

Winning the Battle but Losing the War: The Birth and Death of Intersecting Notions of Race and Sex Discrimination in *White v. Crook*

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In 1965, no federal court had yet held that sex-based classification was a denial of equal protection. The notion that a race-sex analogy could even be made under the Fourteenth Amendment was highly controversial among members of the women's movement, the civil rights movement, and the legal establishment. It was not until White v. Crook, a 1965 case in which the American Civil Liberties Union ("ACLU") challenged the exclusion of African-Americans and women from Alabama juries, that a federal court recognized that the statutory exclusion of women from jury service constituted discrimination under the Fourteenth Amendment.

Despite the great ambitions of Pauli Murray and Dorothy Kenyon, the architects behind the race-sex analogy, White v. Crook has been reduced to little more than a paragraph, if not a footnote, in most accounts of both the civil rights movement and the women's movement. The sex discrimination claim is treated as a side issue in histories told from a racial equality perspective, while the race discrimination claim is treated as a side issue in the feminist legal histories.

This Note seeks to provide a legal historical account of how these two claims ended up side-by-side for the first time in a case that arose out of the murder of a civil rights activist in 1965 in the Deep South. This Note explores the distance between the civil rights movement and the women's rights movement, as well as the careers of the lawyers who brought them together for a brief moment in time, notably Pauli Murray. Because the legal and historical literature dedicated to the two movements during this time period is as bifurcated as the movements themselves, this paper seeks to weave together the stories that led each of these two movements to collaborate under the umbrella of the ACLU in Alabama in 1965. This close examination of White v. Crook demonstrates the extent to which the dominant voices in each movement were preoccupied by their respective claims to equality under the Fourteenth Amendment during this moment of constitutional change; the subsequent entrenchment of arguments treating race and sex as separate and analogous phenomena, rather than overlapping and intersecting, as suggested by Murray, should come as no surprise. By drawing attention to the intersectional origins of sex discrimination, this paper seeks to revive an interest in the intersectional possibilities of the Equal Protection Clause.

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INTRODUCTION

In 2016, it is not as surprising to see race and sex discrimination claims appear alongside each other, but in 1965, no federal court had held that a sex-based classification was a denial of equal protection. This Note seeks to provide a historical account of how race and sex discrimination claims ended up side-by-side for the first time in a case that arose out of the murder of Jonathan Daniels in the Deep South. Much has been written about this landmark victory for feminism — this was the first time that a federal court ruled that the Fourteenth Amendment prohibited sex discrimination as well as race discrimination, and feminists were eager to see whether and how the Supreme Court would embrace such an argument. However, Alabama never appealed the ruling in *White*, and it would be six years before the Supreme Court would hold that the Fourteenth Amendment prohibits discrimination based on sex in *Reed v. Reed*.¹ Nonetheless, *White* strived to do something that none of the subsequent sex discrimination cases before the Supreme Court would be able to do — to link the civil rights and women’s rights movements. As Serena Mayeri has observed, “[s]ubstantively, then, the failure of an instance of jury exclusion of African Americans and white women to become the landmark sex discrimination case under the Fourteenth Amendment represented a missed opportunity for jurisprudential convergence of the Black civil rights and women’s rights causes.”² For early black feminists like Pauli Murray, this “jurisprudential convergence” would have pressured the Supreme Court to consider intersecting forms of discrimination and their implications for the Fourteenth Amendment.³

Previous attempts to challenge sex-based discrimination under the Fourteenth Amendment had been entirely unsuccessful; courts generally applied minimal scrutiny and consistently held that sex-based classifications were constitutional in light of women’s role in society and their presumed need for paternalistic protective legislation.⁴ As recently as 1961, the Su-

¹ *Reed v. Reed*, 404 U.S. 71, 76 (1971).

² Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755, 783 (2004) [hereinafter *Constitutional Choices*].

³ *Id.* (using the term “jurisprudential convergence”).

⁴ Linda J. Cochran, *The Emerging Bifurcated Standard for Classifications Based on Sex*, 24 DUKE L.J. 163, 167 (1975); see also *Muller v. Oregon*, 208 U.S. 402, 421 (1908); see, e.g.,

preme Court had held that a Florida statute automatically exempting women from jury duty did not violate the Equal Protection Clause of the Fourteenth Amendment, given women's "special responsibilities" in the home.⁵

Moreover, until 1965, the civil rights movement had for the most part ignored the particular plight of black women. Legal claims on their behalf were entirely missing from the brilliant litigation strategy of the NAACP and its allies, despite the concurrent rise of a vibrant, but mostly white, women's movement embodied in the National Women's Party ("NWP") and later, the National Organization for Women ("NOW").⁶ However, Pauli Murray saw in the NAACP's Fourteenth Amendment litigation strategy an opportunity to challenge sex-based classifications using the same arguments used by racial reformers. *White v. Crook* became that opportunity.

Part I of this Note describes the immediate lead-up to *White v. Crook*. Part II then zooms out and explores the historical gap between the civil rights and women's rights movements, and some of the socio-political factors that began to narrow the distance between the movements in the mid-1960s. Part III provides an overview of Pauli Murray's education and early career, throughout the course of which Murray experienced overlapping and intersecting forms of discrimination on the basis of both race and sex. It argues that these experiences, coupled with a radicalizing education at Howard Law School, primed her to recognize the potential power of a legal race-sex analogy.

Part IV describes the career of Charles Morgan, the ACLU lawyer who filed *White v. Crook*, and who idolized Harper Lee's Atticus Finch character in *To Kill A Mockingbird*, until his arrival at the ACLU in 1965. It paints a picture of a lawyer who defined himself as courageous, honorable, and willing to fight against all forms of injustice. Part V discusses Pauli Murray's career in the years leading up to her appointment to the ACLU national board in 1965, and situates her appointment within the larger women's rights movement. In the early 1960s, Murray was a figure striving to bridge the gap in the feminist movement between those who supported and those who opposed the passage of an Equal Rights Amendment (ERA); the Fourteenth

Bradwell v. State of Illinois, 83 U.S. 130, 141 (1873) (Bradley, J. concurring) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.").

⁵ Hoyt v. Florida, 368 U.S. 57, 62 (1961).

⁶ This Note acknowledges that though historical accounts of Second Wave Feminism tend to emphasize the feminism of middle class white women (as embodied in the pro-Equal Rights Amendment ("ERA"), NWP, and NOW), these years were also years of feminist organizing for Black, Latina, Native American, and Asian American women. Becky Thompson, *Multiracial Feminism: Recasting the Chronology of Second Wave Feminism*, 28 FEMINIST STUDIES 337, 337-338 (2002). "Second Wave Feminism" refers to the flurry of feminist activity that began in the early 1960s and continued through the early 1980s. This Note does not seek to erase that history, or to obscure the contributions of women of color to the feminist movement, but rather to demonstrate that the arm of the women's movement with which Murray engaged on the national stage during this period was predominantly white.

Amendment strategy she developed during these years would prove to serve as a linkage between these factions. An examination of the *White v. Crook* case itself, as well as its reception and aftermath, follows in Part V.

The conclusion draws on the scholarly work of Serena Mayeri, who argues that *White v. Crook* failed to achieve jurisprudential convergence and demonstrate how the bifurcated historical and legal literature to this day maintains this divergence. This divergence comes as no surprise given the effect of intersectional discrimination on excluding the very voices most interested in achieving jurisprudential convergence.

I. HISTORICAL BACKGROUND TO *WHITE V. CROOK*

When Reverend John B. Morris heard that a young white Episcopal seminarian had been shot and killed in Lowndes County, Alabama, he marched down the hallway to talk to American Civil Liberties Union (“ACLU”) attorney Charles Morgan.⁷ Morris was executive director of the Episcopal Society for Racial and Cultural Unity (“ESRCU”), located next door to the Southern Regional Office of the ACLU in Atlanta, and a friend of Morgan’s.⁸ In a city that was home to many leaders of the civil rights movement, including Dr. Martin Luther King Jr., 5 Forsyth Street housed multiple civil rights organizations. Journalists and activists often congregated in the ACLU offices to share news in the afternoon, and on the afternoon of August 20, 1965, that news was the murder of the seminarian Jonathan Daniels.⁹

Daniels had traveled to Alabama from Harvard Divinity School in Cambridge, Massachusetts a few months earlier to participate in the march to Selma in March of 1965 and, swept up by the movement, had decided to stay as leader of the ESRCU’s activity in Selma. On the afternoon of his death, Daniels had been unexpectedly released from jail in Hayneville, Alabama with three others — a white Catholic priest, Dick Morrisoe, and two black female activists, Ruby Sales and Joyce Bailey.¹⁰ The four had been part of a group of young people unlawfully arrested days earlier for picketing a whites-only store in nearby Fort Deposit, Alabama.¹¹

The foursome walked over to a convenience store to buy sodas while they waited for a ride following their release from jail. As the foursome approached the store, a middle-aged white man hanging around its doorway shouted at them: “Get out! The store is closed! I’ll blow your goddamned

⁷ WAYNE GREENHAW, *FIGHTING THE DEVIL IN DIXIE* 184 (2011).

⁸ CHARLES MORGAN, *ONE MAN ONE VOICE* 39 (1st ed. 1979).

⁹ GREENHAW, *supra* note 7, at 181, 184.

¹⁰ Tim Unsworth, *Murder in Black and White*, 63(3) U.S. CATHOLIC 35, 37 (Mar. 1998).

¹¹ TAYLOR BRANCH, *AT CANAAN’S EDGE: AMERICA IN THE KING YEARS, 1965–68* 290 (2006). The picketing barely lasted a minute before a mob of local men, deputies among them, engulfed the protestors and told them they were going to jail for “resisting arrest, and picketing to cause blood.” *Id.* at 291.

heads off, you sons of bitches!”¹² Daniels asked the man if he was threatening them; he responded that he was, picked up his shotgun and, without warning, aimed his shotgun at Sales. Daniels dove in front of Sales as the man fired and was instantly killed as he took the bullet. A second shot hit Morrisoe in the lower right back as he tried to flee with Sales and Bailey. Morrisoe would survive, but just barely.¹³

The middle-aged white man was Tom Coleman, a volunteer deputy sheriff who worked for the State Highway Department and had spent his entire life in Lowndes County — “Bloody Lowndes” was one of most violent strongholds of the segregated south.¹⁴ When Reverend Morris walked into the ACLU offices to speak to Morgan, he had just gotten off the phone with the Department of Justice (“DOJ”), who said there was nothing it could do about the shooting.¹⁵ Morris knew that without some form of intervention, Coleman would likely be exonerated; for centuries, white men had been acquitted — if even charged at all — for the murders and rapes of black men and women.¹⁶ With the jury stacked, it seemed just as likely that Coleman would get off the hook for the murder of a white civil rights activist.¹⁷

Though the Alabama “justice” system featured an array of corrupt and sham practices, the persistent exclusion of African Americans from the jury system was one of the more egregious. Despite an 1880 Supreme Court ruling in *Strauder v. West Virginia* that the categorical exclusion of black men from juries violated the Equal Protection Clause of the Fourteenth Amendment, southern states had continued to *de facto* exclude black men from juries through other means for decades.¹⁸ Unlike the *de facto* exclusion

¹² MORGAN, *supra* note 8, at 39.

¹³ UNSWORTH, *supra* note 10, at 37.

¹⁴ ROSALIND ROSENBERG, *DIVIDED LIVES: AMERICAN WOMEN IN THE TWENTIETH CENTURY* 183 (rev. ed. 2008); see also BRANCH, *supra* note 11, at 5 (“Across its vast seven hundred square miles, Lowndes County retained a filmy past of lynchings nearly unmatched.”).

