

9-1-2007

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Elaine R. Jones

NAACP Legal Defense and Educational Fund, Inc. (LDF)

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Recommended Citation

Elaine R. Jones, *Social Justice and the Law*, 42 U. Rich. L. Rev. 69 (2019).

Available at: <https://scholarship.richmond.edu/lawreview/vol42/iss1/7>

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SOCIAL JUSTICE AND THE LAW

Elaine R. Jones *

I have the privilege of being in a room full of lawyers, law students, and others who are close to the law with no red, green, or yellow light in front of me. You are on a tight time schedule and I am supposed to give this lecture on a subject about which there can be some disagreement, but since I have the microphone, it is my point of view that I get to expound with no questions and no responses. It is a wonderful position to be in; thank you University of Richmond for this opportunity. All lawyers should have it every once in a while.

I thank the University of Richmond for organizing this commemoration. A lot of work goes into putting together a conference. I was at the dinner last night, it was superb, and I know you enjoyed yesterday's sessions. You had important speakers on great topics. Your co-chairs, Justice Donald Lemons¹ and Dean Rod Smolla,² deserve special recognition for their service in contributing to this historic event. In addition, I thank Dean Roberta Sachs,³ Professor Jonathan Stubbs,⁴ and student-assistant Kristen Johnson, who have been particularly helpful to me. It is a delight to meet all of you and to see my niece Candace Jackson who is clerking for Judge Roger Gregory⁵ this year. Also, it is good to see Judge Jimmy Benton.⁶ Jimmy and I were the students who

* Former President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc. (LDF). J.D., 1970, University of Virginia; B.S., 1965, Howard University.

1. The Honorable Donald W. Lemons, Justice, Supreme Court of Virginia; John Marshall Professor of Judicial Studies, University of Richmond Law School.

2. Rodney A. Smolla, Dean and Professor of Law, University of Richmond.

3. Roberta Oster Sachs, Associate Dean for External Relations, University of Richmond.

4. Jonathan K. Stubbs, Professor of Law, University of Richmond.

5. The Honorable Roger L. Gregory, Judge, United States Court of Appeals for the Fourth Circuit.

6. The Honorable James W. Benton, Jr., Judge, Court of Appeals of Virginia.

represented the 100% black participation in the Class of 1970 from the University of Virginia Law School. It is very interesting about that class; Jimmy and I were both from Norfolk, Virginia and we were in junior high and high school together, and I think that Virginia thought maybe we can trust these people from Norfolk to come up here and know how to act, and since we are having this “experiment in desegregation,” we want to increase our odds that it will go well. Therefore, they kept going back to Norfolk, and I was the first African American woman to graduate and my sister, Candace’s mother, was the second. She came out in 1972. I had no other sisters, so Virginia then had to go elsewhere.

Nevertheless, social justice issues are very interesting. I was in Turkey when I applied to law school, and Virginia had a policy like many of our southern states where if you qualified to go to the public institution then they would pay your way to go to a law school of your choosing, to which you had been admitted. Patricia King,⁷ who is now a tenured faculty member of Georgetown Law School, was a couple of years ahead of me in college. She applied to Virginia, and they did not admit her but instead paid her tuition to Harvard. I applied to the Peace Corps and said to myself, “Elaine, you are on your way to then be a test case on desegregation, or to Harvard, or maybe the State of Virginia will reach in its coffers and pay your tuition to another law school.” However, Virginia called my bluff and admitted me. The university seemed to say, “Alright, you applied, now come here and show us what you can do.” One has to be willing to do that. If you step out there and challenge a tradition or a practice, you have to make sure that you can measure up. Therefore, I decided to go to Virginia, and I think it was a positive experience for both of us. Subsequently, UVA awarded me the *Jefferson Medal in Law*.⁸ They do not give an honorary doctorate, but they do give the Jefferson Medal. There was a big dinner at Monticello, and I indicated that I thought Mr. Jefferson would be pleased. A couple of years later I

7. Patricia A. King, Carmack Waterhouse Professor of Law, Medicine, Ethics, and Public Policy, Georgetown University School of Law.

