

# WHITE SUPREMACY AND HIGHER EDUCATION: THE ALABAMA HIGHER EDUCATION DESEGREGATION CASE\*

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## INTRODUCTION

On June 11, 1963, Alabama Governor George Wallace defiantly stood in the schoolhouse door at the University of Alabama in a vain attempt to block the entrance of two Black students. The steadfast goal of the two Black students, Vivian Malone and Jimmy Hood, was to integrate the University of Alabama which had been racially segregated for 132 years. Wallace was instructed by federal troops to step aside and allow Malone and Hood to enroll at the University in compliance with a federal court order. The University of Alabama became officially integrated when Wallace obeyed the court order by removing himself from the door of the administration building. Three decades later, there continue to be legal and political storms blowing through Alabama centered on the question as to whether real desegregation has occurred in the state's colleges and universities. Moreover, this storm is not limited to Alabama. The same issues and legal challenges are evident across the South and in other states where historically Black colleges and public universities exist. The legal questions to be addressed revolve around the issue of whether these states continue to operate racially dual and inherently unequal systems of higher education in direct violation of federal law. The social policy dilemmas that arise focus on appropriate strategies for eliminating continuing racial inequality in American higher education.

This article focuses on the case *Knight v. Alabama*<sup>1</sup> and considers its legal, political, and social implications. The two senior authors of this article were expert witnesses in this case and helped to provide socio-historical and empirical evidence in support of the plaintiffs' case. They draw on

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\* This article is based on Aldon Morris and Walter Allen's expert witness testimony for plaintiffs in the case *Knight v. Alabama*. The authors are indebted to Ophella C. Dano, Deborah Robinson and Christina Shen for providing secretarial, clerical, and editorial assistance in the preparation of this article. Please direct all inquiries to Walter Allen, 210 Haines Hall, UCLA, Los Angeles, CA 90095-1551, (310) 206-7107.

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1. 787 F. Supp. 1030 (N.D. Ala. 1991).

their knowledge as participants in the case as well as on the wealth of primary and secondary data sources generated by the case.

It should be kept in mind, however, that the Alabama case, while unique in its particulars, mirrors the fundamental issues raised by the host of other legal challenges to racially dual systems of higher education in other states. For example, the United States Supreme Court recently decided a Mississippi higher education desegregation case, *United States v. Fordice*.<sup>2</sup> In an eight-to-one majority decision, the Court ruled that Mississippi's public colleges continue to be segregated.<sup>3</sup> This decision means that states must do more than eradicate present de jure forms of segregation; states must also definitively show that steps are being taken to eliminate vestiges of past de jure segregation.

Previously, a federal district court and the U.S. Court of Appeals for the Fifth Circuit ruled that Mississippi's higher education institutions were, indeed, desegregated.<sup>4</sup> However, in the majority opinion written by Justice Byron White, the Supreme Court overruled the decision of the lower courts.<sup>5</sup> The Supreme Court noted that Mississippi perpetuated segregation in higher education by relying on standardized test scores, unnecessarily duplicating programs, assigning mission classifications that rely on former de jure racist premises, and operating too many public higher-education institutions.<sup>6</sup> Consequently, the Court ruled that Mississippi "has not met its affirmative obligation to dismantle its prior dual system," and that "it shall be adjudged in violation of the Constitution and Title VI and remedial proceedings shall be conducted."<sup>7</sup>

## I. THE ALABAMA HIGHER EDUCATION DESEGREGATION CASE

### A. *Educational Context and Background*

Prior to the mid-1960s, Southern and border states operated de jure segregated systems of higher education.<sup>8</sup> In such states, the law required that whites and Blacks be educated in racially segregated schools. This legal requirement was as applicable to a Ph.D. student as it was to a young kindergartner. In addition to being required by Southern state statutes, racially segregated schools were also backed by the 1896 *Plessy v. Ferguson*<sup>9</sup> ruling issued by the United States Supreme Court. That ruling maintained that racial segregation was constitutional as long as the separate facilities were equal.<sup>10</sup> Thus, as a result of law and practice, colleges and universities throughout the South typically remained segregated for more than a century.

This dual system of higher education produced traditionally Black institutions (TBIs) and traditionally white institutions (TWIs) of higher

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2. 112 S. Ct. 2727 (1992).

3. *Id.*

4. *Biggers v. Mississippi*, 674 F. Supp. 1523 (1981).

5. 112 S. Ct. 2727.

6. *Id.*

7. *Id.* at 2743.

8. JAMES D. ANDERSON, *THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935*, at 238-78 (1988).

9. 163 U.S. 537 (1896).

10. *Id.*

learning. The 1954 Supreme Court ruling in *Brown v. Board of Education*<sup>11</sup> overturned *Plessy* and rendered the "separate but equal" logic supporting racially segregated universities obsolete.<sup>12</sup> The *Brown* decision acknowledged what Black people always understood: Racial segregation created and perpetuated conditions for Black people that were inherently unequal.<sup>13</sup> With regards to higher education, the ultimate challenge of racial integration philosophy is to render the very terms TBIs and TWIs anachronistic.<sup>14</sup>

At this juncture, the dual system of higher education based on race is still firmly in place. TBIs remain overwhelmingly Black institutions with student bodies that are usually over 90 per cent Black.<sup>15</sup> Moreover, the governing boards and administrators of TBIs have recently become majority Black.<sup>16</sup> The majority of faculty members at TBIs are also Black.<sup>17</sup> In terms of their history and substance TBIs are essentially Black institutions of higher learning. Similarly, TWIs are essentially white institutions of higher learning. White professors at TWIs constitute approximately 97 per cent of the faculty<sup>18</sup>; the student bodies of TWIs are overwhelmingly white as are their governing boards and administrative personnel.<sup>19</sup>

Another reality is that these racially dual systems of higher education have been unequal since their inception. In each of the former de jure segregation states, the premier flagship universities are TWIs.<sup>20</sup> Indeed, the states' major white colleges and universities are generally more prestigious, have prodigiously larger budgets, attract higher-caliber research scholars, grant many more graduate degrees and enjoy more inclusive academic missions than do their Black counterparts.<sup>21</sup> In point of fact, the Black colleges and universities operate in the shadows of the more prestigious, better funded and more powerful white institutions. This imbalance is one of the primary reasons why white students avoid TBIs en masse. By the same token, significant numbers of well-qualified African American students also choose not to attend TBIs.<sup>22</sup>

It is this racially dual and unequal system of higher education that has been called into question by private plaintiffs and their attorneys, the federal government and courts, social scientists and legal scholars, as well as civil rights activists and concerned citizens. On the other hand, the defendants, which usually include white colleges and universities, state governors, state commissions of higher education, and state legislatures, maintain that

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11. 347 U.S. 483 (1954).

12. Wendy Brown-Scott, *Race Consciousness in Higher Education: Does 'Sound Educational Policy' Support the Continued Existence of Historically Black Colleges?*, 43 Emory L.J. 1, 13-14 (1994).

13. United States vs. Louisiana, No. 80-3300, slip op. at p. 14 (E.D. La. 1989).

14. United States v. Louisiana, 718 F. Supp. 525 (E.D. La. 1989).

15. DAVID G. SANSING, *MAKING HASTE SLOWLY: THE TROUBLED HISTORY OF HIGHER EDUCATION IN MISSISSIPPI* (1990).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. JAMES E. BLACKWELL, *MAINSTREAMING OUTSIDERS: THE PRODUCTION OF BLACK PROFESSIONALS* 1-28 (1987).

21. *Id.*

22. *Id.*

the state systems of higher education are not unequal along racial lines and that Black college administrators are themselves largely responsible for the current state of TBIs. In their view, white colleges and universities have met all of their constitutional responsibilities by providing equal educational opportunities for both races. It is these radically different views of reality between plaintiffs and defendants that have generated major legal battles from lower state courts to the Supreme Court of the United States. The courts and the nation are left to wrestle with this major challenge to United States higher education.

Is the very existence of historically Black colleges and universities unconstitutional given that they are racially identifiable institutions? Have traditionally white colleges and universities met their constitutional obligations by adopting what appear to be racially neutral policies? Should the legacy of de jure racial discrimination be ignored even though it has been crucial for over a century in shaping the academic missions and prestigious hierarchies of institutions of higher learning? Is the logic of *Brown v. Board* applicable to institutions of higher learning given that, unlike elementary and secondary schools, colleges and universities are not compulsory and that students should be able to exercise freedom of choice when selecting which of these institutions to attend? What in fact is a desegregated or segregated institution of higher learning? What are vestiges of past de jure segregation and how can they be accurately identified in the context of colleges and universities? What are appropriate remedies to racial inequalities in United States higher education? Finally, if institutional merger is to be a solution to accomplish integration, should the white or the Black school be absorbed by the other?

### B. *The Alabama Scene*

In the state of Alabama there are currently sixteen public universities that grant bachelor's degrees.<sup>23</sup> Out of these sixteen institutions only two, Alabama State University (ASU) and Alabama A&M University (AAMU), are TBIs.<sup>24</sup> Included in the remaining fourteen TWIs are the University of Alabama at Tuscaloosa (UA), University of Alabama at Birmingham (UAB), University of Alabama at Huntsville (UAH), Auburn University (AU), and Auburn University in Montgomery (AUM).<sup>25</sup> It is instructive to select and compare these five TWIs with the two TBIs in order to reveal essential differences between historically Black institutions and historically white ones.

The first noticeable difference is size: TWIs are significantly larger than TBIs. As can be seen in Table 1, all five TWIs have larger student enrollment than the two TBIs. AU's enrollment is more than four times the enrollment of AAMU or ASU.<sup>26</sup> Gross square feet is another indicator

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23. Knight v. Alabama, Civil Action No. CV83-M-1676-S (N.D. Ala. 1991), *Post-Trial Proposed Findings of Facts and Conclusions of Law, Volumes I, II and III*, p. 12-15 [hereinafter *Post-Trial Proposed Findings*].

24. *Id.*

25. *Id.*

26. Knight v. Alabama, Civil Action No. CV83-M-1676 (N.D. Ala. 1991), *Defendants' Proposed Findings of Fact, Statewide Issues*, p. 11 [hereinafter *Defendants' Proposed Findings of Fact*].

of institutional size. UAB, AU, and UA are all much larger than AAMU or ASU. UAB and AU have 7,971,222 and 6,167,709 gross square feet respectively, whereas AAMU and ASU have only 1,327,209 and 1,034,815 gross square feet.<sup>27</sup> Financial resources are also unequally distributed between the TWIs and TBIs. UAB and AU receive approximately \$80,000,000 more than AAMU and ASU.<sup>28</sup> Greater state funding of the TWIs cannot be attributed to their greater student enrollment. It can easily be seen that the TWIs also receive greater funding per student.<sup>29</sup> Per capita funding was derived by dividing state funding by total student enrollment. In addition, when one compares an averaged per capita funding for the TWIs with an averaged level for the TBIs, TWIs still receive far greater per capita funding than TBIs (\$3,639 and \$2,334, respectively).<sup>30</sup> For the most part, TWIs have larger student enrollment, more gross square feet, greater state funding and higher per capita funding than TBIs.