¹⁵ GREENHAW, *supra* note 7, at 184.

¹⁶ See generally Tania Telow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 81–84 (2009) (discussing the problem of discriminatory acquittal in the United States and the ways in which discriminatory acquittal served to endorse racial violence after slavery, drawing on the acquittals by all-white juries of the murderers of Emmett Till and Medgar Evers, as well as the customary practice in the South of failing to arrest, prosecute, or convict those guilty of lynching.); see also John D. Gerhart, *Alabama Jury Acquits Slayer of ETS Student*, THE HARV. CRIMSON (Oct. 1, 1965), <http://www.thecrimson.com/article/1965/10/1/alabama-jury-acquits-slayer-of-ets/> (“Coleman’s trial was only the fifth time in ten years that a white Southerner had [sic] been indicted in connection with the killing of a civil-rights worker. None has been convicted.”).

¹⁷ In fact, Coleman was called to serve on the jury at his own trial for the killing of Jonathan Daniels. The judge excused him. Coleman had been called for jury duty twelve times in the previous twenty years. MORGAN, *supra* note 8, at 40.

¹⁸ *Strauder v. West Virginia*, 100 U.S. 303, 308–09 (1880). The Court notably did not hold that the exclusion of blacks from juries violated the rights of potential jury members, but rather that categorically excluding men of the defendant’s race from the jury violated the rights of black criminal defendants. *Strauder* also reaffirmed the state’s power to “confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications.” *Id.* at 310. For a discussion of how courts used the language of *Strauder* to continue to exclude women from jury service, see generally LINDA KERBER, *No*

of black men from juries, the categorical exclusion of women from juries was *de jure*; an Alabama statute excluded women of all races from jury service.¹⁹

Morgan, a born-and-bred white southern civil rights lawyer, had been trying to challenge the persistent segregation of the Alabama jury system for years,²⁰ and the Coleman trial provided another opportunity; an all-white, all-male jury would be almost certain to acquit Coleman. Within a week of Daniels' death, Morgan traveled to Alabama and filed suit in federal court on behalf of five African-American would-be jurors — Gardenia White, Lillian S. McGill, Jesse W. Favor, Willie May Strickland, and John Hulett, as well as Reverend Morris, and Jonathan Daniels' mother. He filed the case against Bruce Crook, Alabama's white jury commissioner, his fellow white jury commissioners, and other Lowndes County officials. The dark humor of the case name was not lost on Morgan.²¹

Notably, the complaint challenged the systemic exclusion of black men from jury service alongside the statutory exclusion of women; the DOJ ended up joining in the case and the ACLU recruited two of its the leading feminist lawyers, Pauli Murray and Dorothy Kenyon, to draft the sex discrimination portion of the brief.²² Morgan asked a federal court to enjoin all jury trials in Lowndes County until it had ruled on the merits of the jury discrimination question. Though the plaintiffs did not succeed in securing an injunction and Coleman walked free as expected, the three-judge panel in the Middle District of Alabama ultimately held that the exclusion of both

CONSTITUTIONAL RIGHT TO BE LADIES 133–34 (1998). For a discussion of how “the justices left southern courts free to exclude blacks from juries” while still reaffirming *Strauder* from 1880 into the mid-20th century, see generally MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 40–47 (2004). The Court refused to identify racial discrimination in the administration of state laws regarding the selection of jurors, and so state officials were able to engage in de facto discrimination with impunity. *Id.* at 43.

¹⁹ Title 30, § 21, Code of Alabama (Recompiled 1958). As of 1965, only two other states, Mississippi and South Carolina, totally barred women from jury service. *White v. Crook*, 251 F.Supp. 401, 408 n.14 (1966). However, thirty states “retained some sort of jury restriction by sex.” BRANCH, *supra* note 11, at 312. As recently as 1961, the Supreme Court had held in *Hoyt v. Florida* that a Florida statute automatically exempting women from jury duty did not violate the equal protection clause of the Fourteenth Amendment, given women’s “special responsibilities” in the home. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961). For a lengthy discussion of women’s struggle for the right to serve on juries in the United States, see generally KERBER, *supra* note 18, at 125–220.

²⁰ Even before he arrived at the ACLU, Morgan had been participating in the ongoing struggle to desegregate southern jury systems. Morgan and Orzell Billingsley, Jr. had filed *Billingsley v. Clayton* on behalf of Billingsley’s father. When Morgan joined the ACLU, the case was still pending in Judge Johnson’s U.S. District courtroom in Montgomery, since at the time it was filed, the federal court did not have the authority to rule. See GREENHAW, *supra* note 7, at 181–82.

²¹ See BRANCH, *supra* note 11, at 312 (“To salvage puckish humor in the face of numb sorrow and rampant fear, Morgan recruited as lead plaintiff one Gardenia White, granddaughter of Rosie Steel, donor of the Lowndes County campsite for the Selma march, and as lead defendant he picked the white jury commissioner Bruce Crook, thus contriving for clerks to name the landmark constitutional case *White v. Crook*.”).

²² See *infra* at Part VI for a further discussion of the DOJ’s intervention in the case.

African-Americans and women from juries in Alabama violated the Equal Protection Clause.²³

II. SEPARATE BUT PARALLEL: RACIAL JUSTICE AND WOMEN'S EQUALITY MOVEMENTS FROM THE ANTEBELLUM ERA TO THE CIVIL RIGHTS MOVEMENT

In order to understand the significance of *White v. Crook*, it is necessary to understand why the civil rights and women's rights movements were not more intertwined from their inceptions.²⁴ After all, female abolitionists were some of the first advocates for women's rights in the early nineteenth century.²⁵ For many of these early advocates, the similarities between the legal situations of slaves and married women had become impossible to ignore. At the time, women occupied a subordinate legal and social status, losing civil and economic rights upon marriage.²⁶ For others, it was the experience of discrimination within the abolitionist movement that led to their politicization as advocates for women.²⁷

With the passage of the Reconstruction Amendments in the years immediately following the Civil War, Congress sought to protect the civil and political rights of black Americans.²⁸ The early women's movement sought to seize this energy to fight for civil rights for all Americans, regardless of race, color, or sex, including the right to vote. Early suffragists used the plight of the black woman to draw attention to the futility of black suffrage without women's suffrage; "What to the slave woman is the equality of the

²³ *White v. Crook*, 251 F. Supp. 401, 406–07 and 409 (M.D. Ala. 1966) (per curiam).

²⁴ Unless otherwise noted, when I refer to the "women's movement," I refer to the predominantly white women's movement for reasons explained hereinafter.

²⁵ See Kerber, *supra* note 18, at 85, 98–99; Carol Ellen DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Women's Suffrage, and the United States Constitution, 1820–1878*, 74 J. AM. HIST. 836, 840 (1987) [hereinafter "*Outgrowing the Compact*"].

²⁶ Pauli Murray, *Constitutional Law and Black Women*, in *REBELS IN LAW* 52, 53–54 (J. Clay Smith Jr., ed., 1998). For a discussion of the history of the race-sex analogy during this period, see Serena Mayeri, "A Common Fate of Discrimination": *Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045, 1053 (2001) [hereinafter "*A Common Fate*"]. White women's rights advocates' efforts to "invoke[] similarities in the legal status of married white women and slaves" were not universally embraced. Abolitionist men feared that any association with women's rights would doom the abolitionist movement, African-American men and women "often subtly subverted" the analogy to prevent the obscuring of the Black woman's plight, while pro-slavery advocates exploited the analogy to argue that race and sex hierarchies were natural. *Id.* The revival of race-sex analogy in the Title VII battles would provoke a similar range of responses.

²⁷ HISTORY OF WOMEN'S SUFFRAGE, VOL. 1: 1848–1861 52–53 (Elizabeth Cady Stanton, Susan B. Anthony, & Matilda Joselyn Gage, eds., 1881).

²⁸ It is worth noting that legal and historical commentators observe that Congress had numerous motives in passing the Reconstruction Amendments, including keeping the union together and putting Republican governments in power in the South. For many members of Congress, civil rights may have been a lesser concern. Regardless, the Amendments had the effect of ending slavery and, at least on paper, granting political rights to black Americans.

“races?” asked Susan B. Anthony.²⁹ However, the movement ultimately found itself divided on the matter of the Fifteenth Amendment, once it became clear that Republican politicians were resistant to any analogy between black male suffrage and women’s enfranchisement.³⁰ Reformers including Elizabeth Cady Stanton and Anthony vehemently opposed the amendment, which restricted voting rights to “males,” while others, including Lucy Stone and Julia Ward Howe, remained true to their abolitionist origins and supported the amendment as a partial victory.³¹ This rift signaled not only an end to interracial collaboration between the feminists and the abolitionists, but the demise of legal arguments based on analogy between race and sex,³² as Stanton and her peers began to argue that women must be granted political rights not “because they were the same as men but that they were different.”³³ As the nature of the nascent feminist movement became increasingly separate from the abolitionist movement, references to the plight of black women dwindled.³⁴

²⁹ DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMAN’S MOVEMENT IN AMERICA 69 (1978).

³⁰ Mayeri, *A Common Fate*, *supra* note 26, at 1053.

³¹ From the ideological and strategic rift within the women’s movement in the lead-up to the Fifteenth Amendment emerged two rival associations. Frustrated by the refusal of both the Republican Party and former abolitionist allies to heed their calls for universal suffrage, in 1869, Stanton and Anthony founded the National Women’s Suffrage Association (“NWSA”). See DuBois, *Outgrowing the Compact*, *supra* note 25, at 847–48. In response, Lucy Stone and Julia Ward Howe founded the America Women’s Suffrage Association (“AWSA”), which tied itself more closely to the Republican Party, ultimately supporting the Fifteenth Amendment and engaging in a state-by-stage strategy for women’s suffrage. See Joellen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN’S L.J. 103, 167 (1994). For a fuller picture of the racism implicit and explicit in Stanton and Anthony’s creation of the NWSA, see Angela Davis, *Racism in the Women Suffrage Movement*, in WOMEN, RACE, AND CLASS 70–86 (1981) (“Whether the criticism of the Fourteenth and Fifteenth Amendments expressed by the leaders of the women’s rights movement was justifiable or not is still being debated. But one thing seems clear: their defense of their own interests as white middle-class women . . . exposed the tenuous and superficial nature of their relationship to the postwar campaign for Black equality. Granted, the two Amendments excluded women from the new process of enfranchisement and were thus interpreted by them as detrimental to their political aims. Granted, they felt they had as powerful a case for suffrage as Black men. Yet in articulating their opposition with arguments invoking the privileges of white supremacy, they revealed how defenseless they remained — even after years of involvement in progressive causes — to the pernicious ideological influence of racism . . .”). For the view that the creation of the NWSA signaled the emergence of an independent woman’s movement that was both radically feminist, but increasingly racist and elitist, see generally DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMAN’S MOVEMENT IN AMERICA, *supra* note 29, at 174–79.

³² Mayeri, *A Common Fate*, *supra* note 26, at 1053–54.

³³ DuBois, *Outgrowing the Compact*, *supra* note 25, at 848. It is not difficult to see the ways in which such rhetoric would “[obscure] the existence of those persons who are both [black and female].” *Id.* at 846.

