

*Senior Banquet Speech, University of Iowa College of Law, May 9, 2019, Paul Gowder*

*(n.b.: this is the rough draft of a speech I delivered on the occasion of my students' graduation in 2019. I haven't been able to find the final, but I recall the content being about the same...although perhaps less exclamation-mark-ey.)*

This is my last chance to make you answer my questions, so let's start with that. How many of you have seen *On the Basis of Sex*? Go ahead and raise your hand.

So you probably remember the scene where they were mooted her oral argument, the scene where the patronizing ACLU lawyer was acting like a particular jerk---do you remember there was a Black woman on the panel? Does anyone know who she was? Shout it out---don't make me call on someone.

Who here had heard of Pauli Murray before that movie? The biographers say this scene didn't actually happen, but Murray still played a very big role in the litigation that Ginsburg was bringing. But who's heard of her? Another show of hands please.

Ok, the socratic portion of the evening has now concluded. Maybe. Let's talk about Pauli Murray---as you join the profession, you should have in your heads a kind of north star for what a lawyer can be and can do, and Murray was quite possibly the greatest American lawyer. I mean that. She has a very strong claim to be up there with RBG, with Marshall, with all the rest. Let me tell you about her.

Pauli Murray was born in Baltimore in 1910, and grew up in North Carolina, where she was raised by her aunt and her grandparents---her grandmother, who was born a slave, and grandfather, who was a free Black abolitionist in Pennsylvania. She graduated from Hunter College in New York City, and then promptly went about setting civil rights milestones. Here's a selective---selective!---list.

- In 1940, fifteen years before Rosa Parks, she was arrested for sitting at the front of a bus in Richmond Virginia, rather than in the broken seats for Black folks at the back.
- In 1941, she started law school at Howard University. For those of you who were moved by the portrayal of the handful of women who attended law school with RBG at Harvard in 1956---Pauli Murray always seemed to be about fifteen years ahead---Murray was the *only* woman in her class at Howard. (On her first day of class, one of her professors expressed confusion that a woman would want to go to law school.)
  - o She graduated number 1 in her class. Because, of course she did.
  - o Despite that, she was rejected from the opportunity to pursue what I think was the equivalent of an LLM degree of the time from Harvard---which the student who was first in their class at Howard traditionally did---because Harvard did not admit women.
    - Incidentally, she had a letter of recommendation from FDR.
    - So she did it at Berkeley instead, and in 1965, got an SJD from Yale---the first Black person to do so.

- In 1951, she published a book called "States' Laws on Race and Color" that criticized segregation. Part of her idea was to make use of psychological evidence in the legal attack on segregation.
  - o Note the date of this book. Thurgood Marshall called it the bible of civil rights lawyers, and do you recall any important cases a few years later where Marshall adopted Murray's strategy?!
  - o That's right. *Brown v. Board*? *She did that*, at least in part.
- But she wasn't satisfied being a great leader in the fight for the civil rights of Black people. She also was a great leader in the fight for the civil rights of women.
- Remember how in *On the Basis of Sex* they showed RBG being inspired by Dorothy Kenyon and her litigation about the right to have women serve on juries? Well, Kenyon's greatest victory was a case from 1966, *White v. Crook*, which struck down the exclusion of Black people as well as women from Alabama juries. Can you guess who the other lawyer representing the plaintiffs was there? That's right! Pauli Murray!
- The same year, she was one of the founders of the National Organization for Women.
- And her article "Jane Crow and the Law" was one of the key influences in RBG's argument in *Reed v. Reed*, the case that recognized that the Equal Protection Clause protected women against sex discrimination too. Pauli Murray was on the brief.

So she gets a lot of the credit for that one too. ***Brown AND Reed!*** And in between all of this, she served as a professor at the Ghana School of Law and at Brandeis University, worked at Paul Weiss as the first black woman associate, worked in the California attorney general's office, served on JFK's Presidential Commission on the Status of Women---you name it, she did it.