TABLE 1<sup>31</sup>  
A Comparison of TWIs and TBIs in Alabama on  
Selected Criteria

Institution	Student Enrollment	Gross Sq. Feet	State Funding	Per Capita Funding
<u>TWIs</u>				
UAB	15,356	7,971,222	\$97,162,640	\$6,327
AU	21,537	6,167,709	\$93,525,621	\$4,342
UA	19,794	5,961,720	\$64,739,132	\$3,270
UAH	8,139	—	\$20,626,723	\$2,534
AUM	6,261	—	\$10,791,519	\$1,723
<u>TBIs</u>				
AAMU	4,886	1,327,209	\$11,148,533	\$2,281
ASU	4,587	1,034,815	\$10,958,253	\$2,388

Institutional missions and roles are the most fundamental distinctions between institutions of higher learning. The Alabama Commission on Higher Education (ACHE) defines an institution's mission as its overall purpose, how it sees itself philosophically, and its aspirations and hopes for what it may become.<sup>32</sup> The ACHE defines an institution's role in terms of the "programs it offers, its student clientele, and the relative emphasis it gives to instruction, research, and service."<sup>33</sup> When Alabama's TBIs are compared with selected TWIs the disparity is clear. The University of Alabama and Auburn University are the state's flagship institutions. As Alabama's most important institutions of higher learning, these institutions provide distinctive missions and roles. Both institutions are major research universities that play central roles in graduate training and in the awarding of advanced degrees, especially doctorates.<sup>34</sup> Graduate work and

27. *Id.* at 146.

28. *Id.* at 101.

29. *Id.* at 11, 101.

30. *Id.*

31. *Id.* at 11, 101, and 146.

32. *Id.* at 40.

33. *Id.*

34. *Id.* at 56.

the production of advanced degrees, especially the doctorate, are not at the core of the educational activities of AAMU and ASU.<sup>35</sup>

In assessing the overall racial status of higher education in the state of Alabama, two conclusions can be reached. First, it is clear that universities in this state can definitely be defined by race. This is true at all levels—student enrollment, faculty, administrators, and trustee boards. However, ASU and AAMU have more racially diverse faculties and governing boards than do the TWIs.<sup>36</sup> Secondly, it is equally clear that by comparison, the two TBIs are grossly disadvantaged relative to the top white TWIs. This inequality is evident across basic dimensions including academic prestige, budget allocations, institutional missions, degrees granted, faculty salaries, research activities, and the academic preparedness of students.<sup>37</sup> The basic question is how did this state of affairs come into existence? Did it result from the natural evolution of educational institutions or is it the result of continued racial discrimination? The *Knight* plaintiffs argue that racial discrimination was the cause. On this basis, they sought remedies capable of achieving racial equality throughout the Alabama system of higher education.<sup>38</sup>

## II. JOHN F. KNIGHT JR. V. THE STATE OF ALABAMA

Impressive and voluminous data have been assembled to support the plaintiffs' claim that the state of Alabama operates a dual, unequal system of higher education. They charge that the state historically worked to keep African Americans at the bottom of the social order.<sup>39</sup> The historical regime of Black subjugation depended heavily on segregation as a key mechanism. During most of its reign, de jure segregation sought to ensure that higher education was located exclusively in white colleges and universities.<sup>40</sup> However, according to the *Knight* plaintiffs, the policy of white supremacy can be (and has been) pursued in the absence of de jure segregation. The "historical regime of segregation included many institutional policies and practices in addition to separation of the races that were designed to implement the state's policy of white supremacy throughout the system of public higher education."<sup>41</sup>

There are myriad current structures of discrimination in Alabama's system of higher education. The first such mechanism is the exclusion of African Americans from, or their underrepresentation on, the governing boards, administrations, and faculty of the TWIs.<sup>42</sup> The severe underrepresentation of Black students at all levels in TWIs and their low gradua-

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35. *Id.*

36. *Id.* at 25; Civil Action No. CV83-M-1676 (N.D. Ala. 1991), *Exhibit 2-7, Chart 07.*

37. *Id.* at *Exhibit 5-8.*

38. *Knight v. Alabama*, Civil Action No. CV83-M-1676-S (N.D. Ala. 1991), *Press Release, Feb. 22, 1991*, p. 4.

39. *Id.* at 14-16.

40. *Id.* at 4.

41. *Id.* at 29-30. This is a demanding and sophisticated argument, for it rests on the premise that the larger systems of white supremacy unleashed historical process designed to protect white domination even as that domination assumed different guises as it marched through time and space. Thus, for the plaintiffs "special attention has been given to identifying the racially invidious purposes of higher education policies still in effect."

42. *Id.* at 30-31.

tion rate<sup>43</sup> constitute the second major mechanism of racial discrimination of higher education in Alabama. The third mechanism involves the devaluation of African Americans, their history, values, and culture. Such devaluation causes feelings of isolation, alienation, and low self-esteem for African Americans at TWIs, especially alongside the exaltation of Southern whites, many of whom are diametrically opposed to Black interests and aspirations.<sup>44</sup> The fourth mechanism that maintains white supremacy in Alabama's system of higher education is the restricted mission of Alabama's two Black universities. There are limited graduate and professional programs in the two TBIs, especially at the doctorate level.<sup>45</sup> The establishment of branches of historically white colleges in Montgomery and Huntsville is the fifth discriminatory mechanism. This development has led to the "white haven"<sup>46</sup> phenomenon, whereby local white students are provided the opportunity to attend the white school rather than be educated by Black people at TBIs. Additionally, these white branches unnecessarily duplicate courses and programs at TBIs.<sup>47</sup> Unequal funding of TBIs is the final mechanism of current racial discrimination pervading Alabama higher education. The funding formula established by ACHE favors the TWIs while placing TBIs at a severe disadvantage. This is so because the formula grants institutions classified as research universities more funds than those with restricted missions, which includes both of Alabama's TBIs.<sup>48</sup>

In sum, white supremacy and racial discrimination in Alabama's system of higher education are not entirely dependent on de jure segregation. Both continue to be strongly entrenched and anchored in hidden mechanisms that ensure white rule. As the offspring of slavery and Jim Crow policies, these mechanisms perpetuate unequal opportunities in higher education. Massive resistance to Black empowerment in higher education throughout Alabama has endured for over a century and is pervasive during the post de jure era. Thus, the current unequal, dual system of higher education in Alabama represents nothing less than the triumph of white supremacy in higher education in the state.

The state of Alabama and defendants flatly reject the claim that they are in violation of the Equal Protection Clause of the Fourteen Amendment and Title VI of the 1964 Civil Rights Act because of racially discriminatory practices in higher education.<sup>49</sup> They believe that the historic unequal, dual system of higher education in Alabama cannot be laid entirely at the doorstep of racial discrimination. They maintain that after de jure segregation, racial discrimination in higher education ceased: "the evi-

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43. *Id.* at 31-35.

44. *Id.* at 29.

45. *Id.* at 31.

46. *Id.* at 24, 27.

47. *Id.* at 43.

48. *Id.* at 28-29.

49. The defendants admit that significant racial discrimination occurred during the regime of de jure segregation. Governor Guy Hunt and state officials concur that "state defendants acknowledge widespread racial discrimination existed" when public higher education in Alabama was segregated by race. These defendants go even further by acknowledging that "effects of widespread racial discrimination remain, in public higher education, and elsewhere." *Knight v. Alabama*, Civil Action No. CV83-M-1676 (N.D. Ala. 1991), *State Defendants' Response to Plaintiffs' Proposed Findings of Facts and Conclusions of Law*, p.4.

dence shows that the defendants have indeed discontinued prior discriminatory practices and have implemented good-faith, race neutral policies and procedure with respect to all aspects of public higher education."<sup>50</sup>

The State and defendants also argue that desegregation in higher education differs from elementary and secondary school desegregation.<sup>51</sup> The defendants believe that they have met the lesser standard of demonstration of good faith, race-neutral policies (as opposed to the more stringent standard of elimination of discrimination "root and branch.")<sup>52</sup> The state's former de jure segregated college and universities now admit Black students, hire Black faculty, allow Blacks to serve on their boards, and hire Black administrators. However, it remains to be explained why there are so few Black students, faculty members, administrators, and board members at the former de jure segregated institutions. Does the underrepresentation of Black students at TWIs result from individual student choice and their inferior elementary and secondary education? While the defendants concede that Black student representation at TWIs is generally very low, they attribute this underrepresentation to student choice: ". . . students tend to choose a college whose difficulty level is commensurate with their own ability."<sup>53</sup>

Regardless of the reasons for the differences, the defendants maintain that Alabama's TWIs are as open for qualified Black students as they are for qualified white students and that the defendants are, therefore, blameless for the low numbers of Black students attending TWIs. Likewise, the defendants argue that the underrepresentation of Black faculty and administrators at the state's TWIs is a problem, but not one of their own making. The defendants claim that Alabama's TWIs are doing level best to recruit Black faculty but that the qualified Black pool is too small to yield dramatic results, especially given the national competition for such faculty.<sup>54</sup> Black underrepresentation at the administrative level is also viewed by the

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50. Knight v. Alabama, Civil Action No. CV83-M-1676 (N.D. Ala. 1991), *Memorandum of Law in Support of State Defendants' Motion for Involuntary Dismissal*, p. 9-10.

51. *Id.*

52. The *Brown* decision called for root and branch elimination of racial discrimination in public schools. In contrast to the *Brown* ruling, the defendants argue that they "have no duty to tear public higher education limb from limb in a vain attempt to eliminate the effects of prior discrimination root and branch." They conclude that "the Constitution and Title VI do not require the state to sacrifice public higher education in an attempt to undo the effects of racial discrimination that pervaded our National Society." *State Defendants' Response to Plaintiffs' Proposed Findings of Law*, Knight v. Alabama, Civil Action No. CV83-M-167 (N.D. Ala. 1991), p. 5.

53. Thus large numbers of Black high school students in Alabama choose not to attend TWIs because they do not have the ability to compete in those schools. The defendants argue that the "better prepared Black students tend to select predominantly white colleges as their first choice because they perceive them to be accessible." Knight v. Alabama, Civil Action No. CV 83-M-1676-S, p. 15. For the defendants, it is standardized test scores that accurately measure student ability. In their view, the ACT and other test scores are used in Alabama, as they are in the nation, to objectively determine ability and not for purposes of racial discrimination. They also point out that the grade point average (GPA) of Black students in the state is lower than that of white students. Therefore, lower Black test scores and GPAs are the barriers preventing large numbers of Black students from attending TWIs, not racially discriminatory admission policies. *Id.* at 14.