³⁴ DuBois, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMAN’S MOVEMENT IN AMERICA, *supra* note 29, at 69–71 (arguing that the attention paid to black women in the early suffrage movement was more rhetorical than real); see also Davis, *Racism in the Women Suffrage Movement*, *supra* note 31, at 77–81, explaining Stanton and Anthony’s ill-informed view that abolition of slavery had “elevated Black people to a position in U.S. society that was comparable in almost every respect to that of middle-class white women,”

In a series of cases in the late nineteenth century, the Supreme Court interpreted the Reconstruction Amendments so narrowly that it effectively rendered them powerless in challenging race discrimination, let alone sex discrimination.³⁵ It would not be until the Civil Rights Movement in the mid-twentieth century that both the civil rights and women's rights movement would begin to successfully chip away at the prevailing legal order and restore some teeth to the Fourteenth Amendment. However, the intervening century widened the gap even further between the civil rights and women's rights movements. Despite common interests, a century of segregated society prevented reformers from cooperating, communicating, and aligning their movements.³⁶

Instead of serving as the natural bridge between movements, black women largely dedicated their energy to the fight against racial discrimination. As was the case with the abolitionist movement, it was the sex discrimination operating *within* the civil rights movement of the Second Reconstruction that ultimately radicalized black women.³⁷ Unsurprisingly, as black women were not represented in the official leadership of the civil rights movement, neither were their economic and political interests.³⁸ Increasingly, civil rights liberals viewed black women's economic and political independence as a potential threat to racial equality and African-American progress.³⁹ Yet, there was not immediately a place for black women within the mainstream white women's movement either. From the 1920s to the

and their problematic willingness to associate their suffrage campaign with white supremacists.

³⁵ See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896); *The Civil Rights Cases*, 109 U.S. 3 (1883); *The Slaughter-House Cases*, 83 U.S. 36 (1872).

³⁶ Pauli Murray, *The Negro Woman in the Quest for Equality*, in *REBELS IN LAW*, *supra* note 26, at 172, 174.

³⁷ Murray noted the ways in which women in the civil rights movement were often assigned a secondary role, if not entirely excluded. "There is much jockeying for position as ambitious men push and elbow their way to leadership roles. Part of this upsurge reflects the Negro male's normal desire to achieve a chance of personal worth and recognition of his manhood by a society which has so long denied it. One aspect is the wresting of the initiative of the civil rights movement from white liberals. Another is the backlash of a new male aggressiveness against Negro women." *Id.* at 174–75; see also SAMUEL WALKER, IN *DEFENSE OF AMERICAN LIBERTIES* 304 (1990) ("The southern civil rights movement also played an extremely important role in raising the consciousness of women who chafed at being relegated to a subordinate role in the movement."). However, many black women, finding themselves in the awkward position of having to "choose" to align themselves with either the fight for racial equality or the fight for sex equality, continued to choose civil rights. ROSENBERG, *supra* note 14, at 199 ("The needs of [minority women's] families and community seemed more important than the individualistic aspirations of many feminists.").

³⁸ SERENA MAYERI, *REASONING FROM RACE* 25–26 (2011). *But see generally* BELINDA ROBNETT, *HOW LONG? HOW LONG? AFRICAN-AMERICAN WOMEN IN THE STRUGGLE FOR CIVIL RIGHTS* 115–139 (1997) for a discussion of the ways in which black women served an integral part in the Civil Rights Movement as "bridge leaders" between the Movement and the community. Robnett argues that previous researchers' studies of gendered relationships in the Civil Rights Movement failed to pay sufficient attention to race, class, and culture, and falsely equated power with titled leadership.

³⁹ See *infra* note 59 and accompanying text; MAYERI, *REASONING FROM RACE*, *supra* note 38, at 26.

1960s, the women's movement had been locked in an intractable debate over the push for an Equal Rights Amendment ("ERA"). Women of color were suspicious of ERA supporters, found mostly in the National Women's Party ("NWP"), who were viewed as "affluent, business-oriented, politically conservative" and "committed to absolute equality with no exceptions."⁴⁰ Through an ERA, the NWP sought to eradicate *all* legal distinctions between men and women in order to secure women's equal status.⁴¹ In contrast, those who opposed the ERA, including the black feminists, were in favor of some protective legislation for women; they represented the "poor, union-oriented, and politically liberal."⁴² This seemingly intractable rift troubled Pauli Murray, who as of 1962 was working with President Kennedy's Commission on the Status of Women ("PCSW"). Having chosen to dedicate her career to both racial justice and sex equality, she saw herself as a mediator between these two factions.⁴³ In a memo drafted for the PCSW, Murray proposed a new legal strategy inspired by the litigation victories of the Civil Rights Movement under the Fourteenth Amendment.⁴⁴ She proposed challenging laws that invidiously discriminated on the basis of sex using a "heightened reasonableness" standard under the Equal Protection Clause of the Fourteenth Amendment; such a case-by-case approach, she argued, would preserve reasonable labor protections while striking down laws that demeaned women, such as exclusion from jury service.⁴⁵

Despite Murray's attempt to forge a middle path, the NWP initially rejected her proposed litigation strategy, fearing a race-sex analogy would require increased ties to groups such as the NAACP and the ACLU.⁴⁶ In the early 1960s, the NWP was seeking to distance itself from the black civil rights movement in a controversial attempt to garner the support of southern states for the ERA.⁴⁷ Members of the NWP feared that Murray's litigation strategy, given its inherent ties to the Civil Rights Movement, would taint

⁴⁰ ROSENBERG, *supra* note 14, at 180.

⁴¹ Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L.R. 755, 762 (2004).

⁴² ROSENBERG, *supra* note 14, at 180. These labor advocates had fought hard for minimum wage, maximum hour, and weight-lifting laws for women in the workplace, and feared that such protections would be struck down under the ERA. MAYERI, REASONING FROM RACE, *supra* note 38, at 17–18.

⁴³ Mayeri, *Constitutional Choices*, *supra* note 41, at 764.

⁴⁴ *Id.* at 763.

⁴⁵ MAYERI, REASONING FROM RACE, *supra* note 38, at 17–18. To Murray, equality between the sexes did not have to come at the expense of some recognition of difference between the sexes. Social reforms feared that the ERA would undo years of state-level advocacy for minimum wage, maximum hour, and alimony laws. *Id.* at 12; Rosenberg, *supra* note 14, at 181. Whether we attribute Murray's perspective to her labor background, her own racial and gender identity, or a compromising impulse, Murray sought to reconcile the pro-ERA movement's calls for formal equality with the anti-ERA's preference for what we now call substantive equality.

⁴⁶ Mayeri, *Constitutional Choices*, *supra* note 41, at 767–68. See *infra* Part V for further discussion of the origins of Murray's memo and the reception to her argument.

⁴⁷ *Id.* at 769.

the women's movement and jeopardize the viability of the ERA. Such a fear was not entirely unfounded; in relying on the Amendment, Murray did hope to connect the women's rights and civil rights agendas in a "substantively meaningful way."⁴⁸

This historical racial divide began to break down in 1964 with Title VII and the fight for the inclusion of a "sex" amendment in the discrimination statute.⁴⁹ It may seem surprising that it was a male congressman from Virginia who initially proposed amending Title VII to also prohibit discrimination based on sex, but for years Southern segregationists had, with the support of the NWP, introduced amendments to civil rights bills establishing protections for white women.⁵⁰ The terms of the alliance were as such: southern legislators viewed the sardonic inclusion of "sex" as a guaranteed way to swiftly defeat civil rights legislation, while the NWP was traditionally uncompromising towards any legislation that granted rights to any group without also granting the same rights to women.⁵¹ However, it quickly became clear that there might be sufficient political momentum to pass Title VII *with* a sex amendment.

Proponents of the sex amendment referenced the plight of Black women opportunistically. In a memo to senators and White House officials, Pauli Murray argued that Title VII without a sex amendment would benefit only half of the Negro⁵² workforce, and benefit black men, but not black women, at the expense of white women.⁵³ Murray was troubled by the view that the sex amendment was "a favor to white women and a blow to Black civil rights," and tried to reframe the amendment as crucial to the protection of the rights of black women.⁵⁴ Though in other contexts she agreed with

⁴⁸ *Id.* at 767; MAYERI, REASONING FROM RACE, *supra* note 38, at 19 ("Moreover, using the Fourteenth Amendment could unite civil rights and feminism under one constitutional banner, mitigating conflicts that had long pained Murray. For Murray, this unification was at least as important as closing the divide between protectionists and ERA supporters.").

⁴⁹ Mayeri emphasizes the importance of Title VII's sex amendment in "consolidating legal feminism as a force to be reckoned with and altering the terms of advocates' constitutional choices." *Constitutional Choices*, *supra* note 41, at 770.

⁵⁰ See Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 171 (1991). Some NWP officials had expressed outright opposition to the prospect of civil rights for African Americans, while others "emphasized the particular dangers it posed to the employment aspirations of white native-born Christian women." Mayeri, *Constitutional Choices*, *supra* note 41, at 772.

⁵¹ Mayeri, *Constitutional Choices*, *supra* note 41, at 770. In introducing the sex amendment, Virginia Rep. Howard W. Smith adopted a "mocking and jocular tone which led to the two hour debate being dubbed "Ladies Day" in the House." Freeman, *supra* note 50, at 176-77.

⁵² This Note uses the word Negro in historical context, where and as it was used by Murray and her contemporaries.

⁵³ MAYERI, REASONING FROM RACE *supra* note 38, at 22.

⁵⁴ Mayeri, *Constitutional Choices*, *supra* note 41, at 774. In her autobiography, Murray writes that she was overjoyed when she first heard that a sex amendment had been introduced in the House because "as a Negro woman, I knew that in many instances it was difficult to determine whether I was being discriminated against because of race or sex and felt that the sex provision would close a gap in the employment rights of all Negro women." PAULI MUR-

Murray, proponent Rep. Martha Griffiths appealed to the fears of southern legislators by argued the converse — that without a sex amendment, Title VII would protect Black women but not white women.⁵⁵

When Congress ultimately passed Title VII containing the sex amendment, the NWP, who had been historically opposed to any symbolic collaboration with the civil rights movement, now had new reason to be invested in the survival of the Civil Rights Act.⁵⁶ Particularly once it became clear that the newly created Equal Employment Opportunity Commission's ("EEOC") attitude towards sex discrimination was half-hearted, if not hostile, black and white feminists joined together in lobbying the EEOC to give teeth to the amendment, and to challenge commonplace discriminatory hiring, wage, promotion, and firing practices under the new statute.⁵⁷ The EEOC's cavalier attitude towards sex discrimination provided women's organizations a common goal.⁵⁸ Though this fight would continue in the late 60s and 70s, black women in particular were alerted to the importance of fighting feminist battles alongside race battles, as liberal conventional wisdom began espousing a belief that the economic independence of black women was a threat to family stability and racial equality; black women realized they would be left out of Title VII's vision of equal employment opportunity if they did not fight.⁵⁹ The Title VII fight made clear the overlapping legal interests of the civil and women's rights reformers, and would lead to an attempt to unite the movements under the Fourteenth Amendment.

III. THE EDUCATION OF PAULI MURRAY

One of the modern architects of the Fourteenth Amendment litigation strategy was Pauli Murray, the aforementioned black female lawyer for whom a link to the civil rights movement was unavoidable. In fact, one explanation for the convergence of the previously separate racial and femi-

RAY, *THE AUTOBIOGRAPHY OF A BLACK ACTIVIST, FEMINIST, LAWYER, PRIEST, AND POET* 356 (1987) (hereinafter "AUTOBIOGRAPHY").

⁵⁵ Mayeri, *Constitutional Choices*, *supra* note 41, at 771.

⁵⁶ Mayeri argues that the passage of Title VII led to the NWP's "shift away from the segregationist alliance that . . . had helped to pass the sex amendment itself" and a warming in its stance toward African-American civil rights. *Id.* at 774–75.

