

No Clue

White American Affirmative
Action Exists and Demands a
Moral Revival Now!



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Action Exists and Demands a
Moral Revival Now!



Jonathan K. Stubbs

with the late Oliver W. Hill, Esq.



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ISBN: 978-1-946074-43-0

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Twelve Tables Press
P.O. Box 568
Northport, New York 11768
www.twelvetablespress.com

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This book is dedicated to Oliver W. Hill, Esq.,
activist, freedom fighter, fearless attorney,
and champion of the despised, rejected, and abused.

Affirmative action, as currently understood and promoted, is also ahistorical. For more than 200 years, white males benefited from their own program of affirmative action, through unjustified preferences in jobs and education resulting from old-boy networks and official laws that lessened the competition. Today's affirmative action critics never characterize that scheme as affirmative action, which of course it was. By labeling problematic, troublesome, and ethically agonizing a paltry system that helps a few of us get ahead, critics neatly take our eyes off the system of arrangements that brought and maintained them in power, and enabled them to develop the rules and standards of quality and merit that now exclude us, make us appear unworthy, dependent (naturally) on affirmative action.¹

—Professor Richard Delgado

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Author's Note



OLIVER W. HILL, ESQ., was sitting in his reclining chair late one afternoon shortly after the dawn of the twenty-first century. I had just read to him an excerpt from a law review article that I had drafted involving race and human rights. Mr. Hill commented that academicians often used long and complicated sentences (I could not help but wonder who he might have meant!). He said to me, “We need to write a book. Something for the man in the street.”

Mr. Hill explained that “we have a whole lot of denial in this country.” Specifically, he singled out the general public’s lack of knowledge regarding history, race, and the law in America. From his perspective, many people in the United States had no clue that from colonial times to the present day, the law has been used to create and maintain advantages for White persons. In other words, legalized White American affirmative action exists and is nothing new. Mr. Hill was keenly aware of that reality.

In these circumstances, Mr. Hill was convinced that we could perform a valuable public service by producing a short book for the everyday reader. He suggested that such

a book use uncomplicated language, with the goal of providing facts for thoughtful discussion. He also stated that such facts as opposed to myths could be helpful in the context of hot debates regarding issues like “confederate heritage” and affirmative action for people of color.

I readily agreed with Mr. Hill and began to research material for the book. He was approaching 100 years of age, was blind, and hard of hearing. Accordingly, I felt some urgency in getting the book done.

We ran into some obstacles. Mr. Hill was hospitalized with a serious medical condition and not long afterward I was diagnosed with early stage prostate cancer. Nevertheless, we both remained committed to the project. Mr. Hill steadily recovered and God gave me a healing touch.¹

On August 5, 2007, we had a nearly complete draft done when Mr. Hill died suddenly at age 100. Having known him for over 15 years and having worked with him on his autobiography, Mr. Hill had become more to me than just the most senior human rights lawyer in America, he was also my friend. The shock of losing a dear friend has been great; nevertheless, I have worked hard to make this document that we began together a fitting expression of some of his and my beliefs. Any errors, omissions, or shortcomings in this work are mine alone.

The goal of this book is not to provide a quick and easy fix to a centuries-long American problem: how to create a society committed to “liberty and justice for all.” The book has more modest goals. It discusses selected historical facts. Such facts can prod us to effect constructive societal change and create opportunities so that individuals can reach their maximum potentials.

How could we reach this goal?

So kind of you to ask.

In his autobiography, Mr. Hill pointed the way. He argued that we should start at the bottom of the social ladder and work our way up:

[W]e should seek new and unique ways of helping human earthlings starting with those below the poverty level and moving upward, at least through the lower middle class. In an evolutionary fashion, we must find ways through economic development—for example labor, industry and discovery—to help those at the bottom to receive a larger share of the economic wealth derived from labor, technology and natural resources.

Business is no more important than technology, health services, or recreation. We need all these things. Consequently, people ought to be trained to do whatever their talents enable them to do; and then work cooperatively to utilize these talents for the benefit of all people.²

In concluding these comments, I offer a few additional observations. First, Mr. Hill firmly believed that change was inevitable, and that humans must guide change for the good of all. His approach was consistent with Charles Hamilton Houston's view that lawyers should be "social engineers."³

Second, Mr. Hill's worldview was broad. He was concerned not just with human rights in the United States, but also globally. Third, Mr. Hill recognized that humans are part of the vast expanse of the universe. We are living beings on earth: in other words, we are earthlings. In fact, because we are humans living on earth, he referred to us as "human earthlings." He recognized that at this crossroads in human history, we—human earthlings—are poised to leave our earthly home and explore other parts of the universe.