54. Knight v. Alabama, Civil Action No. CV83-M-1676 (N.D. Ala. 1991), *Defendant Auburn University's Proposed Findings of Facts and Conclusions of Law*, p. 15 [hereinafter *AU's Proposed Findings*].

defendants as a skills and qualifications problem rather than a racial problem.<sup>55</sup> In short, when it comes to accounting for severe Black underrepresentation at all levels at TWIs, the defendants argue that it is the abilities and qualifications of Black people that are the root cause. Indeed, for them, the TWIs are racially neutral and engage in good-faith measures to attract Blacks at all levels.<sup>56</sup>

Similarly, the defendants argue that the different missions of the two TBIs versus the top TWIs cannot be attributed to racial discrimination. The defendants do not deny inequality in educational missions and institutional roles between the top TWIs and TBIs; however, in the classification of "Alabama's public senior institutions according to role, ACHE acted in accordance with sound education practices used throughout the nation."<sup>57</sup> The missions of the state's institutions of higher learning evolved in a race-neutral manner driven by educational concerns, not a policy of white supremacy. This logic maintains that the top TWIs earned their superior missions and deserve the prestige and resources they command. Moreover, their conclusion is that the missions of the two TBIs should not be enhanced to flagship status because such enhancement would be educationally unwise and economically detrimental.<sup>58</sup>

The defendants argue that the two TBIs are not underfunded in comparison to the TWIs: "It is to be expected that expenses at graduate and professional level institutions will be higher per student than at comprehensive universities."<sup>59</sup> They argue that the funding formula which favors the top TWIs was objectively generated, absent racial considerations.<sup>60</sup>

Employing similar logic, the defendants defend the white branches of Alabama's flagship universities that were built across town from the two TBIs. They argue that these branches tap unmet educational needs and do not unnecessarily duplicate the courses offered by the TBIs.<sup>61</sup> Further, they maintain that white students do not attend TBIs because these schools closely identify with Black culture, history, heritage, and strong commitments to Black leadership and Black control.<sup>62</sup>

The defendants maintain that the institutional character of the TWIs has no negative impact on Black students.<sup>63</sup> According to them, Black students are welcomed at TWIs and that these institutions incorporate both Black and white interests and culture.<sup>64</sup> The defendants deny the claim that the lack of Black faculty, board members, administrators and the small percentage of Black students translate into the TWIs' being essentially white institutions. They disagree with the view that the total exclusion of Black people from the TWIs for over a century has meant that the very foundation and substance of these institutions have been rooted in and

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55. Knight v. Alabama, *Defendants Proposed Findings of Facts*, supra note 29, at p. 32.

56. *AU's Proposed Findings*, supra note 54, at 11.

57. *Defendants Proposed Findings of Fact*, supra note 29, at 56.

58. *Id.* at 66.

59. *AU's Proposed Findings*, supra note 57, at 45.

60. *Id.* at 47.

61. *Id.* at 205-17.

62. *Id.* at 185-90.

63. *Id.* at 80-87.

64. *Id.*

shaped by white interests and culture. To accept this view would mean that the TWIs would have to undergo an institutional transformation in order to treat Black people equitably. For the defendants, all that is needed for Blacks to feel welcome and be treated fairly by the TWIs is that these institutions operate in a race-neutral manner. In their view, this state of affairs at the TWIs has been achieved. Thus, the Auburn defendants maintain that "those [Black students] who did not do well academically or who had negative social experiences were not the victims of any policy or practice of AU. Rather, their negative experiences were caused by the same factors that many white students suffer from, such as homesickness on a large campus, difficulty in adjusting to campus life and overemphasis on social aspects of college."<sup>65</sup> In short, for the defendants, the present institutional character of Alabama's TWIs should remain as is because it has no adverse impact on Black people.

The plaintiffs and defendants are locked into a monumental battle over the racial nature of higher education in the State of Alabama. For the plaintiffs, historical and contemporary white supremacy fuels the engine which drives the dual, unequal system of higher education in the state. For the defendants, racial discrimination in the state's system of higher education collapsed with the fall of de jure segregation. This prior form of racial discrimination, they argue, has been replaced by a neutral system that is dedicated to racial equality in higher education.<sup>66</sup> Moreover, the defendants claim that the TWIs are vigorously engaged in good-faith measures to ensure that Blacks have equal access to these institutions which totally excluded them for more than a century.<sup>67</sup> Both the plaintiffs and defendants are relying on the United States Constitution and the courts to validate their diametrically opposed views of reality. But this is not the first time that an Alabama court has had to rule on this conflict.

#### A. *An Overturned Court Ruling*

The Alabama higher education system was added to the ten other states named in the original *Adams v. Richardson* case.<sup>68</sup> In January 1981, the United States Department of Education concluded that there remained vestiges of a prior, racially dual system of higher education in Alabama in violation of Title VI of the 1964 Civil Rights Act.<sup>69</sup> In response, the state was obligated to develop in conjunction with the Department of Education plans to dismantle the statewide dual system of higher education.<sup>70</sup> In fact, the state of Alabama never produced an actual plan to desegregate the state higher education system. Clarence Thomas, then Assistant Secretary for Civil Rights in the Department of Education, recalled the magnitude of the lack of cooperation by the state of Alabama:

Normally what happens is that a governor puts together a task force involving all the institutions which takes a look at all these [racially discrim-

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65. *Id.* at 86.

66. *Id.* at 11.

67. *Id.* at 11, 16.

68. 480 F.2d 1159 (D.C. Cir. 1973), *aff'd* on reh'g with modifications 356 F. Supp. 92 (D.C. Cir. 1973).

69. *United States v. Alabama*, 628 F. Supp. 1137 (N.D. Ala. 1985).

70. *Clarence Thomas Deposition*, Nov. 1, 1984, p. 91-92.

inatory practices], compares them, works out a plan among the institutions, and then we go on from there. This did not occur in the state of Alabama.<sup>71</sup>

In July 1983, the United States filed a complaint with the Department of Justice charging that Alabama had established and maintained a racially dual system of higher education prior to 1953 and that subsequently they have "continued to pursue policies and practices that have resulted in a public higher education system in which the institutions' student bodies, faculties, and governing boards are still substantially segregated by race."<sup>72</sup>

The United States District Court of Middle Alabama ruled in *Lee v. Board of Educ.*<sup>73</sup> that Alabama's junior colleges and trade schools were segregated by race. The court "recognized as a fact of life in Alabama that where a traditionally white school was available in the same geographic area, white students would not attend traditionally Black schools."<sup>74</sup> Therefore, the court ruled that the facilities and curricula of the Black junior colleges had to be upgraded in order to attract both white students and Black students.<sup>75</sup> Furthermore, capital outlays for projects at junior colleges were enjoined "until [the] 'Negro' junior college had been transformed into a fully desegregated two-year institution and was equal in physical facilities and curriculum to predominantly white junior college[s]."<sup>76</sup>

Shortly after this ruling, the Alabama State Teachers Association (ASTA) and Black students and alumni of ASU filed a lawsuit in the United States District Court to prevent AU's plan to locate a branch in Montgomery.<sup>77</sup> They argued that AU's branch campus would represent a haven for white students and therefore prevent all-Black ASU from becoming desegregated. This new branch would also consume state funds that could be used to enhance the Black college.<sup>78</sup> The plaintiffs in the ASTA case lost; thus the way was cleared for the creation of AUM.

At the time the United States complained to the Department of Justice about Alabama's dual system of higher education, a group of Black plaintiffs in Montgomery, led by John F. Knight, Jr., filed a suit claiming that the presence of branches of predominantly white universities in Montgomery (AUM and TSIM) prevented the state from carrying "out its duty to dismantle the dual system of higher education in Alabama."<sup>79</sup> Since these white branches siphoned resources from ASU, duplicated its programs, and enabled white students to attend TWIs rather than the century-old ASU, the suit demanded that the two white branches merge into ASU.<sup>80</sup>

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71. *Id.* at 86.

72. *United States v. Alabama*, 828 F.2d 1534 (11th Cir. 1990).

73. 317 F. Supp. 103 (1970).

74. *Knight v. Alabama*, Civil Action No. CV83-M-1676 (N.D. Ala. 1991), *Brief of Plaintiffs-Intervenors-Appellees*, p. 12.

75. *Id.*

76. *Lee*, 317 F. Supp. 103 (1970).

77. *Alabama State Teachers Association v. Alabama Public Schools*, 289 F. Supp. 784 (1968).

78. *Id.* at 789.

79. *Alabama*, 828 F.2d 1534 (11th Cir. 1990).

80. *Id.*

The stage was now set for a major constitutional and political showdown between the plaintiffs and defendants over the very nature of higher education in Alabama. The stakes were high: The plaintiffs wanted nothing less than a basic transformation of the state's entire system of higher education. Such a transformation could only become a reality if all the institutions of higher learning in the state ceased to be identifiable by race in terms of their faculties, student bodies, and governing boards. Further, the systematic, historical patterns whereby the two TBIs were deprived of comparable resources and facilities would have to be reversed. Finally, the white branches in Montgomery and Huntsville would be required to merge under the TBIs. In 1983, Alabama's African American community sought to use the United States Constitution and national federal legislation to destroy the state's dual, unequal system of higher education.<sup>81</sup> Then, as always, Black people sought to gain equality by challenging the nation to abide by the supreme ideals and national laws whites themselves formulated and ratified.

When a Black judge, U.W. Clemons, Jr., was randomly selected to hear the case,<sup>82</sup> fate appeared to favor the plaintiffs. Judge Clemons enjoyed the reputation of being a champion for racial equality.<sup>83</sup> The 1985 trial lasted for an entire month.<sup>84</sup> Extensive evidence was presented and the witnesses ranged from unknown college students to former Alabama Governor George Wallace. On December 9, 1985, the court ruled in favor of the plaintiffs.<sup>85</sup> The court concluded that the state had not dismantled the dual system of higher education.<sup>86</sup> In the court's view, this was true because the student bodies, faculties, and governing boards of Alabama's institutions of higher learning were racially identifiable.<sup>87</sup> Also, the establishment of branches of TWIs in close proximity to the two TBIs impeded the efforts of the latter to attract white students, and these branches unnecessarily duplicated the courses and programs of the TBIs.<sup>88</sup> Furthermore, the historic and contemporary distribution of funding and program offerings disadvantaged the TBIs, sealing their fate as second-class Black institutions.<sup>89</sup> The court agreed with the plaintiffs that both historic and contemporary practices of the state were responsible for the racially dual system of higher education in Alabama.<sup>90</sup>

Judge Clemons went beyond identifying the unequal, dual system of higher education. Indeed, he "ordered the State, the Governor, the Alabama Commission on Higher Education, and the Alabama Public School and College Authority to submit a remedial plan consistent with its findings to 'eliminate all vestiges of the dual system.'" <sup>91</sup> For the plaintiffs, it ap-

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81. In particular, they utilized the Equal Protection Clause of U.S. Constitution and Title VI of the 1964 Civil Rights Act. *Id.* at 1546.

82. *United States v. State of Alabama*, 828 F.2d 1534 (11th Cir. 1990).

83. *Id.*

84. *Id.* at 1535.

85. *Post-Trial Proposed Findings*, *supra* note 26, at 3.

86. *Alabama*, 828 F.2d 1536 (1535).

87. *Id.* at 1536.

88. *Id.* at 1535-36.

89. *Id.* at 1536.

90. *Id.*

91. *Id.*

peared as if a federal court had reached a decision that would culminate in the dismantling of a racially unequal system which had reigned supreme for over a century.

The defendants also understood the implications of the ruling and sought to overturn it in a court of appeals. The defendants appealed the ruling on the grounds that Judge Clemons should be disqualified, that the United States failed to comply with the program specificity requirement of Title VI, and that the United States did not have statutory authority to bring suit under the Fourteenth Amendment.<sup>92</sup>

The Eleventh Circuit Court's reversal decision, based on the disqualification of Judge Clemons and the ruling regarding the specificity requirement for Title VI claims,<sup>93</sup> made the current *Knight* case necessary. Given that historical evidence constitutes a core pillar of the current *Knight* case, it is essential that we now examine the historical origins of Alabama's dual system of higher education.