⁵⁷ The commission and staff made clear their belief "that the addition of *sex* to the law had been illegitimate — merely a ploy to kill the bill — and that it did not therefore constitute a mandate to equalize women's employment opportunities." CYNTHIA HARRISON, *ON ACCOUNT OF SEX* 187 (1988). The EEOC "openly gave lower priority to sex discrimination claims than race discrimination complaints." MAYERI, *REASONING FROM RACE*, *supra* note 38, at 22.

⁵⁸ HARRISON, *supra* note 57, at 192.

⁵⁹ In 1965, Daniel Patrick Moynihan published a controversial report, "The Negro Family: The Case for National Action," which largely blamed the matriarchal structure of black communities for "poverty, crime, and African American male unemployment." MAYERI, *REASONING FROM RACE*, *supra* note 38, at 25. This message resonated with some members of the civil rights community, for whom "the focus on rehabilitating black manhood" and pushing for affirmative action employment policies for African American men was appealing. *Id.* at 25. However, it also spurred a feminist critique, by completely excluding the promotion of black female employment.

nist movements in *White v. Crook* is the fact that for her, these movements were never anything but intertwined. To understand the implications of raising race and sex discrimination claims simultaneously, we must understand the background of Pauli Murray, the lawyer who articulated this connection in the ACLU's brief in *White v. Crook*. As a black female lawyer, for Murray such a connection between race and sex was obvious given the overlapping and intersecting forms of discrimination she faced throughout her education and career.

Though she developed the analogical legal arguments ultimately made "famous" by Ruth Bader Ginsburg, Murray is not as well known as she deserves to be outside of certain circles of legal and historical academia.⁶⁰ Top of her class at Howard Law School, she dared to challenge the controlling "separate but equal" doctrine a decade before her professors would entertain the idea of an outright challenge in *Brown v. Board of Education*.⁶¹ After graduating at the top of her class from Howard, she was rejected from a post-graduate fellowship at Harvard Law School due to her gender; she went on to coin the phrase "Jane Crow" to describe the system of overlapping discrimination she faced as an African-American woman.⁶² While Jane Crow was not an uncommon experience, the notion of "intersectionality" and overlapping forms of discrimination would not become common parlance for decades.⁶³ Instead, Pauli Murray and her colleagues created the notion of a Fourteenth Amendment that guarantees equal protection of the laws in cases of discrimination based on sex as well as race.

Murray arrived at Howard Law School in 1941 "with the single-minded intention of destroying Jim Crow,"⁶⁴ but her first personal stand against segregation was much earlier. Growing up in Jim Crow-era North Carolina, Murray was determined to escape the segregation of the South for college. Her heart was set on Columbia University until she learned that it did not admit women and that she was not qualified for entrance at its sister school, Barnard.⁶⁵ Instead, Murray entered Hunter College in 1928, which was at the time New York City's elite public women's college. Murray was reluctant to attend a woman's college. In her autobiography, Murray writes,

⁶⁰ Murray first proposed an argument for sex equality based on an analogy between race and sex, in 1961 in a brief drafted for President Kennedy's Presidential Committee on the Status of Women. See *infra*, Part V. However, the Supreme Court would not see, and ultimately embrace, the race-sex analogical argument until it appeared in an ACLU brief authored by Ruth Bader Ginsburg in *Reed v. Reed* in 1971. Mayeri, *A Common Fate*, *supra* note 26, at 1073.

⁶¹ See *infra* note 79.

⁶² MURRAY, *AUTOBIOGRAPHY*, *supra* note 54, at 183; see generally Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965).

⁶³ See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139-67 (1989) (coining the phrase "intersectionality").

⁶⁴ MURRAY, *AUTOBIOGRAPHY*, *supra* note 54, at 182.

⁶⁵ *Id.* at 66.

“[t]o go to Hunter, it seemed to me, would be to swap segregation by race for segregation by sex.”⁶⁶ However, Murray’s time at Hunter laid the groundwork for her future feminist work; single-sex education meant she grew accustomed to seeing capable women in leadership positions and failed to learn to accept roles subordinate to men.⁶⁷ Meanwhile, galvanized by the relatively small number of black students at Hunter and the invisibility of African-American life in the curriculum, Murray cautiously joined activist efforts to establish a Negro student organization on campus. With “no political experience,” Murray ultimately supported the compromise of an interracial student organization that would incorporate the Negro students’ proposed program of study.⁶⁸ Though Murray would become a fighter in many aspects of her life, her willingness to find a middle ground would resurface in the divisive battles of both the women’s and civil rights movements.

Columbia and Barnard would not be the last educational institutions from which Murray would find herself excluded. Murray struggled to earn a living following her graduation from Hunter in 1933 in the midst of the Great Depression. She was lucky to be among those “rescued” by New Deal job creation. She worked for the Works Progress Administration (“WPA”) Workers’ Education Project for most of the decade, and her years immersed in the interracial labor movement would influence her perspective on the civil rights and women’s rights movements later in her career.⁶⁹ Knowing that she would need further education to expand her job prospects, Murray applied to study race relations in a graduate sociology program at the University of North Carolina (“UNC”) in 1938. UNC rejected her application on the grounds of race two days after the Supreme Court announced its decision in *Missouri ex rel Gaines v. Canada*.⁷⁰ Though at the time Murray felt shame and disappointment at ultimately accepting defeat, she was empowered by the fact that she had raised a public debate about the possibil-

⁶⁶ *Id.* at 67.

⁶⁷ *Id.* at 88.

⁶⁸ *Id.* at 86.

⁶⁹ “These experiences provided happy examples of the possibility of interracial solidarity but also ever more chilling evidence of the apparent invulnerability of segregation and racism.” KERBER, *supra* note 18, at 185–86.

⁷⁰ 305 U.S. 337 (1938) (holding that states that provided a law school for white students must also provide in-state legal education for black students); North Carolina argued that it could comply with the holding of *Gaines* by establishing Negro graduate schools, but appeared to be in no hurry to create these graduate schools. See MURRAY, *AUTOBIOGRAPHY supra* note 54, at 114–26. Murray would not let the matter rest. After failing to persuade UNC herself, she brought her case to the NAACP. Though Murray was certain she could win on the merits, the NAACP decided it could not risk taking her case; Thurgood Marshall believed her case was vulnerable on the question of residence since she was living in New York, and “North Carolina might defend successfully on the ground that the state had no constitutional duty to provide nonresidents with graduate training.” *Id.* at 126.

ity of an integrated university system.⁷¹ This rejection would set her on a circuitous path to law school.

Murray was the only woman in her class at Howard Law School for most of her three years of study.⁷² Surrounded by men who would spend their lives fighting for racial justice, men she deeply admired, Murray was radicalized by experiences of sex discrimination. She was particularly struck by the fact that one of her professors could not seem to grasp that excluding women from a campus professional development organization was as degrading as refusing to admit black lawyers to white bar associations.⁷³ She wrote in her autobiography:

Ironically, if Howard Law School equipped me for effective struggle against Jim Crow, it was also the place where I first became conscious of the twin evil of discriminatory sex bias, which I quickly labeled Jane Crow. In my preoccupation with the brutalities of racism, I had failed until now to recognize the subtler, more ambiguous expressions of sexism. In the all-female setting of Hunter College, women were prominent in professional and leadership positions Now, however, the racial factor was removed in the intimate environment of a Negro law school dominated by men, and the factor of gender was fully exposed.⁷⁴

Murray was at the top of her class despite being silenced in the classroom and excluded from professional networking opportunities. In her third year, she received Howard's prestigious Julius Rosenwald Fellowship for post-graduate study in law.⁷⁵ As was customary for recipients of the fellowship, she applied to study at Harvard Law School. She was tersely rejected on the grounds that she was not "of the sex entitled to be admitted to Harvard Law School."⁷⁶ Though she appealed the admissions decision, she was already pursuing a master's degree at Boalt Hall by the time she learned her application for appeal had been denied.⁷⁷

The emphasis on Murray's heightened awareness of sex discrimination while at Howard is not meant to overshadow the rigorous training she received in civil rights law and her commitment to the civil rights movement. Howard trained its students to develop constitutional arguments that had never been made before.⁷⁸ In that spirit, Murray decided to write a third-year seminar paper entitled, "Should the *Civil Rights Cases* and *Plessy v.*

⁷¹ *Id.* at 128.

⁷² *Id.* at 183.

⁷³ *Id.* at 184.

⁷⁴ *Id.* at 183.

⁷⁵ *Id.* at 238–39.

⁷⁶ *Id.* at 239.

⁷⁷ MAYERI, REASONING FROM RACE, *supra* note 38, at 15.

⁷⁸ Murray lovingly describes Howard as an army of students "sift[ing] through hundreds of judicial opinions in search of fragments of language to bolster our moral convictions." MURRAY, *supra* note 64, at 220.

Ferguson Be Overruled?" despite being met with mockery and derision when she proposed challenging segregation outright in a class discussion.⁷⁹

Living in segregated D.C. also provided Murray and her classmates with ample opportunity to participate in civil rights activism in their own neighborhoods. With the Howard Chapter of the NAACP, Murray participated in sit-ins at segregated restaurants, twenty years before sit-in tactics would garner national attention.⁸⁰ When the Howard administration prohibited students from participating in further direct action efforts, Murray searched intensely for an alternate means of challenging segregation in D.C. and found her legal hook. She argued to her classmates and professors that they should bring a test case using a previously unknown 1872 civil rights statute that was still on the books in D.C. and assert that it was still in force.⁸¹ Her argument was not taken seriously and she wondered "whether it would have made any difference if the suggestion had come not from a woman but from a man, whether a residue of skepticism remained about a woman's capacity to advance bold new ideas."⁸² Like many of Murray's arguments that were initially met with skepticism, her idea was ultimately argued by the NAACP and adopted by the Supreme Court five years later.⁸³ Despite her creativity and brilliance, the NAACP never offered Murray a job. Instead she had a great deal of trouble making a living following her graduate study at Boalt Hall.⁸⁴

IV. CHARLES MORGAN, JR. AND THE FIGHT AGAINST "JIM CROW JUSTICE"⁸⁵

The lead counsel on the ACLU's *White v. Crook* brief was a lawyer twenty years junior to Pauli Murray, Charles Morgan Jr. Though born in Cincinnati, Morgan was a firmly southern lawyer. He moved to Birmingham, Alabama with his family from Kentucky at the age of 15, earned his undergraduate and law degrees at the University of Alabama at Tuscaloosa, and with the exception of stints around D.C., spent his entire career practicing in the south.⁸⁶ While in law school, Morgan spent much time in the classroom and home of civil rights advocate Professor Jay W. Murphy, who was considered a radical in his community for participating in the civil rights

⁷⁹ *Id.* at 221–22.

⁸⁰ *Id.* at 200, 207–08.

⁸¹ *Id.* at 230.

⁸² *Id.* at 230–31.

⁸³ *District of Columbia v. John R. Thompson Co., Inc.*, 346 U.S. 100 (1951).

⁸⁴ ROSENBERG, *supra* note 14, at 171.

⁸⁵ Journalist Jack Nelson published a series entitled "Jim Crow Justice" reporting on events in Lowndes County and elsewhere after Selma in the *Los Angeles Times*, including the Coleman trial. MORGAN, *supra* note 8, at 45–46.

⁸⁶ GREENHAW, *supra* note 7, at 120, 136.

movement and socializing with African Americans.⁸⁷ Murphy also served as the director of the Tuscaloosa chapter of the ACLU.

