

INTRODUCTION

ALABAMA'S MIRROR: THE PEOPLE'S CRUSADE FOR CIVIL RIGHTS

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I plucked my soul out of its secret place,
And held it to the mirror of my eye
To see it like a star against the sky,
A twitching body quivering in space,
A spark of passion shining on my face.

from *I Know by Soul*,
by Claude McKay²

On April 4, 2014, The University of Alabama School of Law hosted a symposium on the Civil Rights Act of 1964. The papers presented at that symposium are included in this issue of the *Alabama Civil Rights & Civil Liberties Law Review*. The symposium was an opportunity to reflect on the reasons and history behind the Act, its implementation to make real the promises of the Constitution and the Declaration of Independence, and the continuing urgency to make the principles of the Act a reality. We, in essence, plucked out the soul of our constitutional democracy's guarantee of equality under the law and held it up for self-reflection. In introducing the symposium, I note the description that appeared in the program stating the hope for the event:

This symposium is a commemoration of the 50th anniversary of the enactment of the Civil Rights Act of 1964. The passage of the Act marked the beginning of a new era of American public life. At the time it was enacted, the Civil Rights Act of 1964 was perceived by many to be the codified culmination of decades of

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² Claude McKay, *Harlem Shadows*, in *HARLEM SHADOWS* (1922).

sustained effort to provide equal opportunity for women and racial minorities. To its supporters, the Act embodied a promise to end systemic, institutional, and private barriers to women and racial minorities' full and fair inclusion in the public and economic life of the nation.

This introduction begins from the premise that we can make the teleological connection between the Civil Rights Act of 1964 and the events that transpired in Birmingham and in Alabama in 1963.³ Certainly, as the articles in this issue so ably demonstrate, the 1964 Act was the result of a struggle for human dignity and equal rights going back to the founding of this country.⁴ The articles also make plain that the Civil Rights Act of 1964 came about from a massive effort by organizations committed to achieving basic civil rights, and by individuals making monumental personal sacrifices. This introduction reflects on the organizations and people in Alabama who played a critical role in shifting the tide of history towards justice and situates the heart and soul of the Civil Rights Movement in Alabama.⁵

I

There were a people, brave and strong, who held up a mirror for America to examine its very soul. We note the Birmingham Campaign, organized by the Alabama Christian Movement for Human Rights and the Southern Christian Leadership Conference with its critical Children's Crusade, where Commissioner of Public Safety Eugene "Bull" Connor attacked children marching peacefully to claim their right to have access to public accommodations.⁶ Dr. Martin Luther King, Jr. marched with the citizens of Birmingham and was arrested and placed in jail, where he wrote his seminal letter about the crucial need to oppose injustice.⁷ As he said in

³ *Id.* at 299.

⁴ See generally CLAYBORNE CARSON, MYRLIE EVERS-WILLIAMS & MARK BAUERLEIN, CIVIL RIGHTS CHRONICLE: THE AFRICAN-AMERICAN STRUGGLE FOR FREEDOM (2003).

⁵ See DIANE MCWHORTER, CARRY ME HOME: BIRMINGHAM, ALABAMA – THE CLIMATIC BATTLE OF THE CIVIL RIGHTS REVOLUTION (2001).

⁶ For a description of the Birmingham Campaign see CIVIL RIGHTS CHRONICLES, *supra* note 3, at 222-33.

⁷ See *Letter from a Birmingham Jail*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 289-90 (James. M. Washington ed. 1986).

his letter, he had been invited to Birmingham by such leaders as Reverend Fred Shuttlesworth,⁸ who told Dr. King the story of students from Miles College, an historically black institution, who in 1962 organized and carried out a selective buying campaign (don't shop where you can't work or try on clothes or receive service equal to that of white patrons), which stung the white power structure in its pocketbook.⁹

One also notes that, in 1963, the University of Alabama was finally integrated. That process began in earnest in 1957, when Autherine Lucy and Polly Myers applied to the University of Alabama.¹⁰ They sued the university when their applications were denied after initially being accepted, and the federal court granted injunctive relief.¹¹ Autherine Lucy was the only one to attempt to register February 1, 1956, after Polly Myers' acceptance process was delayed by the university.¹² After Lucy enrolled, she was assaulted with thrown objects, including eggs, by a white mob that

⁸ *Id.* See also ANDREW M. MANIS, A FIRE YOU CAN'T PUT OUT: THE CIVIL RIGHTS LIFE OF BIRMINGHAM'S REVEREND FRED SHUTTLESWORTH 321, 330-32 (1999).

⁹ The economic impact of the Selective Buying Campaign was noted by Manis:

Yet the effort made a significant cut into the sales figures for the major downtown stores, especially during the Easter season when the African American community spent large sums on clothing. The boycott reduced Easter sales by 12 percent compared with the previous year and claimed 90 percent of black trade with the downtown stores. The efforts also drew national attention, and eventually even the local white press weighed in against the city commission's retaliatory strikes, calling for open communications between blacks and whites. The boycott proved to both white and black leaders in Birmingham that economic pressure could be brought to bear on the racial status quo.