Accordingly, we must be broad minded. For instance, we need to abandon pedestrian and destructive earthly distractions like engaging in violent conflicts based on skin color as well as material wealth. Instead, we should embrace a more cosmic consciousness.⁴

Indeed, Mr. Hill asked, “Why do we look up when we speak of heaven?” He suggested that it might be more accurate to “look out and over.” Look out from our earthly home, and over the breadth of creation.⁵

As we look out and over the physical universe, we need also to look into the mirror. Let’s each ask a personal question: What can I do to make myself and the world better? How can I help to “childproof the world”? In other words, what can I contribute to make earth a safe place for all children to live and reach their potential? To be bold and blunt: What can I do to treat others as I want to be treated? What can I do and who do I need to be to exemplify “love your neighbor as yourself”? In sum, who do I need to be and what do I need to do to nurture the change that I wish to see?

Foreword¹



OLIVER HILL SR. IS ONE OF MY HEROES of the civil rights generation. Born in Richmond, Virginia, on May 1, 1907, Hill lived beyond his centennial anniversary (May 1, 2007) and died shortly thereafter. I met him on several occasions and all of our meetings were incredibly memorable.

When I first met Oliver Hill, he was still actively practicing law in Virginia even though he was in his nineties. I remember being involved in a death penalty case early in the twenty-first century, and went to Virginia to plead with the governor to give this person, who was on death row, an opportunity to serve a life sentence rather than the death penalty. I was more than surprised when Hill joined me in my plea with the governor. When I asked him why he was there, he responded, “Professor Ogletree, I have been meeting with the last eight governors of Virginia about the death penalty, and I certainly wouldn’t miss this one.” The idea that someone would have been involved for many decades against the death penalty and persistently meeting with governors from Virginia only reinforced my respect for this great man.

When Oliver Hill went to Howard University School of Law, his classmate and best friend was none other than Thurgood Marshall.² Born in Baltimore, Maryland, Marshall had earned his undergraduate degree from Lincoln University, a historically Black university in Oxford, Pennsylvania.

At the inception of their careers, Hill and Marshall received expert tutelage from Charles Hamilton Houston, a Howard University School of Law graduate who served as the vice dean at Howard University School of Law.³ Houston was born in Washington, DC, in 1895 and died in 1950. In his 54 years, Houston contributed immensely to the preparation of people like Thurgood Marshall and Oliver Hill so that they could become effective civil rights lawyers and social engineers.⁴ When you compare Hill and Marshall with their White contemporaries who had abundant financial resources and the privilege of knowing that the White man's word would be taken as gospel, it is amazing what Houston was able to achieve. He expertly trained people at Howard University School of Law to do excellent civil rights work.⁵

For instance, upon their graduation from law school, Houston took Hill and Marshall to the national convention of the National Bar Association, a voluntary organization comprised mostly of African Americans because the American Bar Association limited its membership to Whites only. Houston introduced them to more seasoned members of the Bar and personally strategized with Marshall and Hill on a range of cases, including teacher salary equalization, criminal defense litigation, and transportation desegregation.

Early in Marshall's career, Houston served as the NAACP's Special Counsel. Houston groomed Marshall to take over Houston's responsibilities by hiring Marshall as Assistant Counsel.⁶ In that capacity, Marshall gained valuable experience trying civil rights cases around the country. Furthermore, when Houston stepped down as Special Counsel, Marshall led efforts to create the NAACP Legal Defense Fund (LDF), which carried forward much of the work that Houston and Marshall had been doing. In fact, before and

after the incorporation of the LDF, Houston, Marshall, and Hill collaborated on a wide range of human rights activities involving education, transportation, and labor relations.⁷ Marshall would later become the chief lawyer who argued *Brown v. Board of Education*.

In 1967, President Lyndon Baines Johnson appointed Marshall as the first African American to ascend to the United States Supreme Court. Marshall served with distinction. Indeed, in the late 1960s, Marshall was in the majority in some of the most important Warren-era cases. He stayed on the Court until he retired in 1991, having had a tremendous impact as a Justice who concentrated on ensuring that the rights of all people were respected and that the general public understood the role of lawyers.

Oliver Hill was not far behind. Hill spent most of his career in practice. Working with Houston, Marshall, and a team of other superb human rights lawyers, Hill won landmark cases in teacher salary equalization⁸ and transportation desegregation.⁹ In addition, Hill was lead trial counsel in the Prince Edward school case, which was consolidated in *Brown*.¹⁰ His many decades of social activism, effective advocacy, and committed leadership earned him the prestigious Spingarn Medal from the NAACP¹¹ and the Presidential Medal of Freedom from President Bill Clinton.¹²

I was personally amazed to see his enthusiasm even in his later years. His commitment to justice never abated. In fact, Hill was one of the *Brown* lawyers who I honored at Harvard Law School in the fall of 2000.¹³ At that time, we recognized all of the plaintiffs' lawyers who were living (and their descendants if they had passed away)

Not long thereafter, on the fiftieth anniversary of *Brown v. Board of Education* in 2004, Hill came to Harvard again even though he was afflicted not only with the need for a wheelchair but also was legally blind. That did not stop him from being very aggressive. For example, during a session to celebrate the fiftieth anniversary of *Brown*, Hill became agitated when one of my young colleagues from Harvard Law

School talked about the role of Black lawyers. My colleague didn't seem to either know the real firsthand history that Hill and others experienced or fully appreciate their accomplishments. Hill not only interrupted the lawyer and made it clear that the *Brown* lawyers had done something unparalleled and unprecedented in history, but he also went on to write an important essay that became a part of his remarkable legacy.¹⁴ I salute him and honor him—the Renaissance man of the Civil Rights Movement: Oliver Hill.