At the Murphy home, Morgan found like-minded students and advocates. Morgan had been politically engaged since he was a teenager, when he had campaigned for populist candidate Jim Folsom in the 1946 Alabama gubernatorial election.⁸⁸ But it was at the Murphy house that Morgan met black leaders in the civil rights movement, as well as white allies. Perhaps because he ran in progressive circles, and because he knew other universities in the South had integrated peacefully, Morgan was surprised and aghast to watch the violent resistance to the integration of the University of Alabama in 1954 with the admission of Autherine Lucy.⁸⁹ As resistance to the civil rights movement mounted, Morgan and his wife resolved to stay in the South; following graduation, they moved to Birmingham where Morgan intended to practice corporate and municipal bond law.⁹⁰

By 1958, however, Morgan had opened his own litigation practice and was soon taking civil rights cases, something Ivy-League educated closet liberal members of large Deep South law firms dared not do.⁹¹ He was profoundly influenced by *To Kill a Mockingbird*: “To me, Atticus Finch was the personification of everything I ever wanted to be . . . The moment I finished reading that book I knew I would read it over and over again. It was my destiny.”⁹² Morgan continued to establish his reputation as an advocate for racial equality and established working relationships with leaders of the civil rights movement, including Reverend Fred Shuttlesworth and lawyers Orzell Billingsley, Jr. and Peter Hall. In 1961, Morgan worked with Billingsley and Hall to release jailed Freedom Riders upon their arrival in Birmingham.⁹³ In the same year, he also filed *Reynolds v. Sims*, in which the Supreme Court ultimately struck down state legislature malapportionment based on the principle of “one person, one vote.”⁹⁴ He crystallized his reputation in 1963, when he spoke out publicly following the Birmingham church bombing, criticizing community leaders for failing to uphold the law

⁸⁷ GREENHAW, *supra* note 7, at 116.

⁸⁸ Folsom won the election in 1946. He was among the first southern governors to be a champion for racial equality. See “James E. ‘Big Jim’ Folsom Sr. (1947–51, 1955–59),” Encyclopedia of Alabama, Jan. 8, 2008, <http://www.encyclopediaofalabama.org/article/h-1423>, archived at <https://perma.cc/6679-JVLU>. To Morgan, “Folsom was the only politician to the state who would step up to a Negro man on the street and shake his hand and ask for his vote.” GREENHAW, *supra* note 7, at 114. Morgan campaigned again for Folsom in 1954, and remained close to the governor. *Id.* at 117.

⁸⁹ GREENHAW, *supra* note 7, at 118.

⁹⁰ *Id.* at 120.

⁹¹ MORGAN, *supra* note 8, at 21; see GREENHAW, *supra* note 7, at 121–124 (describing Morgan’s first civil rights cases and the extent to which they changed the way he viewed his role as an attorney in Birmingham).

⁹² GREENHAW, *supra* note 7, at 124.

⁹³ *Id.* at 127.

⁹⁴ 377 U.S. 533, 566 (1964); see MORGAN, *supra* note 8, at 60.

of the land and stand up to instigators of racist violence.⁹⁵ Morgan received several death threats after making this speech, and concerned for his children, Morgan and his wife moved to Alexandria, Virginia.

Morgan remained out of the fray only briefly. In 1964, ACLU Executive Director Jack Pemberton offered Morgan the opportunity to open a southern regional office in Atlanta.⁹⁶ The ACLU was in the midst of a rapid transformation and expansion. Whereas traditionally the organization had thought in terms of liberties rather than rights and focused on amicus briefs rather than direct representation, the rights revolution of the 1960s forced the ACLU to reconsider the meaning of civil liberties and to inject itself more directly into new areas — namely, civil rights, abortion, the death penalty, and the rights of the poor.⁹⁷

By the time Pemberton invited Morgan to open the Atlanta office, the ACLU had already officially joined the civil rights movement. In 1963, it published *How Americans Protest* as a message of official support for the civil disobedience and protest tactics used by the civil rights movement.⁹⁸ Such a position was not inevitable for the ACLU and it was the cause of much internal division.⁹⁹ But legal representation for civil rights activists was scarce in the south, and Pemberton decided that the ACLU should take the lead in recruiting and coordinating lawyers willing to offer their services to civil rights activists.¹⁰⁰ Together with the NAACP, the Congress of Racial Equity (“CORE”), the American Jewish Congress, and others, the ACLU formed the Lawyers Constitutional Defense Committee (“LCDC”) in 1964.¹⁰¹

⁹⁵ GREENHAW, *supra* note 7, at 135.

⁹⁶ MORGAN, *supra* note 8, at 23–24.

⁹⁷ See WALKER, *supra* note 37, at 262. Though often used simultaneously, the terms “civil liberties” and “civil rights” have evolved to refer to separate bodies of rights under the U.S. constitution. The term “civil liberties” refers to those rights that individual citizens may assert against the government, as enumerated in the Bill of Rights. *Id.* at 6. The term “civil rights” generally refers to protections against discriminatory treatment, particular under the Equal Protection Clause of the Fourteenth Amendment, but has also come to have a specific meaning referencing a legal tool addressing the problem of racial discrimination and inequality. Christopher W. Schmidt, *The Civil Rights-Civil Liberties Divide*, 12 STAN. J. C.R. & C.L. 1, 21–22 (2016).

⁹⁸ WALKER, *supra* note 37, at 263–64.

⁹⁹ “*How Americans Protest* was a pivotal document in the organization’s history, marking the watershed between its disengaged and elitist style of the 1950s and a new, emotionally engaged style.” *Id.* at 263.

¹⁰⁰ The ACLU’s decision to lead the coalition was a reaction to ineffective federal efforts to recruit lawyers to protect civil rights activists. ACLU legal director Mel Wulf and leaders of the NAACP had met with Robert Kennedy in 1962, but the Attorney General’s response was lackluster. President Kennedy subsequently urged the creation of the Lawyers Committee for Civil Rights Under Law by the ABA, but Pemberton realized coordination had to happen more quickly. See WALKER, *supra* note 37, at 264–65.

¹⁰¹ *Id.*; SARAH HART BROWN, *STANDING AGAINST DRAGONS: THREE SOUTHERN LAWYERS IN AN ERA OF FEAR 206–07* (1998). By early 1964, the Lawyer’s Committee for Civil Rights announced it would draft lawyers to work in Mississippi the following summer. It was around the same time that the LCDC took shape.

By June 1964, the ACLU decided it needed a permanent, on-the-ground presence in the South. Despite division in the ranks over the ACLU's growing role in the civil rights movement and its decision to support protest and civil disobedience, the 1964 ACLU Biennial Conference reaffirmed its support to the civil rights movement and voted to open an office in Atlanta.¹⁰² Despite his early ties to the ACLU through Professor Murphy, Morgan was not a natural choice for the ACLU. Ultimately, Morgan believed in democracy and the power of ordinary people to "do the right thing," even in the South.¹⁰³ In contrast, other ACLU leaders' interest in defending civil liberties stemmed from a suspicion of majority rule.¹⁰⁴ Identifying with the poor and the outcast, he was suspicious of northern liberals, a group into which most of his ACLU colleagues fell.¹⁰⁵

Yet Morgan had already earned the respect of many black civil rights leaders during his days in Birmingham, and was already working on cases of interest to the ACLU — cases challenging discriminatory voting practices and segregated juries.¹⁰⁶ So Morgan moved his family to Atlanta and opened an office at 5 Forsyth Street, in the same building as the Southern Regional Council and Vernon Jordan's Voter Education Project.¹⁰⁷ Morgan was confident and at ease back in the middle of the movement, and his office became a hub, often filling with journalists and activists in the afternoons, including Dr. King himself.¹⁰⁸ Still playing the part of Atticus Finch, Morgan was a media darling.¹⁰⁹

V. DEVELOPING THE CASE FOR A RACE-SEX LEGAL ANALOGY UNDER THE FOURTEENTH AMENDMENT.

Shortly after Morgan joined the ACLU in Atlanta, the ACLU appointed Pauli Murray to its national board of directors, perhaps as part of its expanse into the realm of civil rights. Murray had been busy, but never sufficiently remunerated, since graduating from Howard twenty-one years earlier; she

¹⁰² *Id.* at 267.

¹⁰³ WALKER, *supra* note 37, at 269 (suggesting it was these beliefs that drew him to civil rights cases challenging flawed jury and voting systems).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* Morgan was proud of his southerner status within the ACLU; he cheerfully mocks the New York-centricity of the organization on the first page of his autobiography. See MORGAN, *supra* note 8, at 3 ("The ACLU board was dominated by members from the Manhattan Stockade, with a few from the Far West (eastern New Jersey) and the Deep South (Washington, D.C.)."). Some saw Morgan's bias against New York liberals as a form of latent anti-Semitism. WALKER, *supra* note 37, at 269.

¹⁰⁶ WALKER, *supra* note 37, at 268–69; GREENHAW, *supra* note 7, at 181–82.

¹⁰⁷ GREENHAW, *supra* note 7, at 181.

¹⁰⁸ *Id.* at 181.

¹⁰⁹ "Chuck Morgan is the movie star of the civil rights attorneys. Me and Fred Gray and Peter Hall and Arthur Shores and J.L. Chestnut, we do the dirty work, but Chuck gets the headlines. He knows what's newsworthy," said Orzell Billingsley Jr. GREENHAW, *supra* note 7, at 182.

constantly struggled to find stable and gainful employment.¹¹⁰ In 1961, an opportunity finally arose that would raise Murray to relative prominence. President John F. Kennedy established the President's Commission on the Status of Women, and Murray was invited to join the staff of the Commission's Committee on Civil and Political Rights, to investigate differences in legal treatment of men and women,

The memo, published in December 1962, was 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*."¹¹¹ By forging a litigation-based strategy using the Fourteenth Amendment to eradicate sex discrimination, Murray aimed to provide a middle path between the pro-ERA NWP and the anti-ERA protectionists, and also to forge a connection between the civil rights movement and the women's movement.¹¹² She spent months writing the lengthy memo, which closely examined jury service as the paradigmatic contemporary example of pernicious sex discrimination.¹¹³ Murray argued that sex, like race, is an immutable characteristic, with permanent "implications of inferiority."¹¹⁴ Yet she offered to the protectionists the argument that the Fourteenth Amendment would provide flexibility sufficient to uphold *appropriate* laws relating to women, such as those "genuinely protective of the family and maternal functions."¹¹⁵ Though previous attempts to ask courts to apply heightened scrutiny to discriminatory sex-classifications had run up against dominant constitutional discourse, under which women could not claim status as a "discrete and insular minority," Murray argued that women's inferior position in society was more like that of blacks' than not.¹¹⁶ Both groups were "easily identifiable" and histori-

¹¹⁰ See KERBER, *supra* note 18, at 188.

¹¹¹ The formation of the PCSW was viewed as significant and exciting, as "no such concentration on women's problems by prominent people had ever occurred before." MURRAY, *supra* note 54, at 347. For background information on the formation of the commission as an attempt to diffuse tension between supporters and opponents of the ERA, see generally ROSENBERG, *supra* note 14, at 181-83. A Fourteenth Amendment strategy looked like it could be a compromise since it could theoretically allow protective legislation to be upheld while putting pressure on equal rights in most arenas. See KERBER, *supra* note 18, at 188-89.

¹¹² See *supra* Part II; HARRISON, *supra* note 57, at 126-27.

¹¹³ "Jury service was, she thought, the issue that most clearly illustrated the widespread 'confusion' about whether women had been oppressed by the law and required emancipation or favored by the law and permitted chivalrous exemption." See KERBER, *supra* note 18, at 190.