### B. *Historical Underpinnings of Alabama's Dual System of Higher Education*

The historical record of Alabama's racially based, unequal, dual system of higher education has been an important cog in the machinery of Black subjugation. The architects of white supremacy understood clearly that "when you control a man's thinking you do not have to worry about his actions. You do not have to tell him not to stand here or go yonder. He will find his 'proper place' and will stay in it."<sup>94</sup> Whites in Alabama developed the segregated dual system of education as a means to subordinate Blacks by controlling their thoughts and actions. The state's white-controlled Black schools "mis-educated" Blacks by restricting them to curricula and experiences related to the performance of menial tasks and the adoption of subservient attitudes.<sup>95</sup> By contrast, white students were provided opportunities, attitudes, and education consistent with their status as members of the state's dominant racial group.<sup>96</sup>

Throughout American history, Black people have protested and revolted in pursuit of their liberation.<sup>97</sup> Expectedly, Black people refused to accept Jim Crow higher education quietly. Like slave churches and slave cabins before them, TBIs became vehicles of protest. Thus, not only did Black students have to be segregated from the empowering, education-taught whites, it was also necessary that whites scrupulously controlled Black institutions. The key mechanisms of control exercised by whites over Black institutions of higher learning were governance, mission, and funding.<sup>98</sup>

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92. *Id.* at 1544-45, 1546.

93. *Post-Trial Proposed Findings*, *supra* note 26, at 4-5.

94. CARTER G. WOODSON, *THE MIS-EDUCATION OF THE NEGRO* xiii (1990) (1933).

95. *Post-Trial Proposed Findings*, *supra* note 26, at 81-87.

96. *Id.* at 5-6.

97. VINCENT HARDING, *THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA* (1981); KAY MILLS, *THIS LITTLE LIGHT OF MINE: THE LIFE OF FANNIE LOU HAMER* (1993); Aldon Morris, *Centuries of Black Protest: Its Significance for America and the World*, in, *RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 19-69* (1993).

98. *Post-Trial Proposed Findings*, *supra* note 26, at 5-10.

One year after Nat Turner's bloody 1831 rebellion in Virginia, the legislature of Alabama "enacted a statute making it a crime to instruct any Black person, free or slave, in the arts of reading and writing."<sup>99</sup> After the overthrow of slavery, agitation by former slaves made it increasingly difficult for whites to deny them access to formal education. From Reconstruction to the turn of the twentieth century, official white supremacy rooted in a Jim Crow social order was established.<sup>100</sup> The possibility of Blacks attending white colleges and universities was systematically foreclosed, thus giving rise to Alabama's dual system of higher education. Blacks were allowed to build their own educational institutions. Although the state provided little or no funding for Black education, Alabama's two TBIs grew, yet so did the role of white governance.<sup>101</sup>

Alabama State University was originally founded in 1867 as the Lincoln School at Marion, Alabama. During ASU's early years the first two principals, the first president, and the majority of teachers were white.<sup>102</sup> Local whites were not pleased that the school's governing board was all Black. Subsequently, whites removed the Black board and replaced it with an all-white one in exchange for public funds so desperately needed to keep the institution afloat.<sup>103</sup>

Eventually whites demanded that the Black school be removed from Marion. The state legislature agreed and passed legislation to create "The Alabama Colored People's University," to be located in Montgomery.<sup>104</sup> The promise of white control was necessary for white Montgomeries to agree to have a Black university in its midst. A member of the all-white board promised:

The absolute control of the Trustees over the institution ought to convince anyone that it could never become a hot bed of rudeness and insult. Education controlled and directed by our own people will repress not merely the expression but thought . . . and produce on the contrary, politeness, good will, respect for authority and good deportment.<sup>105</sup>

Hence, prior to the turn of the twentieth century, both ASU and AAMU were under the control of white boards. The trustee boards of both schools were abolished in 1919, and governance was turned over to the Alabama State Board of Education.<sup>106</sup> This transference of governance insured a continuation of white rule over both ASU and AAMU. White governance and control enforced the Jim Crow social order by defining and dictating the parameters of acceptable behavior for administrators, faculty, and students of ASU and AAMU.<sup>107</sup>

From the very beginning, the issue was whether the mission of TBIs would be to reinforce white supremacy or to encourage African Americans

99. *Id.* at 42.

100. JOHN HOPE FRANKLIN AND ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 247-63 (1994); NEIL R. McMILLEN, DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW (1989).

101. *Post-Trial Proposed Findings*, *supra* note 26, at 117-18.

102. *United States v. State of Alabama*, 628 F. Supp. 1137, 1145-48 (N.D. Ala. 1981).

103. *Post-Trial Proposed Findings*, *supra* note 26, at 78-81.

104. *Id.* at 99.

105. *Id.* at 101.

106. *Id.* at 167.

107. *Id.* at 7-9.

to develop an intellectual orientation diametrically opposed to white domination and Black subjugation. Alabama's white power structure wanted TBIs that would teach African Americans, even those with college education, how to serve white people and how to respect and bow to white authority. And so it was that Alabama's state power structure imposed the types of missions onto TBIs that were consistent with this world view.

At the outset, Black Alabamians envisioned TBIs as legitimate institutions of higher learning. Thus, they fought tenaciously to make ASU the equal of the University of Alabama and AAMU the counterpart of Auburn University.<sup>108</sup> Both TBIs were to educate Black citizens to become politicians, lawyers, scientists, doctors, and major decision-makers in all spheres of American life. The Alabama legislature declared that ASU was "to provide for the liberal education of the colored race in the same manner as is already provided for the education of the white race in our Universities and Colleges."<sup>109</sup> Whites objected to ASU's stress on liberal arts and classical training, believing that a classical liberal education would encourage Blacks to desire citizenship, equality, equal rights and to become assertive.<sup>110</sup>

White Montgomerians wanted assurances that the Black school would be an industrial school, not a university. The Alabama Supreme Court provided the legal rationale in *Elsberry v. Seay*<sup>111</sup> that the establishment of a Black university would violate the 1875 Alabama Constitution, which prohibited universities from being supported by public funds.<sup>112</sup> As a result, the state of Alabama transformed the proposed "colored university" into a normal school whose mission was to provide industrial education.<sup>113</sup> Alabama State was to serve the interest of white supremacy, not the aspirations of ex-slaves who yearned to be truly free and empowered. AAMU met the same fate as did ASU. Although AAMU's first president was a former slave, William H. Councill,<sup>114</sup> it could not escape white domination. The institution, which opened in 1875 as the Huntsville Normal School, was governed by an all-white board.<sup>115</sup> It began as a normal school but also offered liberal arts courses. However, by 1883, AAMU became an industrial school.<sup>116</sup> Initially, Councill's philosophy emphasized cooperation with the white power structure as a viable strategy to develop and sustain his school. By the late 1890s Councill's philosophy turned radical. He began to advocate that Black people should return to Africa.<sup>117</sup> At the same time, he attempted to change the mission of the school from industrial to liberal education because "he had lost hope in the promises of white Americans."<sup>118</sup> White control of the missions of Alabama's two TBIs from the very beginning constitutes one of the most fundamental pillars of Ala-

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108. *Id.* at 173-91.

109. *Id.* at 79.

110. *Id.* at 53-54.

111. 83 Ala. 614, 3 So. 804 (1887).

112. *Id.* at 106.

113. *Id.* at 106-07.

114. *Id.* at 87.

115. *Id.* at 89, 117.

116. *Id.* at 96.

117. *Id.* at 94-95.

118. *Id.* at 94.

bama's unequal, dual systems of higher education. Once white supremacists were able to dictate these missions, they achieved a major victory. Black colleges and universities were to teach African Americans how to become seamstresses, wheelwrights, carpenters, field workers, and manual laborers rather than professionally-trained social decision-makers. The "normal school/industrial model" was designed to produce manual laborers who would not become discontented with their station in life as unskilled and semi-skilled laborers.<sup>119</sup> This mission strategy "meant the HBUs should be restricted to junior college programs. And it has always meant they should not offer . . . professional and graduate programs, particularly Ph.D. programs."<sup>120</sup> This reality is still true in the last decade of the twentieth century but its foundation was poured in concrete one hundred years ago.

Finally, those who control the financial levers of an institution of higher learning can determine the nature of its governance and its mission. The white government of the state of Alabama, along with white foundations and the federal government, have controlled the finances of ASU and AAMU historically. Another example from AAMU's history makes the point more strongly. Through the Morrill Act,<sup>121</sup> Congress made millions of dollars available to each state to establish land grant colleges. The state of Alabama designated all-white Auburn as its land grant institution in 1872,<sup>122</sup> enabling it to receive "the entire income from Alabama's share of the Morrill Land Grant Act, 240,000 acres (\$20,280 annually, a sum approximating the amount that the state provided the University of Alabama)."<sup>123</sup> AAMU was designated Alabama's Black land grant college almost a decade later following the Second Morrill Act<sup>124</sup> in 1890, which stipulated that a state had to provide a Black school with money if the state had racially segregated schools. The funding history of the institutions of higher learning in Alabama is literally one of huge disparities between TBIs and TWIs. It is a history that greatly favored the TWIs when issues of governance and mission of the TBIs were not in question. But when those issues were center stage, the TBIs had to yield to the wishes of white supremacists or drown financially. Indeed, white governance, control of missions, and funding were the triple interlocking mechanisms that gave rise to Alabama's dual, unequal system of higher education.

On the white side of the tracks, Blacks had no control or input. Indeed, Blacks were not allowed to attend TWIs as students,<sup>125</sup> nor could they be on their faculties or governing boards.<sup>126</sup> Such behavior was strictly prohibited by state law for over a century.<sup>127</sup> In fact Governor Wallace testified that, as late as the 1960s, the state of Alabama had a policy

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119. *Id.* at 194.

120. *Id.*

121. ALEXANDER W. ASTIN, *MINORITIES IN AMERICAN HIGHER EDUCATION: RECENT TRENDS, CURRENT PROSPECTS, AND RECOMMENDATIONS* 116 (1982).

122. *Post-Trial Proposed Findings, supra* note 26, at 75.

123. *Id.*

124. *See* BLACKWELL, *supra* note 20.

125. *Post-Trial Proposed Findings, supra* note 26, at 192.

126. *Id.* at 648-49.

