Review Article

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Pauli Murray: The US firebrand's unique opportunity to influence a continent

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Abstract

This review article discusses Rosalind Rosenberg's study of Pauli Murray's pivotal role in enhancing the civil rights of African Americans and American women. Pauli Murray should be properly regarded as one of the leading legal thinkers of Twentieth-Century America. She played a role in the development of the jurisprudential thinking, which brought about an end to race discrimination as enshrined in the 'separate but equal' doctrine in the Supreme Court's 1896 decision in *Plessy v. Ferguson* and ending sex discrimination beginning with the Supreme Court's 1971 decision in *Reed v. Reed*. The objective of this review article is to provide an account of her approach to attacking both legally based race and sex discrimination. Drawing on Rosenberg and referencing key legal texts, it begins with a brief account of Murray's life and times. This is followed by an examination of her thinking on both race and sex discrimination. The review concludes by commending Rosenberg for her analysis of the intersections between the private and public personas of Pauli Murray in a century which witnessed fundamental changes in America.

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Keywords

American Constitution, *Brown v. Board* of Education, *Civil Rights Cases*, Eleanor Roosevelt, Fourteenth Amendment, Justice John Marshall Harlan, National Association for the Advancement for Coloured People, Pauli Murray, *Plessy v. Ferguson*, race discrimination, *Reed* v. *Reed*, sex discrimination, slavery, Thirteenth Amendment, Thurgood Marshall

Rosalind Rosenberg, *Jane Crow: The Life of Pauli Murray*. New York: Oxford University Press, 2017, pp. xvi + 494, ISBN: 9780190656454, US$29.95 (hardback).

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Our Constitution is color-blind.

Justice John Marshall Harlan, *Plessy v. Ferguson* 163 US 537 (1896), at 559.

In 1974, Rosalind Rosenberg, a recently minted assistant professor of history, met Ruth Bader Ginsburg at a seminar at Columbia University. Ginsburg was one of the nation's leading feminist legal scholars. In *Reed v. Reed* (1971), Ginsburg had been involved in the preparation of a brief which convinced the Supreme Court of America to expand the meaning of the Fourteenth Amendment of the American Constitution to wind back sex-based discrimination (The Constitution of the United States, n.d.). In 1993, she was appointed to the Supreme Court. In recent years, she has become a 'pop culture icon' with, among other things, the publication of *Notorious RBG: The Life and Times of RBG* (Carmon and Knizhnik, 2015), a documentary, *RBG* (2018), and film *On the Basis of Sex* (2018).

Ginsburg encouraged Rosenberg to develop an interest in the jurisprudential contribution made by Pauli Murray (Anna Pauline Murray) (1910–1985) to campaigns to eradicate sex discrimination. In 1995, Rosenberg became aware that Pauli Murray's papers, which run to 135 boxes, were located at the Schlesinger Library at the Radcliff Institute for Advanced Study at Harvard University. She says, 'I began research trips there that would last two decades' (p. ix). In 2017, she brought this research together with the publication of *Jane Crow: The Life of Pauli Murray.*

Pauli Murray should be properly regarded as one of the leading legal thinkers of Twentieth-Century America. She played a role in the development of the jurisprudential thinking which brought about an end to race discrimination as enshrined in the 'separate but equal' doctrine of the Supreme Court's 1896 decision in *Plessy v. Ferguson* and ending sex discrimination beginning with the Supreme Court's 1971 decision in *Reed v. Reed.* The objective of this review article is to provide an account of her approach to attacking both legally based race and sex discrimination. The review will begin with a brief account of her life and times. This will be followed by an examination of her thinking on both race and sex discrimination. A conclusion will draw together the threads of the review article.