So why haven't you heard of her? Frankly, a lot of it is because of her identity. As a Black woman, a lesbian, arguably transgender although she didn't have the concept available--- incidentally, I use female pronouns to refer to her because as far as I know she never requested otherwise, but had she lived today that might be different---as a lesbian, black, gender nonconforming woman, can you ***imagine*** textbook authors including her in the history of the civil rights movement?

As we know, a lot of the textbooks at the pre-college level are influenced by market demand from places like Texas---can you imagine a bunch of Texas school board members accepting a history textbook that gives a black lesbian who had hormone treatments and liked to wear pants her rightful place in history?

The good news is that in the last few years---she died in 1985, and it's only in the twenty-teens that this starts happening---she's finally been getting some of the long-delayed recognition she deserves---like representation in the RBG biopic, like the fact that Yale named one of its residential colleges after her in 2016. It's long delayed, but people are finally starting to pay attention to her immense contributions to American legal development.

But there are two other aspects of her life that I find particularly interesting. First, she was a poet, she published a book of poetry in 1970. Second, late in her life, she became an Episcopal priest---naturally, the first Black Woman to be ordained in that denomination. And scholars are starting to recognize a relationship between her civil rights work as a lawyer, her faith, and her poetry.

Sarah Azaransky, a professor at Union Theological Seminary, published a book in 2011 called "The Dream Is Freedom: Pauli Murray and American Democratic Faith." In it, she attributes to Murray what she calls a "democratic eschatology." Eschatology is a theological idea that roughly means the study of that which is to come---it's used in the Christian tradition to mean the day of judgment and such, but in the case of Murray, it refers to the constitutional democracy yet to be built. Here's what Azaransky says:

Murray repeatedly described American democracy using an eschatological register of promise and fulfillment. Whereas promises of the nation's founding documents---of "we the people" and "liberty and justice for all"---have yet to be fulfilled, Murray counsels democratic faith and emphasizes strategic coalition building to make more justice available for more Americans.

This idea, democratic faith, is available regardless of your religious beliefs, or even to an unbeliever like me. It's part of what some sociologists have called America's civil religion. We can say that our democratic law---those commands of the Constitution, those promises of the Declaration, that decree that we are all to be treated as equals, that we live in a land where government is by consent of the governed---is an object of faith, and in that faith lawyers are the priests.

Law in a democratic society is an object of faith in at least two senses. First, for law to be real, we must have faith in our fellow citizens. The characteristic feature of law in a democracy is that it is the law of the powerless, to regulate the powerful. That is what distinguishes democracy, rule by the masses, from oligarchy, rule by the rich and the powerful.

That is why the fundamental question of democratic political science for centuries has been "how on earth can the powerless rule? They're the powerless! By definition, other people have more money, more weapons, more of everything that matters for ruling---and that is why, historically, democracies have been rare and transient at best." And the best answer that we know of to that question, to that challenge, is that the powerless have to be able to use the one advantage they have, the advantage of numbers---they have to be able to act collectively to hold the powerful to account when they abuse their power.

But collective action by a bunch of individually powerless people requires an immense amount of faith in your fellow citizens. Because if you don't know that everyone else is going to stand behind you, why would you ever speak out, stand up? And the law is instrumental in this faith, by providing a kind of common knowledge within a community about where the line is, what kinds of behavior by the powerful will be tolerated and what not tolerated, what the trigger is for the people to protest, rise up, revolt---as well as the institutional infrastructure to communicate about how close the powerful are to that line, and to levy collective sanctions, less dire than revolution, on the powerful. Many have thought that if there's anything at all that justifies all the architecture of the U.S. constitution---all of it, the First Amendment, the

existence of a Supreme Court with the power to strike down laws---it is that capacity to support faith in one's fellow citizens and their capacity for collective action in defense of democracy.