127. *Id.* at 120.

prohibiting Black people from teaching white students.<sup>128</sup> He recalled the policy and stated “. . . that was a mistake I made,”<sup>129</sup> although he had backed this policy with state police power. Therefore Alabama's TWIs evolved, devoid of any substantive Black input. Hence, it is hard to escape the conclusions of the *Knight* plaintiffs:

Since Alabama became a state, it has maintained through a variety of historical circumstances a steadfast policy of imposing white control over the public education of Black people. This racially motivated policy was crucial to the regime of white supremacy for two purposes: (1) to make sure the content, values and styles of Blacks' education prepared them for subordinate roles in society, and (2) to ensure that white persons would never be forced to submit to the authority of Black persons.<sup>130</sup>

### C. *Walls That Shattered But Failed to Crumble*

Whites in Alabama used state power, violence, intimidation, and the law<sup>131</sup> to exclude African Americans from TWIs. Black people never completely acquiesced in their struggle for expanded opportunities in higher education; they continued to fight on all fronts. The Black struggle for opportunity and equality exploded in several intense confrontations during the late 1950s and early 1960s. Young Black students seeking their birthright—access to college education from Alabama's TWIs—were met by violent white mobs, defiant white boards of trustees, and Governor Wallace himself who declared before the nation, “Segregation now, segregation tomorrow and segregation forever.”<sup>132</sup>

Autherine Lucy and Polly Myers applied for admission to the graduate school of the University of Alabama in 1952. Unaware of their racial identity, admission officers admitted these two Black women. Efforts to reverse their admission were complicated by the Supreme Court's ruling that Blacks were entitled to equal graduate programs. Lucy and Myers were informed by UA's all-white board of trustees that the program of study they desired was available at all-Black Tuskegee Institute or Alabama State University.<sup>133</sup> Therefore, they were not to attend UA. The women sued to contest this decision.<sup>134</sup> Three years later, the U.S. District Court ruled that Lucy, Myers, and other qualified Blacks had a right to attend the university.<sup>135</sup> UA appealed the decision to the U.S. Supreme Court and lost.<sup>136</sup> Nevertheless, UA continued to deny admission to the students. Myers was pressured to withdraw her application based on details about her private life.<sup>137</sup> In the spirit of Rosa Parks, Autherine Lucy refused to

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128. *Knight v. Alabama*, Civil Action No. CV83-M-1676 (N.D. Ala. 1991), *Wallace Trial Testimony*, July 22, 1985, p. 545.

129. *Id.*

130. *Post-Trial Proposed Findings*, *supra* note 26, at 7.

131. *Post-Trial Proposed Findings*, *supra* note 26, at 120-29.

132. HOWELL RAINES, *MY SOUL IS RESTED: THE STORY OF THE CIVIL RIGHTS MOVEMENT IN THE DEEP SOUTH* 330-31, 338-42 (1977); JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965*, at 194-95 (1987).

133. *United States v. State of Alabama*, 628 F. Supp. 1137, 1141 (N.D. Ala. 1985).

134. *Id.* at 1141.

135. *Id.*

136. *Id.*

137. *Post-Trial Proposed Findings*, *supra* note 26, at 205.

yield her claim. The judge ordered the University of Alabama officials to admit Lucy commencing February 3, 1956.<sup>138</sup> What followed revealed the depth of white resistance to Blacks attending TWIs, or for that matter, seeking their constitutional rights.

Lucy was denied dormitory space and dining hall privileges.<sup>139</sup> She was harassed and physically assaulted by white mobs.<sup>140</sup> The board's response was to suspend Lucy (supposedly for her safety). Eventually she was permanently expelled. The Alabama federal judge concluded with Alabama style white supremacy when he held that the board of trustees had acted properly in both suspending and permanently expelling Lucy.<sup>141</sup>

By 1963, the Civil Rights Movement had come of age: the Montgomery bus boycott was a success; student sit-ins had desegregated lunch counters across the South; freedom riders challenged segregated interstate transportation; and James Meredith desegregated the University of Mississippi. In the spring of 1963, Martin Luther King Jr. and thousands of African Americans forced Bull Connor and the Birmingham white power structure to begin dismantling the Jim Crow social order.<sup>142</sup> In August 1963, 250,000 people marched on Washington, demanding equal rights for African Americans. The time was propitious for challenges to racial segregation and racial discrimination in Alabama, across the South and across the nation.

Black students applied for admission at both the main campus of UA and its extension center in Huntsville.<sup>143</sup> Forced with a court order, the University board decided to admit an African American to both campuses.<sup>144</sup> George Wallace, as Governor and chairman of UA's board, then took his infamous stand, attempting to prevent the entrance of African Americans into UA. Governor Wallace chose to place state power between Black students and their constitutional right to enter segregated classrooms of UA. He believed that racial integration would eventually reduce the pure white race to "that of the mongrel complexity."<sup>145</sup> When Wallace took his stand, the whole world was watching. African Americans and their supporters were not only watching, but also calculating the level and type of social protest necessary to make this nation "do the right thing" on the race question. President Kennedy decided to cast his fortune with Black people and the forces of change. He federalized Alabama's National Guard and ordered them to enforce the court ruling.<sup>146</sup> On June 11, 1963, Vivian Malone and Jimmy Hood, escorted by federal marshals, pushed past Wallace into the history books.<sup>147</sup>

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138. *Alabama*, 628 F. Supp at 1141.

139. *Id.*

140. *Id.*

141. *Id.* at 1142.

142. ALDON MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT* 229-74 (1984).

143. Vivian Malone, Sandy English, and Jimmy Hood applied for admission at the main campus. Marvin Carrol and Dave McGlathery sought admission at Huntsville. *Alabama*, 628 F. Supp. at 1142.

144. *Id.* at 1142.

145. *Id.*

146. *Id.* at 1143.

147. *Id.*

Auburn University, under court order, admitted Harold Franklin, its first Black student in 1964.<sup>148</sup> During the mid-to-late 1960s, most of Alabama's other TWIs began to admit their first Black students.<sup>149</sup> Some did so in response to court orders,<sup>150</sup> while others simply accepted the inevitable tide. Significantly, AAMU admitted its first white student in 1967,<sup>151</sup> while ASU did likewise in 1968.<sup>152</sup> No lawsuits, riots, or federal marshals accompanied the admission of white students to ASU and AAMU. Why not? The answer is simple: only Alabama's state policy and the decisions of the Black schools' all-white governance boards prevented whites from attending the TBIs. Blacks had long championed the idea of desegregated higher education. What they lacked until the 1960s was the power to achieve this goal in either TBIs or TWIs.

In academia, desegregation means more than the mere presence of a few Black people. It means the substantial desegregation of faculties, administrators, curricula, values, and students. Ideally, universities should foster exchanges between diverse groups, cultures, races, social classes and world views. From this clash of diverse ideas and viewpoints should come truth unadulterated in its multiple forms. The courageous acts of African American students in the early 1960s only shattered the formal walls of segregation at Alabama TWIs; vast portions of their racially segregated structures were left largely untouched. To make the point more forcefully, we remind that in 1990, a quarter century after desegregation, AU had only eleven Black faculty members out of one thousand.<sup>153</sup> Moreover, only one of twelve members on AU's board was Black.<sup>154</sup> There were no African Americans in upper-level administration and AU's Black student population was less than 4 per cent.<sup>155</sup> White power, dominance and control remain solidly in place at Auburn. There are more African Americans at UA; however, the substantive reality is essentially the same.

The University of Alabama's board has three Black members; whites constitute a solid majority with twelve seats.<sup>156</sup> Black faculty members number 25 of over 800 total faculty on its sprawling campus.<sup>157</sup> Additionally, only 9 per cent of UA's students are Black, in a state that is over 26 per cent Black.<sup>158</sup> Although located in Birmingham, which is 60 per cent Black, 16 per cent of UAB students, and less than 3 per cent of UAB faculty, are Black.<sup>159</sup> At UAH, only 8 of over 270 faculty members are Black.<sup>160</sup>

The overall situation remains largely the same at Alabama's other TWIs. Although TWIs in the state vary by prestige, mission, size, location,

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148. *Id.* at 1144.

149. *Id.* at 1151-56.

150. *Id.* at 1152, 1154, 1156.

151. *Id.* at 1148.

152. *Id.*

153. *Post-Trial Proposed Findings, supra* note 26, at 282.

154. *Id.* at 294.

155. *Id.* at 271.

156. *Defendants' Proposed Findings of Fact, supra* note 29, at 24.

157. *Post-Trial Proposed Findings, supra* note 26, at 281.

158. *Id.* at 270-71.

159. *Id.* at 271, 305-06.

160. *Id.* at 308.

funding, academic programs, and white student characteristics, there is one constant: white control is thoroughly entrenched at every level. While Blacks may have breached the segregated walls of higher education in Alabama, the all-white power structures directing the vast educational apparatus beyond those walls remain strong and uncompromising. The days when Blacks could be denied access to Alabama's public universities on de jure grounds are certainly past. Yet, when the period since Autherine Lucy's enrollment at UA is examined, there is an eerie sense that insidious mechanisms designed to perpetuate racial inequality in higher education continue to function. There are strong indications that Black students who attend TWIs and TBIs in Alabama and nationally are disadvantaged compared to white students. To examine this premise, we now assess the experiences of African American college students in both TWIs and TBIs in Alabama and across the nation.

### III. BLACK STUDENTS IN ALABAMA HIGHER EDUCATION

Black students in Alabama institutions of higher learning, both those that are traditionally Black and those that are traditionally white, share many issues in common with Black college students across the country. Voluminous evidence from the trial reveal striking parallels between the state scene and the national scene with regards to Black higher education.

#### A. *Traditionally White Institutions*

Black students who attend traditionally white institutions in Alabama reported extreme feelings of isolation and alienation.<sup>161</sup> Many linked such feelings to Black students' scarce numbers on these campuses.<sup>162</sup> One Auburn University student testified that, upon enrolling at the school, she "didn't like it because I didn't see other Blacks on the campus. I believe I had one other Black in my biology class and we kind of hooked together and we were basically friends from that point on. And other than that, I didn't know anyone."<sup>163</sup> This type of experience was repeated again and again by Black Alabama college students who attended traditionally white institutions and who were called to testify in the case.<sup>164</sup>

The sparse numbers of Black students who attend Alabama's traditionally white institutions is largely a function of admissions policies which discriminate against Black students. The University of Alabama has adopted an algebraic formula based on American College Test (ACT) scores and high school grades, which effectively disqualifies from admission 72 per cent of all Black college test takers and college aspirants in the state.<sup>165</sup> The effect of such procedures across Alabama's traditionally white universities is to deny access to the vast majority of Black students. Moreover, these students are penalized on two counts. One is because of earlier educational disadvantages which presaged their poor performance on the ACT. Secondly, these Black students are penalized by the misapplication

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161. *Id.* at 270-81.

162. *Id.*

163. *Id.* at 272.

164. *Id.* at 270-81.

165. *Id.* at 265-66.

of standardized tests, since these merely measure a student's exposure to date.<sup>166</sup> Standardized tests do not effectively measure the many other factors which combine to determine whether a student is a good prospect (e.g., motivation, ability to master new material, creativity, capacity for hard work).<sup>167</sup>

Where Black students in Alabama's traditionally white institutions are the extreme minority, they suffer both inside and outside the academic halls. Black students who attend Alabama's traditionally white institutions find themselves in environments that are, at best, indifferent to their welfare, often actively hostile. It is under these stressful environments, characterized by racial antagonism and institutional neglect, that Black students at white schools must attempt to complete their education. Beyond the already burdensome problems that any college student must confront in his or her daily life and the quest for the Grail, come these race-specific problems. Beyond the regular pressing academic deadlines, beyond the chore of locating satisfactory housing, beyond the need to juggle work and school commitments, and beyond the mounting pressures, these students face an additional gargantuan burden—the problem of racism. Racism and race discrimination permeate—indeed dominate—the daily existence of Black students on traditionally white college campuses in Alabama.

