTLEY, *supra* note 1, at 212–13.
242. *Id.* at 213.
243. *Id.*
244. DEVLIN, *supra* note 13, at 60.
245. *Id.*
246. Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 814 (1947).
247. ROBERT A. LEFLAR, THE FIRST 100 YEARS: CENTENNIAL HISTORY OF THE UNIVERSITY OF ARKANSAS 279 (1972).
248. The school is now known as the University of Arkansas at Pine Bluff.
249. WATTLEY, *supra* note 1, at 75.
250. LEFLAR, *supra* note 247, at 283.
251. *Id.*
252. COMMISSION, *supra* note 51, at 29.

had a personal right to "legal education equivalent to that offered by the State to students of other races,"[253] ordering admission of African Americans to graduate and professional schools throughout the South. In Kentucky, the federal court cited *Sipuel* in ordering the admission of Lyman Johnson to the University of Kentucky's graduate school.[254] In Maryland, the highest state court relied on *Sipuel* in ordering Esther McCready admitted to the University of Maryland School of Nursing.[255] The federal court in Louisiana cited *Sipuel* in ordering Louisiana State University School of Law to admit Roy Wilson.[256] And the U.S. Supreme Court invoked *Sipuel* in ordering the University of Texas to admit Heman Sweatt to its law school, despite the state's hasty creation of a separate law school for African Americans.[257] Ultimately, the Supreme Court built on *Sipuel*'s holding, ruling in *Brown v. Board of Education* that "in the field of public education the doctrine of 'separate but equal' has no place."[258]

## VI. CONCLUSION

Were it not for the Sipuel family being burned out of their home in Tulsa in 1921, Martha Sipuel might never have become a civil rights activist. Were it not for growing up with a civil rights activist mother and hearing the story of the Tulsa Massacre told and retold, Ada Lois Sipuel Fisher might not have developed a finely honed sense of social justice. Were it not for that sense of social justice, Fisher might not have volunteered to become the test plaintiff to desegregate the University of Oklahoma. Were it not for Fisher serving as test plaintiff with such courage, determination, and persistence, the desegregation of higher education would have been delayed. The events in Tulsa in 1921 were truly horrific, but were it not for Tulsa, the history of the desegregation of the American educational system might have been quite different.

253. *See, e.g.*, Sweatt v. Painter, 339 U.S. 629, 635 (1950).

254. Johnson v. Bd. of Trustees, 83 F. Supp. 707, 710 (E.D. Ky. 1949).

255. McCready v. Byrd, 195 Md. 131, 138 (1950). (stating that "'[t]he mandate shall issue forthwith.' Sipuel v. Board of Regents of University of Oklahoma, 332 U.S. 631, 632–33, 68 S. Ct. 299, 92 L. Ed. 247. We cannot subtract anything from what the Supreme Court has said. It would be superfluous to add anything.").

256. Wilson v. Bd. of Supervisors, 92 F. Supp. 986, 988–89 (E.D. La. 1950).

257. *See* Sweatt v. Painter, 339 U.S. 629 (1950).

258. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).