MANIS, *supra* note 8, at 309. See also Jesse Chambers, *Miles College Role in Civil Rights Movement Has Created a Permanent Legacy*, (July 11, 2013 at 4:09 PM), http://blog.al.com/spotnews/2013/07/miles_college_role_in_civil_ri.html.

¹⁰ See E. CULPEPPER CLARK, THE SCHOOLHOUSE DOOR: SEGREGATION'S LAST STAND AT THE UNIVERSITY OF ALABAMA (1993).

¹¹ *Lucy v. Adams*, 134 F. Supp. 235 (N.D. Ala. 1955); *aff'd* 228 F.2d 619 (Former 5th Cir. 955).

¹² CLARK, *supra* note 10, at 56-57.

was stirred up by the Klan.¹³ The Board of Trustees excluded her from school three days later on the grounds that her presence ran the risk of causing civil disturbances.¹⁴ The case stood for the proposition that institutions of higher education in Alabama must be open to all, and it became the legal precedent for the eventual integration of the university by Vivien Malone and James Hood on June 11, 1963.¹⁵ Of course, we know that Governor Wallace failed to block these brave students' enrollment as Assistant Attorney General Nicholas Katzenback, backed by a federalized Alabama National Guard, ensured that desegregation order was carried out.¹⁶

In August 1963, Dr. King delivered his classic "I Have a Dream" speech from the Lincoln Memorial in Washington, D.C., with the prophetic notation of George Wallace's opposition to basic civil rights "...with his

¹³ Atherine Lucy was represented by Attorney Arthur Shores of Birmingham. The viciousness of the riots that greeted Ms. Lucy was described in a biography of Shores written by his daughters, Helen Shores Lee and Barbara Shores:

Agitators had had the needed time to bring in outsiders, and the crowds that gathered on the campus grew large and violent. Outside her classroom windows rioters shouted out death threats, "Kill Lucy!" they chanted. The hostile crowds grew from hundreds to thousands. For her safety, university officials and police surrounded Lucy and sneaked her out of class to a waiting patrol car. As they delivered Lucy to her next class in another building on campus, rioters pelted them with rocks and rotten eggs, exploded firecrackers, shattered the patrol car windows, and shouted more death threats. Later that day, police hid Lucy in the patrol car's backseat floorboard and took her to a "secret" place of safety.

HELEN SHORES LEE AND BARBARA SHORES, *THE GENTLE GIANT OF DYNAMITE HILL: THE UNTOLD STORY OF ARTHUR SHORES AND HIS FAMILY'S FIGHT FOR CIVIL RIGHTS* 161-62 (2012).

¹⁴ *Id.* at 162 -63. Lucy was later permanently expelled from the University. *Id.* at 162.

¹⁵ See *U.S. v. Wallace*, 218 F. Supp. 290 (N.D. Ala. 1963) and *Lucy v. Adams*, 224 F. Supp. 79 (N.D. Ala. 1963).

¹⁶ See CLARK, *supra* note 10. In *U.S. v. Wallace*, the Court noted, "The Honorable George C. Wallace, governor of Alabama, referring to the May 21, 1963, order entered by Judge Grooms, has stated and reiterated publicly that he will be present to bar the entrance of any Negro who attempts to enroll in the University of Alabama. He has also pledged that law and order will be maintained." 218 F. Supp. 290, at 291.

lips dripping with the words of interposition and nullification... .”¹⁷ Dr. King was referring to Wallace’s inauguration speech of 1963 where he declared, “...Segregation now, segregation tomorrow and segregation forever!”¹⁸ Moreover, Wallace had declared with every fiber of his being to preserve the Southern way of life that featured not only the separation of races, but the clear recognition of the doctrine of white supremacy and the rights of states to order society without the intervention of the central government.¹⁹ Under the banner of segregation, violence was visited upon black people with bombs, riots, and threats of violence, culminating on September 15, 1963, with the bombing of the Sixteenth Street Baptist Church and the deaths of four little girls (Addie Mae Collins (14), Cynthia Wesley (14), Carole Robertson (14), and Denise McNair (11)) and the serious injury of a fifth little girl (Sarah Collins, now Rudolph (12)). This was followed later that Sunday by the deaths of two young black boys (Johnny Robinson, Jr. (16) and Virgil Ware (13)). President John F. Kennedy best expressed the call to America to examine its soul:

If these cruel and tragic events can only awaken that city and state—if they can only awaken this entire nation—to a realization of the folly of racial injustice and hatred and violence then it is not too late for all concerned to

¹⁷ A TESTAMENT OF HOPE, *supra* note 7, at 219.

¹⁸ George Wallace, Inauguration Speech, (January 14, 1963).

¹⁹ Wallace noted in his speech that our founding fathers had established the rights of states to have a control separate from the central government, and that the same was true in racial terms:

And so it was meant in our racial lives...each race, within its own framework has the freedom to teach...to instruct...to develop...to ask for and receive deserved help from others of separate racial stations. This is the great freedom of our American founding fathers...but if we amalgamate into one unit as advocated by communist philosophers...then the enrichment of our lives...the freedom from our development...is gone forever. We become, therefore, a mongrel unit of one under a single all powerful government...and we stand for everything...and for nothing.