¹¹⁴ KERBER, *supra* note 18, at 191. Murray was not the first to make this analogy. She supported her argument using a 1935 article by a female lawyer Blanche Crozier, the only article published on sex discrimination as a constitutional issue in the previous 25 years. *Id.* at 191. Others to make the analogy between race and sex included Columbia college student Flo Kennedy in a 1946 paper written for a sociology course, Gunnar Myrdal, a Swedish economist, and ACLU attorney Dorothy Kenyon. For a general history of the rebirth of race-sex analogies in the 20th Century, see MAYERI, REASONING FROM RACE, *supra* note 38, at 9-14.

¹¹⁵ HARRISON, *supra* note 57, at 127 (internal citations omitted).

¹¹⁶ Mayeri, *A Common Fate*, *supra* note 26, at 1057; see also Mayeri, *Constitutional Choices*, *supra* note 2, at 763.

cally excluded from formal decision-making processes on the basis of supposed inherent differences.¹¹⁷

Lawyers in Murray's legal circle praised her memo. Dorothy Kenyon, an older lawyer and ACLU board member who had written the ACLU's amicus brief in *Hoyt*,¹¹⁸ wrote to Murray, "I couldn't agree 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."¹¹⁹ Murray's memo also called for the ACLU or the DOJ to start advancing this argument to the Supreme Court in a "Brandeis Brief" discussing the changing roles of women.¹²⁰

Barely a year after Murray published her memo, passing a new civil rights bill became a priority for Congress and the new Johnson administration.¹²¹ As discussed, *infra*, in Part II, the debates over what would become Title VII of the Civil Rights Act of 1964 included a heated controversy over whether the Act would include a prohibition on sex discrimination. These debates often pitted the plight of white women against the plight of black women. Invoking the schism in the suffrage movement as a cautionary tale, Murray used the race-sex analogy to draw attention to the groups' mutual interests and by demonstrating that *black women* were the group most in

¹¹⁷ Mayeri, *A Common Fate*, *supra* note 26, at 1057 (quoting 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* 10 (1962) (PCSW Papers, Box 8, Folder 62, on file with the Schlesinger Library, Radcliffe Institute, Harvard University)). To support her case, Murray drew on new social science literature that was also making comparisons between the status of women and African-Americans in the United States. *Id.*

¹¹⁸ When the ACLU created its Committee on Discrimination Against Women in 1944, Robert Baldwin appointed Dorothy Kenyon as its chair. WALKER, *supra* note 37, at 167. In *Hoyt v. Florida*, Kenyon had made an analogy to race and argued that Florida's exemption of women from jury service violated the Constitution. 368 U.S. 57, 58 (1961). However, Florida's statute was not a complete bar on jury service — it permitted, but did not require, women to service, *id.* at 60, and the Supreme Court held that the female criminal defendant had failed to show arbitrary systemic exclusion of women from the jury. *Id.* at 68. Moreover, Justice Harlan wrote that Florida's statutory scheme was reasonable because "woman is still regarded as the center of home and family life." *Id.* at 62.

¹¹⁹ KERBER, *supra* note 18, at 192 (quoting Letter from Dorothy Kenyon to Pauli Murray (Apr. 4, 1963) (Pauli Murray Papers, Box 49, Folder 878, on file with the Schlesinger Library, Radcliffe Institute, Harvard University)). In contrast, Erwin Griswold, Dean of Harvard Law School, thought the memo was "excellent," but remained convinced that differences between men and women were legitimate bases for legal classifications. *Id.* (quoting Letter from Erwin N. Griswold to Pauli Murray (Jan. 31, 1963) (Pauli Murray Papers, MC 412, Box 49, Folder 878, on file with the Schlesinger Library, Radcliffe Institute, Harvard University)).

¹²⁰ HARRISON, *supra* note 57, at 127. With the term "Brandeis Brief," Murray was referring to then-litigator and eventual Supreme Court Justice Louis Brandeis's brief in *Muller v. Oregon*, which supplemented legal arguments with evidence about women's particular physiological and social needs to defend protective labor laws. MAYERI, REASONING FROM RACE, *supra* note 38, at 17. The term "Brandeis Brief" has come to refer to a brief that utilizes economic, sociological, or other scientific and statistical evidence in addition to legal principle when presenting arguments in a case.

¹²¹ Freeman, *supra* note 50, at 174.

need of the protections of Title VII.¹²² On the heels of Title VII's passage, in 1965 Murray published an article, this time with Justice Department attorney Mary O. Eastwood. In the face of the EEOC's lackadaisical stance toward sex discrimination, Murray and Eastwood again invoked the race-sex analogy to argue that, "the eradication of race discrimination was impossible without the inclusion of black women in employment protections."¹²³

Murray's Fourteenth Amendment strategy was therefore well known when, in 1965, Dorothy Kenyon and civil rights leader James Farmer sponsored Murray's appointment to the ACLU national board.¹²⁴ Together Murray and Kenyon pressured the ACLU to take as forceful a stance on women's rights as it had on civil rights; Murray continued to insist that the two issues were inextricably intertwined.¹²⁵ She argued to the ACLU that not only did women's exclusion from juries devalue their political identity, but that "the absence of white and black women from Southern juries had substantial effect on the outcome of civil rights cases."¹²⁶

VI. *WHITE v. CROOK* AND THE ATTEMPT TO LINK RACE AND SEX IN CONSTITUTIONAL JURISPRUDENCE

It was at this moment in the ACLU's history that *White v. Crook* appeared on its docket. When Reverend Morris walked into Charles Morgan's office on August 20, 1965, Morgan saw an opportunity to use the near certainty of an unfair prosecution and stacked jury in the Coleman case to challenge in federal court Alabama's deeply embedded patterns of jury discrimination through a civil suit.¹²⁷

Morgan threw the lawsuit together in five days, selecting Gardenia White as lead plaintiff.¹²⁸ What is unclear in all primary and secondary accounts of the case, however, is whether the decision to select a female plaintiff was Morgan's, or whether pressure came from the national ACLU office

¹²² Mayeri, *A Common Fate*, *supra* note 26, at 1066 (quoting Pauli Murray, Memorandum in Support of Retaining the Amendment to H.R. 7152, Title VII (Equal Employment Opportunity) To Prohibit Discrimination in Employment Because of Sex 12 (Apr. 14 1964) (Pauli Murray Papers, MC 412, Box 85, Folder 1485, on file with the Schlesinger Library, Radcliffe Institute, Harvard University)).

¹²³ *Id.* at 1066.

¹²⁴ See Susan M. Hartmann, *Pauli Murray and the 'Juncture of Women's Liberation and Black Liberation'*, 14 J. WOMEN'S HIST. 74, 75 (2002).

¹²⁵ See *id.*, at 75 ("Because the ACLU had already committed itself to black civil rights, Murray's status as an African American woman conferred an influence beyond that which Kenyon could claim and gave force to her insistence that 'classification by race and sex are equally immoral.'").

¹²⁶ Mayeri, *Constitutional Choices*, *supra* note 2, at 784; see also Mayeri, *A Common Fate*, *supra* note 26, at 1068 (summarizing Murray's arguments as to why the exclusion of white women from juries was injurious to civil rights for African Americans).

¹²⁷ See BRANCH, *supra* note 11, at 312. Morgan had already worked on cases challenging racial discrimination in the selection of juries in both Mississippi and Georgia. See WALKER, *supra* note 37, at 270 (citing MORGAN, *supra* note 8, at 29–30).

¹²⁸ See BRANCH, *supra* note 11.

via Murray and Kenyon. That Murray and Kenyon wanted to bring a case challenging *Hoyt* is well documented, as is the fact that they were lobbying the national office to bring a sex discrimination suit.¹²⁹ In 1965, Alabama was one of only three states to outright ban jury service by women, so the statute was almost certainly already on the ACLU's radar.¹³⁰ According to the *New York Times*, the ACLU may have had other tactical reasons for challenging the Alabama statute — to get the case quickly into federal court.¹³¹ It is unclear whether Morgan was the one who ultimately made the decision to name a woman plaintiff and bring in Murray and Kenyon to draft the portion of the brief dealing with sex discrimination, but in any case the decision ultimately worked in the favor of all parties.¹³² Notably, neither Morgan nor Murray mentions each other's names in their autobiographical accounts of *White v. Crook*.¹³³

Within a week of Daniels' death, Morgan filed in the Middle District of Alabama a motion alongside the complaint to enjoin all jury trials until the jury discrimination question was answered.¹³⁴ Morgan argued the motion on September 27, while Judge T. Werth Thagard, a local judge elected with the support of Tom Coleman, simultaneously presided over the Coleman case in an adjoining courtroom.¹³⁵ The federal court denied the motion for an injunction and the Coleman case proceeded to trial. An all-white jury of Coleman's friends and cronies acquitted him after 89 minutes of deliberation.¹³⁶

¹²⁹ See Hartmann, *supra* note 124, at 75–76; KERBER, *supra* note 18, at 189–194. Though Alabama's statute was only one of three functioning as an outright ban on female jury service, thirty states "retained some sort of jury restriction by sex." BRANCH, *supra* note 11, at 312.

¹³⁰ Four years earlier, the ACLU had submitted its first amicus brief in a sex discrimination case in *Hoyt v. Florida*, dealing with the issue of women's jury service in Florida. Kenyon authored the brief. KERBER, *supra* note 18, at 169. As Murray prepared to write her memo on Fourteenth Amendment strategy for the PCSW, she corresponded with Melvin Wulf, general counsel of the ACLU, asking him for a copy of the amicus brief, drawing the ACLU's attention to her intention to use jury service as a contemporary example of sex discrimination. *Id.* at 189–90.

¹³¹ See BRANCH, *supra* note 11, at 437 ("The lawyers had challenged the Alabama statute banning women jurors for tactical reasons — to get *White v. Crook* quickly into federal court, explained the *New York Times* — when their main goal was to attack the exclusion of Negroes by arbitrary practice rather than law."). The *New York Times* would continue to report on the sex discrimination claim as a side issue, though Murray and Kenyon considered it central. KERBER, *supra* note 18, at 198.

¹³² Fred Graham of the *New York Times* referred to Gardenia White and her fellow female plaintiffs as the "all-purpose plaintiff — Negro women." MAYERI, REASONING FROM RACE, *supra* note 38, at 27 (quoting Fred P. Graham, *Rights Case Yields Dividend for Women*, N.Y. TIMES, Feb. 13, 1966, at 172).

¹³³ Morgan does not mention Dorothy Kenyon's name either. See MORGAN, ONE MAN, ONE VOICE, *supra* note 8, at 38–47; MURRAY, *supra* note 54, at 363–65. In her autobiography, Murray simply writes that as soon as she was appointed to the ACLU board, she was "asked to help write the brief in *White v. Crook*." *Id.* at 363.

¹³⁴ GREENHAW, *supra* note 7, at 185.

¹³⁵ See Unsworth, *supra* note 10, at 37; see also MORGAN, *supra* note 8, at 42.

