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## **The Ties That Bind: What Pauli Murray Teaches Us about Race, Family, Slavery, and Inequality**

Jessica Dixon Weaver

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# The Ties That Bind: What Pauli Murray Teaches Us About Race, Family, Slavery, and Inequality

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JESSICA DIXON WEAVER\*

## Introduction

Pauli Murray is an unsung American hero. She was a civil rights activist, a feminist, a lawyer, a book author, a poet, a professor, and a priest.<sup>1</sup> She was a trailblazer—the first Black person to earn a doctorate in law from Yale University, one of the co-founders of the National Organization of Women (N.O.W.), and the first African American female ordained Episcopal priest.<sup>2</sup> Pauli Murray was down-right revolutionary—she was sitting in the front of the bus before Rosa Parks and sitting in at the lunch counter more than 15 years before the Greensboro Four.<sup>3</sup> She wrote the “Bible” of the Civil Rights Movement, a 1950s book entitled *States’ Laws on Race and*

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1. *Who Is the Rev. Dr. Pauli Murray?*, PAULI MURRAY CTR. FOR HIST. & SOC. JUST., <https://www.paulimurraycenter.com/who-is-pauli>.

2. *About Pauli Murray*, YALE COLL., <https://paulimurray.yalecollege.yale.edu/subpage-2>.

3. Patricia Bell-Scott, *Foreword*, in PAULI MURRAY, *PROUD SHOES: THE STORY OF AN AMERICAN FAMILY* ix (Beacon Press 1999).

*Color*.<sup>4</sup> Her law school thesis entitled “Should the *Civil Rights Cases* and *Plessy* Be Overruled?” contained the foundation of the arguments used by Thurgood Marshall in *Brown v. Board of Education*.<sup>5</sup> She coined the term “Jane Crow” while she was a student at Howard University School of Law to describe the similarities between the legal discrimination of Blacks and women,<sup>6</sup> and later co-wrote a law review article published in the *George Washington Law Review* that was the first comprehensive treatment of sex discrimination in an American law review.<sup>7</sup> Ruth Bader Ginsburg added Pauli Murray’s name to the Appellant’s Brief filed in the *Reed v. Reed* case because she used Pauli’s argument from the law review article.<sup>8</sup> Ultimately, it was Pauli’s legal analysis used in the first Supreme Court case that held that the Fourteenth Amendment Equal Protection Clause supported the prohibition of differential treatment based on sex.<sup>9</sup> After Thurgood Marshall was appointed to the U.S. Supreme Court in 1967, Pauli wrote to President Richard M. Nixon in 1971 to offer her availability and readiness “to serve on the high court should he wish to nominate a woman.”<sup>10</sup> In addition to all of the legal monuments she helped erect, she was a person who identified as a male trapped within a female body, and lived her life as a lesbian.<sup>11</sup> The modern-day understanding of equality—and the legal arguments used to obtain it for Blacks, women, and the LGBTQ community—were the brainchild of Pauli Murray.

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4. PAULI MURRAY, PAULI MURRAY: THE AUTOBIOGRAPHY OF A BLACK ACTIVIST, FEMINIST, LAWYER, PRIEST, AND POET 285–89 (Harper & Row, 4th ed. 2003) [hereinafter AUTOBIOGRAPHY]; see STATES’ LAWS ON RACE AND COLOR (Pauli Murray ed., Univ. of Ga. Press 1997).

5. Pauli Murray, *Should the Civil Rights Cases and Plessy Be Overruled?* (1944) (L.L.B. thesis, Howard Univ. School of Law) (on file with Harvard Library); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); see Kathryn Schulz, *The Many Lives of Pauli Murray*, NEW YORKER (Apr. 10, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-many-lives-of-pauli-murray>.

6. AUTOBIOGRAPHY, *supra* note 4, at 183.

7. Pauli Murray & Mary Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965) (arguing that Title VII of the 1964 Civil Rights Act and the Fourteenth Amendment should be interpreted to prohibit discrimination against women by both private employers and the government).

8. Melvin L. Wulf & Ruth Bader Ginsburg et al., Brief for Appellant, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4).

9. AUTOBIOGRAPHY, *supra* note 4, at 347–58; *Reed v. Reed*, 404 U.S. 71 (1971).

10. PATRICIA BELL-SCOTT, THE FIREBRAND AND THE FIRST LADY: PORTRAIT OF A FRIENDSHIP: PAULI MURRAY, ELEANOR ROOSEVELT, AND THE STRUGGLE FOR SOCIAL JUSTICE 339–40 (2016).

11. Kenya Downs, *The “Black, Queer, Feminist” Legal Trailblazer You’ve Never Heard Of*, NPR (Feb. 19, 2015), <https://www.npr.org/sections/codeswitch/2015/02/19/387200033/the-black-queer-feminist-legal-trailblazer-youve-never-heard-of>.