### B. *Traditionally Black Institutions*

The two traditionally Black public universities in the Alabama system of higher education, Alabama State University and Alabama A&M University, have long histories of serving the state's Black community. From their inception these schools have been specific, effective responses to the state's systematic attempts to deny equal opportunity for higher education to its Black citizens.<sup>168</sup> For much of the century, these schools represented the Black community's only public higher education option. Over time, as barriers to Black matriculation at traditionally white institutions were forced down by court dictates and federal legislation, these schools have continued to play a disproportionately important role in the higher education of Blacks in Alabama. Currently over 40 per cent of Alabama's population of Black college students attends one of these institutions.<sup>169</sup> It is important to note that many of these enrolled students were among the 72 per cent of all Black Alabama high school graduates who were disqualified by admissions requirements from attending traditionally white institutions in the state.<sup>170</sup>

The two traditionally Black universities in Alabama have maintained close ties and connections with the state's Black community. Alumni and

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166. Robert L. Williams and Horace Mitchell, *The Testing Game*, in *BLACK PSYCHOLOGY* 193-205 (1991).

167. Walter R. Allen, *The Color of Success: African American College Student Outcomes at Predominantly White and Historically Black Public Colleges and Universities*, 62 *HARV. EDUC. REV.* 26-44 (1992); WALTER R. ALLEN, EDGAR G. EPPS & NESHA Z. HANIFF, EDs., *COLLEGE IN BLACK AND WHITE: AFRICAN AMERICAN STUDENTS IN PREDOMINANTLY WHITE AND IN HISTORICALLY BLACK PUBLIC UNIVERSITIES* (1991).

168. *Post-Trial Proposed Findings*, *supra* note 26, at 404-08.

169. *Id.* at 398.

170. *Id.* at 270.

students are intricately and intimately involved with key institutions in the Black community such as schools, churches, businesses, and fraternal orders.<sup>171</sup> As a result, these traditionally Black schools have helped to establish, maintain and shape the foundations for the life, history, and culture of the entire Alabama community of African Americans. Many in the state's Black middle and professional class were educated at one of these institutions.<sup>172</sup> Others of this elite group of Black professionals have children who are currently attending or who have graduated from Alabama State University or from Alabama A&M University.<sup>173</sup> The critical role played by Alabama's traditionally Black universities cannot be duplicated or supplanted by traditionally white institutions. Traditionally Black schools have an organic connection and intimacy with the Black community that traditionally white institutions cannot approximate.<sup>174</sup>

Alabama's traditionally Black institutions, given their history and current patterns, offer uniquely beneficial educational environments for Black students. These institutions perform a special mission related to state higher education desegregation goals. For one thing, Alabama's traditionally Black universities never denied enrollment or employment based on race. For another, these schools have a long history of multiracial student bodies, faculty, and staff. Without doubt, they have been in the forefront of efforts to desegregate the Alabama state system of higher education.<sup>175</sup> Operating at two levels, the institutional and the student, these schools offer unique promise for advancing the cause of multiculturalism and racial equality in higher education in the state.

In short, historically Black institutions provide Alabama's Black college students with culturally rich, supportive environments designed and committed to ensuring their maximum academic growth and development. However, due to limited resources these schools are often restricted in their ability to fulfill their special missions. Years of discriminatory funding patterns at the state level has left a legacy of severe deprivation. These schools are disadvantaged in terms of physical plant, academic programming, research facilities, research productivity, academic strength and national reputation.<sup>176</sup> In addition, these schools face the additional challenge of educating a student population which itself was the victim of substantial deprivation in terms of the early years of educational opportunity. Despite these far-reaching impediments, these institutions continue to provide a unique and valuable service to the state of Alabama. The continued presence and contributions of Alabama State University and Alabama A&M University will be required into the foreseeable future if there is to be any hope of achieving educational parity between the races in Alabama.

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171. *Id.* at 406.

172. *Id.* at 405-06.

173. *Id.* at 408.

174. *Id.* at 406.

175. *Id.* at 399.

176. *Id.* at 506-11.

### C. *Implications*

After this journey through the creation and development of Alabama's dual system of higher education, an inevitable question arises: What is to be made of all this and are there any solutions? First, it is important for the nation to recognize the existence of a racially dual and unequal system of education. This article examines the origins and operation of this system in Alabama. The realities of this unequal system of higher education are evident in other Southern states as well, e.g., Mississippi, Louisiana, and Tennessee.<sup>177</sup> Even in states across the nation where these issues are not being raised currently by legal challenges or hot debate, the evidence of Black educational inequality is clear.<sup>178</sup> Therefore, we must resist the lure to write all this off as merely a Southern problem, for in fact this is a national problem. The federal government, through its historical allocation of educational funds, through its historical propensity to wink at racist social arrangements, and through its historical acceptance (if not advocacy) of the philosophy of Black subjugation, shares great responsibility for the creation of the unequal system of higher education. The courts are also deeply implicated in the formation and maintenance of this unequal system since the U.S. Supreme Court provided legitimacy for the Jim Crow social order in *Plessy v. Ferguson*.<sup>179</sup> Finally, it is a national problem because African American citizens have paid, and continue to pay, a horrendous price for this country's refusal to grant them equal opportunities in education and employment.<sup>180</sup>

The historical arrangement of educating Blacks and whites in separate institutions within the same nation has its roots and purpose in a deeply racist context. This system developed in a society that was committed to oppressing African Americans and locking them into a permanent subjugated caste status. The dual system of education arose during Reconstruction as one of the answers to the vexing white dilemma of what to do with former slaves who were no longer required by law to submit to white people or to work without remuneration. White America, at this historical juncture, no longer had ready access to a free Black work force on whose back it could build a great empire. It is clear, too, that African Americans, at that point in time, wanted total liberation and rights to self-determination consistent with democratic principles. They recognized that access to higher education was crucial for free, productive citizens in a great democracy.<sup>181</sup> They also understood America's profound obligation (and its stub-

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177. See generally SANSING, *supra* note 15; Geier v. Tennessee, 597 F.2d 1056, 1064 (6th Cir. 1979).

178. BLACKWELL, *supra* note 20, at 1-28; ALLEN BALLARD, THE EDUCATION OF BLACK FOLK: THE AFRO-AMERICAN STRUGGLE FOR KNOWLEDGE IN WHITE AMERICA (1974); BROWN-SCOTT, *supra* note 12, at 1-81 (1994); JOE R. FEAGIN AND MELVIN P. SIKES, LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE 78-134 (1994); GARY ORFIELD ET AL., THE CHICAGO STUDY OF ACCESS AND CHOICE IN HIGHER EDUCATION: A REPORT TO THE ILLINOIS SENATE COMMITTEE ON HIGHER EDUCATION (1984).

179. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

180. HAROLD CRUSE, PLURAL BUT EQUAL: BLACKS AND MINORITIES IN AMERICA'S PLURAL SOCIETY (1987); REYNOLDS FARLEY AND WALTER R. ALLEN, THE COLORLINE AND THE QUALITY OF LIFE IN AMERICA (1989); GERALD JAYMES AND ROBIN WILLIAMS, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY (1989).

181. *Post-Trial Proposed Findings*, *supra* note 26, at 52-55.

born resistance) to make educational opportunities available to Black people.

The South responded to this obligation by extending the social caste system or "Jim Crow" to the educational arena. African Americans were barred from all of "their" colleges and universities. When Blacks continued to demand access to higher education, the South reluctantly conceded by allowing the creation of "Negro" colleges. Whites insisted, however, on deciding the type and content of education that these schools would be allowed to offer. The consensus was that Blacks should only learn practical knowledge and skills that would make them useful to white society. The schools would produce laborers and craftsmen content to work in subservient positions. Whites left little to chance in pursuit of this goal, and thus white-controlled Black schools were established. These institutions were made inherently unequal by limiting their autonomy, missions, and resources. The dual system of unequal higher education was *no* accident: it served its purpose throughout the Jim Crow period and continues to function in a similar manner as we approach the twenty-first century.

The *Knight* case has produced vaults of historical and contemporary evidence to lay bare the existence of an unequal, dual system of higher education in Alabama. When examined with clear, sober, objective eyes, this system looks remarkably like that founded during the Reconstruction period. The TBIs are still nearly completely Black and they are emasculated through underfunding and lack of autonomy. The TWIs have changed slightly, but they continue to be overwhelmingly white and solidly white-controlled. The white schools remain vastly superior in terms of resources, course offerings, mission, and prestige. The white schools grant professional and doctoral degrees, while the Black schools are largely restricted to undergraduate training. Thus, the white schools provide the type of education which produces leaders of society, while Black schools provide the type of education which produces functionaries who are expected to follow their mostly white superiors' orders. Alabama's current dual system of higher education resembles that which emerged during Reconstruction because it is essentially unchanged from that time.

It would be ludicrous and irresponsible to view the current missions, prestige hierarchies, governance structures, and funding patterns of Alabama's institutions of higher education as results of a naturally-occurring order. The dual system of education did not evolve because of sound educational policies; rather, it was engineered by human hands to function as a powerful device for empowering one racial group while subjugating another. To accept the fiction that this dual system, in all of its manifestations, "just happened" would be to legitimize the racist handiwork of previous generations of whites who deliberately conceived and constructed the racially biased, dual, unequal system of higher education.

It is difficult to substantiate an argument that Alabama's TWIs are no longer segregated—equally accessible to white and Blacks. Blacks constitute less than 5 per cent of the governing boards, faculties, and administrators, and the percentage is only slightly better with respect to student

bodies of these institutions.<sup>182</sup> When then Assistant Secretary of Education Clarence Thomas reflected on Alabama's dual system of higher education, he concluded:

I . . . don't know at what point a workforce becomes integrated, but I can tell you when there is the inexorable zero, it is not integrated, . . . and that is what we are approaching here. At the white institutions, you are approaching the point where the Black students are at the inexorable zero. I may have to fall back on what the Supreme Court Justice said, that he knows pornography when he sees it and this is damn well it.<sup>183</sup>

Even when several hundred Black students attend a TWI with many thousands of white students, they often find themselves in situations where their numbers approach the inexorable zero point. Many have never been taught by a Black professor.<sup>184</sup> They have never witnessed a situation where someone of their race is president, provost, dean, or departmental chair.<sup>185</sup> These Black students are often alone when they walk across campus and witness hundreds of white students marching to a football game behind the Confederate flag,<sup>186</sup> a flag which flew over an enslaved people a little more than a century ago, and which was resurrected a generation ago to signal white resistance to federal efforts to grant Blacks full citizenship in the South.