8. The Thomas Jefferson Foundation Medal in Law, awarded annually, is the highest external honor bestowed by the University of Virginia in the field of law. The University of Virginia and the Thomas Jefferson Foundation jointly sponsor the Jefferson Medal in Law. See also Jane Ford, Anne-Marie Slaughter to Receive Thomas Jefferson Foundation in Law (Mar. 14, 2007), http://www.law.virginia.edu/html/news/2007_spr/slaughter.htm (last visited Sept. 4, 2007).

went back and gave the commencement address. UVA law school is truly my alma mater.

I want to thank you on this occasion for honoring an extraordinary human being, attorney Oliver White Hill, Sr., on his 100th birthday. Oliver will be one hundred on May 1st, which is Law Day, and it is only fitting that Law Day is his birthday. You are honoring Oliver for his enormous contributions in the areas of civil and human rights and social justice. Excuse me if I refer to Mr. Hill as Oliver; I take that liberty, and I assure you it is not a sign of disrespect. It is quite the opposite. His name to me is a term of endearment. I have known him and worked with him for thirty-seven years, working on cases with his law firm for many decades. He is a mentor and a friend and I continually take great pleasure in watching the workings of his great mind, and sharing our numerous conversations. Thank you to his step-grandson, Jamaa Bickley-King, for coming with him today. This inaugural *Oliver Hill Social Justice Award* is a high honor and you could not have chosen better. Moreover, I want you to know this opportunity to give the *Twentieth Annual Emmanuel Emroch Lecture*⁹ is greatly appreciated.

In the brochure is a big topic, *From Jamestown to Richmond in 400 Years*. Jamestown is just fifty-five to sixty miles down the road. "Elaine, what are you talking about from Jamestown to Richmond in 400 years?" If I am speaking from the perspective which I was asked to, of African Americans and the rule of law, that gives me about three or four minutes per century and a few minutes to talk about the impressive works of Mr. Hill and how his life's work has advanced the ball in both establishing new legal principles and making existing rules apply more fairly. However, I do not need four minutes per century, especially to describe the rule of law in the seventeenth and eighteenth centuries from the perspective of persons of African descent in the colonies.

Reading and preparing for this talk was an experience for me. As a lawyer, I have spent my time looking at legal history from the Articles of Confederation to the Constitutional Convention and forward into the nineteenth century. It was an eye-opening

9. The Emmanuel Emroch Lecture Series was established through the generosity of the late Mr. Emmanuel Emroch, a 1931 graduate of the University of Richmond Law School, his wife, family, and friends. See Richmond School of Law News: Emroch Lecture, <http://law.richmond.edu/news/view.php?item=30> (last visited Sept. 4, 2007).

experience to go to the historians and look closely at the period from 1607 until 1787. I have never had a more depressing reading. I said to myself, "Elaine, this is lunch; you cannot put these people in their soup with this." You read the history that the scholars have taken time to write in painstaking detail about life in the colonies for people of African descent. At lunch, I am not going to discuss some of the things that occurred.

Nevertheless, how can I cover two hundred years, the 1600s and the 1700s, in a way that you can grasp what I am talking about? Well, I found a slim volume published in 1856 by George M. Stroud in which he looked at all the practices of the slave states and distilled certain propositions, which applied across the board.¹⁰ These are referred to as Stroud's Propositions of Slavery. Now, not everyone was initially a slave. There were indentured servants and you had some free folks, but let me assure you they are footnotes. The vast majority of black folk in Virginia and in the slaveholding states for that two-hundred-year-period were slaves. Stroud's twelve propositions of slavery are as follows:

I. The master may determine the kind, and degree, and time of labour to which the slave shall be subjected.

II. The master may supply the slave with such food and clothing only, both as a quantity and quality, as he may think proper or find convenient.

