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DOROTHY KENYON AND PAULI MURRAY:  
THEIR QUEST FOR SEX EQUALITY IN JURY SERVICE

*Jennifer L. Brinkley*\*

I. INTRODUCTION

Professor Barbara Sinclair Deckard wrote that women faced several obstacles in attempting to become lawyers due to societal expectations.<sup>1</sup> First, the woman had to understand she could choose from more than typical sex-specific professions.<sup>2</sup> Second, she was expected to marry and have children.<sup>3</sup> “Because children and housework are her sole responsibility, she can work only at limited times. Because of the same brainwashing, no one considers the possibility that husbands and society should share these burdens.”<sup>4</sup> And finally, it was difficult to find law schools that admitted women, regardless of their qualifications.<sup>5</sup> If she gained admission, she would be awarded fewer fellowships and lower grades “because many law professors are prejudiced against women. And if she graduates, many law offices won’t admit her.”<sup>6</sup>

These obstacles were no secret. Unhappy with Harvard Law School’s decision to finally open its doors to admit women, a newspaper printed the following:

The latest victory of the powder-puff battalions is the decision of the Harvard Law School to admit women to its classes. Its breaching now by female bluestockings comes as a sour surprise, indeed, to many oldtimers. “Aren’t there already enough women laying down the law to men?” they cry. . . . They want to act like men and be

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<sup>1</sup> BARBARA SINCLAIR DECKARD, *THE WOMEN’S MOVEMENT: POLITICAL, SOCIOECONOMIC, AND PSYCHOLOGICAL ISSUES* 101 (2d ed. 1979).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 101–02.

treated like women. Naturally, the ordinary man thinks this is a little unfair of the fairer sex. He would like either to deal with a lady as a lady, or have the present code of ethics and etiquette modified to allow him to belt a presumptuous female with a baseball bat if she gets out of line. Right now, he's confused. Should he take off his hat before hitting her?<sup>7</sup>

Dorothy Kenyon<sup>8</sup> and Pauli Murray<sup>9</sup> were very familiar with the societal expectations and obstacles described by Professor Deckard. When Kenyon was in law school at New York University in 1916, Harvard, Yale, and Columbia law schools refused to admit women.<sup>10</sup> Murray would face race and sex discrimination regarding her admission to both graduate and law school.<sup>11</sup> Following law school, Kenyon and Murray would both face sex discrimination as lawyers.<sup>12</sup> Instead of getting mad, they got smart.<sup>13</sup> Maintaining gainful employment in legal practice—while simultaneously advocating for social justice causes important to them—would make neither Kenyon nor Murray wealthy women. Yet, they both worked toward the society they wanted: one where different races and sexes would be

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<sup>7</sup> Hal Boyle, *Male Sex Muddled Victim of Equal Rights for Women*, TAMPA TIMES, Oct. 11, 1949, at 11.

<sup>8</sup> *Dorothy Kenyon Papers*, SMITH COLL.,

<https://findingaids.smith.edu/repositories/2/resources/742>. Dorothy Kenyon was born in New York City on February 17, 1888. Kenyon attended New York University Law School and graduated in 1917. In her role as a lawyer, Kenyon was a social justice leader, devoting her time to causes such as women's rights, the New Deal, the labor movement, and consumer cooperatives. In the realm of women's rights, "she devoted special attention to the issues of jury service for women, equality in marriage, the legalization of birth control, and improved educational and economic opportunities for women."

<sup>9</sup> *Who is the Rev. Dr. Pauli Murray?*, PAULI MURRAY CTR.,

<https://www.paulimurraycenter.com/who-is-pauli>. Pauli Murray was born in Baltimore, Maryland on November 20, 1910. Murray attended Howard University School of Law and graduated in 1944. During her life, Murray was involved in the civil rights movement, the women's rights movement, and other social justice movements. Murray was a prominent advocate for Black women.

<sup>10</sup> Frederic J. Haskin, *The Rise of the Woman Lawyer*, DAILY TIMES, Dec. 19, 1916, at 3. A New York woman attorney at the time said the woman who survives in the legal profession must be "supernormal." Dorothy Kenyon and Pauli Murray chose to be lawyers when society was less than excited about female advocates. *See, e.g., There Will Always*, THE PADUCAH SUN, Mar. 24, 1949, at 14. ("There will always be more male than female lawyers—the reason is obvious—more women prefer to lay down the law than to take it up.")

<sup>11</sup> PAULI MURRAY, *SONG IN A WEARY THROAT: AN AMERICAN PILGRIMAGE* (1st ed. 1987).

<sup>12</sup> *Id.*

<sup>13</sup> MURRAY, *supra* note 11.

treated equally. Kenyon said, “I always pick the losing cause. I guess I’m crazy about the underdog. But I think I’m helping women by my kind of life.”<sup>14</sup>

Kenyon became an American Civil Liberties Union (“ACLU”) board member in 1930, and pushed the male-dominated group to use the Equal Protection Clause of the Fourteenth Amendment to attack sex discrimination.<sup>15</sup> Murray joined the ACLU board in 1965, upon the sponsorship of Kenyon.<sup>16</sup> They formed a friendship and a close working relationship that would last until Kenyon’s death in 1972. They were a team, determined to convince the ACLU board to prioritize sex discrimination on its agenda.<sup>17</sup> Kenyon recognized the importance of their relationship. “Pauli and I, she out in front with her double discriminations, I at the rear with my years of experience behind me and the prayer that the younger ones may start out differently from us.”<sup>18</sup> They wanted to push wide the doors for the women coming behind them.

Both women are deserving of recognition for their development of litigation strategies advancing the equal treatment of women. One area where they focused their attention was equality in jury service. Laws existed that wholly barred women from serving on juries, at both the federal and state levels.<sup>19</sup> Some jurisdictions permitted women to serve but only if they affirmatively volunteered, while others allowed women to be excused simply based on sex, with no hardship designation.<sup>20</sup> These laws resulted in the classification of women as second-class citizens.<sup>21</sup> Women had received the right to vote in 1920,<sup>22</sup> but equal representation in important governmental processes still eluded them.<sup>23</sup> In 1958, Kenyon exclaimed, “The courthouse at present shelters women plaintiffs and defendants, women

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<sup>14</sup> *Judge Dorothy Kenyon is Dead; Champion of Social Reform*, 83, N.Y. TIMES, Feb. 14, 1972, at 32.

<sup>15</sup> Philippa Strum, *Pauli Murray’s Indelible Mark On The Fight for Equal Rights*, ACLU (June 24, 2020), <https://www.aclu.org/issues/womens-rights/pauli-murrays-indelible-mark-fight-equal-rights>. The American Civil Liberties Union (ACLU) is a nationwide non-profit, non-partisan membership organization devoted exclusively to the defense, the fostering, and the promotion of the rights guaranteed by the United States Constitution. See *Brief for the Florida Civil Liberties Union and the American Civil Liberties Union as Amicus Curiae, Hoyt v. Florida*, 368 U.S. 57 (1961).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> LEO KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 31 (1969).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> U.S. Const. amend. XIX.

<sup>23</sup> Janolyn Lo Vecchio, *Western Women’s Struggle to Serve on Juries, 1870-1954*, 21 W. LEGAL HIST. 25, 40 (2008).

witnesses, women policewomen, women lawyers, women prosecutors, and women judges. There is no reason why the court cannot also shelter women jurors.”<sup>24</sup>

To understand why jury service was important to Kenyon and Murray, one must understand the importance of the jury in a democracy. It has been described as “the seat of substantial power in American society” and “the voice of the people.”<sup>25</sup> Jury service has historically been tied to voting.<sup>26</sup> Kenyon wrote in 1965, “[i]f jury service is important, voting rights are probably even more so.”<sup>27</sup> Jury service can be seen as a political right—a form of democratic participation in the exercise of law and justice, or a civil right—a form of individual protection against state authority.<sup>28</sup>

The early common law recognized that, upon marriage, the husband and wife “formed a single person, represented by the husband.”<sup>29</sup> At the time, because of coverture, married women were legally disabled.<sup>30</sup> The wife was considered the husband’s chattel, servant, and part of his person.<sup>31</sup> Blackstone said common law juries consisted of “twelve free and lawful men”<sup>32</sup> and women were excluded because of the defect of sex.<sup>33</sup> This resulted in laws that shielded women from certain aspects of society—including jury service.

The Sixth Amendment to the United States Constitution guarantees the right to an impartial jury in criminal cases.<sup>34</sup> The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying to any person within its jurisdiction “the equal protection of the laws.”<sup>35</sup> For much of United States history, however, large segments of community members were treated differently and excluded from jury service.<sup>36</sup> Statutes limiting jury service, or barring women entirely from service, were part of the idea that women needed protection. The

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<sup>24</sup> *Id.*

<sup>25</sup> Rhonda Copelon, Elizabeth M. Schneider & Nancy Stearns, *Constitutional Perspectives on Sex Discrimination in Jury Selection*, 2 WOMEN’S RTS. L. REP. 3 (1975).

<sup>26</sup> Gretchen Ritter, *Jury Service and Women’s Citizenship before and after the Nineteenth Amendment*, 20 L. & HIST. REV. 479, 481 (2002).

<sup>27</sup> ROBERT L. CARTER, DOROTHY KENYON, PETER MARCUSE & LOREN MILLER, EQUALITY 67 (1965).

<sup>28</sup> Ritter, *supra* note 26, at 483.

<sup>29</sup> *Nolin v. Pearson*, 191 Mass. 283, 284 (Mass. 1906).

<sup>30</sup> Ritter, *supra* note 26, at 485.

<sup>31</sup> *Dixon v. Amerman*, 181 Mass. 430, 431 (1902).

<sup>32</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 352 (1962).

<sup>33</sup> *Id.* at 362.

<sup>34</sup> U.S. Const. amend. VI.

<sup>35</sup> U.S. Const. amend. XIV, § 1.

<sup>36</sup> See *Race and the Jury*, EQUAL JUST. INITIATIVE (2021), <https://eji.org/report/race-and-the-jury/what-needs-to-happen/#examples-from-across-the-country>; *Gender-Based Jury Exclusion*, sidebar to *Race and the Jury*, EQUAL JUST. INITIATIVE (2021), <https://eji.org/report/race-and-the-jury/what-needs-to-happen/#examples-from-across-the-country>.

Supreme Court unanimously supported protective legislation in *Muller v. Oregon*, stating the physical structure of women justify special legislation.<sup>37</sup> The case involved the question of whether an Oregon statute limiting the working hours of women violated the Fourteenth Amendment.<sup>38</sup> The Court said it was “obvious” that the physical structure along with maternal obligations place women “at a disadvantage in the struggle for subsistence.”<sup>39</sup> The perceived differences between the sexes, evidenced in *Muller*, coupled with the societal importance of childbearing, created patriarchal constitutional and statutory provisions relating to women’s ability to serve on juries. Romantic paternalism sought to keep men and women in separate spheres.

This article will look at the history of women and jury service, focusing on the work both Kenyon and Murray did to persuade courts that sex discrimination, like race discrimination, was unconstitutional. Jury service was an issue that advocates of equality could agree upon and Kenyon and Murray would use every resource at their disposal to obtain compulsory service for women. Part II gives a brief history of how women were excluded from juries in the United States. It provides popular culture references of the time, along with public opinion about whether women should serve. This clarifies the history surrounding jury service. Part III provides context on the lives of Dorothy Kenyon and Pauli Murray before

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<sup>37</sup> *Muller v. Oregon*, 208 U.S. 412, 420 (1908).

<sup>38</sup> *Id.* at 417–18. Adopted in 1868, the Fourteenth Amendment includes the Equal Protection Clause which prohibits states from denying equal protection of the laws to any persons within its jurisdiction.

<sup>39</sup> *Id.* at 421. “Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. . . . Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. . . . Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. . . . The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her.”

they became a team. Their litigation strategy was strongly influenced by division in the women's equality movement over how best to proceed to seek relief from sex discrimination. Some thought legislative change would be best, while others believed judicial reinterpretation was the proper pathway. The division, and its impact, is discussed.

Part IV begins with a history of jury service litigation before various courts. In 1966, Kenyon and Murray co-authored the ACLU's brief for a federal court case, *White v. Crook*, where they successfully challenged an Alabama statute restricting jury service only to white males.<sup>40</sup> Prior to *White*, all sex-based discrimination challenges arguing a Fourteenth Amendment violation had failed.<sup>41</sup> *White* wanted to successfully link the civil rights and women's rights movements by showing the inferior status both groups experienced.<sup>42</sup> This section gives details about the *White* case—the facts, arguments made, and ultimate victory. Following their work on *White*, Kenyon and Murray encouraged the creation of the ACLU Women's Rights Project, which would place Professor Ruth Bader Ginsburg at the helm.<sup>43</sup> In her brief for *Reed v. Reed*, where the United States Supreme Court unanimously struck down an Idaho law preferring males over females in administering estate matters,<sup>44</sup> Ginsburg gave credit to both Kenyon and Murray by listing them as co-authors.<sup>45</sup> The *Reed* decision marks the first time the Supreme Court declared a statute unconstitutional based on sex-based differentials using the Equal Protection Clause of the Fourteenth Amendment.<sup>46</sup>

A discussion of the ACLU Women's Rights Project and subsequent cases drawing on the strategies put forth in *White* provides evidentiary support of the important work Kenyon and Murray did to effect change. They built, step by step, a foundation on which Ginsburg, on behalf of the Women's Rights Project, could be successful in arguing sex discrimination cases. Part V concludes with a summary of their friendship, outside of Kenyon and Murray's activism.

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<sup>40</sup> PATRICIA BELL-SCOTT, *THE FIREBRAND AND THE FIRST LADY: PORTRAIT OF A FRIENDSHIP: PAULI MURRAY, ELEANOR ROOSEVELT, AND THE STRUGGLE FOR SOCIAL JUSTICE* 329 (2016).

<sup>41</sup> Caroline Chiappetti, *Winning the Battle but Losing the War: The Birth and Death of Intersecting Notions of Race and Sex Discrimination in White v. Crook*, 52 HARV. C.R.-C.L. L. REV. 469, 470 (2017).

<sup>42</sup> *Id.*

<sup>43</sup> BELL-SCOTT, *supra* note 40.

<sup>44</sup> *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>45</sup> BELL-SCOTT, *supra* note 40.

<sup>46</sup> KENNETH M. DAVIDSON, RUTH BADER GINSBURG & HERMA HILL KAY, *TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION* 59 (1st ed. 1981).