Id.

unite in steps toward peaceful progress before more lives are lost.²⁰

Dr. King, after just experiencing the soaring heights of the successful March on Washington, had to return to Alabama to give the eulogy for these children. He stood once more among the people with whom he marched the streets of Birmingham and went to jail to achieve a modicum of freedom in public accommodations. Yet he recognized that these young girls were "...martyred heroines of a holy crusade for freedom and human dignity."²¹ He, like the President, still maintained a hope that a positive would come from such tragedy. He said in his eulogy:

We must not become bitter, nor must we harbor the desire to retaliate with violence. We must not lose faith in our white brothers. Somehow we must believe that the most misguided among them can learn to respect the dignity and worth of all human personality.²²

These are the obvious mirrors that were held up to the soul of America. Those stories are told in the legal cases brought to enforce the *Brown v. Board of Education*²³ mandate to end segregation in public schools and in the participation of young people in pushing forward the fight for equal rights. For me, I was fascinated with the work done by a cadre of lawyers who, with diligence, perseverance and the risk of their very lives, fought segregation and George Wallace in state and federal courts. These lawyers were my heroes as I studied law and eventually became a law professor. The list of lawyers is an honor roll of warriors for justice, including: Constance Baker Motley; Julius Chambers; Norman Amaker; Jack Greenburg; Derrick Bell, Jr.; Fred Grey; Arthur Shores; Oscar Adams; and W. L. Williams, among others. Their work was part of the battle led by the NAACP Legal Defense Fund, Inc. and local attorneys to find individuals who would be willing and able to withstand the stress of going up against the white supremacists who, like Wallace, insisted on segregation forever.²⁴ As a law professor, I consider these lawyers

²⁰ Press Release, Statement by the President on the Sunday Bombing (September 16, 1963), available at <http://www.presidency.ucsb.edu/ws/?pid=9410>.

²¹ A TESTAMENT OF HOPE, *supra* note 7, at 221.

²² *Id.* at 222.

²³ 346 U.S. 483 (1954).

²⁴ See generally MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT* (2007); see also RICHARD KLUGER, *SIMPLE JUSTICE*:

exemplars for my students as they contemplate their contribution to the community.

On a personal level, I recall my own childhood and educational experiences in 1962 and 1963 in contrast to the children involved in these cases. I was attending the Green Knoll Elementary School in Bridgewater, New Jersey, a school that my father attended in the 1930's. In the spring of 1962, I was unsuccessfully completing the fourth grade with a very lackadaisical effort when it was determined that I had received the third highest score in the school on one of those achievement tests. Sensing that I might have more academic ability than I was then displaying, the school officials proposed that I repeat fourth grade and be placed in a class that was academically advanced. The only problem was that I would be the only black child in the classroom. After consulting with my parents, I repeated fourth grade in the 1962-63 school year in a class that contained the brightest children in the school. And I was the only black student. From then on, I was in the educational track that prepared me to take advanced and honors classes in high school, preparing me for college.

My experience certainly seems trivial compared with the fully segregated and brutal school systems that children my age were enduring in Alabama and throughout the South. But as I recall my fourth-grade self, living in an environment that experienced its own more subtle brand of racism (albeit not an apartheid), I tried to imagine what desegregating the schools meant for them. They were on the frontline of the battle for justice with an outcome that was hoped for but not assured. I began to wonder what it was really like for the children of Alabama, facing not only a governor with hatred-dripping lips and the Ku Klux Klan committing violent acts, but also ordinary citizens protesting the very presence of African Americans with thrown objects and spittle-laced invectives. How did they walk into a school through a gauntlet of signs that decried, "Nigger go Home!"²⁵ What strength of character did they possess to be able to seek an education when their fellow white students either left that school or engaged in hateful conduct? How lonely was it to leave their friends behind to attend a school that was indifferent, at best, to their presence?

The goal of the cases brought by these NAACP-affiliated attorneys was to enforce the mandate of *Brown*. In Alabama, the task was to challenge not only the legal system which permitted local school boards to

THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975).

²⁵ MANIS, *supra* note 8, at 151.

maintain separate schools, but also legislative provisions enacted to thwart the *Brown* decision. First, Alabama amended its constitution to declare that there was no state constitutional right to a public education.²⁶ The idea was that no one could claim a right to an integrated education or access to certain schools that had been reserved for whites. Second, Alabama and other Southern states enacted student placement laws which permitted students to enroll in or transfer to schools of their choice or schools other than the ones to which the students were assigned.²⁷ A student had to submit an application, file a variety of documents, take tests, and be evaluated psychologically.

That is what Rev. Fred Shuttlesworth had attempted to do in 1957 in order to speed up the integration of Birmingham Public Schools.²⁸ Initially, Shuttlesworth sought to enlist as many black families as possible to push the schools toward integration by enrolling in a previously all-white school.²⁹ Unfortunately, on September 2, 1957, shortly before the start of school, word spread that he planned to integrate the school, and this resulted in the Ku Klux Klan viciously assaulting a black man who just happened to be walking down a road and was not remotely involved with any of the civil

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 145.

