

ON JUDGE MOTLEY AND THE SECOND CIRCUIT

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INTRODUCTION

Constance Baker Motley hardly needs an introduction in American civil rights circles. The first African American female attorney (and only the second female attorney) to join the storied NAACP Legal Defense Fund (LDF) in 1946 (after graduating from Columbia Law School),¹ Motley was a legendary civil rights lawyer by the time she joined the federal bench in 1966.² Justice William O. Douglas apparently considered her one of the top advocates to appear before him on the United States Supreme Court.³ Even those less familiar with the history of the LDF or its role in the legal civil rights struggle through the mid-1960s will have heard of some of Motley's more famous clients and their cases: James Meredith, the first African American to enter the University of Mississippi,⁴ and Charlayne Hunter, who integrated the University of Georgia and later became a well-respected television journalist.⁵ Motley also worked to desegregate other state university systems, including those in Florida, Louisiana, Tennessee, and Alabama, as well as Clemson University in South Carolina.⁶

For years until the late 1950s, Motley and other LDF attorneys, ably led by Thurgood Marshall, focused primarily, though not exclusively,⁷ on

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1. See Gilbert King, *Devil in the Grove* 46 (2012); Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961*, at 35 (1994).

2. As Judge Motley pointedly put it, “By the time I left the [LDF] in February 1965 . . . I was one of the best known civil rights lawyers in the country.” Constance Baker Motley, *My Personal Debt to Thurgood Marshall*, 101 *Yale L.J.* 19, 21 (1991) [hereinafter Motley, *My Personal Debt*].

3. William O. Douglas, *The Court Years, 1939–1975: The Autobiography of William O. Douglas* 185 (1980) (“Constance Motley . . . argued only a few [cases] before us; but the quality of those arguments would place her in the top ten of any group of advocates at the appellate level in this country.”).

4. See Constance Baker Motley, *Equal Justice Under Law* 173–83 (1998) [hereinafter Motley, *Equal Justice*] (describing attorney Motley's advocacy resulting in the Fifth Circuit's order that the University of Mississippi admit James Meredith).

5. See Vernon E. Jordan, Jr. & Annette Gordon-Reed, *Vernon Can Read!* 139–43 (2001) (discussing Motley's role in the legal effort to enroll Charlayne Hunter (later Charlayne Hunter-Gault) and Hamilton Holmes at the University of Georgia).

6. See Motley, *My Personal Debt*, supra note 2, at 21.

7. To be sure, the LDF engaged in important work relating to other civil rights besides equal educational opportunities. For example, it represented black criminal defendants in capital cases and successfully challenged government enforcement of racially restrictive covenants as a way to combat the scourge of racial housing segregation. See

public education. Integrating public elementary and secondary schools as well as universities consumed the bulk of the LDF's time, effort, and money before and after *Brown v. Board of Education*.⁸ Indeed, as Judge Motley explained in her autobiography, *Equal Justice Under Law*, LDF attorneys were so focused on educational integration and opportunity that they initially thought their task largely completed after their resounding victory in *Brown*.⁹

Motley's most memorable case as an advocate is surely *Meredith v. Fair*, which encompasses the series of decisions involving James Meredith's efforts to enroll in and integrate the University of Mississippi—"Ole Miss."¹⁰ Much has already been written about the events leading to Meredith's walk through the doors of the university;¹¹ I will not repeat the story. Suffice it to say that a measure of the importance that Judge Motley attached to the case is that she elected to grace the cover of her autobiography with the iconic photograph of herself with Meredith on the day of her oral arguments before the Fifth Circuit Court of Appeals.

In this Article, though, I am most interested in Judge Motley's interaction with the Second Circuit. She was a very distinguished district judge and chief judge in the Southern District of New York, where she made her home and raised a family. What, then, was her experience and relationship with the circuit court itself as lawyer and as judge?

I. BECOMING JUDGE MOTLEY

Throughout the period of Motley's work as a litigator for the LDF, from 1949 to 1965, she made only one appearance before the Second Circuit—in a case involving the desegregation of a public elementary school in New Rochelle.¹² Motley's near absence in the Second Circuit during those years is in a sense not surprising, since the LDF's focus, deliberate or not, was on Southern states. And Motley engaged in ceaseless and important work both before the Fifth Circuit and its famed quartet of "unlikely heroes"¹³ and before the Supreme Court, where she prevailed

Shelley v. Kraemer, 334 U.S. 1, 3, 21–22 (1948) (holding that government enforcement of racial covenants on land is impermissible discriminatory state action); *Chambers v. Florida*, 309 U.S. 227, 239–41 (1940) (holding in a capital case that a criminal defendant's confession is inadmissible at trial when compelled by law enforcement).

8. 347 U.S. 483 (1954).

9. See Motley, *Equal Justice*, supra note 4, at 106 (describing the celebratory atmosphere among LDF attorneys immediately following the Supreme Court's decision in *Brown I*).

10. 306 F.2d 374 (5th Cir. 1962).

11. See generally, e.g., Charles W. Eagles, *The Price of Defiance: James Meredith and the Integration of Ole Miss* (2009).

12. See infra Part III (describing *Taylor v. Board of Education*, the only case in which Motley appeared before the Second Circuit Court of Appeals).

13. These "unlikely heroes" were Chief Judge Elbert Tuttle and Judges John Minor Wisdom, Robert Brown, and Richard Rives. See Jack Bass, *Unlikely Heroes* 23 (1981) (identifying "The Four," a group of judges linked by "their common reaction to blatant

in nine of ten argued cases.¹⁴ Her workload and schedule surely left little, if any, time for work elsewhere.

But I confess to being surprised nonetheless by attorney Motley's near absence from the scene in the Second Circuit prior to her appointment, if for no reason other than that history has reshaped our picture of Motley as a quintessentially *New York* lawyer, a jurist and daughter of the Second Circuit.

Setting her one Second Circuit appearance to the side for a moment (I will return to it below), Motley's 1966 appointment to the United States District Court for the Southern District of New York,¹⁵ following her tenure as a New York State Senator and as Manhattan Borough President,¹⁶ marks the true start of her long relationship with the circuit.