III. The master may, at his discretion, inflict any punishment upon the person of his slave.

IV. All the power of the master over his slave may be exercised not by himself only in person, but by anyone whom he may depute as his agent.

V. Slaves have no legal rights of property in things, real or personal; but whatever they may acquire belongs, in *point of law*, to their masters.

VI. The slave, being a *personal chattel*, is at all times liable to be sold absolutely, or mortgaged or leased, at the will of his master.

VII. He may also be sold by process of law for the satisfaction of the debts of a living or the debts and bequests of a deceased master, at the suit of creditors or legatees.

10. GEORGE M. STROUD, SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA: WITH SOME ALTERATIONS AND CONSIDERABLE ADDITIONS (1856).

VIII. A slave cannot be a party before a judicial tribunal, in any species of action against his master, no matter how atrocious may have been the injury received from him.

IX. Slaves cannot redeem themselves, nor obtain a change of masters, though cruel treatment may have rendered such change necessary for their personal safety.

X. Slaves being objects of *property*, if injured by third persons, their owners may bring suit, and recover damages, for the injury.

XI. Slaves can make no contract.

XII. Slavery is hereditary and perpetual.¹¹

This was a code. This was the rule of law in 1856 on the eve of the Civil War. These propositions evolved over time and it is interesting what even Stroud says about Proposition Five; “Prop. V.—Slaves have no legal rights of property in things real or personal; and whatever property they may acquire belongs, in point of law, to their masters.”¹² Some of Stroud’s comments on Proposition Five enlighten further:

Of *negro* slavery, only can this harsh doctrine be affirmed. Among the Romans, the Grecians and the ancient Germans, slaves were permitted to acquire and enjoy property of considerable value; as their own. The Israelites, when in bondage to the Egyptians, were allowed to acquire private property. . . . The Polish slaves, even prior to any recent alleviations of their lot, were not only allowed to hold property, but were endowed with it by their lords.”¹³

Then it says, “I insert various acts of Assembly, which will evidence in what light this subject is viewed in the states so often alluded to.”¹⁴ Further, he writes, “[a]nd in Virginia, if the master shall permit his slave to hire himself out, it is made *lawful for any person* and the *duty* of the sheriff, [] to apprehend such slave, [] and the master shall be fined not less than ten dollars nor more than thirty.”¹⁵ In other words, you cannot hire out your slaves to others, and the slaves cannot earn money because the slave is property and chattel. Stroud’s slender volume is powerful and you can make your own assessment of its value. However, if

11. *Id.* at 12–13.

12. *Id.* at 29.

13. *Id.* at 29–30 (internal quotation marks omitted).

14. *Id.* at 30.

15. *Id.* at 31.

ever you have a free moment and want to look at that period from 1607 up until the Civil War, several historians have written about it. Ira Berlin¹⁶ has a great piece and an author named Degler¹⁷ also has a great piece. The Stroud piece should be read, and there is a lot out there, so it is a very important area of research.

Regarding Jamestown in 1607, the historical record indicates that Africans initially arrived in August of 1619. However, recent research informs us of a census taken in March of 1619, and Africans were counted as part of the census. There were thirty-two Africans at that time already in Jamestown. We do not know when they got there or how they got there, but that is something that the historians are now vigorously discussing.

From the beginning of the nineteenth century, the slavery regime was firmly established and continued to be repressive. Then, in 1856, the U.S. Supreme Court in harsh and abusive language made certain that all understood that a slave was not a citizen, in case anybody was of that view, especially since the new nation had been formed in 1787. When the Constitution was written, slavery was protected. The Founding Fathers, the fifty-five of them, were very smart men. They could have debated the issues in Latin as well as in English. Many were widely read, and most were well-to-do. They locked themselves in that school room for three months in the hot summer of 1787 and when they came out, Benjamin Franklin was asked, "Well, Sire, what have we got, a republic or a monarchy?" and he replied, "A republic, if you can keep it."¹⁸ Therefore, I am inclined to think in order to form a Union, they had to hold the South and keep Virginia and her slaveholding sister states at the table. Thus, there were certain protections in the Constitution that slavery was given, yet they never used the word "slavery." Instead, the word "property" was used when referring to slaves who were chattel property. Among other things, the Founding Fathers protected the importation of slaves