²⁹ Under the auspices of the Alabama Christian Movement for Human Rights, Shuttlesworth sought to speed up the desegregation of the Birmingham Public Schools:

The Pupil Placement Law of 1955 governed school segregation in Alabama. Passed in the wake of the *Brown* decision, the statute gave local school boards wide latitude in determining which schools children in their district would attend. In effect, the law allowed white superintendents to keep black students out of white schools. It was viewed by Shuttlesworth and other blacks as a subterfuge to delay the Supreme Court's desegregation ruling. Fred apprised several families of the possible repercussions under this law of seeking to desegregate the white high schools. Warning of possible job loss and certain harassment that would ensue, the minister managed to persuade eight sets of parents, largely by assuring them that he would be making the same request on behalf of his daughters and the ACMHR members would guard their homes just as they guarded his.

Id. at 146.

rights activities.³⁰ After castrating him and soaking him in turpentine, they left him on the side of the road with a message to tell Rev. Shuttlesworth to stop trying to send black kids to white schools.³¹

While the other black families chose not to join Shuttlesworth in this action, he persisted with his plan. On behalf of his daughters, Patricia and Ricky, Rev. Shuttlesworth had submitted all the necessary forms, but there was a considerable delay and administrative foot-dragging in providing an answer.³² When he did not hear back from the school board, Rev. Shuttlesworth acted as if that constituted a tacit approval. On September 9, 1957, with support from members of his organization, he, his wife Ruby, and his daughters, Patricia (14) and Ruby Fredricka (12, also called Ricky), along with two other students, Nathaniel Lee (17) and Walter Wilson (12), drove to Phillips High School and were met with an angry mob that viciously attacked him and his family.³³ Shuttlesworth was attacked with bats, chains, and fists, receiving significant lacerations but no broken bones.³⁴ He had sent word to the police that this was to happen, but there were only a few police officers on hand, and they did little to stop the brutal assault.³⁵ Shuttlesworth managed to crawl back to his car and was driven to a hospital.³⁶ Somehow he managed to find the strength to attend a mass meeting that evening.³⁷

In the suit to assert the right to an unsegregated education, Shuttlesworth claimed that the Alabama Pupil Placement Act was unconstitutional.³⁸ The federal court refused to issue any injunctive relief on the grounds that the act was facially neutral but left open the possibility that the plaintiffs could come back to court later if it was found that the Birmingham school board was applying the law based on race.³⁹

Following the efforts of Rev. Shuttlesworth's family, in 1957 James Armstrong also filed a suit in federal district court to integrate the Birmingham Public Schools on behalf of his children: Dwight; Denise;

³⁰ MANIS, *supra* note 8, at 147.

³¹ *Id.*

³² MANIS, *supra* note 8, at 146-47.

³³ *Id.* at 150-52.

³⁴ *Id.*

³⁵ *Id.* at 151.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Shuttlesworth v. Birmingham*, 162 F. Supp. 372 (N.D. Ala. 1958).

³⁹ *Id.* at 384; *aff'd.*, *Shuttlesworth v. Birmingham Bd. of Educ.* 358 U.S. 101 (1958).

James, Jr.; and Floyd.⁴⁰ The suit originally charged the Birmingham schools with violating the children's Fourteenth Amendment rights under the *Brown* decision by maintaining a segregated school system, and also with the discriminatory application of the Alabama Pupil Placement Act.⁴¹ After being denied injunctive relief in federal district court, the parties appealed to the United States Fifth Circuit Court of Appeals.⁴² There, the judges found that Birmingham maintained a school district based on racial classifications and ordered it to be "...restrained and enjoined from requiring segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed, as required by the Supreme Court in *Brown v. Board of Education of Topeka*."⁴³ They were also ordered to submit a comprehensive plan for the total desegregation of the school system in Birmingham and Jefferson County.⁴⁴

With court order in hand, five students prepared to begin school in September 1963. Dwight and Floyd Armstrong had enrolled at Graymont Elementary School, a mere block from their home.⁴⁵ Richard Walker was set to start at Ramsey High School, and Patricia Marcus and Josephine Powell were to enter West End High School.⁴⁶ On September 5, on what was to be the first day, all public schools were temporarily closed on the orders of Governor Wallace. When they opened again on September 9, Rev. Shuttlesworth and James Armstrong escorted Dwight and Floyd to Graymont Elementary, where they were met by Colonel Al Lingo, head of the Alabama State Troopers, who turned them away.⁴⁷ They were confronted by white demonstrators waving confederate flags, chanting obscenities, and throwing objects, and the state troopers were of no

⁴⁰ *Armstrong v. Bd. of Educ. of City of Birmingham*, 220 F. Supp. 217 (N.D. Ala. 1963) (original order of Judge Lynn).

⁴¹ *Id.*

⁴² *Armstrong v. Bd. of Educ. of City of Birmingham*, 323 F.2d. 333 (Former 5th Cir. 1963).

⁴³ *Id.* at 338.

⁴⁴ *Id.* at 339.