Dr. Murray wrote two books: a memoir about her family and another autobiography about her life.<sup>12</sup> *Proud Shoes: The Story of an American Family (Proud Shoes)* is a saga about the Fitzgerald family from the early 1800s to the beginning of the 20th century.<sup>13</sup> Initially published in 1956, it is a Black woman's history of her family's journey through slavery, the Civil War, and Reconstruction, written over 20 years before the famous book *Roots* by Alex Haley.<sup>14</sup> In fact, Dr. Murray states that *Proud Shoes* portrays the entanglement of the races, not as a unique story, but as an acceptance of the reality of the multiracial origins of both Blacks and whites.<sup>15</sup>

Dr. Murray's family history is emblematic of the struggle for racial justice and equality in America. The pain and tenacity of her ancestors shaped her destiny and spurred her activism. Her family experiences illustrate the many ways that the foothold of structural racism began with placing insurmountable legal barriers between Black men, women, and children as a family unit. The law has played a calculated role in separating the races as families from an ideological perspective. In other words, the construct of race and the inferiority and superiority complexes that accompany it allowed for the legal exclusion of family members within family units.<sup>16</sup> This legal exclusion rendered the identity of formerly enslaved persons invisible in some families, and it often disrupted the structure of what was deemed as the normative family. Dr. Murray's family story is about the ties that bind us as families in America.

### I. The Cost of Freedom and Education: The Smiths and the Fitzgeralds

Pauli grew up in North Carolina hearing about the Smiths and the Fitzgeralds.<sup>17</sup> The Fitzgeralds were her maternal grandfather's side of the family and were very proud to be free people of color.<sup>18</sup> She learned later in her life that in fact her great-grandfather, Thomas Fitzgerald, had been a slave as a child and young adult but was freed when he was 24 years

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12. PAULI MURRAY, *PROUD SHOES: THE STORY OF AN AMERICAN FAMILY* (Beacon Press 1999) [hereinafter *PROUD SHOES*]; AUTOBIOGRAPHY, *supra* note 4.

13. Bell-Scott, *supra* note 3, at vii.

14. *Id.* at viii–ix; ALEX HALEY, *ROOTS: THE SAGA OF AN AMERICAN FAMILY* (Dell Publishing Co. 1980).

15. *PROUD SHOES*, *supra* note 12, at xx (1978 Introduction).

16. Jessica Dixon Weaver, *Uncovering Race in Family Law* (forthcoming 2022) (on file with the author).

17. *PROUD SHOES*, *supra* note 12, at xiv.

18. *Id.* at xiv, 60.

old.<sup>19</sup> He was inherited by a Quaker family at the age of 11, and the slave trade was forbidden within the Quaker faith.<sup>20</sup> Therefore, his owner listed him as a free person of color in the U.S. Census as well as a member of his household.<sup>21</sup> While he was taught how to read and write, he grew up knowing that he was property but unable to assert any independence.<sup>22</sup> Pauli surmised that the reason his enslavement was concealed within the family was perhaps twofold: The scar that slavery left on his spirit was deep, but it did not stunt him from taking initiative, learning, and becoming independent.<sup>23</sup>

Her grandfather Robert Fitzgerald (Thomas's son) was a schoolteacher and born free.<sup>24</sup> He had fought with the Union during the Civil War and later taught at schools for Negro children during the Reconstruction Era.<sup>25</sup> He taught Pauli how to read by having her recite the newspaper and made sure she spoke with correct grammar.<sup>26</sup> He was a source of pride for Pauli because of his courage as a soldier and his struggle with blindness as an adult.<sup>27</sup> In addition to being a teacher, he learned many trades, including tanner, farmer, carpenter, contractor, and brickmaker.<sup>28</sup> He was able to buy land, build his family home, and raise his six children.<sup>29</sup> He and her grandmother went through a lot to hold on to one acre and the home, and his greatest source of pride was fighting against slavery.<sup>30</sup>

Pauli wrote that the greatest thing that impacted her grandfather's youth was the Dred Scott decision of 1857.<sup>31</sup> Prior to this Supreme Court ruling, free persons of color assumed that they were citizens of the United States. The opinion made it clear that descendants of African slaves, whether emancipated or born free, were not citizens within the meaning of the U.S. Constitution, and they were not intended to be included in the Declaration of Independence.<sup>32</sup> The opinion went on to state that they were "inferior" beings and "had no rights which the white man was bound to respect."<sup>33</sup> Her

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19. *Id.*

20. *Id.* at 60–61.

21. *Id.* at 61.

22. *Id.*

23. *Id.* at 61–62.

24. *Id.* at xiv, 2.

25. *Id.* at 2, 24.

26. *Id.* at 2–5.

27. *Id.* at 24–25.

28. *Id.* at 25.