An interesting life

Pauli Murray was born on 20 November 1910 in Baltimore, Maryland. She described herself as descending from a Euro-African-American 'mix of white, anti slavery Quakers, Episcopalian slave owners, mixed race slaves, freedman farmers, and Cherokee Indians' (p. 3). Her family were educated with many working as teachers and viewed themselves as an educated elite. Her mother died, aged 35 years, in 1914, and her father was committed to a mental hospital in 1917, and later to Crownsville State Hospital for the Negro Insane. He was beaten to death by a White guard who took a disliking to him in 1923 when he was 51 years old (p. 17). After the death of her mother, Murray was raised by her aunts Pauline Fitzgerald Dame and Sarah Fitzgerald at the home of her maternal grandparents, Robert and Cornelia Fitzgerald, in Durham, North Carolina.

Her aunt Pauline instilled in her a combination of independence and responsibility. She encouraged Pauli to express herself and make her own choices. Aunt Pauline also

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taught Pauli 'to face down dangers, meet unpleasant challenges . . . obey orders' and never evade responsibilities (pp. 19–20). These are precepts that Murray embraced; well, except for obeying orders.

As a child, she learnt about lynching and rape, instruments of terror employed in the South to keep Negroes (she preferred this term to African American) in their place. At age 15, she moved to New York and resided with members of her extended family. As an 8-year-old girl, she started working in a variety of jobs to pay for her keep. During the 1920s and 1930s, she had a variety of jobs. Her life was complicated in that she saw herself as being a man trapped in a women's body. Although Murray seems to have been a lesbian, Rosenberg says that she struggled 'with what we would today call a transgender identity' (p. 1). On Thanksgiving 1930, aged 20, she married William Roy Winn, 'a terrible mistake' (pp. 37–38) which barely lasted a weekend. Rosenberg sees Murray's struggles with her sense of sexual and/or gender identity as 'giving' her an extra dimension to a feeling of being 'apart', which morphed into and/or coincided with a highly developed sense of intellectual independence.

Murray was a hardworking and dedicated student. When something piqued her curiosity, she was not shy in seeking out someone to help her better understand the issue at hand or heading off to a library to search out books for self-education. Her talent and potential capabilities were noted from an early age. In 1928, Murray commenced studies at Hunter College's Brooklyn Annex. Her English teacher was Professor Catherine Reigart. After receiving an A for an essay, she told Murray that 'You have a unique opportunity to influence a continent' (p. 34).

In 1938, Pauli Murray was denied entry to the University of North Carolina based on her race. Also, in 1938, President Franklin Delano Roosevelt (1882–1945) delivered a speech at the University about the need to take action to advance social and economic conditions in America. Murray read the President's speech with what Rosenberg describes as 'mounting indignation'. How could he 'praise democratic liberalism at a southern university without acknowledging that the university denied large members of its local citizens their basic civil rights?' (p. 68). She wrote a letter of protest which she initially intended to send to the President. Anticipating it was unlikely that he would ever see the letter, she decided to send a copy to Eleanor Roosevelt (1884–1962). The First Lady responded and, on several occasions, invited Murray to tea in what turned out to be a long and supportive relationship between the two. In 1953, in an article in *Ebony*, Eleanor Roosevelt wrote,

> One of my finest young friends is a charming woman lawyer – Pauli Murray who has been quite a firebrand at times but of whom I am very fond. She is a lovely person who has struggled and come through very well. I think there were times where she may have done foolish things. But now I think she is ready to be of real use. (p. 195; also see Bell-Scott, 2016)

Murray was denied entry to the University of North Carolina on racial grounds. In 1944, she obtained a Law degree from Howard University, a historically private African American university. About to graduate from Howard University, she sought entry to undertake postgraduate work at the Harvard Law School but was rejected because she was a woman (pp. 136–138). She subsequently did postgraduate work at the Berkeley School of Law at the University of California. In 1965, she obtained a Doctor of Law

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from Yale University. And in 1976, she was ordained as a priest of the Episcopalian Church.