Charles J. Ogletree Jr.
Late Jesse Climenko Professor of
Law Emeritus
Harvard Law School

Preface



MY FATHER, OLIVER W. HILL SR., lived to be 100 years old. Born a mere 11 years after the infamous *Plessy v. Ferguson*¹ decision of the Supreme Court, which established the legal basis of American apartheid, most of his adult life was spent living under, and fighting against, laws that relegated Blacks in this country to the status of second-class citizens. In this book, he and his long-time collaborator and friend, Jonathan Stubbs, attempt to give some historical context to the notion of “White privilege,” particularly “White male privilege,” which was overtly manifested in restrictive laws more than a century before *Plessy*, and which has covertly formed the basis for much more subtle continuing race, class, and gender discrimination in this country, even beyond the lingering effects of slavery and “Jim Crow.”

One of the barriers to overcoming the racial divide that persists in contemporary times is the pervasive belief among many in society that, yes, there was racial injustice in the past, but that was long ago, and therefore they have no responsibility for, or role in, any remedies for that injustice today. This kind of thinking fuels much of the resentment toward

affirmative action by Whites who feel they are being unfairly targeted by “reverse discrimination,” or who see no need for society to address inequities of the past. One of the major accomplishments of this book is that by providing the historical thread that binds many of the legal barriers imposed by society to give advantage to some and deny advantage to others, we find a continuing trail that leads to current societal outcomes. If my great-grandfather was denied access to a job that would have led to the elevation of his family to the middle class, and someone else’s great-grandfather who was less well qualified was given that job because he didn’t have to compete against my great-grandfather, the ramifications of that set of circumstances could reverberate for generations.

However, I don’t think the point of this book is just to increase the level of “White guilt” in readers. Rather, I think the purpose is to give the sense that in this long history of racial (and gender) discrimination in this country, we are all inextricably bound together, and that we all have a part to play in coming up with solutions.

One of the most well-known cases my father was involved with was the 1954 *Brown v. Board of Education*² decision that ended the doctrine of “separate but equal” in schools, and for all practical purposes, served as the death knell for segregation in the larger U.S. society. Yet over 60 years after that decision, glaring inequities continue to exist between predominantly minority and predominantly White school districts. What started out as strictly racial (and legally mandated) disparities, has been confounded over the years by issues of class.

For example, with the fall of segregation, many Whites fled the cities in droves. As more opportunities opened up in society, often middle- and upper-class Blacks joined their White counterparts in moving to the suburbs, leaving cities and their schools bereft of an adequate tax base.

Ironically, the quality of education also suffered as women began to be given more career opportunities at the same time. It used to be that the best and brightest women

who wanted a career would often choose education, and now that there are more options, society has not put sufficient incentives in place to continue to attract the “best and brightest.”

The crisis in education is but one of the examples of major societal problems whose roots are in the racial politics of our past. Only as we come to be more aware of that story, and embrace our complete history as a nation, can we hope to effectively address these major issues. This book will make a valuable contribution to that process.

Oliver W. Hill Jr.
Late Professor of Experimental
Psychology
Virginia State University

Acknowledgments



IT HAS TAKEN TWENTY YEARS TO WRITE THIS BOOK.

Accordingly, I thank God for allowing me to make this work the best that I presently can. I also am deeply grateful for my Dear Bride, Dr. Pamela Hamilton-Stubbs, who is a life partner, medical missionary, and powerful woman of God. She sacrificed herself in innumerable ways to help me.

Thanks to my daughter, son in love, and many other family members (biological, legal, and most of all spiritual) for their encouragement and support. My spiritual family has made a decisive and positive difference: they have interceded with the Spirit ...

Thanks to colleagues and friends at the University of Richmond. Each member of that special community has made a positive contribution by helping to foster an environment where work like this can move forward. I especially note the support of the University of Richmond School of Law Library staff, including the invaluable research help of Sylvia Yanes, Esq., and her proficient team of law student assistants.

I extend additional thanks to friends and colleagues at many other educational institutions, legal advocacy

organizations (particularly the NAACP LDF), and the Oliver White Hill Foundation who have provided encouragement.

Moreover, I wish to extend my deepest appreciation to the families of Oliver W. Hill, Esq. and Professor Charles J. Ogletree Jr. Their support has had an immeasurable positive impact.

My sincere appreciation to the publisher, Steve Errick, and the production editor, Sharon Ray, for their professionalism as well as their infinite patience.

I simply wish to thank each person who contributed constructively in any way.

Finally, thanks to you, Gentle Reader, who thought it not robbery—a waste of your time—to read this book.

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