29. *Id.* at 25, 241.

30. *Id.* at 24–25.

31. *Id.* at 103.

32. *Dred Scott v. Sanford*, 60 U.S. 393, 407 (1857).

33. *Id.*, quoted in *PROUD SHOES*, *supra* note 12, at 103.

grandfather sought to further his education and enrolled as one of the first students at the Ashmun Institute, a college that trained Negro male leaders before emancipation.<sup>34</sup> It was at this college that Pauli's grandfather would be bound to other young Black men by a common purpose of proving themselves.

A Negro was forever on trial, carrying always a heavy burden of proof that he was not by nature degraded or inferior, for he stood against the accumulated weight of words, laws, customs and the sanctity of judicial precedent. Slavery robbed him of the right to speak only for himself or be judged by individual merit. In every act or utterance, he must plead for millions of others. . . .

Each learned that since he could never escape the burden of race, he must dedicate himself to it—to the cause of “my people,” that diverse, unpredictable mass of humanity compounded of many nations, tongues and customs, uprooted, dispersed and hammered into a new race of men by common oppression and indestructible faith.<sup>35</sup>

Robert Fitzgerald did just that—during the Reconstruction Era, he opened a school that enrolled 160 scholars and a freedman's store.<sup>36</sup> He also helped in the growth of two other schools and churches in Virginia.<sup>37</sup> He kept a diary that left Pauli insight about this desire to teach in the South after the Civil War. He felt that he was “a soldier in a ‘second war,’ this time against ignorance,” and that freedmen would lose the rights that they had gained unless they were educated.<sup>38</sup> He went to North Carolina to teach, opening another school in Hillsboro, where he soon met Miss Cornelia Smith.<sup>39</sup>

Robert's diary as well as the oral stories he shared with Pauli revealed his fighting spirit against white supremacy. He told of times he faced the Ku Klux Klan with a loaded musket when they tried to scare him away from the schoolhouse in North Carolina.<sup>40</sup> Pauli loved these stories because they made her feel proud of how brave her grandfather was and

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34. *Proud Shoes*, *supra* note 12, at 103–04.

35. *Id.* at 108–09.

36. *Id.* at 185.

37. *Id.*

38. *Id.* at 204.

39. *Id.* at 207–08.

40. *Id.* at 9–10.

demonstrated how he fought for freedom.<sup>41</sup> He told of how he first began to lose his eyesight after being shot in the head near his left eye by Rebel (Confederate) skirmishers when he was traveling at night.<sup>42</sup> He also talked about the inhumane treatment he received after fighting in the war for freedom. Finally, his personal writings illustrated how he followed and enjoyed politics. He spoke about freedmen voting for the first time and how some colored people were forced to vote with their employer and others were met with violence because they voted the Republican ticket.<sup>43</sup>

## **II. Harriet Smith: Pauli’s Blood Tie to the University of North Carolina**

The Smith side of Pauli’s family was also very proud of their roots, mostly because her maternal grandmother, Cornelia Fitzgerald, was related to the Chapel Hill Smiths who endowed the University of North Carolina.<sup>44</sup> Robert Fitzgerald was married to Cornelia Smith, who was born a slave in North Carolina. Cornelia’s mother Harriet (Pauli’s great-grandmother) was the personal slave of Mary Ruffin Smith.<sup>45</sup> Mary’s father was Dr. James S. Smith, a very distinguished citizen of North Carolina, whose family had owned a number of slaves.<sup>46</sup> He was a Democratic Congressman and a trustee of the University of North Carolina (UNC) for many years.<sup>47</sup> He had three children, Francis, Sidney, and Mary Ruffin.<sup>48</sup> His family donated a good deal of land to UNC, and Mary’s brothers Francis and Sidney both graduated from college there.<sup>49</sup> Francis became a doctor, while Sidney went on to become a lawyer and aspiring politician.

In their youth, both Francis and Sidney admired and desired Harriet, who was “known to be one of the most beautiful girls in the county, white or black.”<sup>50</sup> She was thought to be three-quarters white and one-quarter Cherokee Indian.<sup>51</sup> During colonial days, Native American women were often kidnapped, listed as mulattoes, and forced into slavery as concubines

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41. *Id.* at 10.

42. *Id.* at 127.

43. *Id.* at 199–200.

44. *Id.* at 33.

45. *Id.* at xii, 38, 46–49.

46. *Id.* at 35–36.

47. *Id.*

48. *Id.*

49. *Id.* at 33–34, 36.

50. *Id.* at 38, 40–41.