⁴⁵ The story of the integration of the Birmingham City Schools can be found at: MCWHORTER, *supra* note 5 at 476-77; 488-89; MANIS, *supra* note 8, at 401-473; GLENN T. ASKEW, *BUT FOR BIRMINGHAM*, 318-19 (1997); Solomon Kimerling, *George Wallace and the Road to Sixteenth Street Baptist Church, No More Bull*, Sept. 18, 2013, www.welddbham.com/blog/2013/09/18/read-and-weep/.

⁴⁶ *Id.*

⁴⁷ *Id.*

assistance.⁴⁸ Governor Wallace activated the Alabama National Guard to control the crowds and to prevent the schools from being integrated. President John F. Kennedy federalized the National Guard so that the federal court order could be enforced.⁴⁹ The Birmingham schools were integrated even as violent demonstrations continued, including the awful bombing of Sixteenth Street Baptist Church.⁵⁰ The Board of Education and the Birmingham school administrators were also ordered to submit a comprehensive plan for the total desegregation of the Birmingham school district.

In Tuskegee, Alabama, Governor Wallace made his last stand in a schoolhouse door. In the class-action case styled *Lee v. Macon County Board of Education*, the parents of Anthony and Henry Lee (Detroit and Hattie Lee) sought to challenge the biracial school system.⁵¹ There, the District Court found that Macon County had a school system where students, teachers, bus transportation, and finances were assigned by race in violation of the plaintiffs' constitutional rights.⁵² The court ordered the school board to submit a desegregation plan by December 1963 and to begin desegregation by September 1963.⁵³ The facts in that case demonstrated that specific desegregation plans had been made and that "...the Macon County Board of Education assigned 13 Negro pupils to the previously 'white' Tuskegee High School."⁵⁴ This order was thwarted by Governor Wallace and required further injunctive relief to enforce, as reflected in a subsequent opinion by the District Court.⁵⁵ Without informing the Macon County School Board, Governor Wallace used an executive order to close Tuskegee High School from September 2 until September 9, 1963.⁵⁶ When the thirteen black students arrived by bus on Sept. 2, the Alabama State Troopers turned them away.⁵⁷ When the students again attempted to enter the high school on September 9, they were again turned away, and the Governor issued another executive order "...that no student shall be permitted to integrate the public schools of the City of Tuskegee,

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Lee v. Macon Cnty. Bd. of Educ.*, 221 F. Supp. 297 (M.D. Ala. 1963).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 300.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

Alabama.”⁵⁸ Wallace claimed authority for this action as President of the State Board of Education, which supported his takeover of the Macon County Schools.⁵⁹

All of the white students had withdrawn from Tuskegee High School by September 12 and had transferred to the Shorter High School or Macon County High School in Notasulga, or to the private Macon Academy with grant-in-aid money furnished by the state.⁶⁰ Not a thought was expressed about the applicability of the Alabama Pupil Placement Act’s stringent application process⁶¹ or whether the Macon Academy was a duly accredited school.⁶² In January 1964, the Alabama Board of Education ordered the Macon County Board of Education to close Tuskegee High School and to send “...the remaining 12 ‘Negro’ students to other schools in the Tuskegee area, meaning, send them to “the ‘all Negro’ Tuskegee Institute High School.”⁶³ The Federal District Court ordered that those students be transferred to the high schools in Shorter or Notasulga.⁶⁴

However, public officials continued to stand in the schoolhouse door when the mayor of Notasulga tried to prevent the transfer by claiming that the extra students presented a fire and safety hazard and not one more student or teacher could fit into the school.⁶⁵ In a separate suit for injunctive relief, the District Court found this was pretext to get around the order.⁶⁶ Eventually, all of the white students in Shorter and Notasulga transferred out of those schools, attending either the private, all-white Macon Academy or other schools in the surrounding districts, all courtesy of the State of Alabama.⁶⁷ By the end of the school year in 1964, six black students were in each of those high schools.⁶⁸ Subsequently, the Court ordered Governor Wallace, the State Superintendent of Schools, the State Board of Education, and the Macon County Board of Education to proceed immediately with desegregation beginning in September 1964.⁶⁹ Some of the black students

⁵⁸ *Id.* at 745.

⁵⁹ *Id.* at 754.

⁶⁰ *Id.* at 747.

⁶¹ *Id.* at 757.

⁶² *Id.* at 749.

⁶³ *Id.* at 748.

⁶⁴ *Id.*

⁶⁵ *See* U.S. v. Rea, 231 F. Supp. 772, 774 (M.D. Ala. 1964).

⁶⁶ *Id.*

⁶⁷ *Lee v. Macon Cnty. Bd. of Educ.*, 231 F. Supp. 743, 749 (M.D. Ala. 1964).