The start was hardly promising. In *Equal Justice Under Law*, Judge Motley recounts the skepticism and opposition her nomination and confirmation faced from federal judges and members of the stuffy, narrow-minded New York City bar, perhaps unable to countenance her nomination and confirmation as the first female and second African American federal judge in the circuit.¹⁷ Even fifty years after the fact, it makes me wince to think that federal judges in New York engaged in their own version of gendered and, to a lesser extent, racial resistance.¹⁸ That their resistance reflected a deep-seated bias is apparent when one considers that, as an attorney, Motley had gathered more complex litigation experience¹⁹ and argued more cases before the Supreme Court²⁰ than almost

evidence of injustice and their vision of a South liberated from its preoccupation with race"). Along with then-District Judges Frank M. Johnson, Jr., and J. Skelly Wright, these federal judges were instrumental in implementing *Brown's* mandate throughout the Deep South in the 1950s and the 1960s. See *id.* at 19, 114–35.

14. James D. Zirin, *The Mother Court: Tales of Cases that Mattered in America's Greatest Trial Court* 278 (2014).

15. See Motley, *Equal Justice*, *supra* note 4, at 213.

16. Motley was the first woman to become Manhattan Borough President and the first African American woman to serve in the New York State Senate. Zirin, *supra* note 14, at 278.

17. See Motley, *Equal Justice*, *supra* note 4, at 218–19, 222 (describing suspicion among Wall Street lawyers that Judge Motley's appointment was the result of a political deal). The first African American judge in the circuit was Thurgood Marshall, who was appointed to the Second Circuit Court of Appeals by President Kennedy in 1961. *Id.* at 214.

18. As Judge Motley later described, "President Johnson had initially submitted my name for a seat on the Court of Appeals for the Second Circuit, but the opposition to my appointment was so great, apparently because I was a woman, that Johnson had to withdraw my name." Motley, *My Personal Debt*, *supra* note 2, at 23. Judge Motley particularly remembered "how stunned both Johnson and Marshall were by the strength and intensity of the opposition." *Id.*

19. By complex litigation, I mean only to refer to difficult, cutting-edge litigation that forms part of a broader legal strategy beyond the individual litigant or litigants in a single case.

20. With the exceptions of Marvin E. Frankel and Walter Mansfield, none of the federal judges in the Southern District of New York in 1966 appears to have argued a single case in the Supreme Court before his appointment to the federal bench. Frankel argued

any of the judges then on the circuit—perhaps more than all of them combined.

In 1966 President Johnson initially planned to appoint Motley to fill the Second Circuit seat vacated by Thurgood Marshall, who was appointed Solicitor General in 1965.²¹ But the resistance from judges on the Second Circuit and the Wall Street bar proved to be too steep, according to Judge Motley, and the Johnson Administration opted to nominate her instead to the district court.²² Even that nomination was met with stiff opposition from the bench, including members of the Second Circuit Court of Appeals.²³ Judge Motley's autobiography highlights the unfortunate role then-Chief Judge Edward Lumbard of the Second Circuit played leading the opposition in both instances. It is worth quoting at some length Judge Motley's view of Judge Lumbard's opposition to her initial appointment as a federal district judge:

Of course, there were many people who did not like my being appointed to the federal bench and worked hard to defeat my appointment to the Second Circuit, but none of them ever made a public pronouncement or subjected me to public humiliation. Their resentment and opposition were always expressed in private or among those who agreed with them. Judge Edward Lumbard, chief judge of the Second Circuit, had led the opposition to my appointment to that bench. A lawyer who appeared in a case before me once told me of his experience in the Second Circuit soon after my appointment: when he appeared in the Court of Appeals on a matter being handled by Judge Lumbard in his chambers, just the mention of my name caused Lumbard to tremble with anger.

Customarily, a new judge joined the chief judge's table at his or her first circuit conference. So I was invited to sit with Judge Lumbard and tried to make conversation, in response to which I got a blank stare . . .²⁴

This episode, if it occurred, is an embarrassment for the Second Circuit, and Judge Lumbard's reaction as described above is a disappointment, to say the least. To be sure, I have no reason to doubt Judge Motley's account of the judicial resistance to her appointment—particularly Judge Lumbard's private opposition—though I also have been unable to corroborate it. It is somewhat telling, though, that Judge Lumbard

fifteen or sixteen cases before the Supreme Court while serving as Assistant to the Solicitor General from 1949 to 1956. Mansfield appeared a single time in *Shenandoah Valley Broadcasting v. ASCAP*, 375 U.S. 39 (1963). The only other judge on the bench at that time to argue before the Supreme Court was Judge Harold R. Tyler, Jr., who argued a number of cases in the Supreme Court *after* he resigned as a federal district judge. This information was compiled by the library of the Second Circuit.

21. Motley, *Equal Justice*, *supra* note 4, at 212.

22. *Id.*

23. *Id.*

24. *Id.* at 222.

made no reference to Judge Motley in his monographed reminiscences,²⁵ even though her appointment as the first female judge in the circuit and the first African American female federal judge would (to me, at least) surely have been a memorable event.

Unfortunately, the forces behind these early, though unsuccessful, efforts to block Motley's appointment in 1966 resurfaced years later. In 1979, after thirteen years on the bench, Judge Motley was again considered for appointment to the Second Circuit.²⁶ President Carter had established screening committees to assess candidates for federal judgeships, including at the appellate level.²⁷ But yet again, Judge Motley's possible appointment encountered resistance from certain circuit judges, as well as others, notwithstanding her extensive experience as a district judge by then. This time, opponents of Judge Motley's appointment to the circuit pointed to what they claimed was her high reversal rate compared to her peers in the Southern District of New York.²⁸ The claim, though dubious, worked. Finding her "unqualified"—possibly due to her allegedly high reversal rate²⁹—the Carter Administration ultimately decided not to nominate Judge Motley to the circuit, nominating instead another African American woman: my extraordinary colleague Amalya Kearse, then a partner at a major Wall Street law firm.³⁰ Judge Kearse, of course, would go on to become one of the greatest judges ever to sit on the Second Circuit.³¹

In *Equal Justice Under Law*, Judge Motley expressed some doubt about the Carter Administration's explanation that her reversal rate had scuttled