51. *Id.*

or breeders, with their children bringing “high prices in the slave market.”<sup>52</sup> Dr. Smith paid \$450 for Harriet, which was a large sum at the time.<sup>53</sup>

Harriet expressed a desire to marry Reuben Day, a free-born mulatto, when she was around 20 years old.<sup>54</sup> Dr. Smith gave his permission, mainly because it was “good business.”<sup>55</sup> He did not really care about free Negroes; quite the opposite, he had “helped to change the state constitution in 1835 to take away their vote and bar them from education. . . .”<sup>56</sup> Dr. Smith knew that slavery law provided that the status of children was determined by the status of the mother.<sup>57</sup> All of Harriet’s children would be slaves, no matter the legal status of the father.<sup>58</sup> So, they married but could not live together.<sup>59</sup> They had one son together, Julius, a Smith slave who never really knew either of his parents. Harriet could not really care for him because of her duties to Mary, and Reuben was eventually run off by Francis and Sidney.<sup>60</sup>

Two years into Harriet’s marriage, Sidney’s and Francis’s desires to have her culminated in them physically attacking her husband. One evening as Reuben was leaving a visit with Harriet on the Smith property, Sidney questioned why he was there.<sup>61</sup> Reuben reminded him that he was Harriet’s husband and that Sidney’s father had consented to their union.<sup>62</sup> Sidney proclaimed that slave law ruled over the preacher’s words.<sup>63</sup> Reuben was told, “Somebody’s been fooling you, boy. Don’t you know slave marriages aren’t recognized in this state?”<sup>64</sup> Sidney and his brother Frank later beat Reuben severely and dismissed him as a trespasser on the land.<sup>65</sup> After beating Reuben, they told him he would be shot on sight if he ever set foot again on the Smith lot.<sup>66</sup> Reuben Day “disappeared from the county,” leaving his wife and son behind, never to be heard of again.<sup>67</sup>

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52. *Id.*

53. *Id.*

54. *Id.* at 39.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 40.

60. *Id.* at 40–42, 48.

61. *Id.* at 41.

62. *Id.* at 41–42.

63. *Id.* at 42.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*



What did this mean for Harriet? No Negro man would marry or defend her because he knew it would possibly end in his death. She was a marked woman. She was destined to become the subject of not one, but two white men, and she had no control over her body or the children that came from it. She used to nail her door shut and put up barricades so that no one could get to her while she was sleeping.<sup>68</sup> Even though she struggled and screamed, Sidney raped her with no interference from anyone and continued to beat and rape her over and over again until Francis put a stop to it.<sup>69</sup> There was a fight between the brothers this time that ended in Sidney being found unconscious, bleeding with a hole in his head.<sup>70</sup> After this violent incident with his brother, Sidney left her alone.<sup>71</sup> Francis eventually took his place.<sup>72</sup> It was not known whether Harriet was resigned to this reality or whether she was grateful for the intervention and attention. Harriet was reportedly “devoted” to Francis though there was never any public or legal recognition of their relationship.<sup>73</sup> Either way, she really had no personal choice as an enslaved woman. Harriet gave birth to four girls.<sup>74</sup> Her youngest three daughters, Emma, Annette, and Laura, were the daughters of Francis. Her oldest daughter, Cornelia, was Sidney’s daughter and Pauli’s grandmother.<sup>75</sup> Neither Francis nor Sidney ever married.<sup>76</sup>

### III. Smith Pride and Prejudice

Cornelia instilled in Pauli the pride of her father’s family history—that she had “good blood” and should “[h]old [her] head high” as the descendant of doctors, lawyers, judges, and legislators.<sup>77</sup> Even though Cornelia was the product of a rape, she considered herself an aristocrat—not a slave.<sup>78</sup> This was mostly because she was raised in the “Big House” by Mary Smith. Mary had no children of her own because she had never married. While Mary was mortified that her brothers had “sired” children with Harriet, she realized that these children were Smiths, her nieces in blood

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68. *Id.* at 41–43.

69. *Id.* at 43.

70. *Id.*

71. *Id.* at 47.

72. *Id.*

73. *Id.* at 46–47.

74. *Id.*

75. *Id.* at 45–47.

76. *Id.* at 36.

77. *Id.* at 33.

78. *Id.* at xix, 33.

and fact.<sup>79</sup> There was much gossip about what had happened between the brothers, and the four mulatto girls living in their home.<sup>80</sup> While the girls were aware that Harriet was their mother, they looked to Mary as a parent because she made all the choices for them.<sup>81</sup>

The Smith family was caught between a rock and a hard place—incapable of treating the girls purely as servants but unable to openly recognize them as kin.<sup>82</sup> However, Sidney Smith did claim Cornelia as his daughter and often bragged about her intelligence.<sup>83</sup> They had a very close relationship, and he instilled in her a rebellion against everything Negro slavery embodied.<sup>84</sup> The dichotomy of Sidney was that he still owned slaves and represented slave owners in suits to maintain their property.<sup>85</sup> But he also represented without charge free Negroes accused of crimes, winning many acquittals.<sup>86</sup> Grandmother Cornelia said he drank a lot, perhaps to cover the hatred he felt about slavery and maybe even about himself because he was “perpetuat[ing] the very evil he secretly deplored.”<sup>87</sup>

