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OPENING REMARKS

IDENTITY MATTERS: THE CASE OF JUDGE CONSTANCE BAKER MOTLEY

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> Mrs. Motley's reputation has always been excellent . . . . [S]he is a woman, with great humanitarian instinct, but I have never seen it to disturb her judgment objectively and on questions of law.[1]
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> –U.S. Senator Jacob Javits (1966)

INTRODUCTION

Is justice truly blind—rendered without regard to wealth, race, sex, or other background characteristics? For centuries, that compelling idea has animated the self-concept of the legal profession in the West.

But many presume that the idea—symbolized by the blindfold that Lady Justice has worn since the seventeenth century[2]—scarcely depicts reality. It merely articulates, critics say, an often-unrealized aspiration toward impartiality. In the United States, the blind-justice conceit supports the claim, deeply contested, that the country is a land of equality and opportunity for all. Langston Hughes, the Harlem Renaissance-era poet, exposed the contradiction between the ideal and the reality of American law when he proclaimed blacks "wise" to the idea "that Justice is a blind goddess."[3] "Her bandage hides two festering sores," Hughes wrote, "that

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1. Nomination of Constance Baker Motley to Be United States District Court Judge for the Southern District, New York: Hearing Before the Subcomm. of the Comm. of the Judiciary, 89th Cong. 3–4 (1966) (statement of Sen. Javits).

2. See Judith Resnik & Dennis Curtis, Representing Justice 65–75, 95–102 (2011) (explaining that the modern construction of the blindfold symbolizes impartiality in the legal system, while also recognizing the perception of the blindfold as a symbol of blindness to the truth).

3. See Langston Hughes, Scottsboro Limited: Four Poems and a Play in Verse (1932). The poem, *Justice*, referenced the plight of the wrongly accused Scottsboro Boys and Hughes's experience in the Jim Crow South.

once perhaps were eyes."[4] Blind Lady Justice, he proposed, was no more than a national myth.[5]

Well before and long after Hughes cast aspersions on the idea of impartial justice, commentators debated the question of whether and how certain categories of identity influence judging. Race matters, many presume, symbolically and substantively.[6] Women speak in a different voice, psychologist Carol Gilligan famously and controversially claimed.[7] Using similar logic, others argued that female judges also are different. Women employ jurisprudential methods that yield distinctive insights and sometimes different outcomes than those of male colleagues.[8] Similarly, some presume that religious faith can inform the jurisprudence of Catholic, Jewish, or Muslim judges.[9] Others have suggested that sexual

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4. Id.

5. See id.

6. See Wil Haygood, Showdown: Thurgood Marshall and the Supreme Court Nomination that Changed America 6–7, 325–26 (2015) (highlighting the importance of Thurgood Marshall's race in his nomination and subsequent confirmation to the Supreme Court); Thomas Uhlman, Black Elite Decision Making: The Case of Trial Judges, 22 Am. J. Pol. Sci. 884, 893 (1978) (indicating that black judges "act as individuals" and "demonstrate a diversity" in judicial behavior); Susan Welch, Michael Combs & John Gruhl, Do Black Judges Make a Difference?, 32 Am. J. Pol. Sci. 126, 132–33 (1988) (finding that in a large northeastern community, black judges tend to be more evenhanded than white judges in their treatment of white and black defendants); Tajuana Massie et al., The Impact of Gender and Race in the Decisions of Judges on the United States Courts of Appeals 2 (Apr. 25–28, 2002) (unpublished manuscript) (on file with the *Columbia Law Review*) (noting the importance of race and gender in determining how a judge may vote).

7. Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development 1–4 (1993); cf. Martha Minow, Making All the Difference 1–16 (1991) (advocating for a shift in the paradigm used to conceive of differences between people from a focus on distinctions to a focus on relationships within which people notice and draw distinctions).

8. See Betty Barteau, Thirty Years of the Journey of Indiana's Women Judges: 1964–1994, 30 Ind. L. Rev. 43, 88 (1997) (quoting Utah Supreme Court Justice Christine M. Durham's statement that female judges "bring an individual and collective perspective to [their] work that cannot be achieved in a system which reflects the experience of only a part of the people whose lives it [a]ffects" (internal quotation marks omitted)); Carl Tobias, The Gender Gap on the Federal Bench, 19 Hofstra L. Rev. 171, 178 (1990) (quoting New York Court of Appeals Judge Judith S. Kaye's remark that female judges "unquestionably have" a "heightened awareness of the problems that other women encounter in life and in law" (internal quotation marks omitted)); see also infra notes 186–189 and accompanying text.

9. See Frank J. Sorauf, The Wall of Separation: The Constitutional Politics of Church and State 205–30 (1976) ("Nothing explains the behavior of the judges in these church-state cases as frequently as do their own personal religious histories and affiliations. Jewish judges vote heavily separationist, Catholics vote heavily accommodationist, and Protestants divide."); Brian H. Bornstein & Monica K. Miller, Does a Judge's Religion Influence Decision Making?, 45 Ct. Rev. 112, 112–15 (2009) (finding that a judge's religious background is a predictive factor—especially in establishment clause, death penalty, free exercise, and gender discrimination cases); Sanford Levinson, Is It Possible to Have a Serious Discussion About Religious Commitment and Judicial Responsibilities?, 4

orientation might inform judicial decisionmaking, especially in cases pertaining to gender identity.[10]

Whether and how identity shapes judging is an enduring question and a high-stakes proposition, given the tremendous power that judges wield. The issue recurs and resonates with the public because, contrary to the Blind Lady Justice ideal, many commentators assume that identity—race, gender, religion, sexual orientation, and other aspects of a judge's background—in fact do or can matter in legal decisionmaking. Attention to judicial candidates' backgrounds can be productive, some argue. Interest groups have urged greater representation of women, people of color, religious minorities, and other historic outsiders on the judiciary on the view that judges from diverse backgrounds can improve the quality of justice meted out in the courts.[11] Sonia Sotomayor, now an

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U. St. Thomas L.J. 280, 280–95 (2006) (analyzing the role of religion in judicial decisionmaking and advocating the consideration of religious points of view as a valid distinctive perspective, along with judges' racial, gender, and ethnic backgrounds). But cf. Harold W. Chase et al., Catholics on the Court, New Republic (Sept. 26, 1960) (on file with the *Columbia Law Review*) (finding that the ideas of Catholic Justices as a group were indistinguishable from the ideas of non-Catholic Justices). The literature on the appointment of Muslim judges is less well developed; however, for a discussion of the appointment and jurisprudence of a Muslim judge and the significance of his appointment, see Matt Ford, Will the Senate Confirm America's First Muslim Federal Judge?, Atlantic (Sept. 8, 2016), http://www.theatlantic.com/politics/archive/2016/09/qureshi-tk/499106/ [http://perma.cc/RP2R-C2NZ].

10. See generally Leslie J. Moran, Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings, 28 Sydney L. Rev. 565, 597 (2006) (arguing that although sexuality may seem to be a largely unspoken or unspeakable aspect of judicial diversity, it is, rather, a very public part of judicial institutions, roles, and cultures and thus sexual orientation can be simultaneously widely known and largely invisible); Leslie J. Moran, Researching the Irrelevant and the Invisible: Sexual Diversity in the Judiciary, 10 Feminist Theory 281, 283–84 (2009) (discussing the challenge of researching the judiciary's sexual diversity and analyzing the influence of judges' sexual identities through analysis of judicial portraits of the Chief Justices of the Supreme Court of New South Wales). Other scholars have argued that a judge's sexual orientation is less predictive than her critical stance would be. See generally, e.g., Paul Johnson, Challenging the Heteronormativity of Marriage: The Role of Judicial Interpretation and Authority, 20 Soc. & Legal Stud. 349, 362–63 (2011) (challenging the argument that judges' individual identities are the key determinative factor in cases in which nonheterosexual individuals challenge heteronormative laws).

11. See, e.g., Sherrilyn A. Ifill, Racial Diversity on the Bench: Beyond Role Models and Public Confidence, 57 Wash. & Lee L. Rev. 405 (2000) [hereinafter Ifill, Racial Diversity] (arguing that the most important reason for a racially diverse bench is to enrich judicial decisionmaking based on a minority judge's ability to incorporate traditionally excluded views in her decisionmaking); Sylvia R. Lazos Vargas, Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity, 58 Md. L. Rev. 150 (1999) (advocating the incorporation of "outsider" voices in the judicial resolution of majority–minority conflicts); Joy Milligan, Note, Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality, 81 N.Y.U. L. Rev. 1206 (2006) (arguing that racial diversity in the judiciary improves legal decisions about political morality); see also Sherrilyn A. Ifill, Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts, 39 B.C. L. Rev. 95 (1997) [hereinafter Ifill, Judging the Judges]

Associate Justice on the U.S. Supreme Court, openly endorsed this line of thinking; she famously expressed the hope that her identity as a "wise Latina" would positively influence her judicial decisionmaking.[12] Although some criticized Justice Sotomayor's words,[13] others acknowledged benefits when a judge's background—in her case, a perspective formed out of discrimination and real-world experience in the Manhattan District Attorney's Office—can inspire a commitment to equal justice under law.[14]

(arguing that state judges represent the communities they serve by reflecting community values in their discretionary decisionmaking); Sylvia R. Lazos Vargas, Does a Diverse Judiciary Attain a Rule of Law that Is Inclusive?: What *Grutter v. Bollinger* Has to Say About Diversity on the Bench, 10 Mich. J. Race & L. 101 (2004) (arguing that a critical mass of minority judges will increase the chances that a racial dialogue will develop). But cf. Darrell Steffensmeier & Chester L. Britt, Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?, 82 Soc. Sci. Q. 749, 761–62 (2001) (finding that black judges could be more likely to be punitive in sentencing decisions, suggesting a potential correlation between "tokenism" and greater draconian tendencies, but that sentencing decisions were similar enough that "legal training and socialization" likely mattered more than race).

12. See Sonia Sotomayor, Lecture: 'A Latina Judge's Voice,' N.Y. Times (May 14, 2009), http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html (on file with the *Columbia Law Review*). Justice Sotomayor also expressed that sentiment in speeches she made in 1994, 1999, 2001, 2002, and 2004. Sotomayor's 'Wise Latina' Comment a Staple of Her Speeches, CNN (June 8, 2009), http://www.cnn.com/2009/POLITICS/06/05/sotomayor.speeches/ [http://perma.cc/TRA4-NE9L].

13. See Derek Hawkins, 'Wise Latina Woman': Jeff Sessions, Race and His Grilling of Sonia Sotomayor, Wash. Post. (Jan. 13, 2017), http://www.washingtonpost.com/news/morning-mix/wp/2017/01/13/wise-latina-woman-jeff-sessions-race-and-his-grilling-of-sonia-sotomayor/ [http://perma.cc/XP4Z-7RCZ]; Frank James, Sotomayor's 'Wise Latina' Line Maybe Not So Wise, NPR (May 27, 2009), http://www.npr.org/sections/thetwo-way/2009/05/sotomayors_wise_latina_line_ma.html (on file with the *Columbia Law Review*); Sotomayor Explains 'Wise Latina' Comment, CBS News (July 14, 2009), http://www.cbsnews.com/news/sotomayor-explains-wise-latina-comment/ [http://perma.cc/336R-NS7L].