25. J. Edward Lumbard, *A Conversation with J. Edward Lumbard* (1980). I find it noteworthy, though, that Chief Judge Lumbard warmly welcomed and swore in Thurgood Marshall upon Marshall's recess appointment to the Second Circuit in 1961 and that he hired a number of women as law clerks, including my wonderful colleague Debra Ann Livingston. See Marshall Sworn as Federal Judge, *N.Y. Times*, Oct. 24, 1961, at 29 (describing Chief Judge Lumbard's extensive praise for Thurgood Marshall's devotion to civil rights at Marshall's swearing-in); Barbara Fried, *Stanford Law Sch.*, <http://law.stanford.edu/directory/barbara-fried/> [<http://perma.cc/W89D-GYU6>] (last visited Oct. 6, 2017) (noting Professor Fried's clerkship with Judge Lumbard); Debra Ann Livingston, U.S. Court of Appeals for the Second Circuit, <http://www.ca2.uscourts.gov/judges/bios/dal.html> [<http://perma.cc/QGQ9-GP8L>] (last visited Oct. 6, 2017) (noting Judge Livingston's clerkship with Judge Lumbard). Chief Judge Lumbard was also well regarded as a Chief Judge of the circuit.

26. See Motley, *Equal Justice*, supra note 4, at 224.

27. *Id.*

28. *Id.* at 225.

29. *Id.* at 224–25.

30. See Amalya L. Kearse, U.S. Court of Appeals for the Second Circuit, <http://www.ca2.uscourts.gov/judges/bios/alk.html> [<http://perma.cc/T4WS-4J6U>] (last visited Aug. 5, 2017) (discussing Judge Kearse's 1979 appointment).

31. See, e.g., Jonathan M. Moses, *Judge Kearse Is Colleagues' Pick as Next Supreme Court Justice*, *Wall St. J.*, June 14, 1993, at B5 (calling Judge Kearse "brilliant" and "[t]he lawyers' favorite" for a nomination to the Supreme Court); Karen Sloan, *Study Says Michigan Law School Produces Most Influential Judges*, *N.Y. L.J.*, Apr. 4, 2016, at 2 (noting that a recent analysis found Judge Kearse to be among the most influential judges in the country).

her nomination to the Second Circuit.³² Curious to assess that rationale, I analyzed whether Judge Motley's reversal rate was materially higher than those of her contemporaries during the relevant period. With the help of our circuit librarian, I conducted an unscientific, informal review of the reversal rates by the Second Circuit of well-respected district judges of the Southern District of New York with roughly contemporaneous terms of service who were also appointed by Democratic presidents: Morris Lasker, Milton Pollack, and Edward Weinfeld. I added to the list Judge Motley's first European American female judicial colleague on the bench, Judge Shirley Wohl Kram.³³ This rough, admittedly imperfect analysis showed the following:

TABLE 1: JUDGE CONSTANCE BAKER MOTLEY: 302 CASES
Total Cases Timeframe: 1967–2012

Years	Affirmed	Reversed	Affirmed in Part / Reversed in Part
Active (1966–1986)	58%	22%	12%
Senior (1986–2005)	50%	18%	14%
Total	55%	20%	13%

32. Motley, *Equal Justice*, supra note 4, at 224–25.

33. Notably, Judge Kram was not the second female judge appointed to the Southern District of New York. Judge Mary Johnson Lowe, an African American woman, was appointed to the United States District Court for the Southern District of New York in 1979 and was the second woman (after Judge Motley) and third African American (after Judges Motley and Robert Carter) appointed to that court. See Eric Pace, *Mary J. Lowe, 74, U.S. Judge Noted for Her Rulings on Bias*, N.Y. Times (Mar. 3, 1999), <http://www.nytimes.com/1999/03/03/nyregion/mary-j-lowe-74-us-judge-noted-for-her-rulings-on-bias.html?mcubz=3> (on file with the *Columbia Law Review*).

TABLE 2: JUDGE MORRIS EDWARD LASKER: 172 CASES
Total Cases Timeframe: 1969–1996

Years	Affirmed	Reversed	Affirmed in Part / Reversed in Part
Active (1967–1983)	62%	25%	4%
Senior (1983–2009)	68%	13%	8%
Total	65%	19%	6%

TABLE 3: JUDGE MILTON POLLACK: 209 CASES
Total Cases Timeframe: 1968–2005

Years	Affirmed	Reversed	Affirmed in Part / Reversed in Part
Active (1967–1983)	64%	19%	8%
Senior (1983–2004)	59%	16%	11%
Total	62%	18%	9%

TABLE 4: JUDGE EDWARD WEINFELD: 289 CASES
Total Cases Timeframe: 1952–1989

Years	Affirmed	Reversed	Affirmed in Part / Reversed in Part
Active (1950–1988)	82%	9%	4%

TABLE 5: JUDGE SHIRLEY WOHL KRAM: 144 CASES
Total Cases Timeframe: 1984–2010

Years	Affirmed	Reversed	Affirmed in part / Reversed in part
Active (1983–1993)	46%	21%	8%
Senior (1993–2009)	75%	6%	1%
Total	62%	13%	5%

Judge Motley’s reversal rate (even including reversals in part) from 1966 to 1986, when she took senior status, does not materially differ from that of her colleagues; compares favorably to Judge Lasker’s reversal rate; and lags noticeably behind only the legendary Judge Weinfeld, who enjoyed a significantly lower reversal rate than any of the other four judges that I surveyed. Her reversal rate might also be viewed through the prism of recent academic research showing that, all other factors being equal, African American district judges are significantly more likely to be reversed on appeal than their European American colleagues.³⁴ We may never know if the prevalent racial or gender biases of the 1960s and 1970s, conscious or not, seeped into the circuit’s review of Judge Motley’s decisions.

Of course, some observers might think that none of this matters today. Judge Motley overcame the resistance from Judge Lumbard and others, eventually becoming not only a heralded judge but the chief judge of the “Sovereign District,” also sometimes referred to as the “Mother Court.”³⁵ She was graced in her life and posthumously with more awards and honorifics—including the prestigious Presidential Citizens Medal—than virtually any lower federal court judge I know.

II. SECOND CIRCUIT CASES INVOLVING CIVIL RIGHTS AND EDUCATION

Needless to say, at the time of her appointment to the federal bench, Judge Motley had far more experience as a civil rights lawyer—particularly in the area of public educational opportunities—than any federal district court judge in the country. (Judge Robert Carter, appointed to the same court in 1972, was the only judge who arguably exceeded Judge

34. Maya Sen, *Is Justice Really Blind? Race and Reversal in US Courts*, 44 *J. Legal Stud.* S187, S220–21 (2015) (providing evidence that African American judges are “up to 10 percentage points more likely to be reversed” than European American judges).