Sidney’s sister also seemed to operate on both sides of the laws of slavery and racial mores of the era. Mary did not want the four girls to be sold as slaves, so she eventually worked in her garden to earn the money to purchase Harriet and her daughters.<sup>88</sup> Even though she told them they were free after she bought them, she “never manumitted them outright.”<sup>89</sup> She also carefully “avoided giving them an education” but trained them in housework and sewing.<sup>90</sup> When Mary died, she left Cornelia and her three sisters each 100 acres of farmland.<sup>91</sup> Pauli’s grandmother used that land to earn money to educate her children.<sup>92</sup> Cornelia retold the haunting story repeatedly to Pauli, and in her book *Proud Shoes*, Pauli said the recounting was of “a long-buried wrong which had refused to die,” and that her grandmother “expected [Pauli] to right somehow.”<sup>93</sup>

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79. *Id.* at 46, 48–49.

80. *Id.* at 45, 47.

81. *Id.* at 48.

82. *Id.*

83. *Id.* at 49.

84. *Id.* at 49–51.

85. *Id.* at 51.

86. *Id.*

87. *Id.* at 50.

88. *Id.* at 52.

89. *Id.*

90. *Id.*

91. *Id.* at 242.

92. *Id.* at 242–43.

93. *Id.* at 34.

In the fall of 1938, Pauli had her chance. She applied to the graduate school at the University of North Carolina, not fully realizing how much her courageous act would propel her forward to become what some called “a one-woman civil rights movement.”<sup>94</sup> Her application came shortly after the U.S. Supreme Court decision in *Missouri ex rel. Gaines v. Canada*,<sup>95</sup> a case that ruled that the state of Missouri had to provide a Black student (Lloyd Gaines) with facilities for legal education equal to those provided for white students, or it must admit him to the University of Missouri School of Law.<sup>96</sup> While Pauli had been completely unaware of this case, she became embroiled in the segregation debate in the country when she was denied entry to UNC graduate school explicitly because of her race.<sup>97</sup> Pauli Murray understood the impact of her skin color and her family connection in a keen way. Pauli’s denial reminded her that not only was this unequal treatment about race, but it was also about white unacceptance of her family identity. If she had been white, her admittance to UNC would have been a forgone conclusion. The circle of irony was completed by their family obligation to pay taxes on their property to a state that supported an institution that none of them could attend. Pauli noted that Mary had left a sizeable estate to UNC to create a permanent trust fund, named the Francis Jones Smith Scholarships, for the education of students.<sup>98</sup> Pauli called it a “burning issue” in their family, mixed with “feelings of personal injustice” and group discrimination.<sup>99</sup> Her efforts to attend UNC Chapel Hill, a university founded on her family’s land, teach us about the disinheritance of race. “Few white people in the south wanted to acknowledge blood ties between the races created by the slave-owning class during slavery.”<sup>100</sup>

The laws regarding the establishment of parenthood have been grounded in denial of Black children of their right to freedom, identity, and inheritance. The laws of slavery set forth that children born to an enslaved mother followed her status at the time of their birth and they were born enslaved.<sup>101</sup> No matter whether the biological father of her children

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94. Corydon Ireland, *The First Civil Rights Movement: 1920s and Beyond Marked by Dissent and Progress*, HARV. GAZETTE (Feb. 28, 2008), <https://news.harvard.edu/gazette/story/2008/02/the-first-civil-rights-movement/>.

95. 305 U.S. 337 (1938).

96. *Id.* at 350–52; AUTOBIOGRAPHY, *supra* note 4, at 114.

97. AUTOBIOGRAPHY, *supra* note 4, at 114–15.

98. *Id.* at 125.

99. PROUD SHOES, *supra* note 12, at 268.

100. AUTOBIOGRAPHY, *supra* note 4, at 125.

101. See THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 68–72 (1858).

was an enslaved Black man, a free Black man, or a free white man, the child's future was determined by her maternal side of the family.<sup>102</sup> *White children's status was derived from their father, which follows the English tradition and allows for inheritance from the person who historically had title to all of the family property.* So, while the inheritance of Francis, Sidney, and Mary was never in question, Cornelia and her three sisters did not ever receive the full benefit of being the blood daughters of Sidney and Francis, respectively. Cornelia did enjoy a familial relationship with her father Sidney, but she was never granted her freedom by her aunt Mary or her father. The silver lining was the 100 acres of farmland she and her sisters received upon Mary's death. Pauli was a direct beneficiary of this land because it was used to pay for her education; but there is no question that she would have had more educational opportunity in her home state had the laws been different. Cornelia was never satisfied with the 100 acres near Chapel Hill that Mary Ruffin left her in her will.<sup>103</sup> She felt "robbed" of the full inheritance her father intended for her.<sup>104</sup>