16. Ira Berlin, Distinguished University Professor, University of Maryland. Berlin has authored: *Slaves Without Masters: The Free Negro in the Antebellum South; Many Thousands Gone: The First Two Centuries of Slavery in Mainland North America; and Generations of Captivity: A History of Slaves in the United States*.

17. Carl N. Degler, Margaret Byrne Professor of American History Emeritus, Stanford University. Degler authored the Pulitzer Prize winning book, *Neither Black nor White*.

18. The response is attributed to Benjamin Franklin at the close of the Constitutional Convention of 1787, when queried as he left Independence Hall on the final day of deliberation. The response was in the notes of Dr. James McHenry, one of Maryland's delegates to the Convention.

for twenty-one years, from 1787 to 1808. For that period, Congress could not pass a law which would restrict importation of slaves. Moreover, slaves in the Constitution were to be counted as three-fifths of a person.¹⁹ If a slave escaped, the new nation was to use its resources—the federal resources—to return him to his master. This was a constitutional obligation.

From there we were faced with a Civil War, and there is a lot of discussion about whether or not the war was over slavery. There were many arguments posited. A generally accepted one is that the Civil War was fought over economics and slavery happened to be an institution that the South depended on for its labor, for cotton and tobacco, and the war really was not about slavery. The argument continues: the war was about the economic productivity of the region, and we must understand that. However, you can understand I have a personal attachment to this issue and cannot easily detach myself from the idea of slavery as a brutalizing and dehumanizing institution, which itself should have provided a reason for war.

The colonists moved from the period of indentured servants in the 1600s, and by 1670, they had institutionalized a system of slavery. They made certain that there were to be no alliances between the Native Americans, the slaves, and white indentured servants. Different rules applied to different races. If a slave escaped and was later captured, his punishment would be slavery for life, while white indentured servants who sought to escape would get a term of four to five years added to their sentence. In many states, if a slave escaped with someone not a slave that person's sentence was doubled when they were caught. Therefore, the colonies made it a point to make sure white, black, and red people remained separate.

There was a brief moment of hope when the Supreme Court decided *Brown v. Board of Education*.²⁰ However, as is African Americans' experience with the Court, the moment of hope was

19. The Three-Fifths Compromise was enacted to settle a disagreement between the North and the South over the apportionment of congressional representation and distribution of taxes. The South wanted more representation and thus sought to have "free people" counted as a one person to boost representation, while the North sharply disagreed, wanting to limit Southern representation in Congress. As a result, the Three-Fifths Compromise, which was written into Article 1, Section 2 of the Constitution, proposed counting "free people" as "3/5 a person" in state populations. U.S. CONST. art. I, § 2.

20. See 349 U.S. 294 (1955).

all too brief. Also, traditionally, Congress has taken one-step forward and three steps backwards. It is rare to get Congress, the Executive Branch, and the courts all on the same page at the same time. The only time that happened in this country to advance race relations was in the 1960s. The courts, the Congress, and the Executive Branch were all on one page. That is why the civil rights laws were passed and signed into law.²¹ One did not have to worry about trying to override vetoes and all of that. The statutory framework established in the 1960s is the one we principally rely on today.

After the Civil War, legal and political problems surfaced to impede access to full citizenship rights for the newly freed slaves. We were laying the structure, and the post-Civil War Congress laid the foundation for obtaining those rights by passing (and the states ratifying) the critically important Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution. It was clear what the 39th Congress was trying to do with the Fourteenth Amendment. In 1865, the Thirteenth Amendment freed the slaves; in 1868, the Fourteenth Amendment provided citizenship since in 1856 the *Dred Scott* case had established categorically that enslaved blacks were not citizens.²² There was a big fight over the Fourteenth Amendment because women, who did not have the right to vote, were upset with the first-time appearance of the word "male" in the Constitution with the adoption of the Fourteenth Amendment. In 1870, the Fifteenth Amendment gave the newly freed slaves the right to vote. This is progress. This is the rule of law.