⁶⁸ *Id.*

⁶⁹ *Id.* at 758.

who attended Notasulga High School finished but could not graduate from that school because someone burned it down right before graduation day.⁷⁰

In Huntsville, Alabama, the school board was also successfully sued to desegregate in the case of *Hereford v. Huntsville Board of Education* in 1963, despite pressure from Governor Wallace not to integrate.⁷¹ Under an order from the District Court, on September 9, 1963, 6-year-old Sonnie Hereford, IV, was escorted to Fifth Avenue Elementary by his father, one of two black physicians in Huntsville.⁷² He was the first black student to attend a previously all-white public school in Alabama.⁷³ Later that morning, John Anthony Brewton entered the East Clinton School, Veronica Pearson entered the Rison School, and David (Piggee) Osman entered Terry Heights School.⁷⁴ In Mobile, Alabama, also under court order,⁷⁵ Dorothy Bryant Davis and Henry Hobdy entered Murphy High School on September 10, 1963, after first being blocked by Alabama State Troopers under orders from Governor Wallace on September 9, 1963.⁷⁶ When Wallace again attempted to utilize the National Guard, President Kennedy federalized the Guard and the system began the long process of desegregation. Only a few

⁷⁰ Maggie Martin, *Former Students Look Back 50 Years after Integration of High School*, ALABAMA PUBLIC RADIO (September 1, 2013), <http://apr.org/post/former-students-look-after--50-years-after-integration-tuskegee-high-school>.

⁷¹ Order by Judge Grooms, 573 F.2d 268 (former 5th Cir. 1978) (on file with author).

⁷² Sonnie Wellington Hereford IV, *My Walk into History*, NOTRE DAME MAGAZINE, Spring 2007, <http://magazine.nd.edu/news/9874-my-walk-into-history>.

⁷³ *Id.* See also Brandon Curnel, *In the Shadows of Birmingham: The 1962-1963 Huntsville Civil Rights Movement*, HUNTSVILLE HISTORY COLLECTION, http://huntsvillehistorycollection.org/hh/index.php?title=In_The_Shadows_of_Birmingham:_The_1962-1963_Huntsville_Civil_Rights_Movement.

⁷⁴ Lee Roop, *Father and Son Who Integrated Huntsville City Schools 50 years ago Will Recreate Famous Walk to Fifth Avenue School*, AL.COM (September 6, 2013, 9:21 AM), http://blog.al.com/breaking/2013/09/father_and_son_who_integrated.html; see also *Unsung Heroes are Honored and Remembered for Their Courage to Integrate Huntsville City schools 50 Years Ago*, SPEAKIN OUT NEWS (2013),

www.speakinoutnews.info/091113_Huntsville_City_School_Integration.html.

⁷⁵ *Davis v. Bd. of Sch. Comm'r of Mobile Cnty, Ala.* 322 F.2d 356 (former 5th Cir. 1963).

⁷⁶ RICHARD A. PRIDE, *THE POLITICAL USE OF RACIAL NARRATIVES: SCHOOL DESEGREGATION IN MOBILE, ALABAMA, 1954-1997*, 40-43 (2002).

minor demonstrations instigated by the white Citizens Council ensued, and those quickly faded away.⁷⁷

President Kennedy, in trying to “read the signs” of justice for all America and understanding that the “sweet joy and grace”⁷⁸ of freedom have been for too long robbed from fellow citizens on account of race, boldly presented the proposed Civil Rights Act on the evening that the United States Justice Department, supported by the Alabama National Guard, secured equal educational opportunity at the University of Alabama.⁷⁹ He called it a “moral crisis” that must be addressed by every American if we were to stem the rising tide of interracial violence.⁸⁰ He noted that racial oppression had gone on for far too long.⁸¹ Such a state did not align with the ideals of freedom and democracy that the United States promoted around the world.⁸² The nationally televised speech was a clarion call to examine the American soul, plainly stated by the President as follows:

I hope that every American, regardless of where
he lives, will stop and examine his conscience about this

⁷⁷ *Id.*

⁷⁸ Claude McKay, *I Know My Soul*, in *HARLEM SHADOWS* (1922).

⁷⁹ John F. Kennedy, Address on Civil Rights (June 11, 1963), *available at* <http://www.millercenter.org/president/speeches/speech-3375>.

⁸⁰ *Id.*

⁸¹ President Kennedy observed:

One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free. They are not yet freed from the bonds of injustice. They are not yet freed from the social and economic oppression. And this Nation, for all its hopes and all its boasts, will not be fully free until all its citizens are free.

⁸² *Id.*

We preach freedom around the world, and we mean it, and we cherish our freedom here at home, but are we to say to the world, and much more importantly, to each other that this is a land of free except for the Negroes; that we have no second-class citizens except for the Negroes; that we have no class or cast system. No ghettos, no master race except with respect to Negroes?

Id.

and other related incidents. This Nation was founded by men of many nations and backgrounds. It was founded on the principle that all men are created equal, and that the rights of every man are diminished when the rights of one man are threatened.

Today we are committed to a worldwide struggle to promote and protect the rights of all who wish to be free. And when Americans are sent to Viet-Nam or West Berlin, we do not ask for whites only. It ought to be possible, therefore, for American students of any color to attend any public institution they select without having to be backed up by troops.