Throughout her life, Murray had a variety of jobs across a wide range of orbits. In an application for entry to the New York Bar in 1946, she listed 23 previous employers for whom she had worked and 38 places of residence (pp. 180–182). Murray worked for civil rights, union/labour, political, women's/feminist and religious organisations. After obtaining a law degree, she also worked for several law firms, as a sole practitioner, an academic, including a stint in Ghana, and as a bureaucrat in governmental/regulatory agencies. She obtained a grant in 1954 to the MacDowell Colony, a retreat for artists, composers and writers in Peterborough, New Hampshire, to write her family history *Proud Shoes: The Story of an American Family* (Murray, 1956). There she discussed issues of mutual concern with James Baldwin (1924–1987) who helped her find her 'voice' (pp. 200–203). She also wrote and published poetry. The following passage from her poem *Dark Testament* was read at the funeral of Doctor Martin Luther King Junior (1929–1968) in April 1968:

> Then let the dream linger on.
> Let it be the test of nations,
> Let it be the quest of all our days, . . .
> Until the final man may stand at any place,
> And thrust his shoulders in the sky,
> Friend and brother to every other man. (p. 316)

As recounted by Rosenberg, Murray floated in and out, or across, organisations, which she hoped would help her realise her notions of justice. She was an independent and creative thinker. Rosenberg describes Murray's predisposition to challenge and ask questions. She was disheartened by internecine disputes that engulfed 'leftist' organisations that she was associated with. Murray was also appalled at the treatment of women and the 'dictatorial' antics of alpha males in African American/civil rights, law firms and academic organisations that she was involved with. Finally, she saw feminist organisations as being mainly concerned with the needs of White middle-class women rather than poorer women and women of colour. The attractiveness of Pauli Murray to those organisations which called on her services was the quality of her thinking and the speed with which she could get the job done. She had an original and creative mind, a deep understanding of the legal norms which governed America and a highly nuanced sense of strategies that could be employed to bring about change.

Race discrimination

On 4 July 1776, the Congress of the United States of America issued its Declaration of Independence. It boldly declared, 'We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness'. The Constitution that was subsequently adopted by America celebrates 'liberty' and the 'rule of law'. For

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example, Amendment V states, 'No person shall . . . be deprived of life, liberty, property, without due process of law, nor shall private property be taken for public use, without due compensation'. Article IV, Section 2 says, 'The Citizens of each State shall be entitled to all Privileges and Immunities of all Citizens in the several States'. Yet in *Dred Scott v. Sandford* (1857), the Supreme Court found that Black people whether they were enslaved or free could not be citizens of the United States.

The Civil War of 1861–1865 resulted in the abolition of slavery. The Thirteenth Amendment, adopted in 1865, said,

> Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist in the United States or any place subject to their jurisdiction.
>
> Congress shall have power to enforce this article by appropriate legislation.

In 1866, Congress exercised its powers under the Thirteenth Amendment to enact the *Civil Rights Act* which grated the same citizenship rights of Whites to all persons 'of every race and color', 'excluding Indians not taxed'. Without such National action, legislation that the former Confederate states had enacted would not enable persons of colour and other races to have the same civil rights as Whites.

Senator Lyman Trumbull (1813–1896) was the head of the judiciary committee and the person most responsible for the Thirteenth Amendment. In supporting the *Civil Rights Act of 1866*, he said that if the Thirteenth Amendment only meant an end to forced labour, then the 'promised freedom is a delusion . . . With the destruction of slavery necessarily follows the destruction of the incidents of slavery' (p. 156).

In 1866, Congress sought to further ensure the realisation of civil rights for persons of different races and coloured skins by the addition of the Fourteenth Amendment to the Constitution. The Fourteenth Amendment was ratified in 1868. Article I stated,

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdictions the equal protection of the laws.

In 1875, Congress enacted a second *Civil Rights Act.* Its preamble stated,

> Whereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles of law.