¹³⁶ For a general discussion of the Coleman trial see, e.g., Branch, *supra* note 11, at 345–46. See also, MORGAN, *supra* note 8, at 42–47. Alabama Attorney General Richmond Flowers, known for his opposition to Gov. George Wallace's segregation policies, took control of the case, sharing the ACLU's concerns about fair prosecution if the case was left to local

Despite its initial reluctance to take action on August 20, the DOJ ultimately intervened as plaintiffs in the case under the leadership of assistant Attorney General John Doar. In its petition, the DOJ requested that records documenting the systematic exclusion of blacks from Lowndes County juries be made available.¹³⁷ The failure of the DOJ to mention the simultaneously raised sex discrimination claim in its petition suggests how controversial Murray and Kenyon's argument was at the time.¹³⁸

For the ACLU's brief, Morgan pieced together portions of argument drafted by Orzell Billingsley, Jr., Murray, Kenyon, and Melvin Wulf, legal director at the ACLU. Kenyon referred to the final product, filed on December 10, as "a mish-mash" with "bits and pieces about women all through the thing."¹³⁹ The brief argued that the systematic exclusion of Negroes from juries in Lowndes County violated the Fifth, Sixth, and Seventh Amendments, as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹⁴⁰ The brief challenged women's statutory exclusion using only the Fourteenth Amendment, framing its argument in terms of the rights of women who wished not to be excluded from jury service, rather than the rights of female defendants to fair trials with juries drawn from a cross-section of the population.¹⁴¹ The brief argued that sex was an irrational and arbitrary legislative classification for the purposes of jury service, and that, as such, it violated the Equal Protection Clause. It used analogical reasoning to demonstrate that a classification based on sex was as irrational as one based on race: "We can see no difference between a legal distinction predicated solely upon race and one resting solely upon the fact of sex with respect to jury service. The conclusion is inescapable that in either case the classification is completely irrational and arbitrary," the plaintiffs wrote, presumably in the hand of Murray or Kenyon.¹⁴²

As appendices, plaintiffs filed a pre-publication copy of Pauli Murray and Mary Eastwood's forthcoming law journal article, "Jane Crow and the

authorities. However, Flowers and his deputy AG "failed successively to upgrade the charges, shift the venue from Lowndes County, or postpone the trial until the state's surviving vital witness, Richard Morrisroe, was released from the hospital." Branch, *supra* note 11, at 345. Judge T. Werth Thagard denied all motions, removed the Attorney General from the case, and reinstated local prosecution, beginning the trial on the same day. See MORGAN, *supra* note 8, at 45.

¹³⁷ BRANCH, *supra* note 11, at 312.

¹³⁸ *Id.* The DOJ's lack of interest in the sex discrimination angle of the case seems to have been lost on Morgan, who wrote in his autobiography that *White v. Crook* "brought the Justice Department into the struggle for equal women's rights." MORGAN, *supra* note 8, at 40.

¹³⁹ MAYERI, REASONING FROM RACE, *supra* note 38, at 28 (citing Letter from Dorothy Kenyon to Melvin Wulf (January 10, 196[6]) (Box 1832, Folder: White, G. v. Jury Commission, on file with ACLU Records)).

¹⁴⁰ Brief for Plaintiff, *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966) (Civ. A. No. 2263-N).

¹⁴¹ Not until 1975 would the Court rule in another ACLU case, *Taylor v. Louisiana*, that the statutory exclusion of women from juries violated a woman's Sixth Amendment right to a jury representative of the community. WALKER, *supra* note 37, at 305.

¹⁴² Brief for Plaintiff, *supra* note 140, at 53.

Law,” as well as a chapter from Swedish economist Gunnar Myrdal’s 1944 treatise on race relations in America.¹⁴³ The brief relied on Myrdal’s observations of “similarities between the Negro Problem and the women’s problem”¹⁴⁴ to support the fragile race-sex analogy. The plaintiffs also relied on the testimony of expert witness Dr. Robert Coles, a Harvard psychologist, who “established the historical similarities in legal disabilities between ‘women’ and ‘Negroes,’ their common tendency to cope with inferior status through exaggerated deference and self-deprecation, and white women’s greater ‘social sympathy’ and ‘compassion’ for African Americans — both perceived and actual.”¹⁴⁵

The brief was truly a mish-mash. It included a history of jury trials, an argument for why Alabama’s current system for choosing jurors was legally problematic, a history of the early women’s movement and its ties to the abolitionist movement, and documentation of the roles of both black and white women in the civil rights movement. As further evidence that women’s exclusion from the jury was arbitrary and therefore discriminatory, the plaintiffs’ brief pointed out that women served Alabama in various official capacities; even the presiding judge of the Alabama Court of Appeals was a woman.¹⁴⁶

The plaintiffs faced a sympathetic panel, at least on the question of race. Two of its three judges had written decisions in support of the civil rights movement.¹⁴⁷ Judge Richard T. Rives was known as one of a group of four judges on the U.S. Court of Appeals for the Fifth Circuit responsible for issuing a series of crucial civil rights decisions and for implementing *Brown v. Board of Education*.¹⁴⁸ Judge Frank M. Johnson, Jr. sitting on the U.S. District Court for the Middle District of Alabama, was also sympathetic to civil rights. Only months after his appointment to the bench in 1955, he faced the class action suit challenging Montgomery’s bus segregation ordinance; he held that *Brown* applied to public transportation as well as schools, and that Montgomery’s segregation scheme was unconstitutional under the Fourteenth Amendment.¹⁴⁹ The third, Judge Clarence Allgood, usually sat on

¹⁴³ Murray & Eastwood, *supra* note 62; Brief for Plaintiff, *supra* note 140, at Appendix D (GUNNAR MYRDAL, *Justice, in An American Dilemma*, 523–69 (1944)); *id.* at Appendix E (GUNNAR MYRDAL, *A Parallel to the Negro Problem, in An American Dilemma*, 1073–78 (1944)). Myrdal’s treatise was also famously cited to in full by the Supreme Court in *Brown v. Board of Education*. 347 U.S. 483, 494 n.11 (1954).

¹⁴⁴ KERBER, *supra* note 18, at 184 (quoting GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY*, 1073–78 (1944)).

¹⁴⁵ MAYERI, *REASONING FROM RACE*, *supra* note 38, at 27–28 (quoting Deposition of Robert Coles at 33–39, *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966) (Civ. A. No. 2263-N)).

¹⁴⁶ Annie Lola Price could “reverse the verdict of a jury. She could resign and practice law before a jury. But solely because she is a woman she is not eligible to serve on a jury.” Pauli Murray papers, Plaintiff’s Brief, *supra* note 140, at 61.

¹⁴⁷ Until 1976, three-judge panels heard cases challenging the constitutionality of state and federal statutes. The practice has largely ended. 28 U.S.C. §§ 2281, 2282 (repealed 1976).

¹⁴⁸ MAYERI, *REASONING FROM RACE*, *supra* note 38, at 28.

¹⁴⁹ *Frank M. Johnson Jr.; U.S. Judge Issued Key Civil Rights Rulings*, L.A. TIMES, July 4, 1999, <http://articles.latimes.com/1999/jul/24/news/mn-59126>, archived at <https://perma.cc/>

the newly created U.S. District Court for Northern Alabama, and was a known segregationist.¹⁵⁰ Judging from their correspondence with one another, Rives and Allgood were reluctant to reach the sex discrimination question until they realized it could not be avoided.¹⁵¹

In late November, most of a day-long hearing was dedicated to the racial discrimination question. Judge Thargard, the judge who had presided over Tom Coleman's trial, testified that he could not remember any Negroes serving on trial juries, despite Negroes constituting eighty percent of the population of Lowndes County.¹⁵² The DOJ put forth names of black residents of the county who met all voter qualifications but had never been called to serve. The *New York Times* reported on the alleged unconstitutional statutory exclusion of women as a "side issue," reporting that Dorothy Kenyon rose to make an oral argument "but was denied this opportunity when the judges called for submission of written briefs [only]."¹⁵³

Nevertheless, the panel's February 7, 1966 opinion was a ringing endorsement of both the race and sex discrimination claims. The sex discrimination claim was no longer a "side issue;" the headline in the *New York Times* on February 8th read "Women Juror Ban Upset in Alabama."¹⁵⁴ However, the gap between the court's chosen remedies belied its latent discomfort with the sex discrimination claim despite its unequivocal declaration that "women in Alabama have a constitutional right not to be arbitrarily excluded from jury service."¹⁵⁵ Whereas the court issued an injunction requiring "immediate affirmative action"¹⁵⁶ to address the exclusion of Negroes, the court believed "there should be some reasonable delay in [jury service in Alabama for women] going into effect."¹⁵⁷ The Court felt that the question of whether jury service for women should be optional or compulsory was a question better left to the legislature, who would not be meeting for another eleven months.

7LTE-AZAX. Johnson would also preside over the federal trial that would ultimately hold liable the murderers of another civil rights activist, Viola Liuzzo. *Id.*

¹⁵⁰ James Barron, *Clarence Allgood, 89, Federal Judge Since 1938*, N.Y. TIMES, Dec. 2, 1991, <http://www.nytimes.com/1991/12/02/us/clarence-allgood-89-federal-judge-since-1938.html>, archived at <https://perma.cc/W47E-JTTT>.

¹⁵¹ MAYERI, REASONING FROM RACE, *supra* note 38, at 28.

¹⁵² *Alabama Judge Cannot Recall Any Negroes on Trial Juries*, N.Y. TIMES, Nov. 27, 1965, at 35.

¹⁵³ *Id.*

¹⁵⁴ *Women Juror Ban Upset in Alabama*, N.Y. TIMES, Feb. 8, 1966, at 25.

¹⁵⁵ *White v. Crook*, 251 F.Supp. 401, 410 (M.D. Al. 1966) (Civ. A. No. 2263-N).

¹⁵⁶ *Id.* at 409 ("The relief to be afforded in this case will involve . . . an injunction requiring immediate affirmative action by the jury commissioners by their emptying the Lowndes County jury box and abandoning the present Lowndes County jury roll without any further use of either, and by their compiling a jury roll and refilling the jury box in strict accordance with the law . . .").

¹⁵⁷ *Id.* at 410 ("It is not uncommon for courts, when declaring constitutional rights not previously recognized and declared, to delay for a reasonable time, in consideration of practical problems incident to an implementation of those rights, the actual exercise of the newly declared rights." (citing *Brown v. Board of Education*, 347 U.S. 483 (1954), and 349 U.S. 294 (1955)). *Id.* at 410, n.16.

However, Murray and Kenyon were thrilled to see their argument affirmed by the court, whatever the remedy was. The victory was particularly a triumph for 78-year old Dorothy Kenyon, who had been practicing law since 1919 and had dedicated much of her career to the “Cause of Women.”¹⁵⁸ To Kenyon, the decision was, like *Brown*, “the key in the lock”¹⁵⁹ that would lead to future victories.

Though neither discrimination in the selection of jurors on the basis of race nor on the basis of sex ended with *White v. Crook* or any of the subsequent cases to reach the Supreme Court, the constitutional language of the court was nevertheless revolutionary.¹⁶⁰ Perhaps because it is not a well-known case, today it is hard to imagine the extent to which *White v. Crook* was a landmark decision. But though Murray and Kenyon were anxious to hear the Supreme Court affirm the District Court’s recognition of a constitutional claim of sex discrimination, they would have to wait another six years until *Reed v. Reed* in 1971, as the state of Alabama chose not to appeal the case. Alabama Attorney General Richmond Flowers was not only personally sympathetic to the cause of racial equality, but at the time was courting black voters in the Democratic gubernatorial primary against Lurleen Wallace, wife of incumbent governor George Wallace.¹⁶¹ The Supreme Court therefore never had the opportunity to consider the case, and Murray’s hopes of solidifying the link between civil rights and women’s rights in Supreme Court jurisprudence were dashed.¹⁶²

Though the ACLU was perhaps the organization from whence such a convergence would have come most naturally, it never did. Between 1966 and 1970, Murray and Kenyon continued to struggle to keep women’s equality on the ACLU agenda in the face of competing racial justice concerns.¹⁶³ By 1970, the national winds had shifted and Murray and Kenyon were able to convince the ACLU to make women’s rights a priority and to officially endorse the ERA to complement its analogical Fourteenth Amendment strategy.¹⁶⁴ However, the opportunity to articulate a deeper intersectional notion of discrimination under the Fourteenth Amendment was lost.