The disinheritance of race was keenly felt by mulatto children who knew their fathers but were prevented from accessing the tangible and intangible assets that came with whiteness.<sup>105</sup> The most famous interracial coupling during slavery, Sally Hemings and President Thomas Jefferson, produced four children who were also born enslaved, and did not receive any portion of the monetary inheritance of the famously known author of the Declaration of Independence. They were, however, informally and formally manumitted by Jefferson.<sup>106</sup> Freedom for an enslaved person was perhaps the most valuable possession to obtain. As difficult as physical freedom was in the 19th century, being mentally freed of the shackles of race proved to be much more difficult.

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102. SHERRI L. BURR, *COMPLICATED LIVES: FREE BLACKS IN VIRGINIA, 1619–1865*, at 37 (2019).

103. PROUD SHOES, *supra* note 12, at 242.

104. *Id.*

105. See Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1737–41 (1993).

106. See ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY 25–52 (1997). Sally's first two adult children ran away in their early 20s and were not sought after or brought back to enslavement. *Id.* at 25, 33. Her youngest two children, sons Madison and Eston, were freed by Jefferson's will. *Id.* at 38.

#### IV. Free Your Mind (and the Rest Will Follow)<sup>107</sup>

Pauli Murray eventually did receive a degree from the University of North Carolina at Chapel Hill (UNC)—in 1978 she was awarded an honorary degree.<sup>108</sup> She felt “it was more than an academic honor,” stating, “it was a symbol of acceptance stretching back to [her] Grandmother Cornelia and her relationship to the Chapel Hill Smiths. . . .”<sup>109</sup> However, at the time she was scheduled to receive the degree, there was an ongoing dispute between the U.S. Department of Health, Education, and Welfare and UNC regarding UNC’s compliance with a federal court order to enforce desegregation.<sup>110</sup> The Department “threatened to cut off federal funds to the University . . . [for] failure to produce and implement an acceptable plan for fully dismantling the historic legacy of segregation. . . .”<sup>111</sup> In light of the ongoing refusal, Pauli withdrew her earlier acceptance of the degree because she did not feel right accepting an honor from a school that had not remedied the very issue that she had challenged 40 years earlier.<sup>112</sup> Pauli Murray stated, “the real victory of that encounter with the Jim Crow system of the South was the liberation of my mind from years of enslavement.”<sup>113</sup>

Over 40 years later, UNC still struggles to remedy the legacy of slavery. A similar denial based on race occurred in 2021 at UNC, but this time it involved a Black female professor who was not considered for tenure by the Board of Trustees after being offered the Knight Chair in Race and Investigative Journalism.<sup>114</sup> The prestigious Knight Chair came with tenure for every person who had previously been appointed, but all the past chairs were white.<sup>115</sup> Nikole Hannah-Jones, the Pulitzer Prize–winning journalist and author of *The 1619 Project*, was placed in the humiliating position of accepting a coveted position from her alma mater, knowing that she

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107. EN VOGUE, *FREE YOUR MIND* (EastWest Records 1992) (an edgy, heavy metal song that confronts racism and sexism from a Black female perspective).

108. *AUTOBIOGRAPHY*, *supra* note 4, at 128.

109. *Id.*

110. *Id.* at 128–29.

111. *Id.* at 129.

112. *Id.*

113. *Id.* at 128.

114. Katie Robertson, *Nikole Hannah-Jones Denied Tenure at University of North Carolina*, N.Y. TIMES (May 19, 2021), <https://www.nytimes.com/2021/05/19/business/media/nikole-hannah-jones-unc.html>.

115. Laurel Wamsley, *After Tenure Controversy, Nikole Hannah-Jones Will Join Howard Faculty Instead of UNC*, NPR (July 6, 2021), <https://www.npr.org/2021/07/06/1013315775/after-tenure-controversy-nikole-hannah-jones-will-join-howard-faculty-instead-of>.