35. See Zirin, *supra* note 14, at 278 (“Constance Baker Motley followed [Judge David N.] Edelstein as Chief Judge of the Mother Court. She was in a class all by herself.”).

Motley in this regard.³⁶) It is sometimes said that the strength of a court resides in the experiential diversity of its members: Variations in career experiences and perspectives from prior public or private practice add to the quality and timbre of judicial decisionmaking. One hopes that a judge's specific strengths and experiences eventually come to bear on actual cases, so that the securities lawyer might, upon her ascension to the bench, opine on issues of securities law, the labor lawyer on matters of labor law that come before the court, and so on. As a lawyer, Motley's area of expertise was civil rights, with a focus on educational issues. It is somewhat remarkable, then, that in Judge Motley's almost forty years on the bench, the Second Circuit heard only three of her educational civil rights cases—two on appeal from her court and one with her sitting by designation on an appellate panel—none of which involved a classic school-desegregation issue.

III. *TAYLOR V. SCHOOL BOARD OF NEW ROCHELLE*: AN ATTORNEY BEFORE THE SECOND CIRCUIT

I will describe each of the three cases that Judge Motley handled as a judge. But let me first discuss the single educational civil rights case—indeed, the only case, period—that Motley handled as an attorney before the Second Circuit.

The case, *Taylor v. Board of Education*, started as a school desegregation class action brought on behalf of eleven African American schoolchildren by their parents against the school board of New Rochelle, a small city just north of New York City.³⁷ The plaintiffs, students at Lincoln Elementary School, a racially segregated public elementary school in New Rochelle, accused the school board of deliberately creating and maintaining a racially segregated school within New Rochelle.³⁸ After an “extensive trial” in which Motley did not appear, the federal district judge presiding over the action, Irving Kaufman of the Southern District of New York,³⁹ agreed, finding that the school board had “deliberately created and maintained Lincoln [Elementary] School as a racially segregated school.”⁴⁰ Judge Kaufman then directed the defendants to draft a desegregation plan.⁴¹

The school board immediately appealed to the Second Circuit, where Thurgood Marshall appeared on behalf of the schoolchildren as

36. See Motley, *Equal Justice*, supra note 4, at 223.

37. 294 F.2d 36, 37 (2d Cir. 1961).

38. *Id.*

39. Judge Kaufman would later (in 1961) be appointed to the Second Circuit and become its chief judge. The Judges of the Second Circuit 302, 305 (Cornell Law Review et al. eds., 2017).

40. *Taylor*, 294 F.2d at 37–38. Judge Kaufman's *Taylor* “decision was one of the first to implement *Brown*.” The Judges of the Second Circuit, supra note 39, at 302.

41. *Taylor*, 294 F.2d at 37–38.

the appellees.⁴² The Second Circuit, by a divided vote and with Judge Henry Friendly writing for the majority, dismissed the board's appeal as premature because the district court had not yet entered a final reviewable order or remedy or done anything else to force the school board to take or refrain from action pursuant to an established desegregation plan.⁴³

The matter returned to Judge Kaufman, who entered a decree directing the defendants to allow the Lincoln Elementary School students to transfer to other schools in New Rochelle, while rejecting as unduly burdensome several conditions proposed by the defendants.⁴⁴ The defendants again appealed to the Second Circuit, this time from the entry of the decree.⁴⁵ By then, Motley had replaced Marshall as lead counsel appearing on behalf of the children on appeal, and she defended the broad terms of Judge Kaufman's decree.⁴⁶

The Second Circuit's majority decision, though short, was a decisive victory for the plaintiffs. The record history of the school board's conduct over a thirty-year period, the circuit concluded, supported Judge Kaufman's finding that the school board had deliberately created and maintained a racially segregated school district for decades prior to the litigation.⁴⁷ Once the Lincoln Elementary School became "100 per cent Negro" in 1949 as a result of the school board's policies, the circuit observed, "the board adopted a policy of refusing further transfers and of admitting new students only to the school of the district in which they reside," thus preserving the existing level of almost total segregation.⁴⁸ While acknowledging that the "problems facing the Board" were "serious and difficult," the majority rejected its arguments and no doubt echoed Motley's argument⁴⁹ when it concluded that the historical facts

42. *Taylor v. Bd. of Educ.*, 288 F.2d 600, 601 (2d Cir. 1961).

43. Anticipating the link that some might make to federal judges in the South who had, through legal technicalities, resisted and sought to delay school desegregation after *Brown*, Judge Friendly's opinion acknowledged the importance of the merits at stake in the case:

There is a natural reluctance to dismiss an appeal in a case involving issues so important and so evocative of emotion as this, since such action is likely to be regarded as technical or procrastinating. Although we do not regard the policy question as to the timing of appellate review to be fairly open, we think more informed consideration would show that the balance of advantage lies in withholding such review until the proceedings in the District Court are completed.

Id. at 605.

44. *Taylor v. Bd. of Educ.*, 195 F. Supp. 231, 240-41 (S.D.N.Y. 1961).

45. See *Taylor*, 294 F.2d at 38.

46. See *id.* at 37.

47. *Id.* at 38.

48. *Id.*

49. Although I have not been able to find Motley's brief in this case, the school district's reply brief on appeal to the U.S. Supreme Court characterized her argument as fol-

make it appear that the Board considered Lincoln as the “Negro” school and that district lines were drawn and retained so as to perpetuate this condition. In short, race was made the basis for school districting, with the purpose and effect of producing a substantially segregated school. This conduct clearly violates the Fourteenth Amendment and the Supreme Court decision in *Brown*⁵⁰

Having determined that the “plaintiffs and those similarly situated are entitled to some form of relief” and that the decree containing the desegregation plan was “one noteworthy for its moderation,” the circuit affirmed.⁵¹

Motley’s involvement in the New Rochelle case after the Second Circuit’s affirmance appears to have been short-lived. She was named counsel for the schoolchildren in connection with New Rochelle’s petition to the Supreme Court for a writ of certiorari.⁵² But in his sweeping memoir and account of the LDF, *Crusaders in the Courts*, her colleague at the LDF, Jack Greenberg, does not mention her further engagement in the case. Instead, Greenberg takes credit along with Marshall for successfully opposing the petition:

I drove from vacation . . . to join Thurgood in arguing a motion before Justice Brennan in his chambers, filed by the New Rochelle, New York, school board to stay integration while it filed a petition for review. As we left, we both agreed we had lost, but then Brennan ruled with us. The Court refused to hear the case.⁵³

Regardless, the battle involving New Rochelle gave the Second Circuit its first glimpse of the legal skills of Constance Baker Motley, who would be considered for an appointment to the circuit only five years later. Although, as described above, that appointment never materialized, Motley would go on to write three important education-related cases as a federal district judge that improved our circuit’s jurisprudence.