14. See Sonia Sotomayor, My Beloved World 211–12 (2013) (discussing her own background). For ways in which Justice Sotomayor's background as a prosecutor has shaped her criminal justice rulings, see Rachel E. Barkow, Justice Sotomayor and Criminal Justice in the Real World, 123 Yale L.J. Forum 409, 422–23 (2014), http://www.yalelawjournal.org/pdf/3.Barkow_FINAL_eiihd61h.pdf [http://perma.cc/5GZE-LK62] (discussing factors, including Justice Sotomayor's professional experience as a prosecutor, that impact her jurisprudence). Justice Sotomayor has alluded to her background and experience in relevant opinions. In *Schuette v. Coalition to Defend Affirmative Action*, Justice Sotomayor described the experience of a student of color:

> Race matters to a young woman's sense of self when she states her hometown, and then is pressed, "No, where are you *really* from?", regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: "I do not belong here."

Yet, the proposition that a judge's identity matters also has been deployed to disparage judges and to diminish the rule of law. Recent history serves up a textbook example. During the 2016 presidential campaign, then-candidate Donald Trump made an identity-based charge of judicial bias in an apparent effort to undermine legal proceedings in which he was a defendant. Trump claimed that the Honorable Gonzalo Curiel, the presiding judge in a federal lawsuit filed by former students against Trump University, could not be fair because he "is Mexican."[15] Because of his purported bias, Trump said that Judge Curiel should recuse himself from the case.[16] Amid criticism, Trump doubled down on his identity-based appraisals of judges' qualifications. A hypothetical "Muslim" judge also would be unqualified to preside in the Trump University case,[17] claimed the then-presumptive Republican Party presidential nominee and current President of the United States. While Trump's combative style of critique is new, his view that diverse identities can pervert rather than promote justice is not.

Whether supported by facts or not, the claim that demography profoundly and inordinately affects judicial outcomes can undermine judges and damage the judicial process. The asserted link can besmirch the idea that diversity on the bench is a strength rather than a weakness—a perverse outcome given the legal profession's historic

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> In my colleagues' view, examining the racial impact of legislation only perpetuates racial discrimination. This refusal to accept the stark reality that race matters is regrettable.

Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN), 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting) (dissenting from a majority opinion that upheld a Michigan state constitutional provision banning affirmative action in university admissions); see also Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (dissenting from a majority opinion holding that prosecutors can use evidence obtained from illegal police stops if there was a preexisting warrant for the person stopped). Justice Sotomayor noted:

> [I]t is no secret that people of color are disproportionate victims of this type of scrutiny. For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.

Id. at 2070.

15. CNN, Donald Trump on State of the Union—Full Interview, YouTube (June 5, 2016), http://www.youtube.com/watch?feature=player_detailpage&v=kcuQI0V_g-Y#t=985 (on file with the *Columbia Law Review*).

16. Id. For a discussion on historical use of recusal motions against judges, see generally Frank M. McClellan, Judicial Impartiality & Recusal: Reflections on the Vexing Issue of Racial Bias, 78 Temple L. Rev. 351 (2005).

17. Igor Bobic, Trump Says Muslim Judges Also Might Not Be Fair to Him, Huffington Post (June 5, 2016), http://www.huffingtonpost.com/entry/trump-muslim-judge_us_57542cb6e4b0ed593f14ad78 [http://perma.cc/5LRH-SGEK].

discrimination against women, people of color, and religious minorities.[18] In fact, some have opposed the appointment of people of color and women to the federal judiciary explicitly or implicitly on grounds that their backgrounds made them unsuited to the work.[19] Their race or racial allegiances predisposed them to bias, it was said.[20] Men fought women's employment as lawyers and judges based on traditional notions of sex roles—of women's place and proclivities.[21] Justice Louis Brandeis, the Supreme Court's first Jewish justice, suffered delay and false accusations during his confirmation process because of identity politics.[22] Variations on these experiences continue to shape Americans' views of judges and the judicial branch.[23]

Identity-based stereotypes about professional competence are burdensome to those subjected to them. Like other factors that are external to the law but nevertheless affect judicial behavior[24]—for example, the

18. See Sheldon Goldman, Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan 54–56, 98–101, 141–46, 180–87, 222–26, 233–34 (1997) (documenting the barriers to appointment of women and black judges and how few attained appointment); see also J. Clay Smith, Jr., Emancipation: The Making of the Black Lawyer 1844–1944, at 4–5, 15, 141–42 (1993) (discussing the prejudice that black lawyers encountered in the nineteenth and twentieth centuries); Arthenia Lee Joyner, The Future for Black Lawyers, *in* Rebels in Law: Voices in History of Black Women Lawyers 106, 106–10 (J. Clay Smith ed., 1998) (examining factors leading to the underrepresentation of black Americans in the legal profession); Ruth Whitehead Whaley, Women Lawyers Must Balk Both Color and Sex Bias, *in* Rebels in Law: Voices in History of Black Women Lawyers, supra, at 49, 49–51 (giving an account of the impact of sex and race on black women practicing law).

19. See Goldman, supra note 18, at 141–45, 180–81, 182, 184–85, 186 (discussing the lack of interest in the bar, in Congress, and in the White House for appointment of women and black judges, as well as instances of racist and sexist opposition to black and female appointments).

20. See supra notes 16–19; see also Goldman, supra note 18, at 183 (noting "considerable racist opposition" to Thurgood Marshall's appointment as the first African American justice to the Supreme Court); id. at 185 (noting the preference for appointing an Italian or Jewish American to the open federal circuit judgeship instead of A. Leon Higginbotham, a black district court judge); Haygood, supra note 6, at 130–55 (discussing Senator James Eastland's background and opposition to Justice Marshall's appointment).

21. See Barbara Babcock, Woman Lawyer: The Trials of Clara Foltz 18–20, 25–27 (2012); Cynthia Fuchs Epstein, Women in Law 81–90 (Univ. of Ill. Press 2d ed. 1993) (1981); Cynthia Fuchs Epstein, Women in the Legal Profession at the Turn of the Twenty-First Century: Assessing Glass Ceilings and Open Doors, 49 U. Kan. L. Rev. 733, 733, 750–51 (2001).

22. Calvin R. Massey, Getting There: A Brief History of the Politics of Supreme Court Appointments, 19 Hastings Const. L.Q. 1, 10 (1991); Yonathan Shapiro, American Jews in Politics: The Case of Louis D. Brandeis, 55 Am. Jewish Hist. Q. 198, 202 (1965) (maintaining that the delay in Justice Brandeis's appointment process was due to his social and economic views); see also Paul A. Freund, Appointment of Justices: Some Historical Perspectives, 101 Harv. L. Rev. 1146, 1151–52 (1988) (discussing Justice Brandeis's nomination as fraught with anti-Semitism).

23. See supra notes 11–17 and accompanying text.

24. The notion that extralegal factors can impact decisionmaking is consistent with the legal realist view of judging. Realists have long criticized the baseline assumptions that

possibility of promotion, the desire for respect from the public and colleagues, ideological proclivities, institutional norms, or the wish to avoid overturned decisions—identity-related stereotypes can shape judges' performance.[25] In pursuit of professional respect, judges subjected to identity-based scrutiny might be especially careful to avoid using discretion in ways that smack of ideological bias, particularly in cases involving politically fraught issues with a racial dimension.[26] These judges might feel constrained to prove competence and demonstrate impartiality, tendencies that could undermine ingenuity and the pursuit of justice. And they might work hard to avoid reversal by a higher court.[27]

This Essay, based on my forthcoming book on Judge Constance Baker Motley's life and times,[28] explores the relationship between identity and judging and confirms that identity can be a double-edged sword. Relying in part on scholarship and data on judging, identity, and judicial outcomes, I draw inferences and reach conclusions about Motley's particular experience. Motley is a singular figure in history—the first African American woman appointed to the federal judiciary. She took her seat after a long delay in the Senate's consideration of her appointment, occasioned by concerns about her background and work as a civil rights lawyer. Skeptics of her appointment assumed that Motley, as a judge, would seek to vindicate the legal and policy preferences for which she had advocated as a lawyer.

Reality proved Motley—and judging—more complicated than detractors fixated on her background and ideological commitments predicted. Once on the bench, Motley sometimes ruled as opponents had

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judges are disinterested arbiters of law and that the law itself is an apolitical system based on neutral rules and their impartial application. For a discussion on how legal realists thought lawyers and judges should decide cases, see American Legal Realism 164–71 (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993); see also Justin Zaremby, Legal Realism and American Law, at x–xii (2014) (describing Justice Sotomayor's views that identity affects judicial decisions).

25. For a discussion of schools of thought on judicial behavior and factors that affect it, see Lawrence Baum, Judges and Their Audiences: A Perspective on Judicial Behavior 5–9, 88–97 (2006); Lee Epstein, William M. Landes & Richard A. Posner, The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice 26–64, 66, 77–78 (2013); Lee Epstein & Jack Knight, The Choices Justices Make 9–17, 22–27, 57–58, 114–18 (1998); Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited 91–92, 111, 379–80 (2002).

26. See Johnathan P. Kastellec, Racial Diversity and Judicial Influence on Appellate Courts, 57 Am. J. Pol. Sci. 167, 167–83 (2013) (linking race and distinctive voting patterns in civil rights cases).

27. See Maya Sen, Is Justice Really Blind? Race and Reversal in US Courts, 44 J. Legal Stud. S187, S187–89 (2015) [hereinafter Sen, Is Justice Really Blind?] (demonstrating that black district court judges are consistently overturned on appeal more often than white judges, with a gap in reversal rates of ten percentage points even after controlling for proxies for judicial quality).

28. Tomiko Brown-Nagin, Civil Rights Queen: Constance Baker Motley and the Struggle for Equality (forthcoming 2019) [hereinafter Brown-Nagin, Civil Rights Queen] (on file with author).

feared and supporters had hoped. During her early years on the bench, Motley issued landmark rulings implementing the Civil Rights Act's ban on sex discrimination in employment.[29] Because of such high-profile rulings, Motley earned a reputation as a classically liberal judge in the mold of Thurgood Marshall, J. Skelly Wright, or Jack Weinstein.

But qualitative and empirical analyses call into question this outsized reputation. During her thirty-six years on the bench, Motley did not reflexively issue "liberal" opinions. A political liberal, Motley is best understood as a judicial pragmatist. She deferred to constraints imposed by the familiar, if deeply contested, conception of a judge as a neutral arbiter of apolitical law,[30] as well as constraints derived from her values and shaped by her identity.

This Essay unfolds in five parts. Part I discusses the nomination of Motley to the bench. This Part describes the identity-based politics surrounding the nomination and confirmation of Motley to the United States District Court for the Southern District of New York (SDNY). Part II explains that identity plagued Motley even after her judicial confirmation. To illustrate the point, this Part recounts a well-publicized effort by one of New York's esteemed law firms to remove Motley from a sex discrimination case.

With a view toward moving beyond assumptions about Motley's judicial proclivities to the reality of her judicial experience, Part III assesses Motley's decisions in several discrimination cases. Part III analyzes these decisions using qualitative analysis and concludes that the conventional wisdom about Motley—that she invariably issued pro-plaintiff decisions—is mistaken. In cases alleging discrimination, Motley issued rulings favorable to both defendants and plaintiffs. This Part concludes that Motley embraced a pragmatic and virtue-centered conception of the judicial role, rather than an identity-driven and ideologically oriented one.