Section 1 of the Act went on to say,

> . . . all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodation, advantages, facilities, and privileges of inns, public

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> conveyances on land or water, theatres, and other places of public amusement; subject to only the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Section 2 established a regime of penalties for those who abused the provisions of the Act. Section 4 said that no citizen could be excluded from jury duty based on their colour, race or previous condition of servitude.

In *Ex Parte Virginia* (1880), the Supreme Court ruled that a county court judge in Virginia had breached Section 4 of the *Civil Rights Act, 1875*, when he excluded and failed to select citizens of the African race and black colour for jury service. The Court found that this agent of the State of Virginia did not have the power to annul or evade the reach of the Fourteenth Amendment. People of different races, or Whites and Blacks, could sit as jurors.

In 1883, the Supreme Court, 8–1, ruled that the *Civil Rights Act of 1875* was unconstitutional. Several matters were joined together in what became known as *Civil Rights Cases* (1883). The majority maintained that the denial of equal accommodation in inns, public conveyances and places of public amusement did not impose any badges of slavery and it did not impinge the Thirteenth Amendment. The majority saw the Fourteenth Amendment as being a corrective to 'state action' and that Congress cannot prohibit private discrimination. The majority said,

> legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. (*Civil Rights Cases* 109 US 3, at 13)

Justice John Marshall Harlan (1833–1911), a member of the Supreme Court from 1877 to 1911, dissented. His major criticism was that the majority misinterpreted the background to and the purpose of the Thirteenth and Fourteenth Amendments and was usurping 'proper functions' that were the province of Congress. Justice Harlan maintained that the Fourteenth Amendment 'presents the first instance in our history of the investiture of Congress with affirmative power by legislation to enforce an express prohibition upon the States'.

Moreover, the Fourteenth Amendment granted citizenship to 'all persons born or naturalised in the United States', especially members of the Black race. Justice Harlan said,

> The citizenship thus acquired by that race in virtue of an affirmative grant from the nation may be protected not alone by the judicial branch of the government, but by congressional legislation of a primary direct character, this because the power of Congress is not restricted to the enforcement of prohibitions upon State laws or State action . . . the provisions [of the Amendment] authorizes Congress, by means of legislation, operating throughout the entire Union, to guard, secure and protect that right.

He then asked what had been secured for coloured citizens:

> by the national grant to them of State citizenship? With what, rights, privileges, or immunities did this grant invest them? There is one, if there be no other – exemption from race discrimination

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> in respect of any civil right belonging to citizens of the white race . . . Citizenship in this country necessarily imports at least equality of civil rights among citizens of every race in the same State. It is fundamental in American citizenship that, in respect of such rights, there shall be no discrimination by the State, or its officers, or by individuals, or corporations exercising public functions or authority against any citizen because of his race or previous condition of servitude. (*Civil Rights Cases* 109 US 3, at 46–48)

In 1890, the State of Louisiana passed the *Withdraw Car Act* which required railway companies to provide equal but separate accommodation for Black and White passengers. Persons locating themselves in the wrong carriage were subject to fines and/or imprisonment. The Act was challenged by Homer Plessey (1862–1925), a seven-eighths Caucasian and one-eighth African whose appearance was that of a White, as breaching the Thirteenth and Fourteenth Amendments. A majority of the Supreme Court rejected his claim. They said,

> A statute which implies merely a legal distinction between the white and colored races – a distinction which is founded in the color of the two races and must always exist so long as white men are distinguished from the other race by color – has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude. (*Plessy v. Ferguson*, 163 US 537, at 543)

Justice Harlan did not concur with the reasoning of his fellow judges and penned a powerful statement in support of civil rights. He wrote,

> The white race deems itself to be the dominant race in this country . . . But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant ruling class of persons. There is no caste here. **Our Constitution is color-blind**, and neither knows nor tolerates classes amongst citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful . . . The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficial purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of the country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge . . . What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the grounds that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens. (*Plessy v. Ferguson*, 163 US 537, at 559–560, emphasis added)