IV. JUDICIAL DECISIONS INVOLVING THE SECOND CIRCUIT

As I mentioned, Judge Motley wrote three education-related decisions in which the Second Circuit played a role: two as a district judge and the third as a judge sitting by designation on the Second Circuit.

lows: “The keystone of Respondents’ argument is the finding that the Lincoln School District was ‘gerrymandered’. In the context of this case ‘gerrymandering’ can only mean that the boundary lines of the school district were drawn to exclude whites and include Negroes.” Petitioners’ Reply at 1, *Bd. of Educ. v. Taylor*, 368 U.S. 940 (1961) (No. 518), 1961 WL 101700.

50. *Taylor*, 294 F.2d at 38.

51. *Id.* at 39–40.

52. *Taylor*, 368 U.S. at 940 (denying the school district’s petition for certiorari).

53. Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* 565 n.291 (1994); see also *id.* at 291.

A. Trachtman v. Anker

The first case, *Trachtman v. Anker*, involved the First Amendment rights of New York City student editors of a high school newspaper⁵⁴—a far cry from James Meredith’s Fourteenth Amendment struggle to integrate “Ole Miss.” The facts of the case were relatively straightforward. Student staff members of one of Stuyvesant High School’s official student-run magazines, the *Voice*, asked the school’s principal for permission to distribute a questionnaire designed to measure the sexual attitudes of Stuyvesant students.⁵⁵ The confidential answers, tabulated and anonymized, would be published in an article in the *Voice*.⁵⁶ Stuyvesant’s principal, in consultation with officials of the New York City Board of Education, denied permission.⁵⁷ Claiming a violation of the First Amendment, the *Voice*’s editor-in-chief, senior Jeff Trachtman, and his father sued in the Southern District of New York to enjoin the school from preventing the distribution of the questionnaire or the publication of the proposed article.⁵⁸ The school opposed Trachtman’s suit on two grounds: First, it argued that only professional researchers could properly handle the topic of sexual attitudes among teenagers; and second, it claimed that the questionnaire would cause the students “irreparable psychological damage.”⁵⁹

The case was assigned to Judge Motley, who moved swiftly to the merits. As an initial matter, she recognized the need to balance the students’ First Amendment rights against the authority (and interest) of school officials to maintain discipline and a learning-oriented atmosphere.⁶⁰ With that balance in mind, Judge Motley determined that the questionnaire might cause serious psychological distress to some students.⁶¹ Ninth and tenth graders in particular, she found, were apt to be “emotionally immature,” would have to “confront difficult issues prematurely,” and might become “quite apprehensive or even unstable as a result of answering this questionnaire.”⁶² As for eleventh and twelfth graders, Judge Motley found that any psychological harm was outweighed by the psychological and educational benefits to be gained from the questionnaire

54. 426 F. Supp. 198 (S.D.N.Y. 1976), rev’d, 563 F.2d 512 (2d Cir. 1977).

55. *Id.* at 199. The *Voice* was shut down as an officially school-sponsored magazine during the litigation but continued its operation independently. See, e.g., Stuyvesant High School Extra-curricula’s, The Campaign for Stuyvesant, <http://web.archive.org/web/20070928022536/http://www.stuyvesant.ourstrongband.org/extracurriculars.htm#Spectator> [<http://perma.cc/XW78-PS64>] (last visited Aug. 5, 2017).

56. See *Trachtman*, 426 F. Supp. at 200.

57. *Id.* at 199.

58. *Id.*

59. *Id.* at 200.

60. See *id.* at 200–01 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)).

61. *Id.* at 201.

62. *Id.*

and overall project.⁶³ With her characteristically wry, understated, and clear-eyed assessment of social reality, Judge Motley explained that harm to the more senior students in New York City was doubtful: “It cannot be denied that New York City high school students are today confronted with an avalanche of explicitly sexual information and misinformation. Many a newsstand in the midtown area is the functional equivalent of a pornographic shop.”⁶⁴

After completing the factual background, Judge Motley crisply described the values at stake in the case:

What is important here is that a number of students took the initiative to research and design a survey with the help of adults. This type of independent investigation should be encouraged and applauded, for an integral goal of our educational system is to stimulate inquiry as well as to impart knowledge.⁶⁵

In my view, Judge Motley’s description reflects her strong personal sense of the importance of a public education. That sense surely derived in part from her past experience as a civil rights lawyer dedicated to enrolling young black men and women into public educational facilities.

In a resolution worthy of King Solomon, Judge Motley concluded that freshman and sophomore Stuyvesant students were subject to the ban but that the *Voice* could not be stopped from distributing the questionnaire to juniors and seniors.⁶⁶ The *Trachtman* opinion displays many of Judge Motley’s vaunted skills as a practical problem solver with excellent political instincts. For example, she ordered that the details of the questionnaire’s distribution be worked out between the school and the newspaper.⁶⁷ Ironically, a lawyer who once so ably persuaded federal courts to *maximize* their involvement in public school affairs now (wisely, in my view) sought to minimize her involvement in Stuyvesant’s day-to-day business by permitting the school to work out the remaining details.⁶⁸

Judge Motley’s partial judgment in favor of the students in *Trachtman* was reversed on appeal to the Second Circuit.⁶⁹ The circuit’s majority opinion was written by none other than Judge Lumbard, with the concurrence of Judge Murray Gurfein. Over a vigorous dissent by Judge Walter Mansfield, who attacked the majority for relying on “conclusory,” “speculative,” and “factually unsupported” affidavit opinions “of a few expert psychologists,”⁷⁰ Judge Lumbard held that the record substantially supported the school’s position that distributing the questionnaire would

63. *Id.* at 202.