Part IV buttresses the prior Part's conclusion that Motley's reputation as an especially liberal judge driven by identity is overblown. This Part makes its point using quantitative analysis. Drawing on the empirical methods used by political scientists to assess judicial behavior, Part IV examines Motley's judicial record by the numbers.

Part V explores a variety of factors, internal and external to doctrine, that shaped Motley's conception of the judicial role. These factors include doctrine as well as aversion to reversal, personal values, and identity performance. These variables pushed Motley toward pragmatism and away from identity- and ideologically based decisionmaking. Identity played only an indirect and limited role in Motley's judicial self-concept.

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29. See infra notes 117–148 and accompanying text (describing two important civil rights cases in which Motley ruled in favor of the plaintiffs).

30. See infra notes 251–253 and accompanying text.

I. THE POLITICS SURROUNDING MOTLEY'S NOMINATION TO THE BENCH

A. *Motley's Qualifications for the Bench*

During her years in practice at the NAACP Legal Defense Fund (LDF), Motley gained a reputation as a formidable courtroom advocate. By successfully litigating hundreds of civil rights cases, she helped to destroy Jim Crow.[31] In 1954, she played an invaluable role in *Brown v. Board of Education*,[32] the single most important case in twentieth-century American constitutional history.[33] The unanimous U.S. Supreme Court decision outlawed state-mandated racial segregation in the nation's elementary and secondary schools.[34] In *Brown*'s wake, Motley litigated cases that implemented that landmark decision; as a result of her advocacy, school systems in Atlanta, Savannah, New Orleans, Nashville, and Mobile, among other places, desegregated.[35] Motley also handled cases that desegregated higher educational institutions in the South, including the University of Georgia, the University of Alabama, and, most famously, the University of Mississippi—Ole Miss.[36] In addition, Motley litigated cases that supported the activities of the direct-action wing of the civil rights movement. She represented the Freedom Riders, the Birmingham Children Marchers, and Dr. Martin Luther King, Jr.[37]

Given her courtroom skills and the respect that she earned from colleagues and among civil rights activists, Motley came highly recommended for a federal judgeship. After watching her argue a case at the U.S. Supreme Court, U.S. Attorney General Ramsey Clark brought Motley to the President's attention and urged him to appoint Motley to

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31. See Shuttlesworth v. Birmingham, 394 U.S. 147, 150–51 (1969) (overturning trespass convictions of protesters); Hamm v. Rock Hill, 379 U.S. 306, 317 (1964) (overturning trespass convictions of sit-in demonstrators); Calhoun v. Latimer, 377 U.S. 263, 264 (1964) (desegregating Atlanta public schools); Watson v. Memphis, 373 U.S. 526, 529 (1963) (desegregating parks, playgrounds, and recreational facilities in Memphis); Hamilton v. Alabama, 368 U.S. 52, 54–55 (1961) (establishing the right to counsel at arraignment in capital cases); Lucy v. Adams, 350 U.S. 1, 2 (1955) (desegregating the University of Alabama); Woods v. Wright, 334 F.2d 369, 375 (5th Cir. 1964) (voiding expulsions of schoolchildren for protesting segregation); Meredith v. Fair, 306 F.2d 374, 378 (5th Cir. 1962) (desegregating the University of Mississippi); State ex rel. Hawkins v. Bd. of Control, 83 So. 2d 20, 28 (Fla. 1955), vacated, 350 U.S. 413, 413–14 (1956) (resulting in the desegregation of University of Florida Law School).

32. 47 U.S. 483 (1954)

33. See Motley, Equal Justice Under Law 102–11 (1998) [hereinafter Motley, Equal Justice]; see also Brown-Nagin, Civil Rights Queen, supra note 28 (manuscript ch. 5, at 2–3).

34. *Brown* , 347 U.S. at 495.

35. Motley, Equal Justice, supra note 33, at 112–32; see also Tomiko Brown-Nagin, Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement 308–16 (2011) [hereinafter Brown-Nagin, Courage to Dissent] (discussing Motley's role in the Atlanta school desegregation case).

36. Motley, Equal Justice, supra note 33, at 112–33, 141, 145, 162–93.

37. Id. at 127, 130–32, 135–40, 149, 198–200.

the bench.[38] Robert F. Kennedy, the Democratic senator from New York, Motley's home state, submitted Motley's name to the White House (but later and in private called the wisdom of her nomination into question).[39] President Lyndon Johnson appointed Motley to the SDNY in January 1966.[40] For the first time in history, a black woman would sit on the federal bench.[41]

B. *The Confirmation Process and Controversies About Motley's Appointment*

The confirmation process proved arduous and foreshadowed challenges that awaited Motley on the bench. Questions related to Motley's background and career as a civil rights lawyer slowed her bid for Senate approval.

1. *Senator Eastland's "Black-and-Red" Baiting.* — Senator James Eastland of Mississippi, the chairman of the Senate Judiciary Committee, held up Motley's nomination for seven months.[42] The senator's role in Motley's troubled confirmation process was not unexpected. For good reason, he had gained a reputation as "The Voice of the White South."[43] Senator Eastland adamantly opposed *Brown v. Board of Education*,[44] called blacks an "inferior race,"[45] and asserted that the "future greatness of America depends upon racial purity and the maintenance of Anglo-Saxon institutions."[46] Moreover, Senator Eastland and Motley had been on opposite sides of one of the most consequential and deadly racial conflicts in American history, the battle to desegregate Ole Miss—a beloved white southern institution. Motley had anchored the legal team that represented James Meredith, the prevailing plaintiff in that case.[47] By destroying Jim Crow at the state's flagship institution of higher education, Motley and Meredith had defeated forces of white supremacy

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38. Id. at 213.

39. Id. at 210–13. Senator Kennedy revoked his support because of a political dispute with Motley and because he preferred a white candidate. On the latter point, see infra notes 60–61, 66–68 and accompanying text.

40. Motley, Equal Justice, supra note 33, at 213.

41. Id. at 214.

42. Id. at 215–16.

43. See J. Lee Annis, Jr., Big Jim Eastland: The Godfather of Mississippi 162 (2016); Marjorie Hunter, James O. Eastland Is Dead at 81; Leading Senate Foe of Integration, N.Y. Times (Feb. 20, 1986), http://www.nytimes.com/1986/02/20/obituaries/james-o-eastland-is-dead-at-81-leading-senate-foe-of-integration.html (on file with the *Columbia Law Review*).

44. See Annis, supra note 43, at 152 (noting that Senator Eastland "proudly affixed his name" to the Southern Manifesto, pledging to defy *Brown v. Board of Education* through "all lawful means"); see also id. at 153–55, 161, 164 (describing Senator Eastland's prosegregation rhetoric and activities).

45. Hunter, supra note 43 (internal quotation marks omitted).

46. Charles W. Eagles, The Price of Defiance: James Meredith and the Integration of Ole Miss 74–75 (2009) (internal quotation marks omtited).

47. Brown-Nagin, Civil Rights Queen, supra note 28 (manuscript ch. 8, at 3–4); Motley, Equal Justice, supra note 33, at 162–92.

in the state—including Senator Eastland and Mississippi's governor, Ross Barnett—vocal opponents of the litigation.[48]

When Senator Eastland and Motley met again, in 1966 after the civil rights lawyer's nomination to the federal bench, Senator Eastland had the upper hand. As chair of the Senate Judiciary Committee, he held tremendous sway over executive branch nominations, including judicial appointments.[49] Senator Eastland used his power not only to attempt to thwart Motley's judicial nomination but also to smear her in the process. But instead of directly attacking Motley's race or specifically raising the Ole Miss controversy, Senator Eastland opposed Motley because, he claimed, she had engaged in "subversive" activities.[50] According to Senator Eastland, a "very high-class lady" had accused Motley of being an active member of the Communist Party for two years.[51]

Senator Eastland's indictment of Motley fit a pattern. In a concerted effort to destroy the civil rights movement, Senator Eastland—the "quintessential southern red- and black-baiter"—frequently called those who sought to end segregation "Communists."[52] By his biographer's estimation, Senator Eastland, a member of the Senate Internal Security Subcommittee that was charged with investigating Communist activity in the United States,[53] "spent hundreds of hours probing whether . . . critics of his semifeudal Delta homeland were acting on behalf of Stalin or his agents."[54]

In Motley's case, slim evidence supported the "Communist" allegation. A single witness had testified that Motley, as a young woman, had participated in Communist Party activities in Connecticut and New York.[55]

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48. Annis, supra note 43, at 183–88; Brown-Nagin, Civil Rights Queen, supra note 28 (manuscript ch. 8, at 16–19).

49. See Annis, supra note 43, at 156–57, 166–67, 170–71, 175–76, 226–34 (discussing the powers associated with Senator Eastland's role and how he deployed them).

50. 112 Cong. Rec. 21,215 (1966) (statement of Sen. Eastland); Motley, Equal Justice, supra note 33, at 215–16.

51. 112 Cong. Rec. 21,215 (statement of Sen. Eastland).

52. See Jeff Woods, Black Struggle, Red Scare: Segregation and Anti-Communism in the South, 1948–1968, at 43–44 (2004); see also Annis, supra note 43, at 95–115.

53. This Senate committee was the analogue to the better-known House Un-American Activities Committee. The Senate committee was "charged with investigating the 'extent, nature, and effects' of Communist and subversive activities in the United States." Annis, supra note 43, at 100. Senator Eastland drafted the measure that created the committee. Id.

54. Id. at 95; see also id. at 101–10, 155, 182, 210 (discussing Senator Eastland's obsession with alleged black Communists and with subversive activities by labor and civil rights advocates).

55. See 112 Cong. Rec. 21,215–16 (statement of Sen. Eastland); Motley, Equal Justice, supra note 33, at 215–17; Mrs. Motley Gets Senate Voice OK, Balt. Afro-Am., Sept. 10, 1966, at 13 (on file with the *Columbia Law Review*). The appointment of William H. Hastie, the first black person appointed to a federal court of appeals, also had been opposed on

New York's senatorial delegation rejected Senator Eastland's focus on Motley's past, if not the underlying claim.[56] In a robust statement of support, Jacob Javits, the Republican senator from New York, emphasized Motley's decades-long experience in law and politics, during which time she had been subjected to great public scrutiny.[57] "Mrs. Motley is a woman of great capacity," Senator Javits said, and "one of the principal counsels" to Thurgood Marshall and thus had fought a "great legal battle" for equal rights.[58] Motley's stellar record in the practice of law; her service as an elected official, including as Manhattan Borough President; and the respect that she had earned from prominent figures, including the President of the United States, Senator Javits said, outweighed the uncorroborated claim that more than twenty years ago Motley had been a Communist.[59] Senator Kennedy agreed, on the basis of his personal experiences, that Motley's good works dwarfed the aspersions contained in her FBI file.[60] The senator noted that, while serving as Attorney General of the United States, he had worked with Motley; under very difficult circumstances, Senator Kennedy said, Motley had made enormous contributions in the field of civil rights and had shown great "courage" and "integrity."[61]

2. *Skepticism of Motley Based on Her Earlier Civil Rights Practice.* — Segregationists such as Senator Eastland did not, alone, question Motley's fitness for the powerful and prestigious position of federal judge. Some members of the New York bar wondered why Motley, of all the people who sought coveted judicial appointments, had managed to be tapped for the position.[62] The American Bar Association (ABA) hesitated to approve Motley's nomination on grounds that she lacked trial experience in New York—a patently ludicrous claim given her extensive experience in courts nationwide, including those in New York.[63] The ABA ultimately rated Motley merely "qualified" (as opposed

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grounds that he belonged to "Communist-front organizations." Goldman, supra note 18, at 101.