It ought to be possible, in short, for every American to enjoy the privileges of being American without regard to his race or his color. In short, every American ought to have the right to be treated as he would wish to be treated, as one would wish his children to be treated. But that is not the case.⁸³

We honor the leaders and the lawyers who valiantly pushed forward this monumental series of litigation designed to not only secure the constitutional rights of the children named in the suits, but to fundamentally dismantle the system of educational apartheid. As noted earlier, 1963 in Alabama was key to the introduction and passage of the Civil Rights Act of 1964. The courage and tenacity of the students who went through this crucible should never be forgotten. It is clear that the bombing of the Sixteenth Street Baptist Church, on what was hailed as Children's Day four days after the Birmingham, Huntsville, and Mobile schools were integrated, was a violent last spasm to quash the dreams of freedom and justice that these children carried in the secret places of their hearts. We should not only forever tell their stories, but we must also critically reflect on that moment in time to find wisdom for the struggles of today that confront our young people.

⁸³ *Id.*

II

The discourse shared at this symposium was truly inspiring. We invite you to join in a continuing dialogue on the Civil Rights Act of 1964 by considering the thoughtful articles present herein. Each, in its own way, holds up a mirror through which we can glimpse the historical and contemporary significance of the Civil Rights Act of 1964. They make a valuable contribution to the civil rights jurisprudence and amply demonstrate that there continues to be a Civil Rights Movement, and that the effort to make manifest the guarantee of equality continues.

The challenge of reading statistical disparity as evidence of racial discrimination is taken up by Professor Trina Jones. She reminds us of the strides made in employment opportunities with the application of Title VII of the Civil Rights Act of 1964. She explains how sophisticated analysis to find illegal discrimination beyond purposeful intent is reflected in the disparate impact test by using statistics to show racial disparity. However, increasingly, this approach is being challenged as an illegitimate basis for finding discrimination. Accordingly, unconscious biases that have the effect of limiting employment opportunities are difficult to prove and rectify. Furthermore, contemporary Title VII jurisprudence is not keeping up with new discriminatory challenges in the workplace. For example, in spite of advances, albeit slow, in Supreme Court doctrine on sexual orientation (the right to marry someone of the same sex is an emerging reality), there is no statutory basis for protection against discrimination based on sexual orientation. Professor Jones suggests that it is difficult to find grounds for protection against discrimination based on sexual orientation using the analysis generally applied to gender.

Professor Jones explores the theory of formal equality as the measuring rod for finding discrimination and suggests some doctrinal limitations. With formal equality, if all races are treated alike and there is no finding of purposeful discrimination, then there is no need to speculate about disparate impact or low numbers of hires. Furthermore, race cannot be used to level the playing field through affirmative action or diversity programs. Claims of unconscious bias are not reached if formal equality is maintained. Therefore, she concludes that we are left with the challenge of articulating the purpose of anti-discrimination laws in a contemporary context where statistical differences are beyond the law's reach to rectify discrimination that is not demonstrably purposeful.

Professor Alfred L. Brophy examines Title II of the Civil Rights Act of 1964, which requires equal access to public accommodation regardless of race, gender, national origin, or religion. He is interested in how that provision changed our notions of property rights. His analysis suggests that

the Act "...was radical and rebalanced the line between public and community rights and private rights." Professor Brophy asks us to take seriously the arguments of the opponents—that is, the Act is radical and changed the concept of individual property rights. Opponents of the Act made a variety of claims that the Act was an unconstitutional infringement of private property rights that have historically been recognized. Fundamentally, there was the fear of the central government infringing on the rights of states and individuals by expanding its regulatory reach. Was this a slippery slope towards socialism or communism? Was the idea of state action so expansive that any attempt to enforce traditional rules of trespass and the free use of one's property would mean that the right to hold and use property would disappear? And if there was a societal reason for forcing integration, was this a taking of property without just compensation? Professor Brophy considers these and other questions and concludes that the Civil Rights Act of 1964 did indeed place some limits on property rights to enforce the needs of the community, especially recognizing the negative impact of discrimination on commerce. More importantly, the Act recognized the necessity to increase human rights by offering access to previously denied public accommodation, thereby giving meaning to other constitutional rights. It also helped buttress our standing in the world of global politics as the Cold War raged.

Professor Dorothy A. Brown considers the issue of diversity, or lack thereof, in the workplace, especially in large high-tech corporations like Facebook, Google, LinkedIn, Twitter and Yahoo. Reviewing recently released data on hiring minorities, Professor Brown notes that, unlike with Asian employees, the numbers of blacks and Latinos in the workplace are woefully low considering their numbers in the general population. Even for Asians, there is a dearth of minorities in senior management and on boards of directors. Claims by the tech industry that they would hire and promote minorities if they could find them—the so-called pipeline problem—ring hollow, especially for Asians because of their significant numbers in the workforce but not in leadership positions. Professor Brown finds that, while we have overcome explicit discrimination, there are still pathways to opportunity that are effectively closed for minority employees.

Professor Brown's challenge is to uncover unconscious bias in the workplace where people tend to hire and promote folks who are similar, despite the fact that a significant portion of the high-tech customer base is made up of minorities. She prescribes a first step by those in current leadership positions, i.e. white males, of acknowledging that there is a diversity problem that stems from unconscious bias. Second, she says, the

racial dynamics of the workplace must address stereotypes and racial or cultural biases. Third, based on this study, the leadership level must express a strong commitment to diversity, institute training on the subject, and measure success in achieving diversity; in other words, positive progress to weed out the vestiges of racial discrimination in employment can be confronted and corrected if the will is there.