64. *Id.*

65. *Id.*

66. *Id.* at 204.

67. *Id.*

68. *Id.* (citing *Healy v. James*, 408 U.S. 169, 195 (1972) (Burger, C.J., concurring)).

69. *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977).

70. *Id.* at 522 (Mansfield, J., dissenting).

cause significant emotional harm to virtually all Stuyvesant students, including eleventh- and twelfth-grade students.⁷¹ It then directed Judge Motley to dismiss Trachtman's complaint, and the Supreme Court denied Trachtman's petition for a writ of certiorari.⁷²

In what can best be described as wonderfully ironic, Jeff Trachtman served as a law clerk for Judge Motley seven years after he graduated from Stuyvesant and lost in the Second Circuit.⁷³ Trachtman, with whom I have spoken in connection with this Article, would go on to serve as a law clerk on the Third Circuit and now enjoys a distinguished legal career in New York City.⁷⁴

B. Fisher v. Vassar College

In 1995, almost twenty years after *Trachtman*, Judge Motley, having taken senior status, decided an important employment discrimination case in *Fisher v. Vassar College*,⁷⁵ which made a significant doctrinal contribution to what has come to be known as "sex-plus" discrimination. This Article is not the place for an elaborate factual or legal summary of the *Fisher* case, which has drawn the attention of scholars and been the subject of prior journal articles.⁷⁶ I therefore intend to provide only the principal substantive and procedural highlights. That said, of the three decisions by Judge Motley that I discuss in this article, *Fisher* received the most attention from the Second Circuit,⁷⁷ as well as from the press. In 1998, Linda Greenhouse of the *New York Times* described Fisher's case as "[o]ne of the country's most visible tenure disputes," noting that it had "attracted widespread attention, in part because of the counterintuitive nature of the allegation: that a distinguished college founded for women would discriminate against women," especially since "[o]f its tenured faculty, 42 percent are women."⁷⁸ So I turn to the basic facts.

71. *Id.* at 520 (majority opinion).

72. *Id.*

73. See Jeffrey S. Trachtman, Kramer Levin, <http://www.kramerlevin.com/jtrachtman/> (on file with the *Columbia Law Review*) (last visited Aug. 5, 2017).

74. See *id.*

75. 852 F. Supp. 1193 (S.D.N.Y. 1994), *aff'd in part, rev'd in part*, 70 F.3d 1420 (2d Cir. 1995), *aff'd on reh'g en banc*, 114 F.3d 1332 (2d Cir. 1997).

76. See, e.g., Wendi Barish, "Sex-Plus" Discrimination: A Discussion of *Fisher v. Vassar College*, 13 Hofstra Lab. L.J. 239 (1995); Regina E. Gray, Comment, The Rise and Fall of the "Sex-Plus" Discrimination Theory: An Analysis of *Fisher v. Vassar College*, 42 How. L.J. 71 (1998).

77. *Fisher v. Vassar Coll.*, 70 F.3d 1420 (2d Cir. 1995), *aff'd on reh'g en banc*, 114 F.3d 1332 (2d Cir. 1997).

78. Linda Greenhouse, Teacher Loses Case Claiming Bias Based on Marriage, *N.Y. Times* (Jan. 21, 1998), <http://www.nytimes.com/1998/01/21/nyregion/teacher-loses-case-claiming-bias-based-on-marriage.html> (on file with the *Columbia Law Review*).

By 1985 Cynthia Fisher had been an assistant professor of biology at Vassar College for almost nine years.⁷⁹ Fisher, then in her mid-fifties, was married with two adult daughters whom she had raised during an earlier, eight-year hiatus from academic activity.⁸⁰

In 1985 the senior faculty of Vassar's biology department unanimously recommended that Fisher be denied tenure on the basis of her scholarship, teaching ability, and service.⁸¹ The committee responsible for actually denying tenure cited, among other factors, Fisher's prolonged period of time away from academia and biology while raising her daughters.⁸²

By comparison, Fisher pointed out, a male associate professor had received tenure the prior year, two other men had been promoted five and six years prior, and a fourth man was tenured two years after Fisher was denied tenure.⁸³ The tenure committee did, however, promote an unmarried female peer to a full professorship and deny tenure to a male associate professor in the same year it denied tenure to Fisher.⁸⁴

Fisher claimed gender discrimination and separately claimed discrimination based on her status as a married woman, in violation of Title VII.⁸⁵ After a bench trial, Judge Motley evaluated Fisher's claims under a disparate treatment theory, making several factual findings focused largely on statistical and other evidence comparing Fisher's academic record to that of her recently tenured female peer and the four male peers who had also received tenure.⁸⁶ After exhaustively reviewing various scholarship metrics and the scholarly accomplishments of Fisher and her peers (publications, research grants, recommendations, student evaluations, and so on), Judge Motley found that Fisher's scholarship equaled the scholarship of the tenured woman but exceeded that of the four tenured men.⁸⁷ Fisher, for example, had secured four national research grants while at Vassar, but none of her tenured male comparators had mustered even a single similar grant.⁸⁸

Judge Motley also analyzed the recommendations submitted on behalf of Fisher and each of her comparators.⁸⁹ She found that the neutral evaluators who examined Fisher's record as part of the tenure review process

79. *Fisher*, 852 F. Supp. at 1197.

80. *Id.* at 1197, 1216, 1219.

81. *Id.* at 1197.

82. *Id.* at 1216.

83. See *id.* at 1196–97, 1224 (identifying the four men who had received tenure in the years surrounding Fisher's tenure denial).

84. *Id.* at 1199, 1224–25.

85. *Id.* at 1196–97.

86. See *id.* at 1203, 1209 (describing Fisher's receipt of peer-reviewed research grants and her "impressive record" in comparison to her tenured peers).

87. *Id.* at 1198 n.1, 1199.

88. *Id.* at 1202–03.