56. To the contrary, Senator Javits said, "I do not say that this fact should not be considered. I only say it should be weighed against the record of Mrs. Motley in the subsequent 24 years." 112 Cong. Rec. 21,216 (statement of Sen. Javits).

57. Id. at 21,216–17.

58. Id. at 21,216.

59. Id.

60. Id. at 21,217 (statement of Sen. Kennedy).

61. Id.

62. See, e.g., Letter from Dave Hitchcock to President Lyndon B. Johnson (Sept. 2, 1966) (on file with the *Columbia Law Review*); Letter from Cecile L. Piltz to President Lyndon B. Johnson (Sept. 3, 1966) (on file with the *Columbia Law Review*); see also Motley, Equal Justice, supra note 33, at 217–18.

63. See Mrs. Motley Is Chosen for a Federal Judgeship Here, N.Y. Times, Jan. 26, 1966, at 1 (on file with the *Columbia Law Review*).

to "highly qualified") for the post.[64] Others questioned whether Motley's representation of plaintiffs in civil rights suits posed problems: Was she really qualified for the job, given her "narrow" field of practice; and could she be fair, particularly in cases with racial implications?[65]

Even Senator Kennedy, who publicly supported Motley, privately expressed concern about her appointment rooted in her practice background—the same experience that, in official and public remarks, he touted. The senator worried that the appointment of Motley might be perceived as too "political" given her race and her background as a civil rights lawyer.[66] Senator Kennedy also sought and attained a delay in the announcement of her nomination,[67] consistent with Senator Eastland's express wishes.[68]

Senator Kennedy's skepticism of Motley looks remarkable to those who uncritically accept his progressive reputation; however, Kennedy's ambivalent reaction to Motley's nomination is entirely consistent with his mixed record on civil rights.[69] During his tenure as Attorney General of

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64. See Memorandum from Ramsey Clark to President Lyndon B. Johnson (Sept. 14, 1965) (on file with the *Columbia Law Review*). The ABA has consistently rated minority and women lawyers lower than white, male lawyers. See Maya Sen, How Judicial Qualifications Ratings May Disadvantage Minority and Female Candidates, 2 J.L. & Cts. 33, 33–34 (2014) (showing that African American and women lawyers are more likely to receive lower ratings, even when controlling for education and experience over the past fifty years); Dylan Matthews, Has the American Bar Association Kept Our Judges White and Male?, Wash. Post (Feb. 28, 2013), http://www.washingtonpost.com/news/wonk/wp/2013/02/28/has-the-american-bar-association-kept-our-judges-white-and-male/ [http://perma.cc/5R3B-QFBX] (discussing Sen's argument "that the ABA has for the past 50 years been systematically less likely to recommend the judicial confirmations of women or racial minorities"); Adam Serwer, American Bar Association Under Fire for Underrating Women, Minorities, MSNBC (May 12, 2014), http://www.msnbc.com/msnbc/american-bar-association-diversity-ratings [http://perma.cc/8Z8J-AG4K] (discussing evidence that the ABA "rates women and minority candidates for the federal bench lower than white men").

65. See Motley, Equal Justice, supra note 33, at 218–19, 222; Letter from Mrs. William A. Harris to President Lyndon B. Johnson (Sept. 27, 1966) (on file with the *Columbia Law Review*); see also Jesse Helms, Editorial, WRAL TV: Viewpoint #1431 (Sept. 6, 1966) (on file with the *Columbia Law Review*) (noting that Motley's legal career had then consisted entirely of civil rights litigation).

66. See Memorandum from Nicholas deB. Katzenbach on Thurgood Marshall's Replacement on the Second Circuit to President Lyndon B. Johnson (July 14, 1965) (on file with the *Columbia Law Review*) (discussing Senator Kennedy's qualified support for Motley).

67. See Memorandum from John B. Clinton on Constance Banker Motley to Be U.S. District Judge for the Southern District of New York to John Macy (Oct. 12, 1965) [hereinafter Memorandum from John B. Clinton to John Macy] (on file with the *Columbia Law Review*) ("It is the Senator's desire that the nomination be postponed until January.").

68. See Annis, supra note 43, at 179–80 (noting that the Kennedys deferred to Senator Eastland's wish to loudly object to and delay the nominations of Thurgood Marshall and "other black nominees" in exchange for a judgeship for Harold Cox and other nominees that Senator Eastland favored).

69. See Larry Tye, Bobby Kennedy: The Making of a Liberal Icon 120, 127 n.*, 154–55, 187, 194–205, 207–37, 295–96, 324–26, 344–46, 348–49, 399–400, 412–13 (2016)

the United States, Kennedy supported his brother's appointment of open segregationists to the federal bench in the South, the chief arena of struggle in the black freedom movement.[70] The Kennedys' most notorious—and first—judicial appointment went to Harold Cox, Senator Eastland's college roommate.[71] A virulent racist, Cox called blacks "niggers" and "chimpanzees" from the bench and issued flagrantly "anti-civil rights" decisions, some of which flouted federal laws that the Kennedy Justice Department claimed to support.[72] The racial politics of the segregationist appointees who loudly and consistently opposed black interests did not impede their rise to power.[73] To the contrary, the Kennedys approved judicial appointments and other measures sought by Senator Eastland—leader of the powerful and potentially obstructionist congressional bloc opposed to civil rights—in exchange for Senator Eastland's endorsement of the Kennedys' legislative priorities.[74] Meanwhile, Motley's racial politics—her central role in ending a system that tainted American law and society—gave Senator Kennedy pause and encumbered her nomination.[75]

In the context of a lifetime appointment to the bench, Senator Kennedy, other New York legal elites, and the ABA were complicit with openly racist southerners. Strange bedfellows, they all used Motley's background against her.

3. *Motley's Confirmation.* — Notwithstanding Senator Eastland's opposition, Motley prevailed in her bid for confirmation, after a lengthy delay.[76] In a voice vote, the Senate confirmed her appointment as U.S. District Judge in the SDNY,[77] one of the nation's most prestigious courts;

(discussing Senator Kennedy's mixed record, his personal and political calculations regarding whether to support civil rights workers and initiatives, and his evolution on civil rights); see also supra notes 66–68; infra notes 70–74 and accompanying text.

70. See Victor S. Navasky, Kennedy Justice 272–76 (1977); see also id. at 322–23 (noting that corporate lawyers who dominated the ranks of the Kennedy Justice Department "did not focus on the damage a district-court judge in Jackson, Mississippi, could do" and that the ABA joined the Justice Department in its "dereliction" of professional duty).

71. Annis, supra note 43, at 178–79; Navasky, supra note 70, at 248.

72. Annis, supra note 43, at 178–79.

73. See Navasky, supra note 70, at 275–76.

74. See Annis, supra note 43, at 175–78, 182 (discussing Senator Eastland's brokering of deals with the Kennedy Administration on legislation and judicial appointments); Navasky, supra note 70, at 255, 258. Cox and others opposed to civil rights could be appointed because, as Victor Navasky, an authority on the Kennedy Justice Department, noted, the Administration's lawyers thought of the South as the "white South" and ignored blacks and black interests. Id. at 322–23.

75. See Navasky, supra note 70, at 244 (arguing that no aspect of Kennedy's tenure as Attorney General is "more vulnerable to criticism" than the Kennedys' decision "to forego civil rights legislation and executive action in favor of litigation and at the same time to appoint as lifetime litigation-overseers men dedicated to frustrating that litigation").

76. Motley, Equal Justice, supra note 33, at 215.

77. Id.

two segregationists, Senator Eastland and Senator John L. McClellan of Arkansas, voted against her.[78] For decades, blacks had lobbied for the mere consideration of an African American for appointment to that court.[79] At long last, Motley had joined the exclusive club. Motley was both the first woman and the first African American to sit on the SDNY and the first black woman appointed to any federal court.[80] When she took the bench in 1966, only four other women had ever obtained appointments to the federal bench.[81]

The *New York Times* reported Motley's nomination on its front page, and many welcomed her success.[82] Supporters of civil rights, human rights, and women's rights hailed the achievement.[83] One letter in particular summed up the viewpoint of Motley's supporters: "We sincerely feel that this [appointment] is a great step in the development of the Great Society."[84] With one of their own on the bench, supporters felt the quality of justice meted out in the courts could only become better.[85] In the President's view, Motley's appointment to the bench would help him achieve his "human rights" goals and fulfill his pledge of non-discrimination in hiring for high government posts.[86] For her part,

78. Id.

79. Goldman, supra note 18, at 145, 183.

80. See id. at 180–81; Mrs. Motley Is Chosen for a Federal Judgeship Here, supra note 63.

81. See Motley, Equal Justice, supra note 33, at 214; Memorandum from John B. Clinton to John Macy, supra note 67. By comparison, eleven African American men had been appointed federal judges by 1966. Motley, Equal Justice, supra note 33, at 214.

82. See Mrs. Motley Is Chosen for a Federal Judgeship Here, supra note 63.

83. See Letter from Mabel S. Bouldin, Supreme Basileus, Nat'l Sorority of Phi Delta Kappa, and Helen W. Green, Nat'l Dir. of Pub. Relations, Nat'l Sorority of Phi Delta Kappa, to President Lyndon B. Johnson (Feb. 3, 1966) (on file with the *Columbia Law Review*); Letter from Judge Anna M. Kross to President Lyndon B. Johnson (Jan. 27, 1966) (on file with the *Columbia Law Review*); Letter from LaCretia Lamb, Exec. Dir., Citizens Care Comm., Inc., to President Lyndon B. Johnson (Jan. 27, 1966) (on file with the *Columbia Law Review*); see also Letter from Robert E. Harding, Jr. et al. to President Lyndon B. Johnson (May 10, 1965) (on file with the *Columbia Law Review*); Letter from Paul O'Dwyer, Councilman at Large, The Council of the City of N.Y. City Hall, to President Lyndon B. Johnson (Apr. 29, 1965) (on file with the *Columbia Law Review*).

84. See Letter from Mabel S. Bouldin and Helen W. Green to President Lyndon B. Johnson, supra note 83.

85. See Mrs. Motley Is Supported for U.S. Bench in South, N.Y. Times, May 4, 1965, at 39 (on file with the *Columbia Law Review*) (quoting a letter urging Motley's appointment and arguing such a step would be the "most significant single act in furtherance of the drive to bring social equality to the American scene" (internal quotation marks omitted)); Letter from Judge Anna M. Kross to President Lyndon B. Johnson, supra note 83. A few years after Motley's appointment to the district court, the National Women's Political Caucus expressly pointed to "demonstrated commitment to the human issues" as a general requirement for any nominee when it proposed Motley as a nominee for an open seat on the U.S. Supreme Court. See Suggest 10 Women for Top Court, Chi. Trib., Sept. 27, 1971, at A6 (on file with the *Columbia Law Review*).