Professor Gregory S. Parks and his co-authors, Rashawn Ray and Shawna M. Patterson, broaden the consideration of the Civil Rights Act of 1964 by discussing the longer, deeper history of black social, cultural and political organizations' role in the struggle for civil rights. As they indicate, the struggle has been long and many organizations were formed over the 20th century that strove to achieve the promise of freedom, equality and justice. There are two fundamental themes that are woven throughout the article. First, the main focus is on the founding and development of Black Greek Letter Organizations with a review of their role in the fight for civil rights. The Alpha Kappa Alpha Sorority is used as a case study, although the history and activities of other fraternities and sororities are also included. Second, the authors approach their review in terms of the idea of racial uplift, or working to improve the lives of African Americans in a society designed for racial oppression in custom and in law.

Their historical review of African American organizations, including such mainstays as the NAACP, National Urban League and the Prince Hall Free Masons, reminds us that the Civil Rights Movement extends back through the founding of the country. We learn that AKA was a vital part of that movement, collaborating with other organizations and providing leadership to achieve gains in many arenas. Having examined the legacy of civic activism, the authors critique the AKA and other Black Letter Greek Organizations in terms of the current commitment to racial uplift. They explore a number of challenges facing these venerable organizations, including issues of racial identity, homophobia, the lack of strong organizational commitment, and achieving academic success on college campuses. The main conclusion reached is that, while these organizations were an essential part of the Civil Rights Movement, critical self-reflection and rededication to the cause of racial uplift are needed in order to stay relevant in the continuing fight for justice.

Professor Jasmine B. Gonzales Rose urges us to take a deeper look at contemporary challenges of racial discrimination by examining language (persons who speak a non-English language) and language ability as a source of rights to be considered under the Civil Rights Act of 1964. Specifically, while the Civil Rights Act was implemented in large measure to tackle the Jim Crow system of oppression against African Americans, the classic doctrinal analysis for finding racial discrimination does not easily

accommodate discrimination grounded in language. The Act identifies race and national origin as markers for stating a claim of discrimination in the various equality realms, such as housing, employment, education, etc.; Professor Gonzales Rose considers how Latinos can be discriminated against through language and language ability and the discrimination may not be viewed as being within the purview of the Act. Race and national origin could be said to be immutable characteristics, but language is not.

Professor Gonzales Rose presents a historical and contemporary review of discriminatory cases in education, employment, public accommodations, and access to the justice system. She ably demonstrates how language can be a proxy for discriminatory treatment based either on race or national origin. First, Latinos are often thought of as a racial, and not just a cultural, classification, especially when skin color is taken into account.⁸⁴ Notwithstanding that Spanish-speaking persons or persons with Spanish surnames can come from many different nations and even the United States, language identification can become a trope for racial classification leading to purposeful or unconscious discrimination. Second, under the Act, there is a definitional challenge in stating exactly what is meant by national origin. How inclusive is this term and does it have a generational component, i.e., how far back in one's ancestry do we have to go? Moreover, Professor Gonzales Rose posits that there exist biases against persons who are not native or accomplished English speakers. Hence, some Latinos experience unequal treatment because of a "perceived foreignness." By studying the intersectionality of race, national origin, and language, Professor Gonzales Rose states a powerful case for developing civil rights doctrine in a manner that takes account of language and is still consistent with the principles of the Civil Rights Act of 1964.

Professor Richard Delgado offers his contribution to honor the late Professor Derrick Bell, the nation's most preeminent scholar on race and the law. Professor Bell was also a civil rights lawyer active in the NAACP Inc. Fund's drive to enforce equality and promote justice, especially in public schools. Delgado applies Bell's interest convergence theory to the Civil Rights Act of 1964. The heart of the theory is that blacks and other minorities make social, economic, and political progress when their interests align with the interests of elite whites. Delgado critiques the standard traditional analysis that ties the legislation to massive civil rights activism and consciousness-raising of political leaders. Delgado's deeper

⁸⁴ I will leave to another day the discussion of whether, scientifically, humans can adequately be said to belong to separate races other than **human**.

analysis explores the impact of global economic and scientific competition with the former Soviet Union as the underlying motive for the passage of the Civil Rights Act of 1964. He concludes that these interests are no longer aligned, and thus the protections of the Act are being frittered away.

Our country had no choice but to pass the Civil Rights Act of 1964 because the essence of America's soul is freedom, justice, and equality. The children of Alabama made America glimpse, even if only in part,⁸⁵ its highest values in the mirror of their strength, perseverance, dignity, and deep desire to live free. The articles in this issue call for continued vigilance to not only maintain the hopes and dreams of the people who struggled and sacrificed, but also to continue the struggle in contemporary situations where rights and opportunities are limited by the essential qualities of each individual.

⁸⁵ In Claude McKay's poem he expresses a sense of hope in saying, "I need not gloom my days in futile dread, Because I see a part and not the whole." *Supra* note 2. The articles in this issue fill in some of the missing parts of the analysis.