was not receiving the one thing that granted her academic freedom.<sup>116</sup> Conservative Republicans who control the North Carolina legislature and have significant influence over the UNC Board of Trustees took issue with her assertions about the significance of U.S. slavery and racism to the founding and growth of America.<sup>117</sup> Unlike in Pauli's case, students, alumni, and faculty at UNC protested the action of the Board of Trustees, calling national attention to the racist slight.<sup>118</sup> After threat of suit by the NAACP along with national protests (and providing no justification for the disparate treatment of Hannah-Jones), the UNC Board of Trustees did eventually vote on her tenure case and appointment as full professor.<sup>119</sup> She was granted the new position with tenure. Hannah-Jones penned a letter to UNC and the media, noting the discriminatory treatment she had endured even though she had dedicated time and energy to UNC since receiving her masters there, and she had successfully gone through the tenure process at the departmental and university administrative levels.<sup>120</sup> She then announced that she would be accepting the Knight chair appointment at Howard University, Pauli's alma mater, where she would also be the Director of the Center for Journalism and Democracy.<sup>121</sup> Similar to Pauli, Nikole Hannah-Jones declared that she fought the battle to stand up not only for herself, but for other Black faculty around the country who have their opportunities stifled.<sup>122</sup> However, she ultimately chose to free herself from the definition of success taught to Black Americans—to gain entry to and succeed in historically white institutions. “I have done that, and now I am honored and grateful to join the long legacy of Black Americans who have defined success by working to build up their own.”<sup>123</sup> Nikole Hannah-Jones rejected the title from UNC, ultimately for the same reason as Pauli Murray. She decided to liberate herself—letting go of the desire to prove that she belonged in white spaces that were not built for Black people.

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116. *Id.*

117. *Id.*; Robertson, *supra* note 114.

118. Wamsley, *supra* note 115; Press Release, LDF, Nikole Hannah-Jones Issues Statement on Decision to Decline Tenure Offer at University of North Carolina—Chapel Hill and to Accept Knight Chair Appointment at Howard University (July 6, 2021), <https://www.naacpldf.org/wp-content/uploads/NHJ-Statement-CBS-7.6.21-FINAL-8-am.pdf>.

119. LDF, *supra* note 118.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

### V. The Enslavement of Whiteness

After the denial to UNC, Pauli attempted to apply to Columbia University. Columbia did not admit women, and Pauli did not meet the admission or financial requirements for Barnard College.<sup>124</sup> She was encouraged to apply to Hunter College in New York, where she could attend for free if she met the entrance and residency requirements.<sup>125</sup> She first had to live in New York for at least a year, and she also needed to take additional classes to be admitted into Hunter.<sup>126</sup> She enrolled in a public high school in New York City and graduated with honors. During that time, she lived with her Cousin Maude and her husband James, and their three sons.<sup>127</sup>

There are many instances in Pauli's family history where people passed for white. Cousin Maude and her family passed for white in their neighborhood in Queens, which was made up of various immigrants from Ireland, Germany, Italy, Poland, and Armenia.<sup>128</sup> While the neighbors assumed that Cousin Maude's family was white, when Pauli came to live with them for a year in order to go to Hunter College, she felt like the stranger who had upset the balance in the relationships with the neighbors.<sup>129</sup> She also said that Cousin Maude made her feel ashamed about her color.<sup>130</sup> In contrast to what Aunt Pauline taught her about having "pride in race and set[ting] an example in racial achievement," Cousin Maude's choice of passing for Pauli meant that they settled for what she considered "the anonymity of the white background and self-imposed mediocrity, working at less than one's capacity."<sup>131</sup> While it was "a life without bitter struggle," she also saw it as a life without "the incentive to excel."<sup>132</sup>

The life experiences of her aunts, Aunt Pauline and Cousin Maude, show us that economic mobility in America is often dependent on your race. The former husband of Aunt Pauline, a Black lawyer who could not find work in his profession because of his race, apparently was able to become quite successful once he crossed over the color line to practice law

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124. AUTOBIOGRAPHY, *supra* note 4, at 66.

125. *Id.*

126. *Id.* at 67.

127. *Id.* at 66–67.

128. *Id.* at 66, 69.

129. *Id.* at 69.

130. *Id.*

131. *Id.*

132. *Id.*

as a white man.<sup>133</sup> Cousin Maude and her husband chose to pass for white in the state of New York.<sup>134</sup>

It should also be noted that at the root of the demise of Aunt Pauline's marriage was discrimination. Charles Morton Dame, a graduate of Howard University School of Law, was blonde and blue-eyed and trying to earn a living after the 1896 *Plessy v. Ferguson* decision upheld the legal doctrine of "separate but equal."<sup>135</sup> Charles decided to "cross the line" so that he could practice law as a white man.<sup>136</sup> It was difficult for him to earn a living as a colored lawyer, and he was advised by white lawyers he worked for to use his appearance to his advantage.<sup>137</sup> He tried to persuade Aunt Pauline to join him because she looked indistinguishable from a white person.<sup>138</sup> She was a woman of principle though, and her choice to remain Black relegated her to singlehood.<sup>139</sup>

Being a Fitzgerald held a great deal of pride for Aunt Pauline. The Fitzgeralds were free Negroes who were educated and established significant businesses and wealth during Reconstruction in the late 1800s.<sup>140</sup> They took pride in doing honest work to earn a living and remaining independent.<sup>141</sup> Aunt Pauline was the oldest of six children and the workhorse of the family.<sup>142</sup> After her marriage ended, she returned home and decided to forgo a traditional role and adopt three-year-old Pauli Murray, who was her godchild and namesake.<sup>143</sup> Aunt Pauline had lost two children in their infancy, and it was Pauli's mother's last request that Aunt Pauline raise her.<sup>144</sup> There were no nursery schools for working parents, so Aunt Pauline brought Pauli to school with her while she taught. Pauli learned to read early as a result of being in the classroom with older children, and study was as natural to her as breathing.<sup>145</sup> Though Aunt Pauline was a single mother, her sister Aunt Sallie also showered her with love and helped in raising her.<sup>146</sup>

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133. *Id.* at 14–15.