“But wait a minute,” you might be thinking. “Hold your horses, Gowder. What kind of nonsense are you talking? Pauli Murray had no reason to have faith in her fellow citizens. She was a Black woman living under Jim Crow. When her fellow citizens weren't denying her an opportunity to participate fully in civic life because she was Black, they were doing it because she was a woman.”

I think for her, what democratic faith meant was faith that the seeds of democracy existed within the United States. Even though the United States had never been a democracy in a true sense---and indeed, it still has not reached that promised land---her work and the immense personal sacrifices she must have made for the civil rights movement were based on the faith that those seeds could be made to grow, that democracy is possible here.

This democratic faith has long been present in African-American thought, though always mixed with cynicism. When the Black Panthers went out in their communities to "police the police," to monitor and record what the police were doing, we all know that they carried guns. But they didn't carry *only* guns. They also carried "law books." Now, I don't quite know what law books they had, that's Bobby Seale, the founder's, phrase, not mine---I'm imagining them carrying copies of the federal reporter around, but really, they probably had criminal procedure hornbooks---so they could quote them at the police, and make the demand that they comply with the laws in whose name they were acting. That's a kind of faith. They knew the police were going to act lawlessly, but they still invoked the law against them anyway---because the law matters, in a constitutional democracy or in a nation that aspires to be a constitutional democracy---even at the nadir, even when it is being casually ignored by the powerful.

How is this relevant to you, as you enter the legal profession? Well, this democratic faith, this constitutional faith, isn't for everyone. It's a huge ask. You can't turn to someone who is suffering oppression under their system of government and say "well, you just have to have faith that we can make this right." Demanding that faith of someone in an unjust system is to inflict yet another injustice on them.

But you're not just someone. You're a lawyer now. It's your job not just to represent clients, but to represent the potential of our democratic legal institutions, to take those imperfect tools and put them to work, despite their imperfections, in the pursuit of the genuine power of the free and equal people of the United States. And that's why I'm telling you about Pauli Murray. Because it's that faith that gave her a constitutional vision, an insight not into the Constitution that was but into the Constitution that could be---that gave her the capacity to see that segregation in schools could be challenged on the basis of its psychological effects on children, and to see that discrimination on the basis of sex could be subject to the same constitutional treatment as discrimination on the basis of race. Democratic faith, constitutional faith, made her a truly great lawyer.

I'd like to close by reading you a couple of excerpts from her longest poem, *Dark Testament*. It's rather too long to read the whole thing, but there's a part of verse 8 and a part from verse 10 that really capture her genius.

### Verse 8

Hope is a crushed stalk  
Between clenched fingers  
Hope is a bird's wing  
Broken by a stone.  
Hope is a word in a tuneless ditty -  
A word whispered with the wind,  
A dream of forty acres and a mule,  
A cabin of one's own and a moment to rest,  
A name and place for one's children  
And children's children at last . . .  
Hope is a song in a weary throat.

Give me a song of hope  
And a world where I can sing it.  
Give me a song of faith  
And a people to believe in it.  
Give me a song of kindness  
And a country where I can live it.  
Give me a song of hope and love  
And a brown girl's heart

### Verse 10

This is our portion, this is our testament,  
This is America, dual-brained creature,  
One hand thrusting us out to the stars,  
One hand shoving us down in the gutter.

Pile up the records, sing of pioneers,  
Point to images chipped from mountain-heart,  
Swagger through history with glib-tongued traditions,  
Say of your grass roots, "We are a hard-ribbed people,  
One nation indivisible with liberty and justice for all."

Put it all down in a time capsule,  
Bury it deep in the soil of Virginia,  
Bury slave-song with the Constitution,  
Bury it in that vineyard of planters  
And poll-taxers, sharecroppers and Presidents.  
In coffin and outhouse all men are equal,  
And the same red earth is fed  
By the white bones of Tom Jefferson  
And the white bones of Nat Turner.

That, my friends, is a *what a lawyer can represent*. Thank you.