## II. THE EXCLUSION OF WOMEN FROM JURIES

### A. A Brief History

In the United States, women could be arrested by men, tried by a jury composed only of men, sentenced by a male judge, then sent to a jail run by men, but they could not sit on a jury.<sup>47</sup> The first jury with women convened in Wyoming territory.<sup>48</sup> The first permanent state statute which permitted women to serve was passed in 1898, in Utah.<sup>49</sup> Washington followed in 1911, and California followed in 1917.<sup>50</sup>

Women gained the right to vote with the passage of the Nineteenth Amendment in 1920.<sup>51</sup> The Nineteenth Amendment upset previously defined societal roles based on sex by removing it as a reason to deny civic responsibilities.<sup>52</sup> It also caused great debate among legislators and legal scholars about its application.<sup>53</sup> In some states, like Iowa, Michigan, Nevada, and Pennsylvania, statutes defining competent jurors allowed women to automatically be deemed competent upon obtaining the right to vote.<sup>54</sup> However, there was no universal, automatic removal of the word “male” in state statutes that came with the granting of suffrage, and the question became whether women should have the right to serve on juries.<sup>55</sup> Some laws excluded women from trial juries, but not grand juries. Some states made women automatically eligible for jury service, while others did not, based on how those states defined voter or elector.<sup>56</sup> By 1923, eighteen states and the territory of Alaska had permitted women to serve on juries.<sup>57</sup> Some states continued to exclude women wholly, while others, like Florida, passed laws providing that women could volunteer to serve on juries by affirmatively placing their name on the jury lists at the clerk’s office.<sup>58</sup>

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<sup>47</sup> Elisabeth Israels Perry, *Rhetoric, Strategy, and Politics in the New York Campaign for Women’s Jury Service, 1917-1975*, 82 N.Y. HIST. 53, 59 (2001).

<sup>48</sup> Vecchio, *supra* note 23, at 26.

<sup>49</sup> LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* 136 (1948).

<sup>50</sup> Vecchio, *supra* note 23, at 26.

<sup>51</sup> U.S. Const. amend. XIX, § 1.

<sup>52</sup> REBECCA DEWOLF, *GENDERED CITIZENSHIP: THE ORIGINAL CONFLICT OVER THE EQUAL RIGHTS AMENDMENT, 1920-1963* 15 (2021).

<sup>53</sup> *Id.* at 15–16.

<sup>54</sup> LINDA K. KERBER, JANE SHERRON DE HART, CORNELIA HUGHES DAYTON & KARISSA HAUGEBOG, *WOMEN’S AMERICA: REFOCUSING THE PAST* 526 (9th ed. 2020).

<sup>55</sup> *Should Women Serve on Juries?*, THE BROOKLYN DAILY EAGLE, Jan. 13, 1918, at 20.

<sup>56</sup> Brief of the Florida Civil Liberties Union and the American Civil Liberties Union, *supra* note 15, at 15.

<sup>57</sup> *Id.* at 14.

<sup>58</sup> *Id.* at 3.



The Connecticut New Britain Herald reported a woman for jury service measure was rejected in the state senate on March 27, 1929.<sup>59</sup> The committee believed women would not improve jury service and there would be “great expense for separate female jury quarters” in the courthouse.<sup>60</sup> Senator Weaver denied women’s jury service was a fad and pointed out that women served on juries in Babylon in B.C. 22.<sup>61</sup> This elicited a comment from Senator Hirschberg saying, “that was the reason, perhaps, Babylon fell.”<sup>62</sup>

In 1930, New York Lieutenant Governor Herbert H. Lehman went on record supporting compulsory jury service for women as a right of citizenship.<sup>63</sup> The country’s first female state Supreme Court Justice, Florence Allen, advocated for women on juries as they “double our chances of getting good juries.”<sup>64</sup> Judge Joseph B. Lindsley from Spokane, Washington, believed in the ability of women to serve, however, he relied on stereotypes to support his opinion:

Women have a keen ability to get at the facts in a case, and can read witnesses better than men. Their intuition tells them quicker when a witness is not telling the truth. While the female is more emotional and susceptible to emotional influences, the male is more the reasoner, cold and calculating. For this reason, a combination of the two is best in jury work.<sup>65</sup>

Throughout the country, legislation was proposed to remove male-specific wording from state constitutions and laws.<sup>66</sup> Instead of a national campaign, activists worked state by state to obtain statutory and constitutional change.<sup>67</sup> The executive secretary of the League of Women Voters in 1930 likened the lobbying effort to that of a “second suffrage campaign—laborious, costly and exasperating.”<sup>68</sup> In New York, efforts by jury service activists typically died in legislative committee.<sup>69</sup> In 1937, a law was passed that “allowed” women to serve on juries but made service voluntary.<sup>70</sup> Hundreds of women in New York lined up

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<sup>59</sup> *Women for Jury Service Measure Beaten, 21 to 11*, NEW BRITAIN HERALD, Mar. 27, 1929.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Perry, *supra* note 47, at 60.

<sup>64</sup> *Id.* at 61.

<sup>65</sup> *Our Best Jurors Now Are Women, Once Spurned*, L.A. EVENING POST-REC., July 21, 1931, at 2.

<sup>66</sup> Perry, *supra* note 47, at 56–58.

<sup>67</sup> Vecchio, *supra* note 23, at 25.

<sup>68</sup> KERBER, *supra* note 49, at 143 (citing Gladys Harrison, *Re-Fighting an Old Battle*, N.Y. HERALD TRIB. MAG., Feb. 9, 1930, in *League of Women Voters Papers*, Part III, Series A. reel 18, 494–98).

<sup>69</sup> Perry, *supra* note 47, at 58.

<sup>70</sup> *Id.*

to register.<sup>71</sup> The New York World Telegram reported on the women registering in the Hall of Records, predicting women jurors would be harsh in sentencing men who had abused or killed their wives' lovers.<sup>72</sup> Having fought for equality in jury service since the 1920s, Dorothy Kenyon responded to the law, saying, "This gives a new lease of life to the jury system."<sup>73</sup>

Public opinion was mixed on whether women should serve on juries in the several decades it was discussed. Some believed women help make and administer the laws, and must obey them, so they should be eligible to serve.<sup>74</sup> Others argued women are too easily swayed to be allowed on juries.<sup>75</sup> Some relied upon judges who said, in their experience, women jurors were just as able as men to render judgment.<sup>76</sup> Some could not understand why women wanted to serve.<sup>77</sup> It was "enough to make a man blush" thinking about mixed juries having to be locked in a room together to deliberate a verdict.<sup>78</sup>

It is often trying on the health of men. It will be worse on the health of women. Many cases tried in court are controversies over questions with which men are generally familiar but which women know little or nothing about. They have no occasion to know about them no matter how high the general intelligence of the women may be.<sup>79</sup>

Mrs. W.J. Welch, who had served on the first jury open to women in Bloomington, Illinois, did not enjoy the experience. "It was a spicy affair and I say no more for me. Some women may like that but I don't. It takes you away from home too."<sup>80</sup> Illinois Circuit Judge, Chalmer C. Taylor, stated women should serve because it had worked in other states satisfactorily and similar criticism had been made before women were granted suffrage, but "no one would hold that giving women a right to vote had lowered legislative standards."<sup>81</sup> Years later, another Illinois Circuit Court judge espoused a different view, saying all-female juries had

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<sup>71</sup> KERBER, *supra* note 54, at 528.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Renee B. Stern, *Straight Thinking For Modern Women Ladies Of The Jury*, THE BUFFALO TIMES, Dec. 19, 1923, at 26.

<sup>75</sup> *Should Women Serve On Juries?*, DOROTHY DIX'S LETTER BOX, MORNING CALL, May 22, 1930, at 22.

<sup>76</sup> *Id.*

<sup>77</sup> *Should Women Serve On Juries?*, JACKSONVILLE DAILY J., Nov. 1, 1930, at 5.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Catherine Lane, *Should Women Serve on Juries in Illinois? 'Why Not?' Response of Many Interviewed*, THE PANTAGRAPH, Mar. 3, 1939, at 3.

<sup>81</sup> *Id.*

brought in “ridiculous verdicts” and he preferred an all-male jury to them.<sup>82</sup> Speaking to the Men’s Club of the United Protestant Church, Judge Austin added, “It’s amazing to me that 12 women could agree on anything.”<sup>83</sup>

In 1947, Virginia and Tennessee, along with eleven other states, barred women from jury service on the basis of sex.<sup>84</sup> Women were barred by the Texas Constitution from serving on juries, but in 1949, Texas voters considered an amendment to allow women to serve.<sup>85</sup> Opponents argued women belonged in the home, courthouses were not equipped to facilitate women jurors, and “the so-called weaker sex should be protected from the sordidness of criminal trials.”<sup>86</sup> A principal at a local school, Miss Lida Gibbs, equated the right to vote with the right to sit on juries, saying “[s]queamishness should be put aside and women take up their duty and right.”<sup>87</sup> Mrs. H.T. Allard, a housewife, strongly disagreed. “There are too many times in a home when the woman can’t leave. Women are too emotional; a good-looking lawyer could sway them too easily.”<sup>88</sup> The amendment was defeated, and the question was again presented to the electorate in 1954.

The Alabama House of Representatives studied a jury duty bill for women in 1955.<sup>89</sup> Representative Albert Brewer believed only a few hundred women out of the thousands he represented wanted juries open to them.<sup>90</sup> “Most of those pushing the bill are professional club women,” he said. “They don’t speak for the average woman who must keep a home and raise a family.”<sup>91</sup> Senator Albert Davis from Aliceville, Alabama said they did not want women subjected “to the unsavory testimony that sometimes comes up in criminal trials.”<sup>92</sup> Another legislator argued it would be too expensive for counties to provide restrooms and jury rooms for two sexes.<sup>93</sup>

In 1960, the Minneapolis Morning Tribune interviewed men and women about whether they would prefer an all-male jury to an all-female jury<sup>94</sup>. The

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<sup>82</sup> *All-Female Juries Have Returned Some ‘Ridiculous’ Verdicts*, FREEPORT J. STANDARD, Jan. 28, 1954, at 17.

<sup>83</sup> *Id.*

<sup>84</sup> *Give Us Women Jurors*, THE BRISTOL HERALD COURIER, Sept. 10, 1947, at 4.

<sup>85</sup> Joe Belden, *Most Texans Want Women on Juries*, VICTORIA ADVOC., July 26, 1953, at 4.

<sup>86</sup> Mac Roy Razor, *Should Women Serve on Juries?*, VALLEY MORNING STAR, Oct. 4, 1949, at 1.

<sup>87</sup> Jack M. Allard, *Baby Sitters’ Work Boosted With Female Jury Service*, SAN ANGELO STANDARD-TIMES, Oct. 16, 1949, at 30.

<sup>88</sup> *Id.*

<sup>89</sup> *House Studies Jury Duty Bill*, THE DOTHAN EAGLE, May 16, 1955, at 1.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Women Jurors*, GREENVILLE ADVOC., June 16, 1955, at 3.

<sup>94</sup> *JUST ASK: Would you prefer an all-male to all-female jury?*, MINNEAPOLIS MORNING TRIB., May 5, 1960, at 20.

answers were overwhelmingly yes.<sup>95</sup> Vernon Pagel wanted an all-male jury because females are “rattle-brained and let emotions run away with them.”<sup>96</sup> He said he would like to see his wife on a jury because the “judge wouldn’t get a word in edgewise.”<sup>97</sup> Donna Bladow wanted to face an all-male jury because “[m]en are more level-headed” and an “all-female jury would take days to reach a decision because they love to argue about anything.”<sup>98</sup> Louise McDaniels doubted an all-female jury could understand the judge and they did not know anything about laws.<sup>99</sup> Fred W. Hall gave a conditional response. “If I still had my hair, I would prefer to face an all-female jury. But under the circumstances, I’d take an all-male jury.”<sup>100</sup> It should be noted that Minnesota was one of the states that promptly passed laws allowing women to serve as jurors after the Nineteenth Amendment was ratified.<sup>101</sup>

As of 1961, three states—Alabama, Mississippi, and South Carolina—excluded women from jury service, even though women could, and did, serve on federal juries in those states by virtue of the Civil Rights Act of 1957.<sup>102</sup> A memorandum of the U.S. Department of Labor, Women’s Bureau, dated August 7, 1961, prepared a summary of jury service for women in state laws.<sup>103</sup> Twenty-eight states’ laws permitted women to serve on juries under the same terms and conditions as men; however, seven of those states permitted women to be excused based on a family responsibility.<sup>104</sup> Sixteen states and the District of Columbia, permitted a woman to claim an exemption solely on the basis of her sex.<sup>105</sup> Three states required a woman to indicate her desire before becoming eligible for service.<sup>106</sup>

In 1966, eight Congresswomen came together to urge a ban on sex discrimination in federal and state court jury selection.<sup>107</sup> Although the Civil Rights Act of 1957 made women eligible to serve on federal juries, many federal district courts had not given it full effect. The Congresswomen wrote, “Discrimination in the selection of a jury undermines the very foundation of democracy in the

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *State v. County Bd. of Renville County*, 213 N.W. 545 (Minn. 1927). There was an exception added in 1921 that women could be excused from jury service upon discretion of the court.

<sup>102</sup> Brief of the Florida Civil Liberties Union and the American Civil Liberties Union, *supra* note 15, at 14. Congress passed this Act, providing for women jury service in all federal courts.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Women in Congress Score Jury Sex Bias*, N.Y. TIMES, Mar. 2, 1966, at 30.

administration of justice, whether such discrimination is based on race, economic class, political affiliation or sex.”<sup>108</sup>

## B. Jury Exclusion Represented in Popular Culture

As jurisdictions were crafting statutes regarding jury service eligibility, stories, plays, and films were also exploring these concepts. A few examples of jury exclusion in popular culture are important to consider as it demonstrates common perceptions of women—not only of their place in courthouses but in society overall.

In Susan Glaspell’s short story, “A Jury of Her Peers,” published in 1917,<sup>109</sup> Minnie Wright’s husband was murdered in bed with a rope while Minnie slept next to him.<sup>110</sup> Male community members, consisting of the sheriff, county attorney, and the neighbor Mr. Hale, who made the discovery of Mr. Wright’s death, arrived at the scene to investigate.<sup>111</sup> Mrs. Peters, the sheriff’s wife, asked that Mrs. Hale accompany her to the scene. The men disparaged the wives, stating they would not “know a clue if they did come upon it.”<sup>112</sup> While the men were upstairs, the women noticed important details in the kitchen. After determining that Minnie had been an abused spouse, the women tampered with the evidence that would provide a motive as to why Minnie murdered her husband. Returning downstairs, the county attorney stated “it’s all perfectly clear, except the reason for doing it. But you know juries when it comes to women.”<sup>113</sup> For a jury to convict a woman, they must be shown “[s]omething to make a story about. A thing that would connect up with this clumsy way of doing it.”<sup>114</sup>

This story is compelling because it questions whether a female defendant could possibly receive a fair trial when the investigation was conducted by men, and the jury was composed of only men. At the time of the story’s writing, the battered women’s syndrome defense did not exist, women did not have a federal constitutional right to vote, and women were excluded from jury service in most jurisdictions. The two women decided quickly to hide “the smoking gun” and in that moment acted as the jury of Minnie’s peers. They found her “innocent due to mitigating circumstances.”<sup>115</sup> Historian Linda K. Kerber analyzes the meaning of this story in her exceptional book:

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<sup>108</sup> *Id.*

<sup>109</sup> Susan Glaspell, *A Jury of Her Peers*, in EDWARD J. O’BRIEN, ED., *THE BEST SHORT STORIES OF 1917* 256–82 (1917).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> KERBER, *supra* note 49, at 135.