134. *Id.* at 69.

135. *Id.* at 14; *Plessy v. Ferguson*, 163 U.S. 537 (1896).

136. AUTOBIOGRAPHY, *supra* note 4, at 15.

137. *Id.* at 14–15.

138. *Id.* at 15.

139. *Id.*

140. PROUD SHOES, *supra* note 12, at 267.

141. *Id.* at 241.

142. AUTOBIOGRAPHY, *supra* note 4, at 14.

143. *Id.* at 15–16.

144. *Id.* at 16.

145. *Id.* at 18.

146. *Id.* at 16–17.



Pauli proclaims that she was “strongly anti-American at [age] six” because her knowledge of history told her that “the George Washingtons and their kind had stolen the country from the American Indians. . . .”<sup>147</sup> She recalls seeing the contrast between the beautiful red brick school that the white children attended and her own school, a dilapidated warehouse.<sup>148</sup> Everything about her school experience told her that whatever they had, it was always inferior.<sup>149</sup> One’s skin color, features, and hair determined your identity and were the “yardstick by which everyone measured everybody else.”<sup>150</sup> Pauli felt like she had no place because she “could never tell where white folks left off and colored folks began” in her family.<sup>151</sup> The world was confusing to her because she was both related to white people and alienated from them.<sup>152</sup> Pauli noted how close the two races lived together and the familiarity that existed in their dealings with one another.<sup>153</sup> She felt that living in between the races was like a straightjacket existence, and it became more oppressive as she grew older.<sup>154</sup> “Each of us had to deal with it as best we could. Some were ultimately destroyed, some led crippled lives, some endured, and some fled the south, as she did later.”<sup>155</sup>

### Conclusion

Understanding the history of family law is accepting the construction of race and the power dynamic of families within race relations. Slavery was contingent on laws regulating Blacks as inferior. The only way that U.S. law could configure a system to support slavery was to flip family law on its head. Pauli wrote about it in her autobiography, stating, “[f]ew white people in the South wanted to acknowledge blood ties between the races created by the slave-owning class during slavery.”<sup>156</sup> If we were to truly accept how families came to be physically formed in America—and the government’s role in the denial of Black family life, growth, and death—we would have a better understanding of the true arc of justice.

Slavery laws and the use of race as a social construct have been integral to the development of family laws in our country. There were two separate

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147. PROUD SHOES, *supra* note 12, at 271.

148. *Id.* at 269.

149. *Id.* at 270.

150. *Id.*

151. *Id.* at 271.

152. AUTOBIOGRAPHY, *supra* note 4, at 31.

153. *Id.* at 34.

154. *Id.*

155. *Id.*

156. PROUD SHOES, *supra* note 12, at 125.

legal systems that governed white families and Black families—common law for whites and slavery law for Blacks. Because slaves were treated as extralegal—outside of the law—there was a divide between how Black families were treated as compared to white families. This divide continued beyond emancipation and is still present in the regulation of families today.

Pauli's family shows us that race and family are fluid and complex. Pauli Murray teaches us that family ties and the function of families often define and transcend racial differences among people. While family ancestry can be painful and shameful, it is a powerful motivator to fight inequality. Pauli saw her grandfather Robert George Fitzgerald as the person in her family who established their official place in American history, and her ancestors' example of courage fueled her own political activism.<sup>157</sup>

Slavery was not only a physical condition, but it was also a mental one as well. Because it was an institution built upon a belief system of inferiority of the Black race grounded in false morality and science, it has been a difficult condition to overcome for both Blacks and whites. Well after enslaved persons were emancipated in 1865, the laws of slavery and the condition they supported still exist as the backdrop to race relations in the United States.

Pauli Murray spent her entire life teaching and educating others about how the law and the spirit could be used to provide equality and dignity for each person. Though she struggled with how people viewed her mixed ancestry and sexual identity, she believed in treating people as human beings and members of the same human family. The stories of the Smiths and the Fitzgeralds played a role in generating a revolt in her, and she shared the proud heritage of both Robert Fitzgerald and Cornelia Smith. Perhaps embracing the different sides of American family history—free and enslaved, white and Black—will begin a long-awaited healing that is Pauli Murray's legacy.

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157. AUTOBIOGRAPHY, *supra* note 4, at 298.