In the latter part of the 1930s, continuing into the 1940s, Pauli Murray worked for civil rights organisations and became involved in struggles that highlighted racism and discriminatory treatment experienced by African Americans. Mention has already been made of her failed attempt to gain entry to the University of North Carolina. Following her rejection, she met with Thurgood Marshall (1908–1993) who was the Chief Counsel of the Legal Defense and Education Fund, Inc., of the National Association for the Advancement for Colored People (NAACP). He would later become a member of the

Supreme Court, serving from 1967 to 1991. See Zelden (2013) for an examination of Marshall's contribution to America and the struggle for racial equality.

During Easter 1940, Murray and a colleague were arrested, jailed and subsequently fined for sitting in the wrong place on a bus. The incident attracted a degree of interest in African American circles and she met again with Thurgood Marshall and representatives of the NAACP. A friend telegraphed Eleanor Roosevelt who contacted the Governor of Virginia to investigate the arrest (p. 87). On 15 July 1940, Odell Waller (1917–1942), an African American sharecropper shot and killed his White employer who refused to give him his quarter share of the wheat crop. Waller claimed he had acted in self-defence. Murray was active in helping to raise funds for his defence. Odell Waller was electrocuted by the State of Virginia on 2 July 1942 (p. 106).

During her campaigning for Odell Waller, Murray had a chance meeting with Professor Leon Ransom (1900–1954) of the Howard University Law School. Ransom commented on her recent interactions with the law; she had become something of a 'cause celebre' with her failed university application, bus 'indiscretion' and support of Odell Waller. She responded that given her brushes with the law, she might as well become a lawyer. Ransom urged her to come to the Howard Law School. A scholarship was found, and she commenced studies at Howard University in September 1941.

Murray started to think about the possibility of revisiting the Thirteenth and Fourteenth Amendments to overturn racism, or Jim Crow. She also considered if the Amendments could be used to overcome sex discrimination, or what she referred to as Jane Crow. She entered into a wager with Spottswood Robinson III (1916–1998) that *Plessy* would be overturned within 25 years. He was a faculty member at Howard University, who subsequently worked for the NAACP and then became a judge of the United States Court of Appeals. She received permission from Leon Ransom for her senior research paper to be 'Should the *Civil Rights Cases* and *Plessy v. Ferguson* be Overruled?' (p. 132).

Murray was persuaded by Justice Harlan's reasoning that the majorities in the *Civil Rights Cases* and *Plessy v. Ferguson* had adopted a narrow interpretation of the Thirteenth and Fourteenth Amendments which thwarted the attempt of Congress to provide citizens of colour and other races with the same rights as White citizens. As had Justice Harlan before her, Murray concluded that the 'arbitrary separation of citizens on the basis of race . . . is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds' (p. 149).

In 1946, Alexander Pekelis (1902–1946) of the American Jewish Congress employed Murray as a research assistant to help him prepare an amicus curia brief in *Mendez v. Westminster* (1946), a case challenging the segregation of children into separate schools based on their Spanish surnames. This case provided a chance to overturn *Plessy v. Ferguson.* The United States Court of Appeals, while finding such treatment of students with Spanish names, that is Mexican students, was unconstitutional in that it was inconsistent with the due process and equal protection clauses of the Fourteenth Amendment, but not 'the separate but equal' precepts of *Plessy v. Ferguson* (*Mendez v. Westminster*, 1946). Rosenberg maintains that while the case and the amicus briefs did not attract much popular interest, it 'had a major impact because of the attention they drew from the NAACP'. Spottswood Robinson decided to take another look at Murray's 1944 paper

'Should the *Civil Rights Cases* and *Plessy v. Ferguson* be Overruled?' He found her reasoning convincing and he and a colleague persuaded Thurgood Marshall to use it to make a frontal attack on the two cases (p. 171).