All the themes that are present in Glaspell's short story reappeared in legislative battles and in test cases throughout the twentieth century. Some argued that women don't "belong" in the courtroom; that they are too frivolous to take serious matters seriously—or that they take them *too* seriously. Others argued that there are things women intuit better than men do or that their experience and interests are distinct from men's and that courtroom equity requires their presence. In reconstructing the history of jury service, and exploring what this struggle suggests about the citizenship of women, distinctions have to be made between the *right* of citizens, if they are accused of a crime, to an impartial jury and to equal protection of the laws and the *obligation* of citizens to serve on juries.<sup>116</sup>

A silent film, "The Woman Under Oath," was released June 29, 1919.<sup>117</sup> The newspaper promotional materials for the film asked the following question in bold, capital letters: SHOULD WOMEN SERVE ON JURIES?<sup>118</sup> It promoted the film saying it covered "a topical theme that will maintain the keenest of suspense to the very end."<sup>119</sup> The film was about a jury composed of eleven men, and one woman who served as the "first woman juror."<sup>120</sup> An article in the Motion Picture News reviewing the film posed the following questions:

Is a woman temperamentally fitted for service on a jury in a criminal case? Does feminine intuition make females better arbiters than men? Will that intuition that women are conceded to possess in high degree prove a surer and safer guide than mere masculine logic? What would happen were a lone woman juror, holding out against the opinion of eleven male [sic] co-jurors, to find herself bullied, brow-beaten, harangued, and almost third degraded?<sup>121</sup>

Six years later, Edward Peple, an American playwright, published "The Jury of Our Peers."<sup>122</sup> It was described as a comedy "where six men contrive a

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<sup>116</sup> *Id.* at 136. Kerber identifies critical questions regarding Glaspell's short story. "Is jury service a right or an obligation? Is it a compliment or an insult to women to offer them easy excuses from jury service? Is it in the interests of defendants to have women on the jury?" See also KERBER, *supra* note 49, at 134–35.

<sup>117</sup> THE WOMAN UNDER OATH (Tribune Productions 1919).

<sup>118</sup> *The Woman Under Oath*, THE SPRINGFIELD DAILY NEWS, July 27, 1919, at 29.

<sup>119</sup> *Id.*

<sup>120</sup> THE WOMAN UNDER OATH, *supra* note 117.

<sup>121</sup> *Id.*

<sup>122</sup> EDWARD HENRY PEPE, THE JURY OF OUR PEERS, (Samuel French Publisher 1925).

bogus breach-of-promise suit, to be tried by two female lawyers before a jury composed solely of women, on the masculine supposition that no twelve women on earth can agree on anything.”<sup>123</sup> Mr. Reynolds had been in Maine, researching his new novel, and returned home.<sup>124</sup> His wife, the Secretary and Treasurer of the Woman’s Progressive League, was excited to tell him that she was on a jury— “[t]he first to sit within the confines of the United States of America...composed *alone...of women!*”<sup>125</sup> She stated, “[a] woman has a right to demand a jury of her own sex, in all cases such as breach of promise, divorce, or trouble involving children, or in any other case where a woman’s judgment is naturally so much superior to a man’s.”<sup>126</sup>

The play unravels from there, with the women jury members determined to investigate the case ahead of the court trial. The husbands put together a fake case for the first women’s jury to consider, without the knowledge of their wives.<sup>127</sup> The men recruited a recently engaged couple to bring the breach of promise case on the condition they were paid \$2,000 to pretend that the male ended the engagement to the female.<sup>128</sup>

At trial, the judge admitted the phrase “Ladies of the Jury” sounded strange but “not unpalatable.”<sup>129</sup> Suspecting something amiss, the female lawyers joined in a motion to clear the courtroom of all spectators except the husbands of the jury members.<sup>130</sup> The judge granted the motion and the witness testified to hearing the husbands devise the fraud to bring “ridicule upon our first woman’s jury, and to stamp the system at the outset as a failure and a farce.”<sup>131</sup> The judge placed the husbands under arrest, except Mr. Reynolds who had been in Maine when the plan was devised.<sup>132</sup> One of the lawyers, Miss Marshall, convinced the judge not to

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<sup>123</sup> *Curry Club of Sullins Presents Play at V.P.L.*, THE BRISTOL HERALD COURIER, Apr. 5, 1928. It was also reviewed by the play critic for the Fremont Herald in Nebraska: The play is woven around a plot of some complication, supposedly funny and in the main actually so. It is supposed to be the first woman’s jury, empanelled [sic] in a breach of promise suit, which is all a fake framed up through a collusion of the plaintiff and defendant and members of a men’s club, whose wives largely compose the jury. The women jurors have the case all tried and decided before they have heard the evidence, and everything looks exceedingly humiliating for them until a clever coup de maître, counsel for the defense swings the whole base scheme of the scheming men back upon them, like a boomerang, landing them all in jail, except the cocky and conceited Reynolds, who finally gets his, too. *See also* Fremont Herald, *Herald Critic Sees Much to Praise in High School Play*, June 9, 1927.

<sup>124</sup> PEPLÉ, *supra* note 122, at 7.

<sup>125</sup> *Id.* at 9.

<sup>126</sup> *Id.* at 10.

<sup>127</sup> *Id.* at 20.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 52.

<sup>130</sup> *Id.* at 81.

<sup>131</sup> *Id.* at 84.

<sup>132</sup> *Id.* at 85.

declare a mistrial as it would be “the first and last and only woman’s jury trial.”<sup>133</sup> The judge released the husbands and they returned to Mr. Reynolds’ home where the female lawyers disclosed they found the open letters to Mr. Reynolds on his desk from the men describing the fraud in detail.<sup>134</sup> To resolve their contempt charges, and any potential perjury charges, the lawyers proposed payment of \$25,000 in cash damages by the husbands to the plaintiff in the case, who would turn the money over to the Woman’s Progressive League.<sup>135</sup> Miss Marshall told the husbands, “You failed, as you always will, for you haven’t a monopoly on brains.”<sup>136</sup>

### III. THE DOROTHY KENYON AND PAULI MURRAY TEAM

#### A. Dorothy Kenyon

An alumna of Smith College where she majored in economics and history, Dorothy Kenyon graduated from NYU law school, one of the few institutions accepting women at the time.<sup>137</sup> At NYU, she was seen as less capable because she was a woman. It was assumed her education would be wasted because she would marry and not practice.<sup>138</sup> That assumption would be proven false. Her father had been a successful patent attorney in New York City and had supported her wish to study law from a young age.<sup>139</sup> She recalled a time when she was young, skipping and swinging from her father’s hand, when she asked him if girls could also be lawyers. He answered, smiling, “Why not, my dear?”<sup>140</sup>

Kenyon was admitted to practice on October 29, 1917 in New York City.<sup>141</sup> She worked first as a law clerk at the firm of Gwenn and Deming, and then moved to the firm of Pitkin, Rosensohn and Henderson in 1922.<sup>142</sup> Kenyon practiced law privately at the beginning of her career.<sup>143</sup> In 1930, she established a law firm with Dorothy Straus, known as Straus & Kenyon at 475 Fifth Avenue in New York

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<sup>133</sup> *Id.* at 104.

<sup>134</sup> *Id.* at 112.

<sup>135</sup> *Id.* at 114.

<sup>136</sup> *Id.*

<sup>137</sup> *Judge Dorothy Kenyon Is Dead; Champion of Social Reform*, 83, *supra* note 14.

<sup>138</sup> Samantha Barbas, *Dorothy Kenyon and the Making of Modern Legal Feminism*, 5 *STAN. J. C.R. & C.L.* 423, 428 (2009).

<sup>139</sup> *Judge Dorothy Kenyon Is Dead; Champion of Social Reform*, 83, *supra* note 14.

<sup>140</sup> *Id.*

<sup>141</sup> Factual Data About Dorothy Kenyon (May 24, 1972) (on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 7, Folder 4).

<sup>142</sup> *Id.*

<sup>143</sup> *Judge Dorothy Kenyon Is Dead; Champion of Social Reform*, 83, *supra* note 14.



City.<sup>144</sup> She was elected as one of the first twelve women to the New York City Bar in 1937.<sup>145</sup> From 1936 to 1938, Kenyon served as First Deputy Commissioner of Licenses in New York.<sup>146</sup> At the completion of her term in January 1938, Kenyon was appointed by the Council of the League of Nations to a committee of eight to study the legal status of women in other countries.<sup>147</sup> Prior to her appointment, she was chairman of the committee on the legal status of women of the American Association of University Women as well as legal advisor to the New York League of Women Voters.<sup>148</sup> In a 1938 New York Times article, Kenyon was described as one of the “best known women lawyers in the country.”<sup>149</sup> She was appointed to fill a vacancy on the Municipal Court from 1939-1940, and then resumed practicing law thereafter.<sup>150</sup> Kenyon was appointed by President Harry S. Truman in 1946 as the U.S. Representative to the United Nations Commission on the Status of Women.<sup>151</sup>

She served on the national board of the ACLU from 1930 until her death.<sup>152</sup> Kenyon was a trailblazer in the women’s rights movement. When the ACLU created its Committee on Discrimination Against Women in 1944, Robert Baldwin appointed Kenyon as chair.<sup>153</sup> She dedicated her life to social activism and establishing litigation strategies that would persuade the Supreme Court, and the greater public, that sex discrimination was a violation of the Equal Protection Clause of the Fourteenth Amendment. She wanted to change the way judges and legislators thought about the role of women in society. Kenyon believed parallels existed between race and sex discrimination and that women could not enjoy full citizenship without reforming archaic laws based on both race and sex stereotypes.<sup>154</sup>

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<sup>144</sup> JILL NORGRÉN, *STORIES FROM TRAILBLAZING WOMEN LAWYERS: LIVES IN THE LAW* 10 (2018). Dorothy Straus was a lawyer and organizer for women’s rights. She was one of the first twelve women, along with Kenyon, admitted to the New York City Bar. She was active in many organizations, including the League of Women Voters, where she served as chair of the municipal affairs committee and was chosen to represent the United States on the Committee on Nationality of Married Women for Suffrage and Equal Citizenship. See Joe M. Komljenovich, *Dorothy Straus*, JEWISH WOMEN’S ARCHIVE, <https://jwa.org/encyclopedia/article/straus-dorothy> (last visited June 12, 2022).

<sup>145</sup> *New York Woman Gets League Post*, N.Y. TIMES, Jan. 29, 1938, at 7.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Judge Dorothy Kenyon is Dead; Champion of Social Reform*, 83, *supra* note 14.

<sup>151</sup> NORGRÉN, *supra* note 144, at 10.

<sup>152</sup> *Women Who Put Women’s Rights on the ACLU Agenda*, ACLU, <https://www.aclu.org/other/women-who-put-womens-rights-aclu-agenda> (last visited June 12, 2022).

<sup>153</sup> Barbas, *supra* note 138, at 433.

<sup>154</sup> *Id.* at 424.

Kenyon was accused of being a communist by Senator Joseph McCarthy in 1950. Kenyon was not known for biting her tongue, instead she had a reputation for being direct. She did not hold back on the Senator, calling him “an unmitigated liar” and “a coward to take shelter in the cloak of Congressional immunity.”<sup>155</sup> She gave remarks before the Senate Committee in Washington, D.C. in her defense “with such skill and vigor that her record was publicly cleared.”<sup>156</sup>

...I am a lover of democracy, of individual freedom and of human rights for everybody, a battler, perhaps a little bit too much of a battler sometimes, for the rights of the little fellow, the underdog, the fellow who gets forgotten or frightened or shunned because of unpopular views, but who is a human being just the same and entitled to be treated like one.<sup>157</sup>

The experience gave her increased motivation to work on committees as well as travel the country, giving speeches on topics like women’s equality, democracy, and civil liberties. In 1968, she worked with others to set up the West Side’s first free legal service division for the poor in New York.<sup>158</sup>

## **B. Pauli Murray**

As historian and feminist biographer Susan Ware noted, “Pauli Murray was involved in practically all the major developments that historians of the United States write about when they try to make sense of the twentieth century, especially the movements for social change that have been so central to its history.”<sup>159</sup> A running thread throughout Murray’s life was her ability to write. She had a passion for poetry, saying “lawyers respect facts, whereas poets respect the truth.”<sup>160</sup>

Murray graduated from Hunter College and applied for graduate admission to the University of North Carolina in 1938, but was denied because of her race.<sup>161</sup> She received a rejection letter saying, “members of your race are not admitted to the University.”<sup>162</sup> She was ultimately admitted to Howard University School of

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<sup>155</sup> *Id.*

<sup>156</sup> Factual Data About Dorothy Kenyon, *supra* note 141.

<sup>157</sup> Dorothy Kenyon by Whitney North Seymour (June 2, 1972) (on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 7, Folder 4).

<sup>158</sup> *Judge Dorothy Kenyon is Dead; Champion of Social Reform*, 83, *supra* note 14.

<sup>159</sup> Susan Ware, *Pauli Murray’s Notable Connections*, 14 J. WOMEN’S HIST. 54, 55 (2002).

<sup>160</sup> Patricia Bell-Scott, “*To Write Like Never Before*”: *Pauli Murray’s Enduring Yearning*, 14 J. WOMEN’S HIST. 58, 59 (2002).

<sup>161</sup> Rosalind Rosenberg, *The Conjunction of Race and Gender*, 14 J. WOMEN’S HIST. 68 (2002).

<sup>162</sup> MURRAY, *supra* note 11, at 310. Frustrated, she wrote a letter to Franklin Delano Roosevelt, copying Eleanor Roosevelt, about the denial. Eleanor answered her in a personal letter, urging

Law in 1941.<sup>163</sup> She was shocked to encounter jokes about women as well as the exclusion of women from the school's legal fraternity.<sup>164</sup> Murray began developing the idea of "Jane Crow," referring to the stereotypes and customs that have "robbed women of a positive self-concept and prevented them from participating fully in society as equals with men."<sup>165</sup> She argued racism and sexism in the United States shared common origins and reinforced one another, stating, "The successful outcome of the struggle against racism will depend in large part upon the simultaneous elimination for all discrimination based upon sex."<sup>166</sup> Eventually, Mary Eastwood and Murray would co-author a law review article titled "Jane Crow and the Law: Sex Discrimination and Title VII," published in 1965.<sup>167</sup> They "equated the evil of antifeminism (Jane Crow) with the evil of racism (Jim Crow)," and asserted that the interests of women and Black individuals "are only different phases of the fundamental and indivisible issue of human rights."<sup>168</sup>

Murray pushed herself in her studies and placed first in her class, winning a Rosenfeld Fellowship that would allow for her post-graduate study at Harvard upon receiving her law degree.<sup>169</sup> However, she was informed she was "not of the sex entitled to be admitted to Harvard."<sup>170</sup> Murray appealed to the Harvard Board of Overseers, pointing out that her sex was an immutable characteristic.<sup>171</sup> Harvard

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patience and cautioning Murray against pushing "too fast" for change. Glenda Elizabeth Gilmore, *Admitting Pauli Murray*, 14 J. WOMEN'S HIST. 62, 64 (2002) (citing Murray to Mrs. Roosevelt (Dec. 6, 1938) (on file with Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Papers of Pauli Murray, Box 15, Folder 380)). See also Roosevelt to Murray (Dec. 19, 1938) (on file with Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Papers of Pauli Murray, Box 15, Folder 380). Murray and Eleanor Roosevelt would develop a close friendship, with Murray listing her as a reference on her resume. Pauli Murray's Resume (on file with Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Papers of Pauli Murray, Box 28, Folder 555).