However, the success was short-lived. As soon as the Civil War Amendments were adopted the deal was struck. There were troops in the South protecting the newly freed slaves, and the Hayes-Tilden Compromise, in 1876, upset the applecart.²³ At a

21. See Civil Rights Act of 1964, 42 U.S.C. § 1971 (2000); see also Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000); Fair Housing Act of 1968, 42 U.S.C. § 3601 (2000).

22. *Scott v. Sandford*, 60 U.S. 393 (1856) (holding that Scott, a slave of African descent, could not bring an assault case in federal court against his master as Scott was not recognized as a citizen, was not permitted to become a citizen, and no state could grant him citizenship).

23. The Hayes-Tilden Compromise was a compromise between Democrats and Republicans where Republicans promised to remove federal troops from South Carolina and Louisiana in exchange for an unobstructed path to the presidency for Hayes. The Hayes-Tilden Compromise subsequently allowed Democrats to regain control of all state legislatures in Southern states and effectively end Reconstruction. See also Hays vs. Tilden: The

critical juncture, the Compromise ended all federal protection for blacks in the South. In addition, the Supreme Court had gotten back in the game in the 1870s, and everything Congress had tried to accomplish with the passage of the Fourteenth Amendment the Court took back in two critical Supreme Court cases. Both the *Slaughter-House Cases*²⁴ in 1873 and the *Civil Rights Cases*²⁵ in 1883 limited the meaning and reach of the Fourteenth Amendment's Privileges and Immunities Clause. Once again hopes are dashed; rather than having the promised equality, we were given a ten-year period of growth (1865–1875). And, once the protection is removed (Hayes-Tilden Compromise), we go back to our “old habits” with most of the southern states amending their constitutions between 1890 and 1910, restricting civil and human rights. Virginia amended its constitution in 1902, taking away voting rights by adding poll taxes and literacy tests, essentially trying to take us back to a period before the Civil War amendments had been adopted. As lawyers know well, one can have a right on the books; however, if it is not enforced it has limited value.

In this twentieth century, the movement for racial equality is given the gift of the birth of Oliver Hill. Precisely three hundred years after 1607, Oliver was born on May 1, 1907, with the NAACP organizing two years later in 1909. The anthropologist Margaret Mead tells us, “Never doubt that a small group of thoughtful, committed citizens can change the world; indeed it is the only thing that ever has.” Oliver will tell you in a minute, “Elaine, nothing that I did, did I do alone. There was a group of us who cared about this, who cared about this issue and early on, we dedicated our lives to changing it. A problem can seem so big, it can seem so huge, and you say well, how can I make a difference. My life as a lawyer has taught me that we can make a huge difference in the area that we care about if we are willing to devote ourselves to it.” Yes, money is important. Remember the

Electoral College Controversy of 1876–1877, <http://elections.harpreweek.com/09Ver2Controversy/Overview-4.htm> (last visited Sept. 4, 2007).

24. 83 U.S. 36 (1872) (holding held that a state statute, which gave one company the exclusive rights to the landing and slaughtering of livestock, was constitutional and did not violate the Thirteenth Amendment or the Privileges and Immunities Clause of the Fourteenth Amendment).

25. 109 U.S. 3 (1883) (holding that sections 1 and 2 of the Civil Rights Act of 1875 were unconstitutional because the Fourteenth Amendment did not provide the authority to enact these sections since the Fourteenth Amendment's aim was states and not individuals).

great heavyweight boxer Joe Louis, who purportedly said, "I don't really like money, but it calms my nerves." I did not accept a job at President Nixon's former law firm when I left the University of Virginia. I had a job offer at Mudge, Rose, Guthrie & Alexander in New York, and in 1970, the position paid a hefty \$18,000 a year, more money than I had ever seen. Then, however, I did not understand the art of negotiation as well as I do now. Once I said, "No," the person behind me got the job, and I should have negotiated with him lifetime contributions to the Legal Defense Fund.