89. *Id.* at 1205.

gave her strongly positive reviews but that the biology department nonetheless discounted and criticized those reviews for being too vague.⁹⁰ But Fisher's male comparators, Judge Motley determined, either had weaker recommendations or had been given recommendations containing the same level of detail—or less—as those submitted on Fisher's behalf.⁹¹ It was therefore no leap to conclude, as Judge Motley did, that Vassar's articulated reason for denying Fisher tenure was pretextual and that the real reason had to do with her status as a married woman.⁹²

In conclusion, Judge Motley found that “[i]n the 30 years prior to Dr. Fisher's tenure review, no married woman ever achieved tenure in the hard sciences,” including biology.⁹³ All nine married women who had been eligible for tenure at Vassar, she explained, had either left or been terminated, while ten out of eighteen single women at the assistant professor rank during that period had achieved tenure.⁹⁴

After making these and several other factual findings based on both the statistical and anecdotal evidence presented at trial, Judge Motley concluded that Fisher had not adequately established a prima facie case for “pure” sex discrimination.⁹⁵ She pointed out that a woman had received tenure at the same time that Fisher had been denied tenure, that a man considered for tenure at the same time had also been denied, that several women previously had been tenured in Vassar's biology department, and that several women sat on the tenure committee.⁹⁶

Fisher fared better with her claim of discrimination based on her status as a married woman. Relying on *Phillips v. Martin Marietta Corp.*,⁹⁷ in which the Supreme Court recognized what later became known as the “sex-plus” doctrine pursuant to which discrimination based on marital status qualifies as discrimination “because of . . . sex” under Title VII,⁹⁸ Judge Motley was persuaded by Fisher's claim of discrimination for being a married woman. In particular, she pointed to the fact that no married woman had ever achieved tenure in Vassar's hard sciences, while single women and married men had done so.⁹⁹ Judge Motley, it appears, was fundamentally convinced that Vassar's biology department “was unable to overcome the stereotypical view of women as either scientist or wife—

90. *Id.*

91. See *id.* at 1205–07 (“[T]hat Dr. Fisher's outside evaluators did not go into depth or detail about her scholarship . . . was a disingenuous and pretextual criticism Dr. Fisher's evaluations were both more detailed and more unreservedly positive than those the men candidates received.”).

92. See *id.* at 1207.

93. *Id.* at 1215.

94. *Id.*

95. *Id.* at 1224–25.

96. *Id.*

97. 400 U.S. 542 (1971).

98. *Fisher*, 852 F. Supp. at 1225.

99. *Id.* at 1226.

but not both.”¹⁰⁰ Judge Motley also determined that Vassar had discriminated against Fisher on the basis of her age in violation of the Age Discrimination in Employment Act.¹⁰¹ (Fisher was fifty-three at the time of her review, at least nine years older than all other tenured faculty equally or less qualified than Fisher at the time of promotion.¹⁰²) Finally, Judge Motley relied on evidence of unequal pay and an absence of evidence that the disparity was based on factors other than sex to conclude that Vassar had separately also violated the Equal Pay Act.¹⁰³

As for damages, Judge Motley ordered Vassar to reinstate Fisher as an associate professor for a two-year period before reconsidering her for a full professorship and to pay her over \$625,000 plus attorney’s fees on both her sex-plus discrimination claim and her Equal Pay Act claim.¹⁰⁴

I am inclined to agree with those scholars who have endorsed Judge Motley’s careful analysis of Fisher’s evidence, which “taken as a whole was reasonable, logical and valid when interpreted in light of the facts presented, the surrounding circumstances, and the manner in which the unique characteristics of the plaintiff could have caused the employer to discriminate against her in an unlawful manner.”¹⁰⁵ Courts of appeals rarely determine that a district court’s factual findings, particularly those made after a bench trial in a case as intricate as Fisher’s, are clearly erroneous, among the most deferential of all standards of review. But that is what the Second Circuit did in this case with respect to Fisher’s winning “sex-plus” claim (it affirmed Judge Motley’s dismissal of the basic sex discrimination claim).¹⁰⁶ First, a three-judge panel criticized Judge Motley’s conclusion that Vassar College discriminated against Fisher on the basis of her marital status as resting on a series of clearly erroneous premises.¹⁰⁷ The panel in particular assailed Judge Motley’s reliance on the statistical evidence as “clear error” and proceeded to discount other anecdotal evidence of discrimination that Fisher had marshaled at trial.¹⁰⁸ Ultimately, the panel explained, a successful “sex plus” claim arising out of prolonged professional activity for marital reasons would require “comparing (a) the tenure experience of women who took extended leaves of absence from their work (regardless of the reason), with (b) the tenure of experience of men who had also taken long leaves of absence.”¹⁰⁹ The panel’s decision both diluted the “sex-plus” theory of liability under

100. *Id.* at 1230.

101. *Id.*

102. *Id.*

103. *Id.* at 1232.

104. *Id.* at 1234–35.

105. Gray, *supra* note 76, at 93.

106. *Fisher v. Vassar Coll.*, 70 F.3d 1420, 1454 (2d Cir. 1995), *aff’d* on reh’g en banc, 114 F.3d 1332 (2d Cir. 1997).

107. *Id.* at 1441–42.

108. *Id.* at 1442–43.

109. *Id.* at 1448.

Title VII and rejected the view that a prima facie case of discrimination and a demonstration of pretext could alone support a jury verdict for the plaintiff without additional evidence of discrimination. A subsequent en banc hearing was held to consider whether a finding of discrimination, and more specifically of pretext, under Title VII was “subject to review for clear error.”¹¹⁰ The majority of the court en banc held that such a finding was reviewable for clear error, while a minority lamented the “entirely unwarranted rejection of a trial judge’s ultimate findings of discrimination against married women . . . even though those ultimate findings are supported by facts establishing a prima facie case of discrimination”¹¹¹

Although the Supreme Court denied certiorari in *Fisher*,¹¹² it partially vindicated Judge Motley a few years later in *Reeves v. Sanderson Plumbing Products, Inc.*¹¹³ In that case, the Supreme Court explicitly abrogated *Fisher* and held that a prima facie case plus a showing of pretext *can* support a jury verdict for the plaintiff without additional evidence of discrimination.¹¹⁴

Of course, the only woman with children to review the *Fisher* case as a judge was Constance Baker Motley. And she alone actually saw the evidence and heard the testimony at trial. One wonders if the stark differences in viewpoint expressed in Judge Motley’s opinion in *Fisher* and by the Second Circuit panel on appeal are in some measure attributable to differences in life experience. After all, Judge Motley was for most of her career a married woman. So far as I know, she was the *only* married woman employed as a full-time lawyer at the LDF during nearly her entire career there.¹¹⁵ Perhaps, just perhaps, she was then more attuned to the issue of stereotypical thinking about the abilities of married women and working mothers than some members of the Second Circuit.