<sup>163</sup> Susan M. Hartmann, *Pauli Murray and the 'Juncture of Women's Liberation and Black Liberation'*, 14 J. WOMEN'S HIST. 74 (2002).

<sup>164</sup> Rosenberg, *supra* note 161, at 69.

<sup>165</sup> PAULI MURRAY, *THE LIBERATION OF BLACK WOMEN, OUR AMERICAN SISTERS: WOMEN IN AMERICAN LIFE AND THOUGHT* 326 (Jean E. Friedman ed., 1973).

<sup>166</sup> *Id.*

<sup>167</sup> Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 235 (1965).

<sup>168</sup> *Id.*

<sup>169</sup> Rosenberg, *supra* note 161, at 69.

<sup>170</sup> *Id.* (citing Pauli Murray, Memo to Files (July 2, 1944) (on file with Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Papers of Pauli Murray, Box 18, Folder 415); and Pauli Murray to Smith of Harvard Board of Overseers (July 7, 1944) (on file with Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Papers of Pauli Murray, Box 18, Folder 415)).

<sup>171</sup> *Id.*

was unmoved. After receiving her law degree in 1944, she studied at the University of California, Berkeley, where she received her Master of Law Degree.<sup>172</sup>

When Murray tried to land a job in New York City, she had trouble, though her qualifications were exemplary. Two stumbling blocks were in her way—she was Black and a woman.<sup>173</sup> She was referred to Dorothy Kenyon, a former Municipal Court Judge in private practice.<sup>174</sup> Though Kenyon had no job to offer, she did have advice for Murray:

The legal profession is a long hard battle for a woman. We are still only barely tolerated, and you're facing the same problem now that my generation of women lawyers had to contend with after World War I. A few of us got a foot in the door during the war, but when it was over the men began pushing us out again. All I can tell you is what I've observed over the years, that if a woman has the guts to stick it out she somehow survives.<sup>175</sup>

Kenyon reassured Murray that her difficulty in obtaining employment had more to do “with an entrenched bias against women in the legal profession” than with her qualifications.<sup>176</sup> Murray worked temporarily as a Deputy Attorney General in Sacramento, California from January to March 1946, then as an Attorney for the Commission on Law and Social Action in New York City from 1946–1947.<sup>177</sup> Murray opened her own office for the general practice of law, located at 225 Broadway in New York City, in July of 1948.<sup>178</sup> Murray went on to practice as an associate attorney at Paul, Weiss, Rifkind, Wharton & Garrison in New York City in 1956.<sup>179</sup>

In 1965, Dorothy Kenyon and James Farmer sponsored Murray's appointment to the ACLU national board.<sup>180</sup> Because the organization had been committed to the civil rights movement, bringing Murray to the board as a Black woman “conferred an influence beyond that which Kenyon could claim and gave

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<sup>172</sup> *Women Who Put Women's Rights on the ACLU Agenda*, *supra* note 152. She was admitted to the California Bar in 1945 and the New York Bar and U.S. District Court, Southern District of New York, Bar in 1948. *See* Pauli Murray Resume, *supra* note 162.

<sup>173</sup> MURRAY, *supra* note 11, at 271.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Pauli Murray Resume, *supra* note 162.

<sup>178</sup> Pauli Murray Business Card (on file with Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Papers of Pauli Murray, Box 28, Folder 555).

<sup>179</sup> Pauli Murray Resume, *supra* note 162.

<sup>180</sup> *Id.*

force to her insistence that ‘classification by race and sex are equally immoral.’”<sup>181</sup> The ACLU had been reluctant to prioritize sex discrimination, so Murray and Kenyon worked to convert male members of the executive board to their position.<sup>182</sup> Upon becoming a member of the ACLU board, Murray was asked to help Kenyon write the brief in *White v. Crook*.<sup>183</sup> It was their dogged effort that played a role in the ACLU creating the Women’s Rights Project that would bring several successful cases before the Supreme Court in the 1970s, revolutionizing the status of women under the law.<sup>184</sup>

### C. Kenyon and Murray’s Positions on Legislative v. Judicial Change

Activists for women’s equality did not necessarily agree on pathways to achieve end goals. The Equal Rights Amendment (“ERA”), introduced in 1923, served as a division in the women’s movement, with supporters of the constitutional amendment on one side and opponents who wanted to preserve protective legislation for women on the other.<sup>185</sup> Proponents who insisted the ERA was the way to secure equality argued all legal distinctions between men and women should be eliminated.<sup>186</sup> They viewed legislation intended to protect women from harsh working conditions kept them from economic opportunities that men enjoyed.<sup>187</sup> The other side understood how difficult obtaining those protective laws had been, and how necessary they were in providing a foothold for women in the workforce. They feared the ERA would undermine those improvements “which they believed were essential to the well-being of working women.”<sup>188</sup> A consensus could not be reached on whether it was best to use litigation to obtain judicial relief, or constitutional change through legislative reform. The question was who could be trusted more to provide relief from sex-based differentials in the law—judges or legislators?

Kenyon believed that protective labor laws should exist for women in the workplace, a view shared by the ACLU at the time.<sup>189</sup> It supported laws differentiating between the sexes for protective reasons, while supporting equal pay

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> MURRAY, *supra* note 11, at 363.

<sup>184</sup> Hartmann, *supra* note 163, at 76.

<sup>185</sup> Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755, 762 (2004).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> CHARLES LAM MARKMANN, *THE NOBLEST CRY: A HISTORY OF THE AMERICAN CIVIL LIBERTIES UNION* 168 (1965).

for equal work.<sup>190</sup> In her opinion, the Fourteenth Amendment was the avenue that could be used to protect women against arbitrary sex discrimination, making the proposed ERA moot.<sup>191</sup> Kenyon argued that discriminatory laws in the areas of marriage, divorce, property ownership, and jury service could be struck down by litigating these issues under a Fourteenth Amendment argument, without eliminating the protective labor legislation.<sup>192</sup> Kenyon's failure to support the ERA drew a line of division between other progressives and herself.<sup>193</sup> She, however, firmly believed removing protective legislation would do more harm than good for women.<sup>194</sup> She thought it much better to have the Supreme Court recognize female equality under the Fourteenth Amendment, rather than rely on legislators to pass a constitutional amendment.<sup>195</sup> In a draft to *Woman's Day* magazine, Kenyon explained her position.

I am so utterly for equal rights that if I thought the amendment could do the slightest bit of good I would be for it. . . . I console myself with working strenuously for . . . helping women doctors get commissions in the armed forces . . . fighting to get women appointed to policy making positions, seeking to be as good a lawyer . . . as I can possibly be in the hopes of thereby securing greater recognitions for women in the professions. These are the real battlefronts in our fight for woman's freedom.<sup>196</sup>

In 1944, Kenyon felt proponents of the ERA were overly optimistic in what its passage would achieve. She believed the only way to resolve inequalities would be to change societal attitudes. She described expecting the ERA to change the nation's habits and customs was to "expect the impossible."<sup>197</sup> She argued the only way to obtain "real equality is the hard slow way of changing public attitudes" which "includes passing laws to correct legal inequalities . . . specifically directed to particular evils and specifically adapted to their cure."<sup>198</sup>

In 1961, President John F. Kennedy created the President's Commission on the Status of Women to develop "plans for fostering the full partnership of men and

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<sup>190</sup> *Id.*

<sup>191</sup> Barbas, *supra* note 138, at 434.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 432.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 434.

<sup>196</sup> Draft of Article in *Woman's Day* (June 1943) (on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 19).

<sup>197</sup> The Equal Rights Amendment (April 13, 1944) (on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 24).

<sup>198</sup> *Id.*

women in our national life.”<sup>199</sup> Murray’s direct involvement with the women’s rights movement began when she was appointed, on the recommendation of the chair Eleanor Roosevelt, to the Commission.<sup>200</sup> The Commission was faced with a serious question: whether to endorse the ERA, which stated, “equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex,” or whether an alternative could be found.<sup>201</sup> In 1962, the Commission’s Committee on Civil and Political Rights asked Murray to examine legal strategies to address the status of American women.<sup>202</sup> Murray spent months writing the memo, which looked at jury service as a current example of sex discrimination.<sup>203</sup> In preparing her memo, Murray requested a copy of Kenyon’s brief in *Hoyt v. Florida*, where Kenyon had unsuccessfully argued sex discrimination in jury service violated the Equal Protection Clause, to use in developing her argument.<sup>204</sup> Murray wanted to develop a litigation strategy using the Fourteenth Amendment to persuade the Supreme Court that it applied to questions of sex discrimination.<sup>205</sup>

The Commission ultimately published a memo titled “A Proposal to Reexamine the Applicability of the Fourteenth Amendment to State Laws and Practices Which Discriminate on the Basis of Sex Per Se.”<sup>206</sup> It was a comprehensive analysis of judicial decisions involving sex-based differentials within the law, and emphasized the importance of a “reexamination by the courts . . . of state laws and practices that discriminated solely on the basis of sex.”<sup>207</sup> Murray thought jury service “clearly illustrated widespread “confusion” about whether women had been oppressed by the law and required emancipation or favored by the law and permitted chivalrous exemption.”<sup>208</sup>

When is it “appropriate” to treat women differently from men? To what extent and in what degree does a physiological difference, or the biological function of childbearing, or the social function of

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<sup>199</sup> STEPHANIE COONTZ, *A STRANGE STIRRING: THE FEMININE MYSTIQUE AND AMERICAN WOMEN AT THE DAWN OF THE 1960S* 150–151 (2011).

<sup>200</sup> Hartmann, *supra* note 163, at 74.

<sup>201</sup> MURRAY, *supra* note 11, at 454.

<sup>202</sup> Mayeri, *supra* note 185, at 763.

<sup>203</sup> KERBER, *supra* note 49, at 190.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Chiappetti, *supra* note 41, at 488.

<sup>207</sup> MURRAY, *supra* note 11, at 457–58.

<sup>208</sup> Pauli Murray, *A Proposal to Reexamine the Applicability of the Fourteenth Amendment to State Laws and Practices Which Discriminate on the Basis of Sex Per Se* (Dec. 1, 1962) (on file Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Papers of the President’s Commission on the Status of Women, Committee on Civil and Political Rights, Box 8, Folder 6).

child-rearing justify differential treatment? And should such differential treatment apply to *all* women without regard to the performance of the function of motherhood? Is a policy which discriminates in *favor* of women in the same undesirable category as one which discriminates *against* them? When can it be justified on the ground of governmental intervention to protect a traditionally disadvantaged group? And how far is such protection to extend? When does it operate to restrict personal rights in violation of constitutional guarantees?<sup>209</sup>

Murray suggested an analogy existed between race and sex. She personally had bumped up against both race and sex discrimination throughout her life. She recommended that instead of constitutional reform through the ERA, success could be had with a litigation strategy using the Fourteenth Amendment. ERA supporters were eager to show that classification by sex, like race, was arbitrary.<sup>210</sup> ERA opponents were eager to leave protective labor laws, since they had been hard fought to obtain. By using very specific cases to persuade the Supreme Court to apply the Equal Protection Clause of the Fourteenth Amendment to sex-based differentials, those protective labor laws could remain.<sup>211</sup> She realized the Fourteenth Amendment strategy could link the civil rights and women's rights movements and would act as an alternative to the counterproductive arguments that served as a roadblock to securing equality.<sup>212</sup> Murray wrote Commission member, U.S. Representative Edith Green, "The controversy over the ERA seemed to force people who espoused the same goals into rigid positions and dissipated energies which might have gone toward a development of standards for the concept of equal status."<sup>213</sup> Using judicial reinterpretation of the Fourteenth Amendment as the primary focus to bring about change would not prevent an eventual ERA, should that be necessary. Not opposed to the ERA in substance, Murray did not think there was enough public support for it to be successfully enacted. Murray believed the litigation strategy would bring about the same type of change sought by the ERA through achieving success on a strategic case-by-case basis.<sup>214</sup>

The report was sent to the ACLU, where Kenyon and other staff used it as a roadmap for litigation strategies.<sup>215</sup> Kenyon wrote to Murray: "I couldn't agree

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<sup>209</sup> *Id.* at 7.

<sup>210</sup> Rosenberg, *supra* note 161, at 70.

<sup>211</sup> Hartmann, *supra* note 163, at 75.

<sup>212</sup> Mayeri, *supra* note 185, at 764.

<sup>213</sup> *Id.* (citing Letter from Pauli Murray to Re. Edith Green (D-OR) (Jan. 24, 1963) (on file with Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Pauli Murray Papers, Box 49, Folder 878).

<sup>214</sup> *Id.* at 765.

<sup>215</sup> Strum, *supra* note 15, at 9.



with you more that [the equality clause of the Fourteenth] Amendment is ideally fitted to deal with discriminations against women if only the Judges could be made to see it.”<sup>216</sup> Kenyon also wrote to the Commission, voicing her support of Murray’s memo. “Miss Murray’s analysis heartens us in our belief that the equality clause of the XIV Amendment looks like the best constitutional instrument at hand for the reflection of the social changes involved in the changing status of women.”<sup>217</sup>

Murray’s memo called for new legislation that would “ensure full participation of women as jurors.”<sup>218</sup> The memo became part of the Commission report, published in 1963.<sup>219</sup> Being persuaded by Murray’s argument to use the Fourteenth Amendment litigation strategy instead of a constitutional change, the Commission did not take a position in favor of the proposed ERA.<sup>220</sup> “[I]n view of the fact that a constitutional Amendment does not appear to be necessary to establish the principle of equality, the Commission believes that constitutional changes should not be sought unless at some future time, it appears from court decisions that a need for such action exists.”<sup>221</sup> The Commission advocated for the end of discrimination in the work force, jury service, property rights, and in politics.<sup>222</sup> The report inspired governors to appoint commissions to ask similar questions regarding the status of women in their own states.<sup>223</sup>

Following the recommendations, the Fair Labor Standards Act was amended by the Equal Pay Act of 1963, providing equal pay for equal work.<sup>224</sup> The Civil Rights Act of 1964 was an important step in future litigation regarding sex discrimination. Title VII outlawed discrimination on the basis of sex as well as race.<sup>225</sup> This legislation removed many of the concerns voiced by opponents of the ERA, by codifying protection for both men and women in the workplace. It helped alleviate the counterproductive arguments within the equality movement and brought activists together. Women now had federally protected rights to equal employment.<sup>226</sup> However, it did not alleviate all concerns for Kenyon regarding supporting the ERA. In a letter dated October 13, 1966 to Murray, Kenyon was

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<sup>216</sup> Pauli Murray, Letter from Dorothy Kenyon to Pauli Murray (Apr. 4, 1963) (on file with Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Pauli Murray Papers, Box 49, Folder 878).

<sup>217</sup> Mayeri, *supra* note 185 (citing Memorandum from Dorothy Kenyon 4 (Mar. 28, 1963) (on file with Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Pauli Murray Papers, Box 9, Folder 63)).

<sup>218</sup> MURRAY, *supra* note 11, at 35–36.

<sup>219</sup> KERBER, *supra* note 49, at 192.