Richard Kluger in his exhaustive analysis of *Brown v. Board of Education* points out that, in June 1950, Thurgood Marshall convened a conference of 43 lawyers and 14 branch and state conference presidents of the NAACP where it was decided that in mounting education cases, the NAACP would move from a policy of 'equality' – trying to make the 'separates' of educational facilities of Black children equal to those of White children – to attacking the segregation contained in *Plessy* head on. This decision was endorsed by the NAACP's Board of Directors (Kluger, 1976, pp. 292–294; also see pp. 474 and 520)

In 1948, Thelma Stevens (1902–1990), executive secretary of the Women's Division of the Board of Missions of the Methodist Church, approached Murray for advice on how to integrate its Southern chapters without breaching local laws. On 28 April 1951, Thelma Stevens arranged for the publication of *States' Laws on Race and Color* (Murray, 1950). Rosenberg reports that Thurgood Marshall was so impressed with the report that he called it the 'Bible' of civil rights' litigators and acquired copies for everyone on his staff (pp. 185–187).

Brown v. Board of Education of Topeka provided an opportunity for the NAACP to challenge *Plessy v. Ferguson* and test Pauli Murray's reading of the Constitution. The case involved the provision of separate educational facilities for White and Black children in Kansas, South Carolina, Virginia and Delaware. The Supreme Court said,

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditure for education both demonstrate our recognition of the importance of education for our democratic society . . . It is the very foundation of good citizenship. Today it is a principal interest in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity where the state has undertaken to provide it is a right which must be made available to all on equal terms.

It went on to say,

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of the law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system . . . **We conclude that in the field of public education, the doctrine of 'separate but equal' has no place.** Separate educational facilities are inherently unequal. (*Brown v. Board of Education of Topeka (No 1)* 347 US 483, at 492–495, emphasis added)

Pauli Murray collected on her wager made with Spottswood Robinson back in 1944. He told her that her Howard Law School essay with its 'emphasis on Justice John Marshall Harlan's ringing dissents, had helped the NAACP lawyers formulate their

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arguments in *Brown*' (p. 195). Eleanor Roosevelt's 'Firebrand' had realised the potential that many had seen in her from a young age; she had influenced a continent; a feat she would perform a second time.

Sex discrimination

When she started her studies at Howard University, Pauli Murray believed the Fourteenth Amendment could provide the basis for attacking both race and sex discrimination. She believed that the same precepts should apply to both Jim Crow and Jane Crow. Woloch (2017 [2015]) has provided a detailed account of attempts by women's/feminist groups to enhance the civil rights of women from the 1890s to the 1990s. The major source of tension was whether they should pursue 'protective legislation' or an Equal Rights Amendment to the Constitution. The major criticism levelled at the Equal Rights Amendment is that it would remove various protections women's groups had achieved in the past. The counter was legislation that 'protected' women from working long hours or at night and weight restrictions reduced the employment opportunities of women willing and able to perform such work.

In April 1962, Murray received an invitation from Eleanor Roosevelt to serve on a Committee on Political and Civil Rights as part of a Presidential Commission on the Political and Social Rights of Women. President John Fitzgerald Kennedy (1917–1963) appointed Eleanor Roosevelt as the head of the Commission. Murray's 'task' was to work out a way to resolve the differences between the 'protective' and 'equal rights' wings of the women's movement.

She said that there were three options available to advance the civil rights of women. First, action could be mounted at the state level for favourable legislation. She dismissed this as it would, at best, take a long time for the requisite number of states to embrace such changes. In the latter part of the 1960s and continuing over ensuing decades, the states began the process of rolling back 'protective' legislation under the rubric of deregulation. Second, pursue an Equal Rights Amendment under the Constitution. Under Article V of the Constitution, a successful amendment must receive a two-thirds majority in the House of Representatives, two-thirds majority in the Senate and be endorsed by three quarters of the states. She predicted that the achievement of this three-step process would take a long time and/or was unlikely to be achieved. In addition, if such an amendment was secured, there would be extensive litigation over its meaning and application. An Equal Rights Amendment did in fact receive endorsement by both Houses of Congress in the early 1970s but failed to secure a three-fourths majority of the states. (pp. 250 and 338–340)