C. Greenburgh No. 11 Union Free School District

The final case I discuss, *Greenburgh Eleven*,¹¹⁶ is important largely for two reasons. First, Judge Motley authored the opinion sitting by designation

110. *Fisher*, 114 F.3d at 1333.

111. *Id.* at 1361 (Newman, C.J., dissenting, joined by Kearse, Winter & Cabranes, JJ.).

112. *Fisher v. Vassar Coll.*, 522 U.S. 1075, 1075 (1998).

113. 530 U.S. 133 (2000).

114. See *id.* at 140, 146, 153–54 (noting the en banc opinion in *Fisher* and holding that a courts of appeals that held the same way had erred).

115. See Motley, *My Personal Debt*, supra note 2, at 22 (“I was the only professional woman employed by the NAACP or the [LDF] at that time.”). Marian Wynn Perry, a European American female graduate of Brooklyn Law School, had been employed as an associate counsel with the LDF from 1945 until 1949. See Motley, *Equal Justice*, supra note 4, at 154; Tushnet, supra note 1, at 35.

116. Ad Hoc Comm. of Concerned Teachers ex rel. Minor & Under-Age Students Attending Greenburgh Eleven Union Free Sch. Dist. v. Greenburgh No. 11 Union Free Sch. Dist. (*Greenberg Eleven*), 873 F.2d 25 (2d Cir. 1989).

on the Second Circuit—one of only eight times in her long career that she wrote for the Second Circuit. Second, the case involved the type of issues that Judge Motley might have litigated decades earlier as an LDF lawyer: race, employment, standing, and access to equal educational opportunities.

Judge Motley’s own introduction of the school district and of the plaintiffs best describes the basic facts of the case:

The Greenburgh Eleven School District is a public school district established by a special act of the New York State Legislature for the main purpose of educating students housed at a private social service agency located in Dobbs Ferry, New York, and known as Children’s Village. Children’s Village employs some 80 teachers, 65 paraprofessional staff and 9 administrators to teach approximately 320 emotionally disturbed boys. The vast majority of the Children are either Black or Hispanic and reside at Children’s Village. A small number live with their parents or guardians and are transported daily to the District.¹¹⁷

A group of the children’s teachers, both African American and European American, formed an ad hoc committee (Committee) and filed suit on their own behalf and on behalf of the children alleging racial discrimination in the Greenburgh school district’s employment practices.¹¹⁸ Judge Motley explained that “the Committee’s complaint and the complaint of each of its members is essentially that the District failed to hire minority teachers and administrative staff who would have created a racially integrated work environment.”¹¹⁹ “On its own behalf,” Judge Motley continued, “the Committee does not allege that any of its members have been discriminated against but rather that ‘they have been harmed indirectly by the exclusion of others.’”¹²⁰

The district court had dismissed the complaint for lack of standing by the Committee on its behalf and also on the ground that the teachers lacked capacity to represent the children.¹²¹ The Committee appealed.¹²²

Writing for a unanimous panel, Judge Motley agreed with the district court that the Committee lacked standing to sue on behalf of its members.¹²³ But the group of teachers could bring suit, she held, as the children’s next friend to vindicate the children’s constitutional right to a school environment free from the effects of racially discriminatory employment practices:

On the Children’s behalf, . . . the complaint alleges a direct, specific deprivation of the Children’s Fourteenth Amendment

117. *Id.* at 27.

118. *Id.*

119. *Id.* at 28.

120. *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 514 (1975)).

121. *Id.* at 26.

122. *Id.*

123. *Id.* at 26–27.

right to a school environment free from the effects of racially discriminatory practices. It is well settled that students have standing under the Fourteenth Amendment to challenge faculty segregation because it denies them equality of educational opportunity.¹²⁴

The Second Circuit therefore affirmed in part and reversed in part and remanded to the district court.¹²⁵

Greenburgh Eleven established in the Second Circuit the already generally accepted rule that when a minor's authorized representative is unable, unwilling, or refuses to act, or has interests conflicting with those of the child, a court may appoint a "next friend" to protect the child's rights. But the decision's primary interest to me is that it most closely reflects Judge Motley's own specific experience as an LDF attorney fully committed to the ideal of equal educational opportunity and the fundamental importance of a public education. In other words, it is a case that we can readily envision (and, as in the case of *Taylor v. Board of Education*, have seen) Judge Motley litigating herself in the 1950s and 1960s.

CONCLUSION

Judge Motley had a relationship with the Second Circuit that no one would describe as easy. As we have seen, her vision of the facts and of justice in the few education-related civil rights cases that involved the circuit was often at odds with the more conservative views of her circuit judicial colleagues on appeal. But I think her vision has ultimately prevailed. At Stuyvesant today, the school paper, now called the *Spectator*, contains sexual references that would have made Judge Lumbard blush but that no one thinks of withholding from modern high school freshmen or sophomores equipped with smartphones that are virtual portals to the world. As for *Fisher*, the Supreme Court, if not the Second Circuit, ultimately vindicated Judge Motley's position on pretext. Finally, *Greenburgh Eleven* established an important principle of standing in this circuit that will, one hopes, continue to protect vulnerable schoolchildren.

On the bench, Judge Motley used the perspective of her extraordinary life and career to improve the lives of ordinary persons. During a 1977 interview with the *New York Times*, she said that "[t]he work I'm doing now will affect people's lives intimately," "it may even change them."¹²⁶ That was an understatement. Today, the United States District Court for the Southern District of New York has fifteen women, including three former or current chief judges. Judge Motley paved the way for them. In fact, her work and life both on and off the bench has improved

124. *Id.* at 28 (emphasis omitted).

125. *Id.* at 27.

126. Douglas Martin, Constance Baker Motley, Civil Rights Trailblazer, Dies at 84, *N.Y. Times* (Sept. 29, 2005), <http://www.nytimes.com/2005/09/29/nyregion/constance-baker-motley-civil-rights-trailblazer-dies-at-84.html> (internal quotation marks omitted) (on file with the *Columbia Law Review*).

all of our lives, and I can say with confidence that Fortune shined brightly on the Second Circuit when Constance Baker Motley was appointed to the federal bench over fifty years ago.