<sup>220</sup> JUDITH PATERSON, *BE SOMEBODY: A BIOGRAPHY OF MARGUERITE RAWALT* 142 (1986).

<sup>221</sup> *Id.* at 143.

<sup>222</sup> *Id.* at 147–48.

<sup>223</sup> KERBER, *supra* note 49, at 193.

<sup>224</sup> Brief for Plaintiff at 57, *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966) (No. 2263-N).

<sup>225</sup> KERBER, *supra* note 49, at 193.

<sup>226</sup> Fred P. Graham, *Rights Case Yields Dividend for Women*, N.Y. TIMES, Feb. 13, 1966, at 172.

discussing a case about employers failing to give equal promotional opportunities to women with legally limited hours (an eight-hour workday).<sup>227</sup> They were discussing the Fourteenth Amendment's application to this type of issue and how the Supreme Court would receive the argument. Kenyon stated women had fought for years to obtain protective laws and wanted to be able to maintain the eight-hour limitation for both men and women while eliminating discrimination based on sex in promotions.<sup>228</sup> Her questioning in this letter indicated the need to find a strong case that would convince the Supreme Court that judicial reinterpretation of the Fourteenth Amendment was a critical step in eliminating sex discrimination, while maintaining protective legislation for workers.

[I]s it good enough for our purposes? We're not reevaluating our policy in respect to protective laws for working women; we're merely asserting that the XIV Amendment applies to women qua women. And we haven't done that yet at top level. Is it better to take a simpler case and establish our doctrine than to sail into the briary patch of protective laws for working women on facts like these?<sup>229</sup>

Eventually, Kenyon's view on the ERA shifted. In 1970, she said "we better have the Equal Rights Amendment in a hurry because I'm afraid the Supreme Court is going in a backward wave for the next 20 years."<sup>230</sup>

In September 1970, the ACLU board was in the midst of discussions on whether to support the ERA. Kenyon and Murray received their packet of materials in preparation for the meeting and sent a joint telegram back to the entire board on September 23, 1970.<sup>231</sup> It said: "Board materials include paper on Equal Rights Amendment written by four men law professors and (inadvertently) not one syllable from any women. We are aghast at such gallant effrontery. Hell hath no rage greater than a woman scorned. Beware of more materials."<sup>232</sup> Though the ACLU had refrained from endorsing the ERA over concerns it would unravel protective legislation for women, by the early 1970s legislation had been put in place around the country that made unions more comfortable with the potential passage of the ERA.<sup>233</sup> Murray and Kenyon advised the ACLU board to use the "dual strategy" of proceeding with litigation under the Equal Protection Clause while also supporting

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<sup>227</sup> Letter from Kenyon to Murray (Oct. 13, 1966) (on file with Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Pauli Murray Papers, Box 39, Folder 685).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> Marilyn Bender, *Liberation Yesterday—The Roots of the Feminist Movement*, N.Y. TIMES, Aug. 21, 1970, at 41.

<sup>231</sup> Strum, *supra* note 15, at 11.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 12.

the ERA. Their efforts were victorious as the ACLU board voted to make women's rights a top priority.

#### IV. JURY SERVICE LITIGATION

##### A. Caselaw Preceding *White v. Crook*

Following the enactment of the Reconstruction Amendments, Black males still had to fight for their rights and responsibilities of citizenship.<sup>234</sup> In 1879, the United States Supreme Court struck down a West Virginia statute limiting jury service to white adult males, stating it was a violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>235</sup> The Court wrote the denial of the right of a citizen to serve on a jury due to color alone was “practically a brand upon them affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.”<sup>236</sup> The Court, in dicta, observed states can make some discriminations in prescribing the qualifications of jurors, like confining the “selection to males, to free holders, to citizens, to persons within certain ages, or to persons having educational qualifications.”<sup>237</sup> The Court said the Fourteenth Amendment did not intend to prohibit these decisions, only those discriminations “because of race or color.”<sup>238</sup> Though Black men were not to be excluded any longer from jury lists, history proves this exclusionary practice continued, particularly in southern states.

The Florida Supreme Court took up the issue of mixed jury service in *Hall v. State*, where a female defendant filed a challenge based on the fact no women were summoned for her jury.<sup>239</sup> She alleged the jury selection was a denial of her Fourteenth Amendment rights, relying on *Norris v. State of Alabama*, a 1935 case before the United States Supreme Court, where the defendant challenged the exclusion of Black citizens from the jury.<sup>240</sup> Testimony in *Norris* showed that no Black citizen had served on any jury, grand or petit, in the county within the memory of several witnesses, including court officials, who had resided in the county for the entirety of their lives.<sup>241</sup> Based on testimony that indicated no Black citizen had ever been called, and there were indeed qualified Black citizens eligible

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<sup>234</sup> Brief of the Florida Civil Liberties Union and the American Civil Liberties Union, *supra* note 15, at 8.

<sup>235</sup> *Strauder v. West Virginia*, 100 U.S. 312 (1879).

<sup>236</sup> *Id.* at 308.

<sup>237</sup> *Id.* at 310.

<sup>238</sup> *Id.*

<sup>239</sup> *Hall v. State*, 136 Fla. 644, 662 (1939).

<sup>240</sup> *Norris v. Alabama*, 294 U.S. 587 (1935).

<sup>241</sup> *Id.* at 591.

for service pursuant to the statutory requirements, the Court held that the “wholesale exclusion” of Black individuals solely based on race was a violation of the Fourteenth Amendment’s equal protection guarantees.<sup>242</sup>

The defendant in *Hall* wanted to argue that the exclusion of women solely based on sex, like race, was a violation of the Fourteenth Amendment. The Florida Supreme Court was not persuaded. It identified the main purpose of the Fourteenth Amendment was to “give the newly emancipated colored race complete equality of civil and political rights with all other persons and races within the jurisdiction of the states.”<sup>243</sup> The court found no reason that a jury made of men alone would be less fair to women defendants than mixed juries. “Indeed, experience would lead to a contrary conclusion. The spirit of chivalry, and of deep respect for the rights of the opposite sex, have not yet departed from the heads and hearts of the men of this country.”<sup>244</sup>

In *Ballard v. United States*, the Supreme Court questioned the fundamental fairness of women being excluded from jury service: “But if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel?”<sup>245</sup> The Court compared this exclusion to the detrimental effects of excluding a certain economic or racial population, writing “a flavor, a distinct quality is lost if either sex is excluded.”<sup>246</sup> The Court found the exclusion of women from federal jury service “deprives the jury system of the broad base it was designed by Congress to

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<sup>242</sup> *Id.* at 597.

<sup>243</sup> *Hall v. State*, 136 Fla. at 663.

<sup>244</sup> *Id.* at 665. The United States Supreme Court revisited the Fourteenth Amendment’s prohibition against racial discrimination in *Smith v. Texas*. The Court affirmed that the use of racial discrimination to exclude qualified citizens from jury service, particularly in grand jury service, was a violation of the Constitution as well as a practice “at war with our basic concepts of a democratic society and a representative government.” The Court further stated the Fourteenth Amendment guarantees “that equal protection to all must be given—not merely promised.” *Smith v. Texas*, 311 U.S. 128, 130 (1941). The Supreme Court looked at the exclusion of certain economic groups from jury service in *Thiel v. Southern Pacific*, where a plaintiff in a negligence action challenged the jury panel as discriminatory due to daily wage earners being excluded from the jury lists. The Court reaffirmed that trial by jury “contemplates an impartial jury drawn from a cross-section of the community.” The Court defined this to “mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion” of various community groups. The Court recognized that daily wage earners were systematically and automatically excluded without any effort to determine if they would suffer an undue hardship through service. Because “jury service is a duty as well as a privilege of citizenship,” the Court stated it is a “duty that cannot be shirked on a plea of inconvenience or decreased earning power.” *Thiel v. Southern Pacific*, 328 U.S. 217, 219–24 (1946).

<sup>245</sup> *Ballard v. United States*, 329 U.S. 187, 193 (1946).

<sup>246</sup> *Id.* at 194.

have in our democratic society.”<sup>247</sup> The absence of either man or woman from a jury made it less representative of the community.

In *Fay v. People of New York*, women were permitted to serve in New York, but were granted an exemption if they chose not to serve.<sup>248</sup> New York used special, or blue ribbon, panels of jurors where the statute allowed the general panel to be sifted through based on various qualifications to a total of about 3,000 names. Special jurors were selected from those accepted for the general panel who appeared and testified under oath as to their fitness to sit on a jury.<sup>249</sup> The challenge was based on the exclusion of lower economic groups and women.<sup>250</sup> The Court stated that merely showing a class of persons was not represented in a jury is not enough to question its composition, instead there has to be a clear showing the exclusion of that class was due to a discriminatory purpose.<sup>251</sup> Women had the ability to volunteer for service so they were not excluded. The Court pointed out that “[u]ntil recently, and for nearly a half-century after the Fourteenth Amendment was adopted, it was universal practice in the United States to allow only men to sit on juries.”<sup>252</sup> As of 1942, fifteen of the twenty-eight states allowing women to serve also allowed an exemption on the basis of sex.

It would, in the light of this history, take something more than a judicial interpretation to spell out of the Constitution a command to set aside verdicts rendered by juries unleavened by feminine influence. The contention that women should be on the jury is not based on the Constitution, it is based on a changing view of the rights and responsibilities of women in our public life, which has progressed in all phases of life, including jury duty, but has achieved constitutional compulsion on the states only in the grant of the franchise by the Nineteenth Amendment. We may insist on their inclusion on federal juries where by state law they are eligible but woman jury service has not so become a part of the textual or customary law of the land that one convicted of crime must be set free by this Court if his state has lagged behind what we personally may regard as the most desirable practice in recognizing the rights and obligations of womanhood.<sup>253</sup>

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<sup>247</sup> *Id.* at 195.

<sup>248</sup> *Fay v. New York*, 332 U.S. 261, 267 (1947).

<sup>249</sup> *Id.* at 268.

<sup>250</sup> *Id.* at 272–73.

<sup>251</sup> *Id.* at 284.

<sup>252</sup> *Id.* at 289.

<sup>253</sup> *Id.* at 290–91.

In 1949, on appeal to the Supreme Court of Arkansas, a male appellant challenged the systematic exclusion of women from jury panels.<sup>254</sup> It was stipulated that no woman had been selected by the jury commissioners in that county since 1925.<sup>255</sup> The state constitution stated, “women shall not be compelled to serve on juries.”<sup>256</sup> The court stated that criminal trials “often involve testimony of the foulest kind, and they sometimes require consideration of indecent conduct, the use of filthy and loathsome words, references to intimate sex relationships, and other elements that would prove humiliating, embarrassing and degrading to a lady.”<sup>257</sup> It differentiated *Fay* stating that where a state does not impose upon women as a class the duty of jury service, a defendant who alleges due process or equal protection violations must show something more than continuing failure of jury commissioners to call women for service in a court “where the innate refinement peculiar to women would be assailed with verbal expressions, gestures, conversations and demonstrations from which most would recoil.”<sup>258</sup> The court found that though there was a stipulation that no women had served in almost twenty-five years on a jury, the appellant did not show that they had systematically been excluded nor that he failed to receive a fair trial.<sup>259</sup>

A critical case in this line was *Hoyt v. Florida*.<sup>260</sup> Historically, women were seen as “*favored* by the culture, and exemption from jury service was understood to be one manifestation of that privilege.”<sup>261</sup> Although women were first admitted to practice law in Florida in the late 1890s, it was not until 1949 that women had an option to serve on a jury.<sup>262</sup> The Florida legislature passed a statute saying no female name could be considered for jury service “unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list.”<sup>263</sup> This was the legislative compromise reached after a bill requiring women to serve was filed.<sup>264</sup> Opponents of the bill did not want “their wives and sisters exposed to the embarrassment of hearing filthy evidence” so the volunteer language was added.<sup>265</sup>

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<sup>254</sup> *Bailey v. Arkansas*, 219 S.W.2d 424, 428 (1949).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 428.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 429.

<sup>259</sup> *Id.* at 63–64.

<sup>260</sup> *Hoyt v. Florida*, 368 U.S. 57 (1961).

<sup>261</sup> KERBER, *supra* note 49, at 134.

<sup>262</sup> *Women on Juries: Hoyt v. Florida*, FLA. SUP. CT., <https://www.floridasupremecourt.org/Library-Archives/Evolution-of-Justice-in-Florida-Documents-Images-and-Books/Women-on-Juries-Hoyt-v.-Florida> (last visited Jan. 16, 2023).

Florida would pass a law requiring mandatory jury duty for women in 1967.

<sup>263</sup> *Hoyt v. Florida*, 368 U.S. at 59.

<sup>264</sup> Linda K. Kerber, *Fighting for a jury of her peers*, MIA. HERALD, Aug. 8, 1993, at 29.

<sup>265</sup> *Id.*

Gwendolyn Hoyt had been charged with the murder of her husband after striking her husband with their son's broken baseball bat.<sup>266</sup> They had a tumultuous relationship—marrying, divorcing, remarrying—with allegations of infidelity and behaviors evidencing what is known today as domestic violence or intimate partner violence. At Hoyt's jury trial, only men sat on the jury. Hoyt argued the jury was not properly made up of a cross-section of her peers and the Florida statute deprived Hoyt of her Fifth, Sixth, and Fourteenth Amendment rights.<sup>267</sup> The trial judge disagreed, and Hoyt was ultimately convicted. The case was appealed to the Florida Supreme Court where the court dismissed the argument, focusing on the lack of any United States Supreme Court decision striking down differential requirements for female jury service.<sup>268</sup>

Kenyon co-authored the amicus curiae brief before the Supreme Court.<sup>269</sup> The brief asked three questions: whether the Florida statute, which excludes from jury service all female persons who do not volunteer is repugnant to and in violation of Hoyt's rights under the Fourteenth Amendment; whether the Florida statute, because it systematically excluded women from jury service in a case "in which the point of view of women was most important" is repugnant to and in violation of the Fourteenth Amendment; and if the Florida statute resulted in arbitrary action taken by the jury commissioners in violation of the Fourteenth Amendment.<sup>270</sup> As to the first question, Kenyon argued the requirement for women to affirmatively volunteer in order to be included for jury service serves as "a separate classification" of men and women and is unreasonable.<sup>271</sup> Two distinct rights are implicated in this differentiation—the right and obligation of a fully enfranchised woman to participate in a public duty without restrictions not imposed on men and the right of all persons accused of a crime to be tried before a jury consisting of an adequate cross-section of their peers.<sup>272</sup>

Kenyon considered the practical impacts suffered by a woman accused of a crime without the benefit of the female juror perspective. In 1957, 114,247 registered voters were in Hillsborough County, with forty percent being women.<sup>273</sup> Out of that number, only 218 women were registered to serve.<sup>274</sup> This was clear evidence that few women were volunteering for jury service under the statutory

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<sup>266</sup> *Wife Wields Baseball Bat on Mate*, MIA. HERALD, Sept. 21, 1957, at 3.

<sup>267</sup> George B. Crawford, *Murder, Insanity and the Efficacy of Woman's Role: The Gwendolyn Hoyt Case*, 89 FLA. HIST. Q. 59 (2010).

<sup>268</sup> *Id.* at 71.