These realities leave African Americans at TWIs feeling as if they are aliens in their own country. These are the factors that disempower young African Americans who dare to attend TWIs. At this point in our history, the idea of desegregation needs to be reexamined from top to bottom. One thing is clear: for most African Americans, desegregation has not occurred when a few Black students are admitted and a trickle of Black faculty are hired. Nor are Black people educationally empowered by simply being able to sit next to a few white students or to hear a white professor's lecture. True desegregation occurs when African Americans actually share equally in the governance, life, and instructional activities of a college or university.<sup>187</sup> Real desegregation is predicated on the sizeable presence of African American students at TWIs.<sup>188</sup> Substantial numbers are required if racial desegregation is to empower instead of demoralize Black students. It is precisely for this reason that a thorough study of racial diversity at TWIs concluded that:

Creating a hospitable campus environment requires going beyond the announcement of good intentions and uplifting principles . . . . Research has shown that 'multi - cultural campuses' (campuses with 30 percent or more minority enrollment) are most conducive to the success of minority students . . . the fact remains that if there is only a handful of minority students, faculty, and administrators, they are much more likely to feel isolated.<sup>189</sup>

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182. *Post-Trial Proposed Findings*, *supra* note 26, at 281-82.

183. *Clarence Thomas Deposition*, Nov. 1, 1984, p. 68.

184. *Post-Trial Proposed Findings*, *supra* note 26, at 281-333.

185. *Id.*

186. *Id.* For a discussion of the confederate flag issue, see *Post-Trial Proposed Findings*, *supra* note 26, at 366-68.

187. *Post-Trial Proposed Findings*, *supra* note 26, at 691-92.

188. *Id.*

189. MADELEINE F. GREEN, ED., *MINORITIES ON CAMPUS: A HANDBOOK FOR ENHANCING DIVERSITY* 116 (1989).

There are no TWIs in Alabama that come anywhere close to having this critical mass of Black students. It is insufficient to attribute the underrepresentation of Blacks at every level of the TWIs to the small pool of Black Ph.D.'s or to low test scores and poor academic preparation, or to societal racial discrimination and Black poverty. This position ignores the active historical role played by Alabama's TWIs in designing and producing exactly this outcome. It is a cruel paradox to blame African Americans for an outcome that was determined by the decisions and actions of whites. It should never be forgotten that for over a century African Americans' tax dollars helped to support the TWIs where Black people were not allowed to attend. The advocates of reverse discrimination and the opponents of affirmative action wish to ignore these facts. TWIs, the state of Alabama, and this society share an obligation to correct these historic wrongs.

What then should come of the *Knight* case?<sup>190</sup> First, it is clear that ASU and AAMU should be maintained and enhanced. There simply is no TWI in the state capable of accomplishing the vital missions of these two institutions. Despite their meager resources and oppressive white control, these institutions have been amazingly successful at providing a quality undergraduate education for generations of Black Alabamians and Blacks across the nation. Second, ASU and AAMU should be provided the funding and support that would enable them to become flagship institutions capable of providing Blacks and whites with the kind of educational experience conducive for the development of social leaders. Had there been no racial discrimination nor the resulting dual system of education, these institutions might very well have become Alabama's current flagship institutions.<sup>191</sup>

We realize that to achieve these goals a great deal of money will be required. Where will this money come from in these stringent economic times? Given its vital importance, this goal warrants extreme action. It may very well prove necessary to eliminate (or merge under ASU or AAMU with) AUM and UAH or even Auburn University. In this manner, resources could be freed up and redirected to enable the Black schools to achieve the status of desegregated flagship institutions. We are clear on the gravity of this position. However, we are equally clear about the gravity of a century of Black oppression and racial discrimination in higher education in the state of Alabama. The real question is whether America can ignore this past and current form of undemocratic oppression and yet still be considered the shining symbol of democracy. What Eastern Europe and other countries teach us is that the deep-seated oppression of a people cannot stand forever.<sup>192</sup>

The courts will play a crucial role in determining what is to happen with America's dual system of education. We believe the courts should come to grips with institutional inequality. It is institutions that largely determine the fate of Americans, and it was the institutional behavior of the state and the TWIs that was largely responsible for Alabama's unequal,

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190. *Knight v. Alabama*, 787 F. Supp. 1030 (N.D. Ala. 1991).

191. *Post-Trial Proposed Findings*, *supra* note 26, at 600-01, 650.

192. ALEKSANDR SOLZHENITSYN, *THE GULAG ARCHIPELAGO, 1918-1956* (1973); Jeffrey C. Alexander, *The Return to Civil Society*, 22 *CONTEMPORARY SOCIOLOGY* 797-803 (1993).

dual system of education. If the courts fail to direct their analyses and wisdom squarely on the institutional nature of these dual systems of education then they fail to confront the real nature of the beast. The political, economic, and social data generated by the *Knight* plaintiffs make it clear that a complex system—the state, state organs, and the TWIs—was and is responsible for the dual system of higher education in Alabama. If the courts fail to recognize and address this nexus, then they will perpetuate the racist legacy.

The nation and its courts must now ponder the future of America's dual, unequal system of education. The solutions proposed for "separate but unequal" in higher education usually take the form of "race-neutral" integration plans.<sup>193</sup> These plans seek to "dismantle" the prior de jure segregation system in order to improve Black educational opportunity. Problems arise, however, in that under such plans Black people, Black communities, Black institutions—specifically, TBIs in this case—carry a disproportionate sacrifice relative to their white counterparts.<sup>194</sup> Decision-making about which schools to close, the programs to be phased out, which professors to retain, and the students to be admitted exclude disempowered Blacks and are made by whites in such a way as to ultimately privilege TWIs.<sup>195</sup> The end result is that actions supposedly taken to expand Black educational opportunity in fact often have an opposite effect.<sup>196</sup>

Wendy Brown-Scott attributes such unintended negative effects on Black higher education outcomes to the false premises used by courts.<sup>197</sup> As a corrective, she argues for "race-conscious" judgments and remedies:

"Thus I base my proposed remedy on a concept of equality that takes race into account and treats African-Americans differently from whites, in order to end the perpetuation of white supremacy in systems of higher education and to close the gap between racial reality and the Constitution."<sup>198</sup>

This approach, she goes on to argue, would be consistent with the *Fordice* court's recognition ". . . that race-neutral remedies fail to address racial subordination, and the discrimination that results from it. . . ." <sup>199</sup> It would also find validation in Justice Blackmun's concurring opinion in *Regents v. Bakke*<sup>200</sup> where he states that

. . . in order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some people equally, we must first treat them differently. We cannot . . . let the Equal Protection Clause perpetuate racial supremacy.<sup>201</sup>

Translated into the context of *Knight v. Alabama*, Professor Brown-Scott's and Justice Blackmun's conclusions argue forcefully for the maintenance and enhancement of historically Black institutions. This should in

193. Brown-Scott, *supra* note 12, at 46.

194. *Id.* at 48-50.

195. SANSING, *supra* note 15, at 140-155 (1990).

196. CRUSE, *supra* note 180.

197. *Id.* at 74-75. For example, Blacks are inferior to whites; Blacks desire to assimilate or become like whites; integration is the sole route to equality between the races.

198. Brown-Scott, *supra* note 12, at 66.

199. *Id.*

200. 438 U.S. 265 (1978).

201. *Id.* at 407 (Blackmun, J., concurring).

turn be coupled with programs to increase African American representation in traditionally white institutions. Properly managed, initiatives aimed at increasing white student representation at historically Black universities could help to maintain and enhance these institutions. Together these initiatives would serve to redress the sad history of Black exclusion and deprivation in American higher education. Simply put, the challenge requires that this nation's courts decide whether they will commit to protect the legacy of Autherine Lucy or that of George Wallace. We can only say that if Lucy's legacy is not protected by a democracy, then God help us all.

IV. CONCLUSION: *KNIGHT V. ALABAMA* 1991, *U.S. V. FORDICE* 1992, AND *KNIGHT V. ALABAMA* 1995

In December of 1991, District Court Judge Harold L. Murphy issued a ruling in the *Knight v. Alabama* case. The ruling was based on the testimony of approximately 200 witnesses and hundreds of thousands of pages and exhibits. Indeed, massive resources were expended by the plaintiffs and the defendants, for each side recognized that this case had the potential to alter the very nature of higher education in the state of Alabama—and possibly, in the nation as a whole.

In a 360-page opinion, the Court issued findings on all the major issues brought before it. The main finding was that vestiges of segregation still exist in Alabama's public university system. This was an important ruling for it contradicted the defendants' claims that race no longer played a role in higher education in Alabama. Contrary to the defendants' view, the Court made it clear that a number of current practices and arrangements generated differential racial outcomes and could, therefore, not be defined as having a race-neutral character. Nevertheless, to understand fully the gravity of the Court's ruling, it is crucial to identify which areas the Court found vestiges of segregation to be operative. It is these decisions that determine whether the system of higher education in Alabama will remain largely intact or must undergo fundamental changes.

The *Knight* plaintiffs sought fundamental changes in the Alabama system of higher education. They argued that the limited missions of the state's two Black universities resulted from racist actions by whites designed to keep African Americans subordinate. In their view, these limited missions were vestiges of segregation that prevented the two Black institutions from becoming flagship institutions comparable to Auburn and the University of Alabama. The plaintiffs asked the Court to change the missions of the two Black schools so they could receive the kind of resources that would enable them to become flagship universities. Additionally, the plaintiffs argued that Black people had no real power in the predominantly white institutions because of their lack of significant representation on boards, in the administration, and on the faculties of these institutions. They sought to change these imbalances, arguing that these vestiges of segregation prevented African Americans from having any real impact on the system of education.

The *Knight* plaintiffs also argued that the curricula of the predominantly white institutions were vestiges of segregation because they largely ignored the culture and history of African Americans. The lack of atten-

tion to the African American experience was thought to be especially damaging because an important function of education is to empower people by enabling them to learn and to understand their history and culture. In short, major changes in the structure of higher education would have been necessary if the court had ruled that the missions of the two TBIs were vestiges of segregation; the low representation of African Americans on the boards and faculties of TWIs were vestiges of segregation; and the content of the curricula at the TWIs were vestiges of segregation. If vestiges of segregation were found to be deeply rooted in these areas, far-ranging remedies would be required to correct the situation.

The court ruled that the institutional missions of the TBIs were not vestiges of segregation. Similarly, it ruled that the racial compositions of the TWI's boards and faculties were not vestiges of segregation. Finally, it ruled that the content of the curricula of the TWIs was not a vestige of segregation. These decisions meant that the Alabama system of higher education would not be required to make fundamental structural changes.

Nevertheless, the Court did find vestiges of segregation to exist in some important areas. These included facilities at TBIs, state funding, faculty and administrative employment at some of the TWIs, and the admission policies of some of the TWIs. The Court ordered the TWIs to formulate plans to eradicate these vestiges of segregation. The Court made it clear that the state of Alabama has an obligation to make sure that its institutions of higher learning operate in a nonracist manner and that they should serve the interests of all citizens equally.

One can draw certain conclusions from the 1991 court ruling. One is that some additional resources would be made available to strengthen the state's two TBIs. Second, additional pressure will be applied to the state's TWIs to increase the representation of African Americans on their boards and faculties. Third, there is an ongoing need to monitor both TWIs and TBIs to make sure the system of higher education operates in such a manner as to educate students irrespective of race. Finally, the basic nature of the TBIs and the TWIs will remain intact for years to come. What appears to be clear from this ruling is that the outcome of the struggle between the legacies of Autherine Lucy and George Wallace is yet to be determined insofar as higher education is concerned in the state of Alabama.