86. See Marie Smith, Where Are the 'Can-Do' Women?, Wash. Post, May 30, 1965, at F1 (on file with the *Columbia Law Review*); Letter from Harry C. McPherson, Jr., Special

Motley said of her appointment: "America is about to make good on its promise of equal opportunity for all."[87]

But in a sign of things to come, many letters questioning Motley's suitability for the bench poured into the White House—notwithstanding her confirmation by the Senate. Citing Motley's allegedly narrow practice experience and Communist background, these writers questioned Motley's qualifications for the bench. The criticisms and scrutiny would not soon relent.[88]

II. MOTLEY AND THE POLITICS OF JUDICIAL RECUSAL

Even after Motley took her seat on the United States District Court, race, gender, and her background as a civil rights lawyer shadowed her. Yet, she hardly was alone. Other judges from groups historically excluded from the judiciary shared the experience of being subject to unusual scrutiny.

A. *Recusal Motions Based on Personal Traits and Practice Background*

Judges of color frequently have been the targets of motions for recusal on grounds that their demographic characteristics or practice backgrounds called into question the judges' ability to be impartial. Litigants challenged the integrity of several pioneering black judges who had practiced in the field of civil rights, including A. Leon Higginbotham, Robert Carter, Nathaniel Jones, and Damon Keith.[89] This phenomenon persists: Litigants still single out for recusal judges who are of color, who are female, or who belong to religious minorities.[90] Motley met the

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Counsel to the President, to Judge Constance Baker Motley (Dec. 26, 1968) (on file with the *Columbia Law Review*).

87. Mrs. Motley Awaits Senate Approval, Balt. Afro-Am., Feb. 5, 1966, at 13 (on file with the *Columbia Law Review*).

88. See, e.g., Letter from Mrs. William A. Harris to President Lyndon B. Johnson, supra note 65; Letter from Dave Hitchcock to President Lyndon B. Johnson, supra note 62; Letter from Cecile L. Piltz to President Lyndon B. Johnson, supra note 62.

89. See, e.g., United States v. Alabama, 828 F.2d 1532, 1541 (11th Cir. 1987) (rejecting a motion to remove a black judge from a desegregation case because his children might have benefited from his ruling); LeRoy v. City of Houston, 592 F. Supp. 415, 422–24 (S.D. Tex. 1984) (denying a recusal motion made on the grounds that the judge and minority plaintiffs in a vote-dilution case were the same race); Baker v. City of Detroit, 458 F. Supp. 374, 375–77 (E.D. Mich. 1978) (rejecting a recusal motion targeted at Judge Keith in a discrimination case based on his friendship with the black mayor on grounds that such relationships are common in a small circle of elite blacks in a predominantly black city); Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155, 157 (E.D. Pa. 1974) (rejecting the recusal of Judge Higginbotham on grounds of judicial bias and prejudice in a case involving a suit by a black construction worker).

90. See, e.g., MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc., 138 F.3d 33, 35–38 (2d Cir. 1998) (upholding sanctions issued by Judge Denny Chin after counsel called for recusal based, in part, on his race and ethnicity); In re Evans, 801 F.2d 703, 706 (4th Cir. 1986)

controversy head on. In response to the claim that her presumed racial interests and loyalties undermined her impartiality, Motley defended her integrity in a landmark case.

B. *A Request to Remove Judge Motley*

A sex discrimination case filed against Sullivan & Cromwell ("Sullivan"), one of New York's most prominent law firms, provided the context for Motley's objection to efforts to disqualify her and other judges based on personal traits. One of many cases in which litigants requested Motley's recusal, *Blank v. Sullivan & Cromwell* stands out: Motley's race and sex explicitly figured into calls for her to withdraw from the case.[91]

In *Blank*, Diane Blank and several female law school graduates sued Sullivan.[92] The 1975 suit alleged that the firm systematically discriminated against women in employment.[93] The plaintiffs claimed that the firm refused to hire well-qualified female attorneys; subjected the few women whom it did hire to less favorable working conditions than men; paid women lower salaries than men; excluded or marginalized female associates in firm culture; and relegated women to "behind-the-scenes" legal specialties, such as trusts and estates, instead of assigning them to high-profile departments such as litigation.[94]

(disbarring an attorney for sending a judge a letter accusing the judge of "incompetence and/or religious and racial bias"); Wessmann ex rel. Wessmann v. Bos. Sch. Comm., 979 F. Supp. 915, 915–16 (D. Mass. 1997) (rejecting an argument for recusal in a discrimination case based on the judge's background as a civil rights lawyer); Johnson v. State, 430 S.E.2d 821, 822 (Ga. Ct. App. 1993) (affirming the denial of a motion requesting the transfer of a rape and kidnapping case from a female judge to a male judge); see also Lynn Hecht Schafran, Not from Central Casting: The Amazing Rise of Women in the American Judiciary, 36 U. Tol. L. Rev. 953, 959 (2005) (detailing specific examples of and study findings supporting the prevalence of recusal motions based solely on gender); cf. McCann v. Commc'ns Design Corp., 775 F. Supp. 1506, 1509 (D. Conn. 1991) (rejecting a recusal motion made on grounds that Judge José Cabranes tended to favor defendants over plaintiffs in certain cases as opposed to on grounds of extrajudicial prejudice).

91. 418 F. Supp. 1 (S.D.N.Y. 1975). For other cases in which litigants requested Motley's withdrawal on grounds of her alleged prejudice, see, e.g., Curley v. St. John's Univ., 7 F. Supp. 2d 359, 362–63 (S.D.N.Y. 1998) (alleging bias because Motley had imposed sanctions on an attorney and denied that attorney's request to depart early for a religious holiday); Holmes v. NBC/GE, 925 F. Supp. 198, 199–200 (S.D.N.Y. 1996) (alleging Motley's bias on grounds that she had disrespected the Title VII plaintiff's attorney and favored corporate defendants); Bin-Wahad v. Coughlin, 853 F. Supp. 680, 682 (S.D.N.Y. 1994) (alleging bias based on Motley's alleged sympathies with members of the Black Panther Party, prisoners, or subjects of government investigation); United States v. Occhipinti, 851 F. Supp. 523, 526–27 (S.D.N.Y. 1993) (alleging bias based on a "social and personal relationship" between Motley and the African American Assistant United States Attorney (internal quotation marks omitted) (quoting petitioner)); Hodgson v. Liquor Salesmen's Union Local No. 2, 334 F. Supp. 1366, 1367 (S.D.N.Y. 1971) (alleging bias by Motley against the union based on Motley's past ruling and relationships).

92. See Fred Strebeigh, Equal: Women Reshape American Law 152–59 (2009).

93. *Blank*, 418 F. Supp. at 2.

94. Id.; see also Strebeigh, supra note 92, at 152–59.

The women filed suit in the SDNY, and Motley drew the case.[95] The famed civil rights lawyer found herself the presiding judge in one of the first cases testing the antidiscrimination principles of Title VII of the Civil Rights Act of 1964.[96]

The law firm's attorney, Ephraim London, protested. In personal correspondence to the judge and in a formal motion, London requested that Motley recuse herself.[97] He argued that Motley should withdraw from the case because, as an African American and a woman, she likely had experienced workplace discrimination. He also cited a past statement that Motley reportedly had made regarding "the crippling effects of discrimination."[98] Given her identity and experiences, Motley would strongly identify with other women who alleged discrimination. London explained his logic in a letter to Motley: "I believe you have a mindset that may tend, without your being aware of it, to influence your judgment."[99] London argued, by implication, that only white men could properly preside in a sex discrimination suit.

Later, after Motley certified *Blank v. Sullivan & Cromwell* as a class action, London formally petitioned the court of appeals to overturn the ruling on grounds that Motley should have disqualified herself from the case.[100] Motley had certified the class during a pretrial proceeding, without permitting the defendant to protest the action, London claimed.[101] Motley's allegedly premature certification of the class showed her eagerness to aid the plaintiffs' case and revealed her inability to handle the litigation judiciously.[102]

Motley would not remove herself from the case. She explained why in a short but compelling opinion. Sullivan had no actual evidence to support its claim that she could not be impartial. The firm had not supported its allegation that Motley "identified" with alleged victims of sex discrimination with documentary or testimonial evidence.[103] Nor had London provided any citation to support the charge that Motley had bemoaned the "crippling effects of discrimination."[104] The only evidence in the record on that point had come from Motley, who denied using the phrase.[105] Motley also rejected London's claim that her certification

95. *Blank*, 418 F. Supp. at 1–2.

96. On the significance of Title VII in the struggle for race and gender equality, see Nancy MacLean, Freedom Is Not Enough 117–27 (2006); Serena Mayeri, Reasoning from Race: Feminism, Law, and the Civil Rights Revolution 22–23 (2011).

97. *Blank*, 418 F. Supp. at 2, 5.

98. Id. at 4.

99. Strebeigh, supra note 92, at 177 (internal quotation marks omitted).

100. Id. at 189.

101. *Blank*, 418 F. Supp. at 3–4.

102. Strebeigh, supra note 92, at 177–78.

103. *Blank*, 418 F. Supp. at 4.

104. Id.

105. Id. at 2.

decision had been made without giving the defendants an opportunity to be heard on the matter.[106] Furthermore, Motley observed, nothing in her nine years of work on the bench supported London's claim. She repeatedly had ruled *against* plaintiffs in civil rights cases, including women in workplace discrimination actions.[107] Instead of showing favoritism, Motley's rulings proved her *impartiality*.[108]

After analyzing the black letter law on judicial recusal, Motley directly addressed the heart of London's allegation: Could a female preside over a controversy alleging sex discrimination? Yes, she answered. "It is beyond dispute that for much of my legal career I worked on behalf of blacks who suffered race discrimination," noted Motley.[109] "I am a woman, and before being elevated to the bench, was a woman lawyer."[110] However, these facts did not and could not, by themselves, rise to the level of "bias" within the meaning of relevant law. "[I]f background or sex or race of each judge were, by definition, sufficient grounds for

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106. Id. at 3–4.

107. Id. at 4.

108. See, e.g., id. (citing Mullarkey v. Borglum, 323 F. Supp. 1218 (S.D.N.Y. 1970)). In *Mullarkey*, Motley ruled against a female-led tenants' rights organization, which filed a lawsuit under § 1983 alleging civil rights violations, because of insufficient evidence to show that the landlord, a private person, had acted "under color of law," notwithstanding the landlord's use of criminal process and threat of eviction. In granting the defendant landlord's motion to dismiss, Motley wrote:

> Certainly, it cannot seriously be contended that every time a court clerk, at the request of a private person, initiates a civil action against another or a criminal summons is issued on the complaint of a private person, that that private person acts under color of law for Fourteenth Amendment purposes . . . . The fact that the state provides the machinery and a forum for the hearing of private disputes, no matter how baseless, does not provide the necessary showing, without more, that there is the required state action for Fourteenth Amendment purposes. . . . Plaintiffs' reliance upon Shelley v. Kraemer . . . is therefore also unprofitable without a showing of conscious state involvement in the unlawful conduct of a history of unconstitutional state conduct.

Mullarkey, 323 F. Supp. at 1225–27. For other cases in which Motley ruled against plaintiffs alleging discrimination, see, e.g., Tarshis v. Riese Org., 195 F. Supp. 2d 518, 524–28 (S.D.N.Y. 2002) (granting summary judgment for an employer in a case alleging age and national-origin discrimination); Sykes v. Mt. Sinai Med. Ctr., 967 F. Supp. 791, 794–98 (S.D.N.Y. 1997) (granting summary judgment for an employer in a case in which an African American supervisor alleged racial discrimination); De La Cruz v. N.Y.C. Human Res. Admin. Dep't, 884 F. Supp. 112, 113–17 (S.D.N.Y. 1995) (granting summary judgment for an employer in a discrimination action brought by a Hispanic employee); Van Zant v. KLM Royal Dutch Airlines, 870 F. Supp. 572, 574–75 (S.D.N.Y. 1994) (granting summary judgment motion for an employer in a case alleging sexual harassment); Johnson v. Frank, 828 F. Supp. 1143, 1147–54 (S.D.N.Y. 1993) (granting summary judgment for the government in a case brought by an African American postal employee alleging race discrimination).