<sup>269</sup> Brief of the Florida Civil Liberties Union and the American Civil Liberties Union, *supra* note 15.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 3.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 4.

<sup>274</sup> *Id.*

scheme. Additionally, the administration of the statute indicated “its effect is to keep women off the jury rolls” and “to deprive a defendant, a woman herself and accused of a crime peculiarly within the experience and understanding of women, of the opportunity to have women serve on her jury.”<sup>275</sup> To the third question, Kenyon argued the commissioners and their staff made it their practice to not “put down all the names of women who had registered, insignificant though that number was in relation to the total number of available men.”<sup>276</sup> In 1957, the commissioner had not looked at the women’s registry and did not include any new names. There were ten women’s names left undrawn from the year before—those were the only women available to be drawn for Hoyt’s jury. Kenyon argued the commissioners and their staff engaged in “a planned, systematic and arbitrary exclusion of women for all practical purposes from the lists.”<sup>277</sup>

Kenyon tried to persuade the Court that women are a “demonstrably distinct class in the community.”<sup>278</sup> Because their classification was different than that of men, the classification would have to be reasonable to survive a constitutional challenge.<sup>279</sup> Here, she argued, the classification was unreasonable.<sup>280</sup> Trying to parse out the historical rationale behind the differential classification of women, Kenyon reminded the Court of when women were not able to participate in the political system, explaining:

Old habits change slowly; customs survive far beyond the reason for their being; the herd instinct is strong. . . . “Woman’s place is in the home,” a slogan of ancient origin, has living force and terrific emotional impact even today. It has taken people a long time to realize (and some still do not) that the great revolutionary forces that helped to bring about the advancement and emancipation of women in the last century have changed the patterns of living for women to an astonishing extent and have in effect forced many women to find a new place for themselves in the world outside their homes.<sup>281</sup>

The U.S. Department of Labor Handbook on Women Workers provided evidentiary support for Kenyon’s argument that times had changed for women. The notion that women needed to be protected from jury service due to their home and family duties was misplaced. As of 1958, women made up thirty-three percent of

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<sup>275</sup> *Id.* at 5.

<sup>276</sup> *Id.* at 6.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 17.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 19–20.



the total labor force.<sup>282</sup> They were not all staying home. Additionally, a woman's normal life expectancy was 73.7 years, as compared to men being 67.2 years of age.<sup>283</sup> Only eleven years out of the average married woman's nearly fifty-three years of adult life would be needed for child-rearing.<sup>284</sup> Women lived longer than men and there was no valid reason to exclude them or limit their service due to affirmative registration requirements. If a woman was to be fully emancipated and enfranchised, it was a "genuine humiliation and degradation of her spirit" to deem her ineligible to share this duty of citizenship with her male counterparts.<sup>285</sup> Kenyon posed the question: "Does it not shock our sense of fair play that, because a few young women with small babies at home might find it inconvenient to come to court . . . this woman should be deprived of even one single woman on her jury?"<sup>286</sup>

The Supreme Court was not persuaded and found no reason to conclude the statute was unconstitutional.<sup>287</sup>

Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.<sup>288</sup>

By identifying woman "as the center of home and family life," the Court implied that both men and women, and arguably any children, would be harmed by women serving on a jury.<sup>289</sup> It failed to recognize the harm excluding women imposed—not only as a constitutional violation but also the detrimental sociological impacts. The Court also was shortsighted in its unwillingness to understand administrative hardships placed on local and state governments by upholding the exclusion of a

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<sup>282</sup> *Id.* at 25 (citing U.S. DEP'T OF LAB., 1958 HANDBOOK ON WOMEN WORKERS 2 (U.S. Gov't Printing Off. 1958)).

<sup>283</sup> *Id.* at 25 (citing PUBLIC HEALTH REPORT 510 (June 1961), as republished in the WORLD ALMANAC, 1961, at 464). This is for white men and women born in 1958; for non-white men and women there is approximately seven years less for both categories.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 26.

<sup>286</sup> *Id.* at 28 (noting that the Judge would excuse those women from the jury for an undue hardship).

<sup>287</sup> *Hoyt v. Florida*, 368 U.S. 57, 61 (1961).

<sup>288</sup> *Id.* at 61–62.

<sup>289</sup> Kanowitz, *supra* note 19, at 30–31.

large segment of the population. Recycling the same names, and frequently calling the same individuals, required a disproportionate sacrifice of time on those called with little remuneration from the county for their service. The Court permitted the volunteer scheme to continue based on the idea that women were home raising children while men worked, without any determination whether service would be an actual hardship. The mere basis of sex was enough for legislators, and the Supreme Court justices, to believe differential treatment of men and women was merited.

### **B. *White v. Crook***

The comparison of race and sex was a controversial move in the women's movement and the civil rights movement at the time.<sup>290</sup> Because of women's assigned role in society, and the perceived need for paternalistic treatment by legislatures and courts, all previous attempts to challenge sex-based discrimination using the Fourteenth Amendment had failed. The ACLU wanted to use the case of *White v. Crook* to link the civil rights and women's rights movements.<sup>291</sup>

Lowndes County, Alabama was known locally as "Bloody Lowndes" and was historically a violent community.<sup>292</sup> A saying among white citizens was that any Black person who tried to register to vote "would be dead by nightfall."<sup>293</sup> It was a place where male and female, Black and white, "struggle in the continuing American revolution. The scars are ugly, the tensions are visible."<sup>294</sup> The county was described as "the symbol of segregated or all-white justice in the nation," resulting in a jury system under attack.<sup>295</sup>

Tom L. Coleman, age fifty-four and white, was a resident of Lowndes County and served as a deputy sheriff when needed.<sup>296</sup> Jonathan M. Daniels, age twenty-five and white, was a seminarian from New Hampshire who was doing civil rights work in Alabama for the Episcopal Society for Racial and Cultural Unity.<sup>297</sup> Daniels and Catholic Father Richard Morrisroe had been arrested and incarcerated on August 14, 1965 for carrying signs which read "Equal Justice For All" in Lowndes County.<sup>298</sup> The demonstration had barely lasted a minute before the

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<sup>290</sup> Chiappetti, *supra* note 41, at 469.

<sup>291</sup> *Id.* at 470.

<sup>292</sup> CHARLES MORGAN, ONE MAN, ONE VOICE 31 (1979).

<sup>293</sup> Tim Unsworth, *1967 Shooting of Two Clergy in Lowndes County, Alabama*, U.S. CATHOLIC, Mar. 1, 1998.

<sup>294</sup> Brief for Plaintiff, *supra* note 224, at 1.

<sup>295</sup> *Id.* at 15.

<sup>296</sup> MORGAN, *supra* note 292, at 38. Coleman's father had allegedly taken part in a lynching and likely served on juries that sentenced Black defendants to death. *See* Unsworth, *supra* note 293.

<sup>297</sup> *Id.* at 38.

<sup>298</sup> *Id.* at 1; Brief for Plaintiff, *supra* note 224, at 1.

protestors were arrested for “resisting arrest, and picketing to cause blood.”<sup>299</sup> Upon their release from jail on August 20, 1965, Daniels and Morrisroe, along with two Black female companions, went to the local convenience store for cold soft drinks.<sup>300</sup> Coleman was there, armed with a twelve-gauge shotgun.<sup>301</sup> Coleman shouted at them to get out, that the store was closed, and he would blow their heads off.<sup>302</sup> Daniels asked if Coleman was threatening them to which Coleman replied, “You damn right I am!”<sup>303</sup> Coleman then fired the shotgun. Daniels was killed and Morrisroe was wounded in the lower spine.<sup>304</sup>

Police initially charged Coleman with murder, but the grand jury returned a first-degree manslaughter charge, punishable from one to ten years in prison.<sup>305</sup> The grand jury also returned an assault and battery charge for shooting Morrisroe.<sup>306</sup> Alabama Attorney General Richmond Flowers said “he was shocked and amazed” the grand jury did not return a first-degree murder charge against Coleman.<sup>307</sup> Ultimately, the Attorney General’s office took over the prosecution of Coleman.<sup>308</sup> The trial was quickly set for September 28, 1965.<sup>309</sup>

Charles Morgan, Jr. was an attorney working for the ACLU in Atlanta, Georgia.<sup>310</sup> Upon learning about the murder, he saw an opportunity to challenge jury service exclusion in Alabama.<sup>311</sup> Gardenia White, a Black woman, was not eligible to serve on the jury due to a state law excluding women and was recruited as the lead plaintiff.<sup>312</sup> Her fellow plaintiffs included both females and males (Lillian S. McGill, Jesse W. Favor, Willie May Strickland, and John Hulett) and the federal lawsuit was filed five days after the murder.<sup>313</sup> The suit was filed against the white jury commissioner, Bruce Crook.<sup>314</sup> Morgan asked for an injunction of all Lowndes County jury trials until the federal court had disposed of the jury discrimination questions.<sup>315</sup> He lost that motion so the murder trial would continue.

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<sup>299</sup> TAYLOR BRANCH, *AT CANAAN’S EDGE: AMERICA IN THE KING YEARS 1965-68* 291 (2006).

<sup>300</sup> MORGAN, *supra* note 292, at 39.

<sup>301</sup> *Id.* at 38–39.

<sup>302</sup> *Id.* at 39.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Alabamian Indicted in the Slaying of Seminarian*, N.Y. TIMES, Sept. 16, 1965, at 33.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> MORGAN, *supra* note 292, at 41.

<sup>309</sup> *Alabamian Indicted in the Slaying of Seminarian*, *supra* note 301.

<sup>310</sup> BRANCH, *supra* note 299, at 312.

<sup>311</sup> *Id.*

<sup>312</sup> Dorothy Kenyon, Jane Crow and Lily-White Males (Jan. 1966) (on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 23).

<sup>313</sup> MORGAN, *supra* note 292, at 39.

<sup>314</sup> BRANCH, *supra* note 299, at 312.

<sup>315</sup> MORGAN, *supra* note 292, at 42.

Though Coleman was on trial for manslaughter, his name appeared on the jury list summoned for his own trial, and no Black men were called.<sup>316</sup> At trial the assistant prosecutor, Joe Breck Gantt, informed the court his primary witness, Father Morrisroe, was still hospitalized and unavailable to testify.<sup>317</sup> The judge ordered the prosecution to go forward and the prosecutor informed the court he wanted to dismiss the manslaughter indictment so he could seek murder charges in the future against Coleman. The judge ordered Gantt to proceed with the prosecution, with Gantt responding he could not proceed without Morrisroe. The judge threatened Gantt with contempt if he did not move forward but Gantt refused.<sup>318</sup> Instead of citing Gantt, the judge removed him from the case, reinstated the local prosecutor, and opened the trial.<sup>319</sup>

The defense witnesses testified that Daniels had a knife and Morrisroe had a pistol, however, neither weapon was ever found.<sup>320</sup> A defense witness said that Coleman had gone to the store to protect it from civil rights demonstrators.<sup>321</sup> One of the Black women in the group testified that Coleman threatened them with his shotgun.<sup>322</sup> After Daniels was hit, Morrisroe grabbed her hand and they started to run until he was shot.<sup>323</sup> She testified that neither Daniels or Morrisroe had weapons.<sup>324</sup> A written statement by Morrisroe was read to the jury, saying they had approached the store to purchase soft drinks.

When Daniels was shot, I turned to leave. I did not want to play hero. Another shot was fired, and I was struck by that shot in my lower spine, and I fell to the ground. To my knowledge, at the time of the threat and the first shot, Daniels did not have a knife, gun, stick, or other weapon in his hand. The only thing I had in mine was a dime.<sup>325</sup>

Coleman did not testify at his trial. During an adjournment, one of the jurors turned and winked at Coleman.<sup>326</sup> At closing, the defense attorney called the

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<sup>316</sup> Brief for Plaintiff, *supra* note 224, at 9.

<sup>317</sup> MORGAN, *supra* note 292, at 43.

<sup>318</sup> *Id.* at 42.

<sup>319</sup> *Id.* at 43–44.

<sup>320</sup> *Id.* at 44.

<sup>321</sup> John Herbers, *Community Backs Coleman: Alabama Jury Frees Coleman*, N.Y. TIMES, Oct. 1, 1965, at 1, 3.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> MORGAN, *supra* note 292, at 44.

<sup>326</sup> *Id.* at 45.

victims “false prophets in sheep’s clothing.”<sup>327</sup> After deliberating for one hour and twenty-nine minutes, the jury found Tom Coleman not guilty.<sup>328</sup>

Kenyon and Murray joined forces to write a portion of the ACLU’s brief in *White v. Crook*.<sup>329</sup> Murray described the effort as “a double-barreled challenge of the constitutionality of all-white, all-male juries.”<sup>330</sup> The brief argued the jury selection system as administrated in Lowndes County, along with the statute excluding women, violated equal protection. It also argued the systematic exclusion of Black citizens from juries violated the Fifth, Sixth, and Seventh Amendments, as well as the Due Process and Equal Protection Clause of the Fourteenth Amendment.<sup>331</sup> Alabama, Mississippi, and South Carolina were the remaining states prohibiting women from trial and grand juries, however, thirty states still allowed some type of jury restriction based on sex.<sup>332</sup> Additionally, the United States Supreme Court had recently denied Kenyon’s argument in the brief filed in *Hoyt*, upholding the Florida law permitting women to only be placed on the jury rolls should they affirmatively volunteer. However, Kenyon and Murray would not be dissuaded from trying to convince the court of their argument. Murray’s article, “Jane Crow and the Law: Sex Discrimination and Title VII,” was attached to the brief as an appendix.<sup>333</sup> They argued the unwillingness of the Supreme Court to apply the Equal Protection Clause of the Fourteenth Amendment to racial discrimination, but not sex discrimination, was a mistake.<sup>334</sup>

The United States Department of Justice (DOJ) intervened in the lawsuit. The DOJ’s brief linked jury service with the right to vote, “their most direct opportunity to participate in the operation of government.”<sup>335</sup> The DOJ asked the court to find Alabama’s wholesale statutory ban unconstitutional and provide prospective relief.<sup>336</sup> The argument to ban women from jury service because “a woman’s place is properly in the home” was overbroad as that rationale did not consider single women, women who have grown children, or women who can discharge their homemaking responsibilities while still serving.<sup>337</sup> The DOJ supported the plaintiff’s argument that Alabama’s exclusion of women was a

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<sup>327</sup> John Herbers, *supra* note 321.

<sup>328</sup> MORGAN, *supra* note 292, at 45.

<sup>329</sup> NORGREN, *supra* note 144, at 11.

<sup>330</sup> MURRAY, *supra* note 11, at 363.

<sup>331</sup> Brief for Plaintiff, *supra* note 224.

<sup>332</sup> BRANCH, *supra* note 299, at 312.

<sup>333</sup> Brief for Plaintiff, *supra* note 224.

<sup>334</sup> JANE SHERRON DE HART, RUTH BADER GINSBURG: A LIFE 132 (2018).

<sup>335</sup> Brief in Support of Intervenor’s Findings of Fact, Conclusions of Law and Decree, *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966) (No. 2263-N), <https://www.fulcrum.org/downloads/t435gd000?locale=en>.

<sup>336</sup> *Id.* at 29.