The United States Supreme Court overturned the Fifth Circuit Court of Appeals decision in the landmark case *United States v. Fordice*. While this case has been known by various designations over nearly twenty years of litigation (e.g., *Ayers v. Allain*) the issues have been consistent. The case has always been about achieving equal opportunity for African Americans in higher education. On January 28, 1975, Jake Ayers brought a class action suit against the Governor of Mississippi, the Board of Trustees of State Institutions of Higher Learning of the State of Mississippi, the Commissioner of Higher Education and other officials, and the five historically white universities in the State of Mississippi, charging racial discrimination against Blacks in the public system of higher education in violation of the U.S. Constitution.<sup>202</sup> Seventeen years later, the case was argued before the

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202. *Ayers v. Allain*, 674 F. Supp. 1523, 1526 (N.D. Miss. 1987).

United States Supreme Court. Over the years, the case came to be known as the equivalent of *Brown v. Board* for higher education. Like *Brown*, *Ayers* was to provide the basis for overturning "separate and unequal" treatment for Blacks in public education, however in this case, at the level of higher education. The Supreme Court's *Fordice* ruling required a re-visitation and retrial of issues raised in the 1991 *Knight v. Alabama* court decision.<sup>203</sup>

In light of the Supreme Court's findings in *United States v. Fordice*, the U.S. Court of Appeals, Eleventh Circuit affirmed in part, reversed in part, vacated in part, and remanded for retrial Judge Murphy's 1991 decision in *Knight v. Alabama*.<sup>204</sup> Of particular significance to the Court of Appeals decision was the three-step analysis prescribed by the Supreme Court for determining whether a state had fulfilled its responsibility to desegregate public higher education. *Fordice* rejected the contention that simple "abolition of the legal requirement that whites and blacks be educated separately and . . . establishment of racially neutral policies not animated by a discriminatory purpose" are sufficient to discharge a state's duty to dismantle "root and branch" its prior dual system.<sup>205</sup>

Instead, a more rigorous standard required a three-step assessment. In the first step, it must be demonstrated that a contemporary policy in the operation of the state's system of public higher education is traceable to past segregation. Secondly, it must be shown that the policy traceable to past segregation (i.e., "vestige") has current segregative effects. Lastly, where vestiges are still in force and where these continue to have segregative effects, it must be shown that these policies have not been reformed to the extent practicable and consistent with sound educational practices.<sup>206</sup> To the degree that plaintiffs are able to meet these standards, the state must be judged to be in violation of the Fourteenth Amendment which guarantees equal protection under the law. In the *Fordice* decision, the Supreme Court resoundingly rejected Governor Wallace's legacy in Alabama higher education and embraced that of Autherine Lucy, thus necessitating the 1994-95 retrial of *Knight v. Alabama*.

The Court finds that although the historically black institutions play an important role in higher education, Alabama State University and Alabama A&M University have maintained and asserted their black heritage in ways, and to a degree, that has a segregate effect on student choice. The Court concludes that Alabama State University and Alabama A&M University must henceforth act in a manner such that their pride in their heritage does not hinder their, the state's, or the Court's efforts to reduce segregative effects on student choice.<sup>207</sup>

So reads a significant passage from the August 1, 1995 ruling rendered by Federal District Judge Harold L. Murphy in *Knight v. Alabama*. Despite the overwhelming preponderance of evidence pointing to Alabama's legacy of de jure and de facto "white supremacy in higher education,"

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203. *Knight v. Alabama*, 14 F.3d 1534 (11th Cir. 1994).

204. *Id.* at 1557.

205. *Id.* at 1540.

206. *Id.* at 1540-42.

207. *Knight v. Alabama*, Civil Action No. CV83-M-1676 (N.D. Ala. 1991), *Findings of Fact, Conclusions of Law and Remedial Decree*, p. 97.

Judge Murphy chose to place disproportionate responsibility for the perpetuation of separate and unequal treatment with the state's historically Black institutions. Explicit in his ruling is the conclusion that Alabama State University and Alabama A&M University must become less Black in order to eradicate vestiges of racial discrimination in the Alabama system of higher education. In fact, Judge Murphy concludes his nearly 300-page decision with an admonishment to Black universities:

In order to meet their responsibility of removing the remaining vestiges of segregation from Alabama State University and Alabama A&M University, the leadership of each of those institutions must take responsible action in areas in which they have been deficient in the past. . . . The administration, board of trustees, faculty, staff and student body of the universities must provide an atmosphere of openness and welcomeness to other-race students which has not been a consistent practice in the past.<sup>208</sup>

Beyond chastising historically Black institutions for contributing to their own segregation and for helping to perpetuate racial discrimination, Judge Murphy ordered the state to provide some remedial relief for Alabama State University and Alabama A&M University. Under one provision, the state must pay one million dollars a year, over a period of fifteen years, to establish a Trust Fund for Educational Excellence at each school. The state was also instructed to make available an additional one million dollars a year, over the fifteen-year period, as matching money for successful university efforts at independent fundraising. These trust funds were to make available a pool of forty-five million new dollars to be devoted to the enhancement of academic quality at these institutions. Expenditure of these funds is expressly limited to: 1) academic scholarships based upon academic excellence, 2) endowment of department chairs to attract distinguished faculty, 3) merit pay for high-achieving, currently employed faculty, and 4) creation of lecture series to attract nationally recognized scholars. Each of these activities was seen by the Court as contributing to the enhancement of educational quality in academics, instruction, and public service at the affected institutions. It was also expected that these activities, especially the lecture series, would help to attract all segments and races in the area onto the campus and, in the process, would help to improve the general image of the campus. An additional feature of the remedial decree was the creation of "diversity scholarships." The state is to pay Alabama A&M University and Alabama State University up to one million dollars a year over ten years. These funds are primarily to assist each university's efforts to diversify its student body. More specifically, the state goal is to attract and enroll other-race students (i.e., white) at these historically Black campuses: "These scholarship funds shall be managed by the University and scholarships granted in a manner which will assist in, and lead toward, the integrating of the races within the student body of each respective University."<sup>209</sup>

In a further effort to desegregate Alabama State University and Alabama A&M University, the Court sought to restrict local competition for

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208. *Id.* at 278.

209. *Id.* at 226.

undergraduate students generally and, by inference, for white undergraduate students in particular. The record revealed that many other-race students who attend predominantly Black universities in Alabama are non-traditional students living within commuting distance. At the same time, these students were offered a wealth of local alternatives for undergraduate education, which made it possible for them to avoid attending historically Black institutions while actively pursuing their educational goals. Over the years, various predominantly white four-year and two-year institutions established and maintained undergraduate education programs in Montgomery and in Huntsville that enrolled white students who might otherwise have pursued degrees at Alabama State University and Alabama A&M University. The Court deemed that by restricting the ability of historically white institutions to create new undergraduate programs and/or to expand established undergraduate programs, historically Black institutions would be given a fair opportunity to compete for white undergraduate students.

As an additional vehicle for the desegregation of historically Black institutions, the Court directed that several new, high-demand programs be implemented at these institutions. Alabama State University is to implement a curriculum and program of study in Allied Health Science. The Court also approved development of up to two Ph.D. or Ed.D. programs at this institution. In addition, Alabama State University would be the only institution authorized to offer a Master's degree in accounting in the Montgomery area. Alabama A&M University is authorized to establish undergraduate programs in mechanical and electrical engineering. It is presumed that the establishment of these high-demand programs will not only attract other-race students but also improve the quality of faculty, academic facilities, and institutional reputation.

The final feature of the Court's remedial action aims to create a single, statewide cooperative system in order to unify the efforts of Auburn University and Alabama A&M University. Within this statewide extension system, there is to be uniform pay, benefits, and personnel practices for all staff. The practical effect of these changes would be to equalize salaries and staff benefits by bringing those at Alabama State University up to par with those at Auburn University. On the other hand, the state cooperative system is placed firmly under the control of Auburn University, with Alabama State University serving as junior partner. The greater bulk of funding, staff positions, and initiatives is to be located at Auburn (e.g., System Director, Associate Director for Rural and Traditional Programs), while Alabama A&M University would house the Associate Director for Urban Affairs and New Non-Traditional Programs. Similarly, there is to be created a unified, statewide agricultural research program headquartered at Auburn University. Under this arrangement, Alabama A&M University would be eligible to compete for at least ten per cent of funding dollars available for research conducted at Alabama Agricultural Experimental Stations.

The implementation of this decree is to be overseen by a court-appointed Long-Term Planning and Oversight Committee for Public Higher Education in Alabama, working cooperatively with the Court's Monitor. Except where inconsistent, the Court's Prior Remedial Decree from De-

ember 30, 1991, is to be incorporated with the current decree (key points from this earlier decree is summarized below). The current decree is to be in force initially until July 31, 2005, subject to the Court's discretion and to subsequent legal actions.

The Court claims to have considered the full range of remedies available and to have "fashioned a Remedial Decree which, in conjunction with the prior Decree, the Court finds to be the most desegregative alternative that is educationally sound and practicable."<sup>210</sup> In fact, this decree gives with one hand while taking with the other; in the decision, slaps follow strokes. There are many features that benefit Alabama's historically Black institutions, providing resources and initiatives calculated to help strengthen academic programs at these schools. However, there is also damning indictment of these institutions, placing the onus of responsibility for racial discrimination and segregation in Alabama higher education at their doorsteps. It is also implicitly suggested that improvement in the academic quality and reputations of these historically Black institutions is contingent on an increased white presence—such a position assumes the inherent inferiority of Black institutions and of Black people. This underlying assumption rings bitterly in the ears, even as the Court goes on to assert that the transformation into an "integrated higher educational institution . . . [can be achieved] . . . without in any way limiting the tradition or diminishing the importance of each University as a historically black institution of higher learning, a bastion of black culture in America and a birthplace of the civil rights movement."<sup>211</sup>

The plaintiffs in this case are disappointed by Judge Murphy's decision, feeling that he did not challenge historically white institutions in the state to change to the same extreme required of historically Black institutions. They are relieved, however, that the Court did not order the closure or merger of historically Black universities, a real concern given the current political climate. James Blackshear, attorney for the plaintiffs, said an appeal of Judge Murphy's decision was unlikely due to fears that such an appeal might provoke the Court to order the closure of Alabama State University and/or Alabama A&M University. Blackshear, a white Alabamian said, "Basically, white America is reasserting its ownership of the country, and they have decided to put the black community in its place."<sup>212</sup>

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210. *Id.* at 199.

211. *Id.* at 279.

212. THE CHRONICLE OF HIGHER EDUCATION, Aug. 11, 1995, at A22.

# **POWER AND AUTHORITY IN THE AFRICAN CONTEXT: WHY SOMALIA DID NOT HAVE TO STARVE—THE ORGANIZATION OF AFRICAN UNITY (OAU) AS AN EXAMPLE OF THE CONSTITUTIVE PROCESS**

James S. Bowen\*

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## INTRODUCTION

This article focuses on the suitability of the Organization of African Unity (“OAU”) as a viable entity to confront Africa’s problems in the contemporary world. The article examines the feasibility of an African response to the humanitarian and state crises of the Continent—namely the structure of the OAU as functional or not for the millennium beginning in the year 2000. Looking to the twenty-first century, globalization replaces

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