Her third and favoured option was to target the most restrictive laws before the courts. Murray saw the challenge as 'to remove legal restrictions which are not grounded in biological and life-serving functions . . . without at the same time endangering protective legislation which still has a rational basis in law and in fact'. She urged both 'protectors' and 'rights' advocates to unite on issues they could agree. She pointed to the Supreme Court's decision in *Hernandez v. Texas* (1954), a case decided before *Brown v. Board of Education of Topeka (No 1)* (1954), involving jury selection. It said that the Fourteenth Amendment applied to all arbitrary types of determination (discrimination), not just to Whites and Negroes.

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Murray maintained that the central constitutional challenge was to determine 'the reasonableness of each legislative classification based upon sex within the concept of equal protection of the laws' (pp. 250–254, emphasis in original). She believed that the focus should be on laws that were clearly discriminatory rather than those that were protective or compensatory. She recommended that action should be mounted against laws that discriminated against women in jury selection, education, hiring and pay based on the precepts contained in the Fourteenth Amendment (p. 257). Her recommendations were adopted by the members of the President's Commission. Its report, *American Women*, was published in 1963 (U.S. Department of Labor, 1963).

In the early 1960s, Congress contemplated the passage of a Civil Rights Act. Title VII would prohibit discrimination in employment on grounds such as race, colour, religion, handicap, family status and national origin by employers employing 15 staff or more. Initially, it did not include 'sex' in its list of attributes where discrimination was prohibited. Pressure from women's/feminist groups saw its adoption by the House of Representatives in early 1964 (p. 275). Murray was asked to draft a memorandum to the Senate as to why 'sex' should be included in Title VII (Civil Rights Act, 1964).

Murray pointed to the parallels to discrimination based on race and gender. She maintained that there were few, if any jobs where race or sex could be considered as relevant in hiring decisions. The fact that some women were mothers and homemakers did not change 'the basic principle that the right to a job without arbitrary discrimination is a fundamental and individual right'. She also believed that without the addition of sex that male Negroes, and not women, would enjoy the benefit of 'genuine equality of opportunity' (p. 278). There was a strong push for the inclusion of 'sex' from many groups. The Senate agreed to include 'sex' in Title VII in June 1964. While there was what Rosenberg describes as a 'veritable avalanche of letters' during this campaign, Murray played a role, one that should probably not be overstated, in the eventual adoption of 'sex' in Title VII (p. 279).

In 1965, Murray and Mary Eastwood (1930–2015) published 'Jane Crow and the Law: Sex Discrimination and Title VII' in *The George Washington Law Review.* It is a seminal article which brings together much of Murrays thinking starting with her Howard University days through to her involvement with the Committee on Civil and Political Rights for the President's Commission on the Status of Women and her memorandum to the Senate supporting the inclusion of 'sex' in Title VII. Murray met Mary Eastwood during her work with the Committee on Civil and Political Rights and developed a long-term friendship. While 'Jane Crow' was jointly authored, Rosenberg points out that the section dealing with the legal analysis involving the Fourteenth Amendment, extracts of which will be presented below, 'was principally Murray's work' (p. 287).

'Jane Crow' acknowledged that society has a genuine interest in protecting the maternal and familial functions of women:

> But in discussing the legal status of women, courts generally have been content to parrot the doctrine that sex forms the basis of a reasonable classification and to ignore the fact that women vary widely in their attributes as individuals. What is needed to remove the present ambiguity of women's legal status is a shift of emphasis from women's class attributes (sex per se) to their *functional* attributes. The boundaries between social policies that are genuinely protective of

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> the familial and maternal functions and those that unjustly discriminate against women as individuals must be delineated. (Emphasis in original)

Continuing with this line of thought, the article said,

> To the degree women perform the function of motherhood, they differ from other special groups. But maternity legislation is not sex legislation; its benefits are geared to the performance of a special service much like veterans' legislation. When the law distinguishes between 'the two great classes of men and women', gives men a preferred position by accepted social standards, and regulates the conduct of women in a restrictive manner having no bearing on the maternal function, it disregards individuality and relegates an entire class to inferior status.