<sup>337</sup> *Id.* at 29–30.

violation of the Equal Protection Clause of the Fourteenth Amendment. However, the DOJ did not go so far to say that the statutory exclusion of women from jury service rendered an unfair trial. The brief argued the systematic exclusion of a racial class resulted in a discriminatory purpose against members of that race.<sup>338</sup> The bias stems from the jury commissioners in the selection of the jury, which results in an unfair trial to a defendant of the excluded race.<sup>339</sup> “The same may not be said of Alabama’s statutory exclusion of women. Alabama’s decision to exclude women was not intended to produce biased juries, nor should such bias be presumed.” The DOJ argued when the decision to exclude women from juries was made, it was not considered arbitrary or irrational.<sup>340</sup> Instead, the decision to continue to exclude women “is rooted in statute, and legislative momentum has not developed sufficient to cause its repeal.” Because the DOJ did not think the exclusion resulted in unfair trials to criminal defendants, the court should “declare that, for the future, women have a right not to be excluded as a class from jury service in the Alabama Courts.”<sup>341</sup> However, race discrimination in jury selection could not wait for legislative action. The DOJ urged the court to find the process unconstitutional under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment and provide immediate relief.<sup>342</sup>

A day-long hearing was held before the federal court on November 27, 1965.<sup>343</sup> Kenyon flew to Montgomery, Alabama to argue before the court.<sup>344</sup> The DOJ asked the federal court to enjoin Lowndes County from discriminating against Black citizens by failing to call them for jury service, but described the exclusion of women as a “side issue” in the suit.<sup>345</sup> Kenyon rose to make her oral argument that the exclusion of women was unconstitutional and just as injurious as race discrimination but the panel called for submission only on written briefs. When Kenyon insisted on making her argument one of the judges addressed her “sharply.”<sup>346</sup>

The brief before the court was due by December 10, 1965. Kenyon and Murray argued there were many women, Black and white, who desired to serve and were qualified were they not barred by statute.<sup>347</sup> They stated there were many Black men who would serve but they had been systematically excluded. The

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<sup>338</sup> *Id.* at 35.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* at 37.

<sup>342</sup> Proposed Findings of Fact at 5, *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966) (No. 2263-N), <https://www.fulcrum.org/downloads/t435gd000?locale=en>.

<sup>343</sup> *Alabama Judge Cannot Recall Any Negroes on Trial Juries*, N.Y. TIMES, Nov. 27, 1965, at 35.

<sup>344</sup> MURRAY, *supra* note 11, at 475.

<sup>345</sup> *Alabama Judge Cannot Recall Any Negroes on Trial Juries*, *supra* note 343.

<sup>346</sup> *Id.*

<sup>347</sup> Brief for Plaintiff, *supra* note 224, at 7.

exclusion of both women and Black men from juries “seriously hampered the efforts of those seeking to exercise constitutionally guaranteed rights there.”<sup>348</sup> All persons employed in the administration of justice, along with the jury commissioners, were white.<sup>349</sup> In Lowndes County white men between ages twenty-one and sixty-four years of age made up 13.2% of the population. Black men made up 32.1% of the population, while Black women made up 34.8% and white women made up 19.9%. Only 738 white males in the applicable age group were available to serve, excluding 86.6% of the county’s total population.<sup>350</sup>

The authors also pointed out the presiding judge of the Alabama State Court of Appeals was a woman—Judge Annie Lola Price. Judge Price could reverse a jury verdict; however, she could not serve on one. She could resign her post and return to practice before a jury; however, she could not serve on one, based solely on her sex.<sup>351</sup> Though the United States Supreme Court had recognized that jury exclusion based on race was unconstitutional and inconsistent with democratic concepts, the authors argued sex was no different. The issue was not that of an exemption but the “mandatory exclusion of an entire class based solely upon the biological fact of being female.”<sup>352</sup> Scholars had recently identified the parallel between the inferior status of women and that of Black individuals while recognizing the “similarity of the myths used to sustain discrimination against both groups.”<sup>353</sup> The authors urged the court to reach the same conclusion.

Writing an article for *Civil Liberties* before the federal court rendered its opinion, Kenyon remarked on the “revolutionary” case.

It seems inconceivable that the Negro half of the case could be lost, the proven exclusion being so complete. Supreme Court decisions in this area are clear. Systematic exclusion of Negroes from jury service is repugnant to the Fourteenth Amendment. The other half of the case is more novel. Perhaps it would be the part of wisdom (and modesty on the part of the writer) not to prognosticate the result at this time. But the combination of total Negro exclusion (of both Negro and white women), with women in the majority in both categories, shows how greatly the true cross-section of the community, which a jury is supposed to exemplify if it is to be truly “impartial,” is out of balance—and how far the system of justice in a democracy is askew. Let women and Negroes, we say, Jane Doe,

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<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at 8.

<sup>350</sup> *Id.* at 12.

<sup>351</sup> *Id.* at 61.

<sup>352</sup> *Id.* at 53.

<sup>353</sup> *Id.* at 55.

Jane Crow, and Jim Crow, all have a fair chance to serve—and justice, instead of guns, may return even to Lowndes County.<sup>354</sup>

On February 7, 1966, the three-judge panel ruled unanimously for Gardenia White and her fellow plaintiffs.<sup>355</sup> This was the first time a federal court agreed that the Fourteenth Amendment’s guarantee of equal protection should apply to both sex and race.<sup>356</sup> The court found it significant the all-white jury commissioners relied almost entirely on the qualified voter lists, which contained no Black citizen names prior to March 1, 1965.<sup>357</sup> The panel ordered Lowndes County to add registered Black male voters to the jury lists.<sup>358</sup> The court also found the statute violated the Fourteenth Amendment as it denied women the right to serve on juries.<sup>359</sup>

Jury service is a form of participation in the processes of government, a responsibility and a right that should be shared by all citizens, regardless of sex. The Alabama statute that denies women the right to serve on juries in the State of Alabama therefore violates the provision of the Fourteenth Amendment that forbids any State to “deny to any person within its jurisdiction the equal protection of the law.” The plain effect of this constitutional provision is to prohibit prejudicial disparities before the law. This means prejudicial disparities for all citizens—including women.<sup>360</sup>

The court said the Constitution “must be read as embodying general principles meant to govern society and the institutions of government as they evolve through time.”<sup>361</sup> When the court applied the Fourteenth Amendment to the facts in *White*, “the conclusion is inescapable that the complete exclusion of women from jury service” was arbitrary.<sup>362</sup> The court struck down the application of the law in

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<sup>354</sup> Kenyon, *supra* note 312. This article is housed in the Dorothy Kenyon papers in Smith College. On the article is a handwritten note at the top that says, “Property of Dorothy Kenyon.” At the conclusion of the article, there is a handwritten note that says, “We won our case!”

<sup>355</sup> BRANCH, *supra* note 299, at 437.

<sup>356</sup> ROSALIND ROSENBERG, *DIVIDED LIVES: AMERICAN WOMEN IN THE TWENTIETH CENTURY* 184 (2008).

<sup>357</sup> *White v. Crook*, 251 F. Supp. 401, 406 (M.D. Ala. 1966).

<sup>358</sup> *Id.* at 407.

<sup>359</sup> *Id.* at 408.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*



Alabama, delaying the ruling until 1967 to give the legislature a chance to decide whether jury service for women should be mandatory or voluntary.<sup>363</sup>

Murray and Kenyon were thrilled with the opinion.<sup>364</sup> Additionally, Murray and Mary Eastwood were excited to see the ruling took the same position as they had argued in their law review article.<sup>365</sup> They were hopeful this decision would impact jury service laws beyond Alabama. Eastwood wrote to Charles Morgan, Jr. following the ruling describing it as “far better than I had dared hope for. It is the most important thing to happen to women since the Nineteenth Amendment. (At least.)”<sup>366</sup>

Kenyon had been practicing law since 1919, and, of all the lawyers who had worked on the case, it was she who had been “a stalwart survivor of the earlier women’s movement” and “devoted to the ‘Cause of Women’ since her youth.”<sup>367</sup> Throughout her long career, Kenyon had battled to become a lawyer “in a male-dominated profession, disarming her male colleagues with amusing witticisms to win their support of her point of view when her brilliant logic failed.”<sup>368</sup> Since the 1920s, Kenyon had advocated for women’s social, economic, and political rights.<sup>369</sup> *White* was the first victory for Kenyon where the Equal Protection Clause of the Fourteenth Amendment was judicially applied to cases of sex-based discrimination.<sup>370</sup> In a March 17, 1966, letter, Kenyon wrote: “Other victories will follow. But this one turned the key in the lock. Like the Civil Rights Boys when the *Brown* decision was handed down, I could cry.”<sup>371</sup> Murray believed that *White* was the *Brown v. Board of Education* for women, saying that if a similar case came before the Supreme Court it was “unthinkable that it could say any less.”<sup>372</sup>

Unfortunately, Alabama did not appeal the decision. Though the ACLU would have to wait to argue sex discrimination before the Supreme Court, it was still cause for celebration—a federal court had ruled that state laws could not deprive women of constitutional rights.<sup>373</sup>

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<sup>363</sup> *Id.* at 406, 409.

<sup>364</sup> MURRAY, *supra* note 11, at 474.

<sup>365</sup> *Id.* at 475.

<sup>366</sup> Mayeri, *supra* note 185, at 779 (citing Letter from Mary Eastwood to Charles Morgan, Director, Southern Regional Office, ACLU (Feb. 1966) (on file with Schlesinger Library, Radcliffe Institute for Advanced Study, Harvard University, Mary Eastwood Papers, Carton 1, Folder 28)).

<sup>367</sup> MURRAY, *supra* note 11, at 475.

<sup>368</sup> *Id.*

<sup>369</sup> Barbas, *supra* note 138, at 428.

<sup>370</sup> MURRAY, *supra* note 11, at 475.

<sup>371</sup> Letter from Dorothy Kenyon to Charles Duncan (Mar. 17, 1966) on file with (on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 28).

<sup>372</sup> Paterson, *supra* note 220, at 162.

<sup>373</sup> *Id.* at 161–62.

### C. The Aftermath of *White v. Crook*

The Alabama legislature, after the opinion in *White*, amended its statutes to allow women to serve.<sup>374</sup> Cases continued to be litigated about how juries were selected, particularly in the southern states.<sup>375</sup> Soon after *White*, the Supreme Court of Mississippi issued an opinion in *State v. Hall*, where Virginia Hall argued that the exclusion of women from jury service denied equal protection guarantees to female defendants.<sup>376</sup> The court did not find *White* binding and denied her relief. The court found the eligibility qualifications for jurors was a legislative matter, and classification by sex was reasonable.<sup>377</sup> The court was “unwilling to take from the legislature that which the people have entrusted to it.”<sup>378</sup> Chief Justice Ethridge dissented in the case, stating that “[t]he Fourteenth Amendment prohibits prejudicial disparities before the law for all citizens, including women.”<sup>379</sup> The Chief Justice argued that equal participation in the administration of justice is a fundamental right of citizenship, which included the right to serve on juries.<sup>380</sup> Jury service is “a responsibility and right possessed by all citizens, regardless of sex. Certainly a statute completely and absolutely excluding over one-half the population of this state from eligibility for jury service is a classification without any reasonable basis.”<sup>381</sup>

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<sup>374</sup> *Carter v. Jury Commission of Greene County*, 396 U.S. 320, 323 n.2 (1970).

<sup>375</sup> *Id.* at 331–45. In *Carter v. Jury Commission of Greene County*, a challenge was made to the Alabama statute allowing jury commissioners to select for jury service those who are “reputed to be honest and intelligent” and of “good character and sound judgment.” *Id.* at 323. The appellants argued the statute was unconstitutional because it gave the commissioners an opportunity to discriminate based on race. *Id.* at 331. The United States Supreme Court stated it was long held that the Constitution allows states to prescribe relevant qualifications for jurors. *Id.* at 332. The Court did not find the statute should be invalidated. *Id.* at 337. In his dissent, Justice Douglas said “[t]here comes a time when an organ or agency of state law has proved itself to have such a racist mission that it should not survive constitutional challenge.” *Id.* at 340. The record in Greene County, much like that of Lowndes County in *White*, demonstrated a systematic exclusion of Black citizens from juries even though they “outnumber the whites by two to one.” *Id.* at 342. Justice Douglas would strike down the all-white jury commission system as it did not provide “proportional representation for the two races” and asserted “[w]here there exists a pattern of discrimination, an all-white or all-black jury commission in these times probably means that the race in power retains authority to control the community’s official life, and that no jury will likely be selected that is a true cross-section of the community.” *Id.* at 342–43, 345.

<sup>376</sup> *State v. Hall*, 187 So.2d 861, 863 (Miss. 1966).

<sup>377</sup> *Id.* at 870.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.* at 871.

<sup>381</sup> *Id.*

The ACLU's Women's Rights Project was soon established with Ruth Bader Ginsburg, a professor at Columbia Law, leading the group.<sup>382</sup> Ginsburg prioritized persuading the Supreme Court to reverse decisions affirming sex-based differentials in statutes. One of the cases she wanted reversed was *Hoyt*. A case soon presented itself to persuade the Supreme Court that arbitrary sex discrimination was a denial of the Equal Protection Clause of the Fourteenth Amendment, though it did not involve jury service.

In *Reed v. Reed*, an Idaho statute said males must be preferred to females when choosing an estate administrator.<sup>383</sup> Ginsburg co-wrote her first sex equality brief before the Supreme Court in the case. In the brief, Ginsburg stated that one's sex, like race, is a "congenital, unalterable trait of birth" and it should be "impermissible to distinguish on the basis" of traits the individual cannot control.<sup>384</sup> When Ginsburg finished drafting the brief, she honored Kenyon and Murray by listing them as co-authors, giving them long overdue credit for their litigation strategy.<sup>385</sup> Ginsburg said it was a symbolic gesture to reflect "the intellectual debt which contemporary feminist legal argument owed [them]."<sup>386</sup> She understood the shoulders upon which she stood, later saying "[i]t was much easier for us to do what we did . . . there were a lot of things that were very hard for [that generation]."<sup>387</sup> She also reiterated the great debt her generation owed them, "for they bravely pressed arguments for equal justice in days when few would give ear to what they were saying" keeping the "idea—and the hope—alive."<sup>388</sup> In *Reed*, the Supreme Court held for the first time that the Equal Protection Clause of the Fourteenth Amendment prohibits differential treatment of women solely on the basis of sex.<sup>389</sup> It was a decision on narrow grounds but a victory for equality.<sup>390</sup>

Ginsburg would go on to be recognized as the "founding mother" of modern constitutional sex equality law because of her work before the Supreme Court.<sup>391</sup> She played a direct role in nearly every major sex discrimination case that arrived before the Supreme Court in the 1970s, personally presenting oral argument in six

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<sup>382</sup> MURRAY, *supra* note 11, at xvi.

<sup>383</sup> *Reed v. Reed*, 404 U.S. 71, 73 (1971).

<sup>384</sup> Brief for Appellant at 5, *Reed v. Reed*, 404 U.S. 71, 73 (1971) (No. 70-4), 1971 WL 133596.