109. *Blank*, 418 F. Supp. at 4.

110. Id.

removal, no judge on this court could hear this case," Motley wrote.[111] The judge had turned London's argument on its head.

Motley's sober, no-nonsense approach left an indelible imprint. Treatises and courts continue to cite Motley's opinion in *Blank* for the proposition that neither sex nor race alone can disqualify a judge from presiding in a case, and commentators laud it.[112] The *Blank* principle and other precedents established that, while the appearance of impartiality and impartiality in fact are important, a party to a lawsuit does not have a right to a judge free of identity or ideology.[113] A judge's background or experience in a certain field, such as workplace discrimination or civil rights activism, will not automatically disqualify her from a case.[114] For, like Motley, all judges come to the bench with a "background of experiences, associations, and viewpoints."[115]

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111. Id.

112. For cases that cite to Motley's opinion, see, e.g., Bryce v. Episcopal Church, 289 F.3d 648, 660 (10th Cir. 2002); MacDraw, Inc. v. CIT Grp. Fin., Inc., 138 F.3d 33, 37 (2d Cir. 1998); Brody v. President & Fellows of Harvard Coll., 664 F.2d 10, 11 (1st Cir. 1981); United States v. Fiat Motors, 512 F. Supp. 247, 252 (D.D.C. 1981); Baker v. Detroit, 458 F. Supp. 374, 378 (E.D. Mich. 1978); see also Richard Flamm, Judicial Disqualification: Recusal and Disqualification of Judges 264–65 (2d ed. 2007). For laudatory commentary, see Ifill, Racial Diversity, supra note 11, at 459 (describing Motley's decision in *Blank* and noting how her opinion "expose[d] the sham of an impartiality definition that assumes 'whiteness' . . . as the standard for measuring judicial bias"); Margaret M. Russell, Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice, 95 Mich. L. Rev. 766, 778–79 (1997) ("Judge Constance Baker Motley, for example, defended her professional competence to preside over a sex discrimination case, explaining with withering succinctness that *everyone*—and not just she as a Black woman—is possessed of racial identity and gender identity.").

113. Flamm, supra note 112, at 259.

114. United States v. Alabama, 828 F.2d 1532, 1543 (11th Cir. 1987) ("All judges come to the bench with a background of experiences, associations, and viewpoints. . . . A judge is not required to recuse himself merely because he holds and has expressed certain views on a general subject."); see also Laird v. Tatum, 409 U.S. 824, 835 (1972) ("Proof that a Justice's mind . . . was a complete *tabula rasa* . . . would be evidence of lack of qualification, not lack of bias."). In addition to Motley and Higginbotham, other civil rights lawyers who secured judicial appointments repeatedly faced the question of whether they could be "fair to white people, whether" during confirmation hearings, bar committee screenings, or in recusal motions filed when each judge presided in cases related to questions of equality. See, e.g., Robert Carter, A Matter of Law: A Memoir of Struggle in the Cause of Equal Rights 147 (2005) (noting that Carter, in responding to the bar committee's fairness question, inquired whether white candidates were asked whether they could be fair to blacks, which he described as more pertinent considering the country's history of discrimination and "data showing that white judges were consistently less generous towards black defendants").

115. United States v. Alabama, 828 F.2d at 1543. Today, Motley's classic opinion in *Blank* still remains relevant and a powerful refutation of the idea that demonstrated concern for equality is a disabling trait in a jurist. Vaughn Walker, the federal district court judge who presided over the successful challenge against California's ban against gay marriage, found himself the object of identity-based scrutiny. Some commentators questioned whether Walker, who reportedly is gay, could be fair in the case. Citing *Blank*, a noted legal ethics professor observed: "You could say, 'If a gay judge is disqualified, how

III. CIVIL RIGHTS PLAINTIFFS IN MOTLEY'S COURTROOM

In *Blank*, Motley proclaimed herself free of bias despite her personal traits and her practice background. In doing so, she cited cases in which she ruled against civil rights plaintiffs.[116] Neither move undercut her reputation as a judge unusually sympathetic to civil rights plaintiffs. But why not?

The reputation persisted in part because certain decisions appeared to substantiate it. Motley issued rulings in several high-profile cases that did, in fact, favor civil rights plaintiffs. These decisions received considerable publicity and reinforced the preexisting narrative and perception of Motley: As a legendary civil rights and pioneering woman lawyer, she would favor alleged victims of discrimination over alleged perpetrators.

Cases that contradicted the received wisdom about Motley—those in which she ruled against plaintiffs in civil rights cases—tended to garner little or no press attention. By also describing decisions unfavorable to civil rights plaintiffs, this Essay provides a fuller picture of Motley's judicial record. A vital part of Motley's legacy, these decisions reveal a gap between her liberal reputation and outcomes in her courtroom.

A. *Decisions Favorable to Plaintiffs*

1. Blank v. Sullivan & Cromwell *(1976)*. — Motley remained the presiding judge in *Blank*, and just as counsel for the prestigious law firm defendant had feared, the case's substantive outcome reshaped the legal workplace. Initially, however, Motley issued a key ruling favorable to the defendants: She denied Blank access to partnership information on grounds that the plaintiff had applied only for the position of associate.[117] After the Equal Employment Opportunity Commission (EEOC) filed a brief arguing for reconsideration, Motley reconfirmed her ruling that Sullivan did not have to release partnership records.[118] At the same time, she held that Sullivan's record of failing to hire women as partners could be used to establish evidence of a pattern of sex discrimination in the selection of associates.[119]

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about a straight judge?' There isn't anybody about whom somebody might say, 'You're not truly impartial in this case.'" John Schwartz, Conservative Jurist, with Independent Streak, N.Y. Times (Aug. 5, 2010), http://www.nytimes.com/2010/08/06/us/06walker.html (on file with the *Columbia Law Review*).

116. See supra note 108 and accompanying text.

117. See Arnold H. Lubasch, Quota for Woman Lawyers Agreed to by Firm, N.Y. Times (Feb. 7, 1976), http://www.nytimes.com/1976/02/07/archives/new-jersey-pages-quota-for-women-lawyers-agreed-to-by-major-firm.html?mcubz=1 (on file with the *Columbia Law Review*).

118. Id.

119. Strebeigh, supra note 92, at 195–96.

In the wake of Motley's ruling and subsequent discovery in the high-profile case, Sullivan settled.[120] In the settlement agreement, the firm agreed to conduct outreach efforts to women and to confine interview questions to qualifications for work, as opposed to personal questions about female candidates' ability to travel and to work long hours.[121] The firm also agreed to hiring goals; it would offer women associate positions at a percentage comparable to the percentage of applications received from them.[122] In other words, Sullivan instituted an affirmative action policy to recruit female lawyers into its ranks.[123] Further, the firm agreed to pay women fairly and support women's professional development.[124] Motley also mandated the appointment of an administrator to ensure compliance with the settlement agreement.[125]

The Sullivan settlement proved a watershed moment in the history of women lawyers. It put all firms on notice that Title VII applied to high-status, but traditionally male, occupations.[126] *Blank* signaled the far-reaching impact of the employment title of the Civil Rights Act—the landmark law that Motley had, through her own pathbreaking lawyering,[127] indirectly helped to effectuate by creating a political environment open to change.

2. Ludtke v. Kuhn *(1977)*. — In a constitutional case alleging sex discrimination, Motley issued another momentous decision in the annals of the struggle for workplace equality. In 1977, Motley toppled a bastion of male dominance and exclusion: the locker room of the New York Yankees. She did so by issuing a landmark opinion favoring Melissa Ludtke, a female reporter for *Sports Illustrated*.[128]

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120. Id. at 193–96.

121. Blank v. Sullivan & Cromwell, No. 75 Civ. 189, 1977 BL 664, at *2 (S.D.N.Y. June 29, 1977) (approving the parties' proposed settlement); Strebeigh, supra note 92, at 197–99.

122. *Blank*, 1977 BL 664, at *1; see also Arnold H. Lubasch, Top Law Firm Bans Sex Discrimination, N.Y. Times (May 8, 1977), http://www.nytimes.com/1977/05/08/archives/top-law-firm-bans-sex-discrimination-sullivan-cromwell-will-pursue.html?mcubz=1 (on file with the *Columbia Law Review*).

123. See Rebecca Bayer, Decades-Old Gender Bias Case Marked Turning Point in Big Law, Bloomberg L. (May 15, 2017), http://bol.bna.com/decades-old-gender-bias-case-marked-turning-point-in-big-law/ [http://perma.cc/K5KB-CY7Z] (examining the impact that the *Blank* litigation had on law firms' employment practices).

124. See *Blank*, 1977 BL 664, at *2.

125. See id. at *1; see also Strebeigh, supra note 92, at 198–99 (describing Sullivan's obligations under the settlement).

126. For an overview of how courts distinguished between lower-level jobs and more senior positions for the purposes of enforcing Title VII, see Elizabeth Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 945, 950–55 (1982).

127. See Brown-Nagin, Courage to Dissent, supra note 35, at 308–11 (describing Motley's strong lawyering skills and professional accomplishments despite the outrage occasioned by her singularity).

128. Ludtke v. Kuhn, 461 F. Supp. 86, 88 (S.D.N.Y. 1978).

Ludtke sued after the New York Yankees enforced a ban, imposed by the Commissioner of Major League Baseball (MLB), on female sportswriters in the locker room.[129] Ludtke had hoped to enter the clubhouse during the 1977 World Series between the Yankees and the Los Angeles Dodgers; like other journalists, Ludtke wanted to obtain fresh-off-the-field postgame interviews of ballplayers.[130] She wanted to garner quotes and insights from athletes by meeting them in their own clubhouses—where they were most likely to be at ease and open up to reporters.[131] Because of her sex, Ludtke could not enter the Yankee clubhouse and do her job.[132] In the suit she filed against the MLB and its Commissioner, Ludtke argued that the clubhouse ban on female reporters violated her constitutional rights.[133]

The suit required Motley to consider two thorny issues in constitutional law. First, she had to determine whether New York City's involvement with Yankee Stadium constituted state action within the meaning of the Fourteenth Amendment.[134] If so, Motley had to confront the underlying issue: whether the blanket exclusion of female sportswriters violated the Fourteenth Amendment's guarantees of equal protection and due process of law.[135]

Motley sided with the plaintiff on both counts. In reaching the determination that the MLB qualified as a state actor, she drew on her extensive knowledge of civil rights era state action cases. Motley relied on a precedent established in a race discrimination case litigated by LDF.[136] Applying the Civil Rights Era precedent establishing that state action could be premised on the "entwining" of activity by a private party and a state agency, Motley found state action on the facts at issue in *Ludtke*. The MLB qualified as a state actor, she concluded, because of its financial relationship with the city and the city's failure to act against sex

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129. See id. at 90; Lily Rothman, This Is Why Female Sportswriters Can Go in Men's Locker Rooms, Time (Oct. 5, 2015), http://time.com/4061122/ludtke-kuhn-jaguars-colts/ [http://perma.cc/3GGL-4WPD] (discussing the advancement of women reporters in sports, in part due to the *Ludtke* litigation).