Getting back to Oliver Hill's enormous contribution, in his biography he writes:

The thing that made me determined to go to law school was actually learning that it was the Supreme Court that had taken away our rights; and I saw no hope of regaining them through the political process prevailing in the late 1920's. At that time, it was not even possible to get Congress to enact legislation to make lynching or murdering Negroes a crime. Therefore, I determined to go to law school, become trained as a lawyer, and endeavor to get the Court to reverse its previous error in *Plessy*²⁶ [in which the Supreme Court told us "separate and equal."²⁷

We had the separate, but we never had the equal.

Oliver Hill committed himself to that goal, and it is interesting how he did it. To overrule *Plessy v. Ferguson* was a twenty-five year process that started in 1929 at Howard Law School. Justice Louis Brandeis²⁸ told the President of Howard University, Mordecai Johnson²⁹ in 1929, he can "tell most of the time when I'm reading a brief by a Negro attorney,"³⁰ and Mordecai has got to get himself a real faculty out there or he will always have a fifth-rate law school. And it had to be a full-time and a day school. That stung Mordecai Johnson and he said, "I am going to change this law school from top to bottom." He began by finding a brilliant young man, who was the architect of the entire strategy on

26. OLIVER W. HILL, SR., *THE BIG BANG BROWN VS. BOARD OF EDUCATION AND BEYOND: THE AUTOBIOGRAPHY OF OLIVER W. HILL, SR.* 71-72 (2000).

27. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that under the Equal Protection Clause of the Fourteenth Amendment, the "separate but equal" provision of public accommodation by state governments was constitutional).

28. The Honorable Louis Brandeis, Associate Justice, Supreme Court of the United States, served 1916-1939.

29. Dr. Mordecai Wyatt Johnson, President, Howard University, served 1926-1960.

30. JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* 5 (1994).

legal campaigns and how to conduct them. His name was Charles Hamilton Houston. He was a Harvard law graduate in 1922 and the first African American editor of the *Harvard Law Review*. He studied under future Supreme Court Justice Felix Frankfurter, receiving a doctorate in juridical science. Then, after he got his law degree, he went off to Spain. In 1924, he returned to practice in Washington, D.C. with his father and was teaching at Howard part-time. President Mordecai tapped him and said, "I want you to come to Howard and I want you to make this law school into a first rate institution and you have all the support from me that you need."

Charlie Houston did that. Two in his first class of six people were Thurgood Marshall and Oliver Hill. They entered law school in 1930, they ate lunch together, studied together; they were friends. Thurgood called Oliver "Peanut" because Oliver ate the peanut cookies and Oliver called Thurgood "Turkey." I do not know why, certainly, they had food on their minds. "Peanut" and "Turkey" are the kind of quality that they had in that class. By 1931, the American Association of Law Schools (AALS) and the American Bar Association (ABA) had fully accredited Howard Law School.

Charlie Houston came up with the idea of the litigation strategy, and he trained lawyers to implement that strategy. He trained them how to develop a record and how to try a case. In the 1930s, Charlie Houston started the early cases. He sued the University of Maryland for not admitting African Americans.³¹ He taught Thurgood and went up to the NAACP in New York. Houston then became counsel for the NAACP in New York. Thurgood, his former student, followed him there, eventually becoming general counsel to the NAACP, and then in 1940 Thurgood created the NAACP Legal Defense Fund. Houston returned to Washington, D.C. Houston and Marshall began strategically filing lawsuits, suing professional schools, such as the University of Texas³² and the University of Oklahoma,³³ because they thought

31. *Pearson v. Murray*, 182 A. 590 (Md. 1936) (affirming a writ of mandamus issued by the Baltimore City Court compelling the admission of an African American student into the University of Maryland Law School).