¹⁵⁸ MURRAY, *supra* note 54, at 364.

¹⁵⁹ MAYERI, REASONING FROM RACE, *supra* note 38, at 28 (quoting Letter from Dorothy Kenyon to Caroline Ware (March 23, 1966) (Dorothy Kenyon Papers, Box 17, Folder 17 on file with the Sophia Smith Collection, Smith College)). Murray too described the case as the *Brown v. Board of Education* for women. *Id.* at 29.

¹⁶⁰ *White v. Crook*, along with *Taylor v. Louisiana*, 419 U.S. 522 (1975), only “resolved the matter of which names must be made available for random drawing. [They] did not address the matter of what happened to those names once they entered the pool.” KERBER, *supra* note 18, at 215.

¹⁶¹ MAYERI, REASONING FROM RACE, *supra* note 38, at 29.

¹⁶² *Id.*

¹⁶³ See MAYERI, REASONING FROM RACE, *supra* note 38, at 37 (“[T]he male-dominated ACLU leadership prioritized black male empowerment in the mid-1960s, leaving women’s concerns for later resolution. They also feared that opposing protective legislation for women would undermine the ACLU’s relationship with labor organizations.”).

¹⁶⁴ WALKER, *supra* note 37, at 304.

While *White v. Crook*'s analogy between race and sex served as the foundation for legal arguments in subsequent sex discrimination cases under the Fourteenth Amendment, these later cases failed to take Murray's argument one step further by reflecting her understanding of the potentially intersectional nature of race and sex.¹⁶⁵ Instead, race and sex discrimination equal protection jurisprudence under the Fourteenth Amendment developed along parallel tracks, with the courts reviewing race-based classifications with "strict scrutiny," and sex-based classifications with "intermediate scrutiny." Partially in response to this phenomenon, Professor Kimberle Crenshaw coined the term "intersectionality" in the 1980s to demonstrate the tendency "to treat race and gender as mutually exclusive categories of experience and analysis" in both law and society.¹⁶⁶ She has argued that this single-axis framing "erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group."¹⁶⁷ Black feminist critics have called the race-sex analogies operating along these single axes as "opportunistic, parasitic, and marginalizing . . ."¹⁶⁸ In the years following *White v. Crook*, the Supreme Court's feminist jurisprudence enshrined this analogical understanding of race and sex, of the sort critiqued by theorists such as Crenshaw and hooks.

The Supreme Court's jurisprudence not only obscures the ways in which discrimination can occur along multiple axes of identity simultaneously, but obscures Murray's original arguments on behalf of "Jane Crow." For Murray, intersectional and analogical arguments were intertwined; she frequently invoked her own identity to demonstrate that "[w]ithout special attention to sex discrimination . . . one-half of black Americans would be left without protection, fatally hampering racial progress."¹⁶⁹ Murray constantly faced advocates who saw a "false choice between the interests of blacks and women . . ."¹⁷⁰ With her analogy, she sought not only to advance and link both movements, but to demonstrate that without such a linkage, those at the intersection — black women such as Gardenia Crook — would be left behind. Murray also understood her Fourteenth Amendment strategy as having the potential to cut across issues of class. In contrast to the ERA, which in the minds of many was tied to the aspirations of professional white women, the issue of jury service affected women across class lines.¹⁷¹

Between *White v. Crook* and 1970, leaders in the women's movement finally reached a consensus and decided to adopt a dual strategy of lobbying

¹⁶⁵ See Crenshaw, *supra* note 63, at 139–67.

¹⁶⁶ *Id.* at 139.

¹⁶⁷ *Id.* at 140.

¹⁶⁸ Mayeri, *A Common Fate*, *supra* note 26, at 1045. For a full discussion of how race-sex analogical arguments must be viewed in the context of their historical moment, see generally *id.*

¹⁶⁹ *Id.* at 1063.

¹⁷⁰ *Id.* at 1067.

¹⁷¹ Mayeri, *Constitutional Choices*, *supra* note 2, at 784.

for an ERA while also continuing to develop Fourteenth Amendment litigation strategy.¹⁷² However, perhaps in part because the Supreme Court would not encounter the question of sex discrimination for the first time within the context of Ms. Crook's plight, the Fourteenth Amendment strategy eventually lost its intersectional origins. Moreover, though the Fourteenth Amendment strategy would be central to the success of the ACLU's newly formed Women's Rights Project under Ruth Bader Ginsburg's leadership, the continued emphasis on the ERA would distance the women's rights movement from the civil rights movement.¹⁷³ Despite the newly formed National Organization for Women's ("NOW") official endorsement of a dual Fourteenth Amendment/ERA strategy, many feminists, including Murray, saw NOW's renewed focus on the ERA "as the elevation of white professional women's priorities at the expense of unity with other movements for social justice."¹⁷⁴ Furthermore, as societal tides turned with the election of President Nixon in 1968, increasing opposition to the advances of the Civil Rights Movement and resentment toward government intervention in race relations made analogies to race more troublesome for feminists, both in the courtroom and in public discussion.¹⁷⁵ Legal feminists also struggled to develop their legal reasoning to account for actual differences between the biological sexes and the weaknesses of the race-sex analogy.¹⁷⁶ The 70s and 80s did see moments of convergence between the interests of sex equality and racial justice advocates.¹⁷⁷ However, this convergence of interests was less apparent in advocacy around the ERA and was not pursued in the legal academy, despite Murray's dream of a Fourteenth Amendment strategy that united race and sex.¹⁷⁸ While black feminist theorists in the academy increasingly explored the notion of intersectionality elsewhere, race and feminism remained largely separate topics in legal scholarship until the late 80s, with only a few exceptions.¹⁷⁹

CONCLUSION

Despite the great ambitions of Pauli Murray and Dorothy Kenyon, *White v. Crook* has been reduced to little more than a paragraph, if not a footnote, in most accounts of both the civil rights movement and the women's movement. Murray and Kenyon had sought to demonstrate that race

¹⁷² *Id.* at 777–78.

¹⁷³ *Id.* at 790–91.

¹⁷⁴ *Id.* at 785.

¹⁷⁵ MAYERI, REASONING FROM RACE, *supra* note 38, at 76–77.

¹⁷⁶ *Id.* at 77–78. Conservatives also began to use the race-sex analogy as a way to undermine the feminist movement, using the civil rights revolution as a cautionary tale of government intervention. *Id.* at 84–86.

¹⁷⁷ *Id.* at 188–94 (noting that feminist and civil rights advocates' interests did converge in battles around affirmative action and abortion funding).

¹⁷⁸ See *id.* at 194–96 for a discussion of black women's relationship to the ERA.

¹⁷⁹ *Id.* at 222–23.

and sex discrimination were *intersecting* phenomena; what was left of their argument by the 1970s was a notion of race and sex discrimination as *parallel* phenomena.¹⁸⁰ Feminist lawyers came to rely on race-sex analogies as an abstract legal argument, divorced from the reality of how race and sex discrimination interacted in intersecting ways in both the law and the lives of women of color.¹⁸¹ Lost from the race-sex legal analogy was the recollection that the original courageous plaintiff — on whose back the analogy rested — was a black woman who had been doubly excluded from jury service due to her race and sex.

This history has been nearly lost because the legal and historical literature dealing with the civil rights movement and the women's movement are fundamentally separate.¹⁸² *White v. Crook* was a lone moment of intersection. Where its sex discrimination claim is treated as a side issue in histories told from a racial equality perspective, its race discrimination claim is treated as a side issue in the feminist legal histories. As a result, we are missing details in this story — particularly, how Murray, Morgan, and Kenyon came to work together, what that collaboration was like, and whether lawyers and judges who had been heretofore focused on racial equality were really anything more than ambivalent about sex equality.¹⁸³ The subsequent history of divergence between the movements suggests they were not.

As a direct consequence of the sort of intersectional discrimination and oppression Murray sought to articulate, lawyers and leaders who could stand in the middle like Murray were rare. Murray's understanding of intersectionality would not become common parlance until the rise of the black feminist movement in the late 1980s and early 1990s, at which point Fourteenth Amendment legal doctrine had already solidified in a way that was blind to intersectional concerns. This close examination of *White v. Crook* demonstrates the extent to which the dominant voices in each movement were preoccupied by their respective claims to equality under the Fourteenth Amendment during this moment of constitutional change; the subsequent entrenchment of those dominant arguments, rather than the arguments made by black women, should come as no surprise.

This history certainly demonstrates the importance of collaboration between feminist and civil rights advocates going forward. It might also, however, inspire litigators to look for opportunities to move the Court towards Murray's original understanding of Fourteenth Amendment equal protection strategy as a way to protect those who live at the intersection of marginalized identities. As advocates and scholars seek to challenge statutes and

¹⁸⁰ *Id.* at 33 (discussing how, over time, feminist lawyers' use of the race-sex analogy made it an abstract legal argument).

¹⁸¹ *Id.* at 40.

¹⁸² An intersectional legal history of this time period has been recently salvaged by Serena Mayeri. See MAYERI, REASONING FROM RACE, *supra* note 38.

¹⁸³ However, for the suggestion that Morgan did not work particularly well with Murray and Kenyon, see *supra* note 133 and relevant text.

schemes that disproportionately burden such classes — low-income women of color, for instance — it may be useful to remember that our Fourteenth Amendment equal protection jurisprudence has intersectional as well as analogical origins. Though, in the decades since *White v. Crook*, the Supreme Court has been willfully blind to intersectional identity in its adherence to the tiers-of-scrutiny approach to equal protection, dissenters have echoed the calls of advocates and challenged the notion that such an approach sufficiently protects the interests of certain classes of citizens.

Questions of disparate impact on low-income women of color frequently arise in the reproductive justice context. In *Harris v. McRae*, for example, the Court upheld the Hyde Amendment's denial of federal funds for abortion coverage for low-income women enrolled in joint federal-state Medicaid programs.¹⁸⁴ In dissent, Justice Marshall observed that, “[t]he class burdened by the Hyde Amendment consists of indigent women, a substantial portion of whom are members of minority races.”¹⁸⁵ Rather than considering the race and gender of those affected, which would have triggered heightened scrutiny of the Amendment, the Court focused instead on their indigent status.

Unfortunately, when a law disproportionately affects women of color — and poor women at that — the Court ignores the disparate racial impact of the law, “downgrades” the standard of review applicable because it discounts the invidiousness of sex-based classifications, and then applies rational basis review based on their indigent status alone. The result is that, instead of being triply protected, poor women of color are rendered triply vulnerable.¹⁸⁶

While Supreme Court jurisprudence might prove disheartening to advocates seeking to challenge state action that has a disparate impact on low-income women of color, revisiting the origins of Pauli Murray's theory of sex discrimination reminds us that such an argument does have strong roots; Murray's theory stemmed from a personal understanding of the “double vulnerability” of black women. Whether lawyers reinvigorate their equal protection challenges by invoking this history, or strive to demonstrate the intertwined origins of analogical and intersectional reasoning, looking to the historical origins of our equal protection jurisprudence might be a source of creativity and hope.

¹⁸⁴ 448 U.S. 297, 298 (1980).

¹⁸⁵ *Id.* at 343 (Marshall, J., dissenting).

¹⁸⁶ Jill E. Adams & Jessica Arons, *A Travesty of Justice: Revisiting Harris v. McRae*, 21 WM. & MARY J. WOMEN & L. 5, 53 (2014).