130. See David Krell, The Landmark Case of *Ludtke v. Kuhn*, Sports Post (July 12, 2016), http://thesportspost.com/baseball-history-melissa-ludtke-kuhn/ [http://perma.cc/2DFH-URMY] (explaining the importance of the *Ludtke* lawsuit for equal access for women in sports reporting because otherwise "[a] level playing field . . . would not exist").

131. See id.

132. See *Ludtke*, 461 F. Supp. at 89.

133. Id.

134. Id. at 93.

135. Id. at 93–98. Ludtke also sued under New York's equal accommodations statute. Motley did not reach that claim, given her resolution of the federal constitutional questions. Id. at 98.

136. See id. at 93 (citing Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961)) (finding that state action may be found when a private party's actions are entwined with a state agency).

discrimination.[137] Yet, the city had not endorsed the team's policy, and it was not yet established that the exclusionary policy violated the law.[138] Based on these facts, a different judge might not have found the city's partnership with the Yankees sufficient to establish state action.[139] However, Motley, relying on these same facts, reached a conclusion favorable to the plaintiff.[140]

After a hard-fought trial, Motley also ruled in Ludtke's favor on the merits. She found that the Yankees' blanket exclusion of women violated Ludtke's constitutional rights.[141] Citing *Craig v. Boren*, the 1976 precedent setting forth the standard for determining whether a sex-based classification could withstand scrutiny,[142] Motley found the Yankees' justifications for their discriminatory policy constitutionally inadequate.[143] The team claimed that the ban on women reporters protected the privacy of the all-male team.[144] Citing *Roe v. Wade*, the 1973 Supreme Court decision holding that the right to privacy encompassed a woman's choice to have an abortion,[145] Motley found the Yankees' desire to protect players' privacy a legitimate objective.[146] But, citing *Califano v. Goldfarb*, a sex discrimination case recently won by then-attorney Ruth Bader Ginsburg that required inquiry into the *actual* purpose of a policy,[147] Motley also questioned the Yankees' proffered justification for the ban. The Yankees could easily protect their ballplayers' privacy without "maintaining the locker room as an all-male preserve."[148] The Yankees had struck out.

B. *Decisions Unfavorable to Plaintiffs*

1. Mullarkey v. Borglum *(1970)*. — Motley's opinions in *Blank* and *Ludtke* rightly earned her a reputation as a judicial trailblazer on behalf of civil rights plaintiffs. *Mullarkey v. Borglum* casts an altogether different

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137. See id. at 93–95.

138. See id. (noting that the city indicated that a less restrictive alternative to the exclusionary policy could be devised).

139. See, e.g., Jackson v. Statler Found., 496 F.2d 623, 629 (2d Cir. 1974) (discussing "a double 'state action' standard—one, a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims"). For a leading Supreme Court case narrowly conceiving state action, see Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175–78 (1972) (holding that the state liquor board and its practices insufficiently implicated actions of a private club that refused service to a black guest to make the board's practices "state action" within the meaning of the Equal Protection Clause).

140. See *Ludtke*, 461 F. Supp. at 93–95.

141. Id. at 98.

142. 429 U.S. 190, 197 (1976).

143. *Ludtke*, 461 F. Supp. at 98.

144. Id. at 97–98.

145. 410 U.S. 113, 153 (1973).

146. *Ludtke*, 461 F. Supp. at 97.

147. 430 U.S. 199, 212 (1977).

148. *Ludtke*, 461 F. Supp. at 97.

light on Motley's record. In *Mullarkey*, Motley sided with defendants and upheld the status quo in the antidiscrimination context.[149] What is more, Motley understood the significance of the decision to her judicial reputation. In her opinion denying the law firm's request for recusal in *Blank*, Motley cited *Mullarkey* as evidence of her impartiality: Because she had ruled against the plaintiffs alleging discrimination, *Mullarkey* demonstrated her fairness and vindicated her judicial record, she believed.[150]

The case involved a dispute over tenant activism and rent control in New York City. Tenant organizers, mostly female, claimed that their landlord had violated their civil rights.[151] In retaliation for their activism, the organizers alleged the landlord and building superintendent, together with the district attorney, conspired to deprive them of their First and Fourteenth Amendment rights.[152] The retaliation took a form especially pernicious for renters of limited means engaged in a battle over rent control: The defendants allegedly instituted groundless eviction and criminal proceedings against the organizers.[153]

Motley rejected the plaintiffs' most consequential claim—their equal protection challenge.[154] In order to sue, the plaintiffs had to show, as a threshold matter, that the defendants had acted "under color of law," that is, that the allegedly wrongful action had occurred by virtue of law or of the alleged wrongdoer's legal authority.[155] The plaintiffs had claimed the involvement of the district attorney in a campaign to deprive them of constitutional rights.[156] One could hardly dispute that the official, the government's chief representative in criminal prosecutions, had acted under the authority of state law. Nevertheless, Motley found the plaintiffs had failed to allege facts that demonstrated a determined effort to deprive them of rights "under color of law."[157]

The organizers hoped that Motley would accept a broad theory of how concerted action by a state actor and private parties could establish abuse of power under state law. By virtue of the eviction proceedings and

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149. Mullarkey v. Borglum, 323 F. Supp. 1218, 1230 (S.D.N.Y. 1970).

150. See Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4 n.1 (S.D.N.Y. 1975).

151. *Mullarkey*, 323 F. Supp. at 1220.

152. Id. at 1219.

153. Id. at 1221–22.

154. Id. at 1227. Although she did not dismiss the conspiracy claim, her language expressed skepticism of it:

> This court also concludes that the allegations of the complaint, when construed together and when construed most favorably for plaintiffs, can fairly be said to make out a claim within the *bramblebush* of § 1985. More specifically, there is alleged a conspiracy which, *it can be said*, falls within the amorphous requirements of § 1985.

Id. (emphasis added).

155. Id. at 1224.

156. Id. at 1219–20.

157. Id. at 1224–26.

criminal summonses at issue in the case, the plaintiffs alleged the landlord and building superintendent—private persons—and the district attorney—a governmental agent—had engaged in an unlawful campaign of harassment "under color of law." However, Motley held that this set of facts did not amount to an unlawful conspiracy effectuated through law.[158] Plaintiffs had merely described the parties' use of official power, rather than the abuse of the legal process. It could not "seriously be contended," Motley wrote, "that every time a court clerk, at the request of a private person, initiates a civil action against another or a criminal summons is issued . . . that that private person acts under color of law for Fourteenth Amendment purposes."[159] In order to state a claim, the plaintiffs would need to show that, in bad faith, the district attorney had deployed the machinery of the state to violate the tenants' First and Fourteenth Amendment rights. The plaintiffs had failed to allege such facts.[160] Consequently, Motley would not accept the plaintiffs' far-too-broad theory of an unlawful conspiracy.

In reaching that conclusion, Motley rejected plaintiffs' reliance on a landmark civil rights case—*Shelley v. Kraemer*—a signature litigation effort handled by LDF during Motley's early years in practice there.[161] The plaintiffs cited *Shelley* in hopes of persuading the court that the *Mullarkey* defendants had engaged in an unlawful conspiracy.[162] In *Shelley*, the U.S. Supreme Court held that judicial enforcement of private parties' racially restrictive housing covenants can amount to state action.[163] Motley rejected the plaintiffs' reliance on *Shelley*. Whereas the judges in *Shelley* had intentionally deployed the judicial process to deprive persons of civil rights, the district attorney in *Mullarkey* had merely issued run-of-the-mill criminal summonses. He had not deployed the legal process in bad faith to harass the tenant organizers.[164]

Motley granted the defendants' motion to dismiss in *Mullarkey* notwithstanding her past advocacy for related causes. During her brief tenure as an elected official, Motley had devoted considerable time and energy to fair and equal housing opportunities. New Yorkers elected Motley to the state senate in 1964 and to the Manhattan borough presidency in 1965.[165] In both posts, Motley had pushed for equal and affordable housing opportunities for low-income New Yorkers, many of

158. Id. at 1225–26.

159. Id.

160. Id.

161. See Motley, Equal Justice, supra note 33, at 66–67.

162. See *Mullarkey*, 323 F. Supp. at 1222.

163. Shelley v. Kraemer, 334 U.S. 1, 14 (1948).

164. *Mullarkey*, 323 F. Supp. at 1225–27.

165. Motley, Equal Justice, supra note 33, at 206.

them black and Latino.[166] By supporting urban renewal projects in Harlem and in ghettos, Motley had sought to add better and new housing stock in areas with extraordinary need.[167] Moreover, Motley had represented community activists and organizers during her civil rights practice. Most famously, she defended demonstrators, including Dr. King, involved in mass forms of protest in Birmingham, Alabama; Jackson, Mississippi; and Albany, Georgia.[168]

In light of *Ludtke* and her prior legal advocacy, Motley's state action analysis in *Mullarkey* is striking. The judge's determination in *Ludtke* that the entanglement of New York City and the Yankees created state action hardly was a foregone conclusion. But in the context of a sex discrimination claim supported by a growing body of Supreme Court precedent, Motley accepted the broad theory of state action Ludtke urged. By contrast, in *Mullarkey*, a case involving an area of law—landlord–tenant relations—that did not give the plaintiffs much leverage, Motley did not recognize a broad theory of state action.

If, as some assumed, Motley overwhelmingly favored plaintiffs in civil rights cases or was so inclined, one would not expect her to so definitively quash the *Mullarkey* plaintiffs' hopes for relief. Yet, that is precisely what she did in that case. Going forward, Motley's *Mullarkey* opinion stood for the proposition that tenants had a limited ability to sue private landlords for civil rights violations under the particular statute at issue.[169] Notably, before and after her *Mullarkey* opinion, other federal trial and appellate judges issued decisions more favorable to plaintiffs' attempts to sue landlords for retaliatory eviction proceedings.[170] On this issue, Motley certainly did not look like a liberal activist judge.

2. Gulino v. Board of Education *(2002–2003).* — *Gulino v. Board of Education* also chips away at the notion that Motley reflexively sided with plaintiffs alleging discrimination. In *Gulino*, a group of African American and Latino educators sued the boards of education of the city and of the state of New York.[171] Because they had failed to attain satisfactory scores

166. See George H. Favre, Manhattan Finds a Spokesman, Christian Sci. Monitor, Apr. 5, 1965, at 15 (on file with the *Columbia Law Review*) (noting Motley's desire to pursue "equal opportunities in housing, education and jobs").

167. See Edward C. Burks, Borough President Race: Mrs. Motley May Turn Judge; Blaikie Hates Post, N.Y. Times, Sept. 12, 1965, at 81 (on file with the *Columbia Law Review*); Favre, supra note 166; The Unique Triple Life of Constance Baker Motley, N.Y. Herald Trib., Aug. 23, 1964, at 17 (on file with the *Columbia Law Review*) ("One of her major legislative drives has been to eliminate the dire living conditions that prompted last month's bitter Harlem riots.").

168. See Motley, Equal Justice, supra note 33, at 137–39, 147, 149, 151–53, 155–61.

169. See Annotation, When Is Eviction of Tenant by Private Landlord Conducted "Under Color of State Law" for Purposes of 42 USCS § 1983, 73 A.L.R. Fed. 78, § 8 (1985).