32. *Sweatt v. Painter*, 339 U.S. 629 (1950) (reversing the judgment denying mandamus to compel the University of Texas Law School to admit an African American student, providing relief for abridgment of the Fourteenth Amendment's Equal Protection Clause).

33. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (holding that entry

judges would understand the impact of being excluded from a legal education. At first, they sought to equalize educational facilities. Later, they moved to challenge "racial separateness" mandated by the U.S. Supreme Court in the 1896 decision, *Plessy v. Ferguson*.

Oliver became one of Charlie Houston's and Thurgood Marshall's lawyers at home in the field taking heat everyday with these cases. There were cases challenging the jury system and challenging the equalization of teacher salaries in Virginia. Black teachers got one salary and white teachers received a better salary.³⁴ It just so happens that both of Oliver's plaintiffs in the teachers' case, Emily Seeger Austin and Aileen Black Hicks, taught me when I was in high school. Those two brave women were the lead plaintiffs in the case, which dismantled the separate system of pay for black and white teachers. Oliver's law partner, Spotswood Robinson, affectionately known as "Spot," became an outstanding federal judge in the District of Columbia.³⁵ Both Spot and Oliver went to Prince Edward County, to R.R. Moton High School, when those kids called in 1951 and said "we need your help."³⁶ They filed the lawsuit which became one of the five cases in *Brown v. Board of Education*. The Fourteenth Amendment was purposefully adopted to advance before the law the equality historically denied African Americans and to make certain rights accorded to them erased the inequalities sanctioned and enshrined by a legacy of slavery. The Supreme Court must reconnect the amendment to its mooring. As Justice Blackmun said to the Court, "In order to get beyond racism, we must first take account of race."³⁷

into a segregated condition at the University of Oklahoma violated the African American students' rights under the Fourteenth Amendment).

34. *Alston v. Sch. Bd. of Norfolk*, 112 F.2d 992 (4th Cir. 1940) (reversing the decision of the district court, which dismissed the plaintiff's complaint for race discrimination and remanded for further proceedings, where ultimately a salary equalization plan was negotiated).

35. The Honorable Spotswood Robinson, Judge, U.S. District Court for the District of Columbia, served 1964-1966; Judge, United States Court of Appeals for the District of Columbia, served 1966-1981; Chief Judge, United States Circuit Court of Appeals for the District of Columbia, served 1981-1992.

36. *Davis v. County Sch. Bd.*, 103 F. Supp. 337 (E.D. Va. 1952).

37. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (holding that race could be used as one of multiple factors in an admissions process, upholding the entry of a student to the University of California, Davis Medical School).

We have had three hundred and forty-seven years of legal ostracism from 1607–1954. We have had forty-two years from 1965 to the present of some racial progress. I should date the period of progress from 1969, rather than 1965, since in a democracy, if one does not have the vote, then one is politically ignored. Blacks did not get to vote in a systematic way until the 1965 Voting Rights Act. The constitutionality of the Voting Rights Act was challenged in the Supreme Court, and it was not until 1969 that the Court held the Act to be constitutional.³⁸ Any civil rights legislation that is passed will be challenged in Congress, which it was when the Supreme Court came down with their decision in 1969, so I date it from 1969. Speaking generously, that gives us a total of forty-two years of racial progress plus the ten years of Reconstruction between 1865 and 1875. There were 347 years of oppression and fifty-two years of intermittent racial progress. There is much that remains to be done; and it takes a fully engaged citizenry to make racial progress.

Historically, whites have been an important part of the modern civil rights movement. This struggle requires differing cultural and experiential inputs. When I headed the Legal Defense Fund, I affirmatively hired white lawyers. I did not understand everything. One cannot successfully talk to a jury without having some sense of the various cultural perspectives. My affirmative action plan was to make sure I had whites on my staff and that my plaintiffs were not only African American, but also white, who had important civil rights issues that advanced the law.