The article then offered some comments on protective legislation of the past. It advanced the proposition that

> It may not be too far fetched to suggest that [such an approach] as presently applied has implications comparable to the now discredited doctrine of 'separate but equal'. It makes the legal position of women not only ambiguous but untenable. Through unwarranted extension, it has penalized all women for the biological function of motherhood far in excess of precautions justified by the findings of advanced medical science. Through semantic manipulation, it permits a policy originally directed toward the protection of a women's life to dominate and inhibit her development as an individual. It reinforces an inferior status by lending governmental prestige to sex discriminations that are carried over into those private discriminations currently beyond the reach of law. (Murray and Eastwood, 1965, pp. 238–240)

As Rosenberg argues, Murray had provided the intellectual apparatus with which to attack sex discrimination. All that was needed was to find the 'right' case to start the process. A dispute emerged between a mother and father, who had separated, over who should be appointed administrator of their son's estate following his death. Legislation in Idaho gave preference to males over females. Ruth Bader Ginsburg was asked to prepare a brief in support of the mother. In 1969, Ginsburg had started teaching a course on women and the law at Rutgers Law School after being asked to do so by female students. Rosenberg points out that Ginsburg quickly discovered Murray and Eastwood's 'Jane Crow and the Law' article. In preparing her brief, she leaned heavily on it, even to the extent of adding Pauli Murray's name as a co-author (pp. 342–343).

The Supreme Court in *Reed v. Reed* (1971) found that Idaho's probate statute which gave preference to men over women violated the Equal Protection Clause of the Fourteenth Amendment. In language that could have been written by Pauli Murray herself, the Supreme Court said,

> The Equal Protection Clause of [the Fourteenth] amendment . . . does . . . deny to States the power to legislate that different classes on the basis of criteria wholly unrelated to the objectives of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. (*Reed v. Reed* 404 US 71 (1971), at 75–76)

Pauli Murray had influenced a continent for a second time.

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Concluding comments

Pauli Murray lived a complicated, multifaceted life in the tumultuous times of Twentieth-Century America. She was a mixed race woman living in a society that denied equal legal rights to African Americans (and persons of other races) and women. As someone with a highly developed sense of social justice, she found herself embroiled in civil rights struggles at the end of the 1930s. Serendipity found her undertaking a law degree at Howard University. It was at Howard University that she developed her Fourteenth Amendment strategy to take on both race and sex discrimination. Her thinking lay at the basis of both *Brown v. Board of Education* (1954) and *Reed v. Reed* (1971).

The extent of the research, quality of scholarship and clarity of the analysis and presentation of material provided by Rosalind Rosenberg in *Jane Crow: The Life of Pauli Murray* is of the highest order. Over 17% of her text, 81 of 470 pages, comprises notes and bibliographic material. Rosenberg has also included photos of various moments of Murray's life, which helps to enhance her narrative. She also has the most comprehensive and reader friendly index, which runs to 24 pages, that I have encountered in a long time.

Rosalind Rosenberg has thoroughly examined the intersections between the private and public personas of Pauli Murray in a century which witnessed fundamental changes in America. She has a keen grasp of the minutiae of Murray's life and intersection with broader societal changes and clearly takes readers through the nuances of legal and constitutional issues involving the overturning of race and sex discrimination. *Jane Crow: The Life of Pauli Murray* is research of the highest order in its examination of a 'Firebrand' who enhanced the legal rights of African Americans, and persons of other races, and women in America.

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