<sup>385</sup> Michael S. Rosenwald, *Ruth Bader Ginsburg was inspired by a forgotten female trailblazer*, WASH. POST, Dec. 28, 2018. Murray and Kenyon did not write the brief; however, Kenyon served as a consultant to the ACLU in the case. Factual Data About Dorothy Kenyon, *supra* note 141.

<sup>386</sup> *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU, <https://www.aclu.org/other/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff> (last visited June 12, 2022).

<sup>387</sup> KERBER, *supra* note 49, at 201.

<sup>388</sup> DE HART, *supra* note 334, at 153.

<sup>389</sup> *Reed v. Reed*, 404 U.S. 71, 76–77 (1971).

<sup>390</sup> Factual Data About Dorothy Kenyon, *supra* note 141.

<sup>391</sup> Julie C. Suk, *A Dangerous Imbalance: Pauli Murray's Equal Rights Amendment and the Path to Equal Power*, 107 VA. L. REV. ONLINE 5, 10 (2021).

of the cases—winning five.<sup>392</sup> She continued to argue before the Court that race and sex should be classified equally.

In *Frontiero v. Richardson*, a federal law allowed differential treatment for military spousal dependency based on sex.<sup>393</sup> In Ginsburg’s oral argument, she had the opportunity to educate the court about the impact of sex discrimination and how it was linked to race discrimination.

Sex like race is a visible, immutable characteristic bearing no necessary relationship to ability. Sex like race has made the basis for unjustified or at least unproved assumptions, concerning an individual’s potential to perform or to contribute to society. . . . The sex criterion stigmatizes when it is used to limit hours of work for women only. Hours regulations of the kind involved in *Muller* against Oregon though perhaps reasonable on the turn of the century conditions, today protect women from competing for extra remuneration, higher paying jobs, promotions. The sex criterion stigmatizes when as in *Hoyt* against Florida, it assumes that all women are preoccupied with home and children and therefore should be spared the basic civic responsibility of serving on a jury. These distinctions have a common effect. They help keep woman in her place, a place inferior to that occupied by men in our society. . . . Proponents as well as opponents of the equal rights amendment believe that clarification of the application of equal protection to the sex criterion is needed and should come from this Court. . . . In asking the Court to declare sex a suspect criterion, amicus urges a position forcibly stated in 1837 by Sara Grimke, noted abolitionist and advocate of equal rights for men and women. She spoke not elegantly, but with unmistakable clarity. She said, “I ask no favor for my sex. All I ask of our brethren is that they take their feet from off our necks.”<sup>394</sup>

Ginsburg hoped the Court would treat sex as a suspect class, thereby obtaining a higher standard of review in cases involving sex-based differentials.

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<sup>392</sup> *U.S. Supreme Court Cases: Ruth Bader Ginsburg*, NAT’L ARCHIVES, <https://www.archives.gov/files/women/ginsburg-cases.pdf> (last visited Jan. 16, 2023).

<sup>393</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>394</sup> Oral Argument at 20:53, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694), <https://www.oyez.org/cases/1972/71-1694> (last visited Jan. 17, 2023).

She was not successful in this respect; however, the Court did find the law unconstitutional.<sup>395</sup>

In the Eastern District of Louisiana, Ginsburg represented Marsha Healy in *Healy v. Edwards*, where the challenge was to a law that exempted women from jury service unless they filed a written declaration stating their desire to serve.<sup>396</sup> The federal court stated that a jury panel resulting from women being excluded, or only permitted to serve if they volunteered, cannot be “truly representative of the community” and the absence of women does “violence to the democratic nature of the jury system.”<sup>397</sup> As such, juries should not reflect one sex, just like they should not represent only one race.<sup>398</sup> The court stated the absence of women “from jury panels is significant not because all women react alike, but because they contribute a distinctive medley of views influenced by differences in biology, cultural impact and life experience.”<sup>399</sup> Following the federal court decision, Louisiana adopted a new constitution, to become effective January 1, 1975, that said all citizens who have reached the age of majority are eligible for jury service.<sup>400</sup>

Ginsburg continued to represent Healy on appeal at the Supreme Court in *Edwards v. Healy*, giving the oral argument on October 16, 1974.<sup>401</sup> Though the new constitution would soon be effective, Ginsburg pointed out the legislature had not yet had its session to provide additional qualifications.<sup>402</sup> The change in the constitution did not resolve the issue since it was not a question of women’s eligibility but rather a question of whether they would receive an exemption unless they affirmatively volunteered.<sup>403</sup> Ginsburg reminded the Court that the common law excluded women from jury service because of the defect of sex, and that was accepted in subsequent statutory laws.<sup>404</sup> It did not make sense to include women on juries when “they couldn’t vote or hold office” and married women were “subject to a range of legal disabilities that drastically curtailed their scope of activity.”<sup>405</sup> Ginsburg further argued that excluding women based on childbearing or childrearing concerns is “appallingly overbroad and stereotypically underinclusive.”<sup>406</sup> It was overbroad because “it includes the childless woman, the

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<sup>395</sup> *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

<sup>396</sup> *Healy v. Edwards*, 363 F. Supp. 1110 (E.D. La. 1973).

<sup>397</sup> *Id.* at 1116.

<sup>398</sup> *Id.*

<sup>399</sup> *Id.* at 1115.

<sup>400</sup> Oral Argument at 12:53, *Edwards v. Healy*, 421 U.S. 772 (1975) (No. 73-759),

<https://www.oyez.org/cases/1974/73-759> (last visited Jan. 17, 2023).

<sup>401</sup> *Id.*

<sup>402</sup> *Id.* at 13:29.

<sup>403</sup> *Id.* at 16:12.

<sup>404</sup> *Id.* at 27:28.

<sup>405</sup> *Id.* at 27:53.

<sup>406</sup> *Id.* at 35:25.

woman whose children are grown, the woman who can provide without hardship,” and it was underinclusive because it did not include men “whose presence at home may be essential to the family’s well-being.”<sup>407</sup> The Court asked about a companion case, *Taylor v. Louisiana*, during the oral argument.<sup>408</sup> *Edwards* was disposed of without opinion and remanded back to the district court for consideration if it was moot.<sup>409</sup>

In *Taylor v. Louisiana*, the Supreme Court held the systematic exclusion of women from a jury violates the requirement that a jury be drawn from a fair cross-section of community members.<sup>410</sup> The Court vindicated Ginsburg’s argument in *Edwards*. Women had not been wholly excluded from serving, however, they had to affirmatively make known to the jury commissioner their desire to serve.<sup>411</sup> Because men did not have that requirement, the effect was to exclude women from serving. The Court found it untenable “to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male.”<sup>412</sup> As such, it could no longer “follow the contrary implications of the prior cases, including *Hoyt v. Florida*.”<sup>413</sup>

If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed. If at one time it could be held that Sixth Amendment juries must be drawn from a fair cross section of the community but that this requirement permitted the almost total exclusion of women, this is not the case today. . . . Nothing persuasive has been presented to us in this case suggesting that all-male venires in the parishes involved here are fairly representative of the local population otherwise eligible for jury service.<sup>414</sup>

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<sup>407</sup> *Id.* at 35:25. Ginsburg would finally obtain a heightened standard of review for sex-based differentials in *Craig v. Boren*, 429 U.S. 190, 197 (1976). Though not strict scrutiny, as desired, *Craig* provides intermediate scrutiny as the standard of review for sex discrimination. “[C]lassifications by gender must serve *important* governmental objectives and must be *substantially related* to the achievement of those objectives.” *Craig*, 429 U.S. at 197. This placed the sex criterion above rational basis review but below strict scrutiny.

<sup>408</sup> *Id.* at 30:35.

<sup>409</sup> *Edwards v. Healy*, 421 U.S. 772 (1975).

<sup>410</sup> *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975).

<sup>411</sup> *Id.* at 523.

<sup>412</sup> *Id.* at 537.

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

The Court would revisit the issue four years later in *Duren v. Missouri*.<sup>415</sup> Jackson County, Missouri, allowed women an automatic jury exemption from jury service upon request.<sup>416</sup> Women made up the majority of the population, however, only 26.7% of the names on the jury list were women.<sup>417</sup> The male defendant, Billy Duren, challenged his convictions based on violations of Sixth and Fourteenth Amendment constitutional rights as women were exempted.<sup>418</sup> Ginsburg gave her oral argument in the case before the Court on November 1, 1978:

[T]he state is providing an ineludible message that the male citizens are counted by Government as the essential participants of the administration of justice but the female citizens are not so counted, this service is expendable. . . . The Court said in *Taylor* that is untenable to suggest it would be a special hardship for a woman to perform jury duty simply because of her sex. Post *Taylor* then, a woman's work whether at home or on the job and the administrative convenience of treating all women as expendable, these are not even arguable basis for diminishing the defendant's Sixth Amendment right by diluting the quality of community judgment a jury trial provides. Moreover, eliminating the exemption for any woman clouds no reasonable jury service exemption. Only two states, Missouri and Tennessee, today maintain a solely sex-based exemption. Other Missouri exemptions are tied to occupation, prior service, individual hardship, not to an unalterable identification each of us is marked with at birth and identification bearing no necessary relationship to one's capacity or life situation and therefore inherently unreasonable as a basis for jury duty avoidance... Selection of a criminal trial jury from a representative cross-section, the Court held in *Taylor* is an essential component of a defendant's Sixth Amendment right.<sup>419</sup>

In an eight-to-one opinion, the Court held Jackson County's jury selection process violated Duren's constitutional rights.<sup>420</sup> The Court reiterated its holding in *Taylor* that "systematic exclusion of women during the jury-selection process" results in jury lists that are not "reasonably representative" of the community, and

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<sup>415</sup> *Duren v. Missouri*, 439 U.S. 357 (1979).

<sup>416</sup> *Id.* at 360.

<sup>417</sup> *Id.* at 362.

<sup>418</sup> *Id.* at 359–60.

<sup>419</sup> Oral Argument at 21:45, *Duren v. Missouri*, 439 U.S. 357 (1979) (No. 77-6067), <https://www.oyez.org/cases/1978/77-6067> (last visited Jan. 17, 2023).

<sup>420</sup> *Duren v. Missouri*, 439 U.S. 357 (1979).

further denied a criminal defendant their rights under the Sixth and Fourteenth Amendments.<sup>421</sup>

Ginsburg was appointed to the United States Supreme Court as an Associate Justice in 1993 and soon sat on a case involving sex and jury service.<sup>422</sup> In *J.E.B. v. Alabama ex rel. T.B.*, a father was tried in Alabama in a paternity and child support action.<sup>423</sup> The state used nine of its ten peremptory challenges to exclude male jurors, and an all-female jury panel was empaneled. The Supreme Court held, “[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.”<sup>424</sup> The Court detailed the history of women and juries, including a discussion of romantic paternalism, where objections to women serving resulted from the “ostensible need to protect women from the ugliness and depravity of trials. Women were thought to be too fragile and virginal to withstand the polluted courtroom atmosphere.”<sup>425</sup> The Court linked race and sex discrimination and the detrimental impacts of both forms of discrimination. “Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.”<sup>426</sup> This outcome was what Kenyon and Murray had hoped the Supreme Court would eventually decide regarding jury service.

## V. CONCLUSION

In her papers housed at the Schlesinger Library at Harvard, Murray created a handwritten chart titled “Leaders for Women’s Rights and Reforms (U.S.A.)”<sup>427</sup> In the chart, Murray lists individuals, no longer living, who she thought were leaders in the movement.<sup>428</sup> The first name she included was Anne Hutchison, and the last name on the list was Dorothy Kenyon.<sup>429</sup> Their relationship was one of deep respect, later described by Murray as “a sisterhood.”<sup>430</sup>

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<sup>421</sup> *Id.* at 359.

<sup>422</sup> *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, *supra* note 386.

<sup>423</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

<sup>424</sup> *Id.* at 130–31.

<sup>425</sup> *Id.* at 132.

<sup>426</sup> *Id.* at 140.

<sup>427</sup> *Pauli Murray Papers, 1910-1985. Women’s Rights – History Personalities, 1970.*, HARV. UNIV. LIBR., [https://iiif.lib.harvard.edu/manifests/view/drs:46227989\\$1i](https://iiif.lib.harvard.edu/manifests/view/drs:46227989$1i) (last visited Jan. 16, 2023).

<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

<sup>430</sup> *Obituary for Dorothy Kenyon*, DAILY NEWS, Feb. 15, 1972, at 116.



St. Peter's Church in the Episcopal Diocese of New York, also known as St. Peter's Chelsea, began serving the community on the West Side in 1831, its pews original to the building with two nineteenth century massive pipe organs within its interior.<sup>431</sup> This was where Kenyon's funeral was held on February 17, 1972.<sup>432</sup> Murray gave the eulogy.<sup>433</sup> Kenyon lived her entire life on the West Side and "was part of the pulse beat" of New York City.<sup>434</sup> Murray's poetic voice rang throughout her address at the memorial service:

Dorothy Kenyon's presence sparkled in every group in which she took part, and the removal of that sprightly presence leaves us with a sense of being diminished, of a loss which cannot be replaced in our time. Yet, the central lesson of her high-hearted spirit impels us not to mourn but to rejoice in the triumph of a life richly lived, valiantly fought, dedicated to service on behalf of human rights for all, creative and productive almost to the very end. Our legacy is the fire of that dauntless independent spirit, forever in rebellion against injustice and inequality, and having the capacity to endure and overcome many defeats until her ideals became accepted principles . . . It is the vindication of a lifetime of patient effort that she lived to be one of the attorneys who persuaded the Supreme Court in November 1971 to adopt the view that the Fourteenth Amendment applies to discrimination on grounds of sex, and that today the ACLU has adopted a comprehensive program to implement its policies on women's rights as a priority in 1972 . . . I think when future historians assess the important issues of the Twentieth Century they may well conclude that Judge Dorothy Kenyon was one of the giants who stood in bold relief against the American sky.<sup>435</sup>

In examining the history of women and jury service, one can see Kenyon and Murray indeed were on a quest for equality. *White v. Crook* was like lightning in a bottle. For a moment, a federal court was convinced of what Kenyon and Murray had been arguing for so long—race and sex discrimination were linked. Though they would have to wait for a case to come before the Supreme Court to

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<sup>431</sup> *Our History*, ST. PETERS CHELSEA, <http://www.stpeterschelsea.org/our-history-buildings.html> (last visited June 12, 2022).

<sup>432</sup> *Obituary for Dorothy Kenyon*, *supra* note 430.

<sup>433</sup> Pauli Murray Eulogy Address (Feb. 17, 1972) (on file with Smith College, Sophia Smith Library, Dorothy Kenyon Papers, Box 7, Folder 4).

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

test their litigation strategy, their efforts ultimately succeeded. Kenyon and Murray were the architects of a strategy that would not only persuade the Court in *Reed v. Reed* to apply the Equal Protection Clause of the Fourteenth Amendment to sex-based differentials but would also persuade the Court to eliminate jury service exemptions on the basis of sex in *Taylor v. Louisiana*.

In 1965, Kenyon wrote, “No freedoms are ever won without a struggle and eternal vigilance is the price we pay for keeping them.”<sup>436</sup> Their legacies inspire activists to continue in the struggle against inequality, and to exercise eternal vigilance maintaining the principles Kenyon and Murray ultimately achieved.

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<sup>436</sup> CARTER, *supra* note 27.