My experience is that we must be careful how we evaluate one another on issues of race. In 1970, a white female, Ida Mae Phillips, was the plaintiff in the first employment discrimination case before the Supreme Court of the United States.³⁹ She had three preschool-aged kids and the company told her you could not work here because you need to be home with your babies. Now that may have been true, but it was not the company's business. If she qualified for the job, it was their job to hire her under Title VII. The Legal Defense Fund took that case, and we won that case for

38. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (holding that Congress intended all actions necessary to effectuate the vote were subject to section 5 of the Voting Rights Act, making state election laws subject to this approval before they were enforceable).

39. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (holding that separate hiring policies for women and men violated section 703(a) of the Civil Rights Act of 1964).

Ms. Phillips. When we were celebrating the win, I said to Ms. Phillips, who was from Georgia, "Ms. Phillips, why did you come to the Legal Defense Fund?" She said, "Well, I know 'Negras' understand this issue"—a lazy 'a' on 'negras.' I said to myself, "Ms. Phillips does not mean to insult me; she is happy that she won her case and I should not jump to conclusions about her." I have learned that it is important not to make a hasty judgment, especially if it is negative. I followed up with, "Ms. Phillips, that word hurts feelings." She replied "Oh?" "Yes," I said, "Now follow me Ms. Phillips, knee like your knee and grow like you grow, Ne-gro, Ms. Phillips." We were in a restaurant in New York talking about how one properly pronounces "Negro." She understood and learned how to pronounce the word correctly. I was not insulted, and Ms. Philips was in a position to teach others.

I am going to end these remarks with an additional word about Oliver Hill and all that he has accomplished. One needs to understand the personal threat that he and his family lived with. Oliver practiced in this State until he was ninety-one years old. Oliver and his wife, Bernie, faced constant harassment.

The police came in 1947 to their home here in Richmond and told his wife that he had been killed, and she said, "Well, I don't know anything about Oliver being killed." Later, the fire department came and told her they understood that her house was on fire, and she told them, "Well, there is no fire." Much later, the mortician came to pick up Oliver's body, and she said, "But, there is no body."⁴⁰

This was just a form of harassment. After their son was born in 1949, she received a call one night from someone (referring to Oliver) stating that, "they were gonna 'get his ass' that night."⁴¹ Moreover, she said that she thought they would try to kill him as he drove through the dark alley into the garage, and she strung an extension cord from seventy-five feet from the back porch and installed a floodlight before he got home. One time he came home and she was sitting on the porch with a pistol in her lap because of threatening phone calls. She received call after call [about him] that he would be attacked or that he would be killed.⁴²

40. See HILL, *supra* note 26, at 286.

41. *Id.*

42. *Id.*

A further interesting point that Oliver just dismisses in his book, when he writes:

[B]efore our son was born, we had been getting harassing phone calls. Consequently, until our son became a teenager, we would not allow him to answer the telephone. We received all types of calls, sometimes ranging from cursing, lewd threatening calls, to calls in which the caller said nothing. . . . Other calls were simply vicious.

To get a full night's sleep, before going to bed, my wife or I took the phone off the hook. The phone company raised hell about that; however, I told them if they would cooperate and trace the abusive calls, the problem would cease. Sometime after six or seven months of taking the phone off the hook each night, we would put the phone on the hook to see if we could sleep through the night peacefully. It never worked. The abusive calls continued from 1947 until I went to Washington in 1961.⁴³

Nevertheless, that is the kind of harassment Oliver faced, and that is why we owe him a debt of gratitude. The system of inequality, established in Jamestown, the Founding Fathers provided the mechanisms with which we can challenge the system. Oliver used those tools well. He is first and foremost a lawyer and is the finest embodiment of what one can accomplish when one believes both in full equality and in the rule of law. I thank you this afternoon for giving Oliver this award that he so richly deserves. Thank all of you very much.

43. *Id.* at 287.