170. See, e.g., Lavoie v. Bigwood, 457 F.2d 7, 15 (1st Cir. 1972); Walton v. Darby Town Houses, Inc., 395 F. Supp. 553, 557 (E.D. Pa. 1975); Anderson v. Denny, 365 F. Supp. 1254, 1259 (W.D. Va. 1973).

171. Gulino v. Bd. of Educ., 236 F. Supp. 2d 314, 318 (S.D.N.Y. 2002).

on a national or state teachers' exam, the teachers had lost their teaching licenses or had been prevented from seeking full licenses.[172] In a suit brought on their behalf by the Center for Constitutional Rights, the teachers alleged disparate impact discrimination under Title VII of the Civil Rights Act of 1964.[173] The educators' claim of discrimination turned on a significant racial disparity in passage rates between white and racial-minority candidates, coupled with the assertion that the exam did not, in fact, measure preparedness to teach.[174] The state board of education argued, however, that the licensing requirements sought to enforce uniform minimum standards, with a view toward "'break[ing] the cycle' of poor and minority students' 'being poorly educated by underqualified teachers.'"[175]

Motley, who had certified the class of black and Hispanic educators,[176] ruled against it on the most important issues on cross motions for summary judgment. Neither the statute of limitations nor other procedural doctrines barred the teachers' claims, the judge held.[177] At the same time, Motley concluded that the plaintiffs had not established a prima facie case of disparate impact discrimination.[178] Declining to side with the teachers, she indicated that a "business necessity" might justify use of the tests.[179]

Then, after a five-month trial, Motley ruled against the plaintiffs on the merits of the case. Evidence adduced at trial showed that while forty-five percent of class members passed the relevant tests, eighty-five percent of whites passed them.[180] These tests, said one of the plaintiffs' attorneys, "had a staggering effect on screening out teachers of color."[181] Despite the significant disparity, Motley sided with the defendants because a particular portion of the test, the essay, was "manifestly related" to a teacher's ability to communicate and thus to successfully perform

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172. Id.

173. Id.

174. Id.

175. Mark Walsh, Court Seeks Justice Dept.'s Views in Case over N.Y. Teacher Test, Educ. Wk. (Dec. 5, 2007) (quoting Brief of Respondent New York State Education Department in Support of the Petition at 14, Bd. of Educ. v. Gulino, 554 U.S. 917 (2008) (No. 07-270), 2007 WL 2764264), http://www.edweek.org/ew/articles/2007/12/12/15scotus.h27.html (on file with the *Columbia Law Review*).

176. Gulino v. Bd. of Educ., 201 F.R.D. 326, 334 (S.D.N.Y. 2001).

177. *Gulino*, 236 F. Supp. 2d at 320–35.

178. Id. at 339–42.

179. Id. at 343.

180. Id. at 339; see also Gulino v. Bd. of Educ., No. 96 Civ. 8414 (CBM), 2003 WL 25764041, at *10–11 (S.D.N.Y. Sept. 4, 2003) (finding that pass rates for African American and Latino educators were "less than four-fifths of the pass rates for White test-takers").

181. Emily Jane Goodman, Challenging a Test the Teachers Must Take, Gotham Gazette (Sept. 15, 2003) (internal quotation marks omitted), http://www.gothamgazette.com/education/1960-challenging-a-test-the-teachers-must-take [http://perma.cc/RMX7-PHUE].

her job.[182] The judge's commentary about the essay made clear her lack of sympathy for plaintiffs who had failed to meet the standards:

> It should go without saying that New York City teachers should be able to communicate effectively in both spoken and written English. Teachers who are unable to write a coherent essay without a host of spelling and grammar errors may pass on that deficiency to their students, both in commenting upon and grading the work they turn in. Defendants' decision to exclude those who are not in command of written English is in keeping with the legitimate educational goal of teaching students to write and speak with fluency.[183]

In a telling outcome, the Court of Appeals for the Second Circuit reversed the most important part of Motley's decision.[184] The judge had erred, the appeals court held, in siding with the New York City Board of Education. The Second Circuit agreed, as lawyers for the plaintiffs had argued, that Motley had wrongly found one of the tests in question valid notwithstanding the absence of a formal evaluation of the exam.[185] In so concluding, Motley had not followed the controlling precedent on test validity.[186] Instead, she had relied on a different precedent that "lowered the bar for defendants."[187] The Second Circuit rejected Motley's proposition that employers no longer needed to conduct validation studies.[188] The court of appeals issued a unanimous opinion reversing Motley on that point.

Motley's decision in *Gulino* surprised many commentators, given the judge's career as "a noted civil rights lawyer before joining the bench."[189] These observers welcomed the court of appeals' reversal. Members of the civil rights bar expressed particular disappointment that Motley—who once had represented black teachers in antidiscrimination suits[190]—sided with defendants in this important case. As Motley well knew, civil rights lawyers had long relied heavily on disparate impact analysis to fulfill Title VII's purpose of achieving employment opportunities for protected classes, even in the absence of intentional discrimination. LDF had litigated the cases, including *Griggs v. Duke Power Co.*, in which the U.S.

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182. *Gulino*, 2003 WL 25764041, at *31.

183. Id.

184. Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 382–88 (2d Cir. 2006).

185. Id at 385–87.

186. Id. at 385.

187. Id.

188. Id. at 386.

189. Walsh, supra note 175; see also Joy M. Barnes-Johnson, Preparing Minority Teachers: Law and Out of Order, 77 J. Negro Educ. 72, 75 (2008) (noting that some thought Motley's reputation as a civil rights activist would impact her treatment of the case); Goodman, supra note 181 (noting that Motley was an integral part of the legal team that argued *Brown v. Board of Education*).

190. See Motley, Equal Justice, supra note 33, at 71–80.

Supreme Court established disparate impact theory,[191] and Motley cited *Griggs* in her *Gulino* decision.[192] The validation of employment tests—including those aimed at educators—long had been a means of ensuring employment opportunities for women and racial minorities.[193]

More than any other single opinion, Motley's decision in *Gulino* demonstrated how far removed she now was from her days as a civil rights lawyer and from the positions that she had advanced in that role. In the years that followed, some courts that rejected employment discrimination claims favorably cited Motley's controversial *Gulino* opinion.[194]

B. *Conclusion*

The foregoing analysis of *Blank*, *Ludtke*, *Mullarkey*, and *Gulino* demonstrates that Motley's judicial career defies simple categorization. She interpreted the law in ways that favored and in ways that disfavored alleged victims of discrimination. That is, the qualitative analysis of Motley's judicial record demonstrates impartiality—not bias.

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191. 401 U.S. 424, 436 (1971) ("What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."). On LDF's role in the disparate impact cases, see Jack Greenberg, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution 418–20, 427 (1994).

192. See Gulino v. Bd. of Educ., 236 F. Supp. 2d 314, 341 (S.D.N.Y. 2002) (calling *Griggs* the "original disparate impact case" and explaining its significance). By 1971, when the Supreme Court decided *Griggs*, Motley had joined the bench and no longer worked at LDF. See Mrs. Motley Is Chosen for a Federal Judgeship Here, supra note 63 (discussing Motley's appointment in 1966).

193. Lydia Chavez, Study Sees Bias in New York Teacher Exams, N.Y. Times (Mar. 11, 1988), http://www.nytimes.com/1988/03/11/nyregion/study-sees-bias-in-new-york-teacher-exams.html (on file with the *Columbia Law Review*).

194. See Duggan v. Local 638, Enter. Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach., Air Conditioning & Gen. Pipefitters, 419 F. Supp. 2d 484, 492 (S.D.N.Y. 2005) (holding that union members who brought a race discrimination claim under Title VII failed to demonstrate disparate impact or disparate treatment and citing stringent requirements in Motley's opinion to support its proposition that plaintiffs' statistical analysis did not adequately demonstrate disparate treatment of black union members); Michael Delikat, Orrick, Herrington & Sutcliffe LLP, Evidence Issues and Jury Instructions in Employment Cases: Procedure, Evidence & Jurisdiction in EEOC Lawsuits 18 (2006) (on file with the *Columbia Law Review*) (citing Motley's *Gulino* opinion to support the proposition that there is no consensus among courts as to whether there is "a distinction between 'pattern-or-practice' cases and systemic continuing violations ('policy or practice') cases" for the purposes of Title VII claims); see also Ricci v. DeStefano, 530 F.3d 88, 90 n.1 (2d Cir. 2008) (Parker, J., concurring) (citing *Gulino* in support of the decision to deny en banc rehearing of a decision rejecting an employment discrimination claim), rev'd, 557 U.S. 557 (2009) In *Ricci*, the Second Circuit affirmed the district court's ruling that an employer's use of a test with racially disparate impact did not constitute intentional discrimination against white candidates. See Ricci v. DeStefano, 554 F. Supp. 2d 142, 143 (D. Conn. 2006), aff'd, 530 F.3d 88, rev'd, 557 U.S. 557.

IV. MOTLEY BY THE NUMBERS

To supplement and broaden the analysis, I also conducted an empirical analysis of Motley's decisions. The empirical research followed the framework and methods of interdisciplinary scholarship on judicial behavior.

A. *Empirical Research on How Women and Minority Judges Affect Case Outcomes*

In recent years, scholars have applied empirical methods associated with the field of political science to study judicial behavior. These scholars collect and code cases to ascertain whether judges' gender and race correlate with judicial outcomes, generally or with respect to certain subject matters. These scholars are particularly interested in outcomes in the categories of cases that pertain to highly politically salient and controversial subject matters and that are therefore most likely to reveal a judge's ideological orientation—namely, criminal law, discrimination, and individual-liberties cases.

This scholarship tests arguments for judicial diversity based on the supposed distinctive viewpoints and experiences of women judges and judges of color. If, as some argue, these judges add unique perspectives to legal debates,[195] then one would expect these judges to issue or to inspire outcomes consistent with the interests of women and minority communities or "substantive representation."[196] Women judges presumably would be more likely than male judges to favor females in cases alleging sexual harassment or sex discrimination and in cases involving reproductive rights, for example.[197] Similarly, black judges would be more likely to favor blacks who allege discrimination in the workplace or in the criminal justice system and in cases involving race-based affirmative action.[198]

The scholarship concludes that the demographic backgrounds of judges can and sometimes do produce distinctive substantive outcomes in cases. But the influence is limited and occurs only with respect to certain demographic characteristics.

Studies have not found a significant difference in the voting behavior of white and nonwhite judges.[199] For example, black district

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195. See supra notes 6–10 and accompanying text.

196. Jennifer A. Segal, Representative Decision Making on the Federal Bench: Clinton's District Court Appointees, 53 Pol. Res. Q. 137, 138 (2000) [hereinafter Segal, Representative Decision Making].

197. Id. at 140.

198. Id.

199. Theresa M. Beiner, What Will Diversity on the Bench Mean for Justice?, 6 Mich. J. Gender & L. 113, 137 (1999); Sean Farhang & Gregory Wawro, Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making, 20 J.L. Econ. & Org. 299, 326 (2004); Massie et al., supra note 6, at 10–11.

court judges do not decide cases differently than white judges and do not support "black issues" more often than white colleagues.[200] Nor does the presence of black judges on appellate panels lead white judges to issue decisions more favorable to blacks.[201] Moreover, black district court judges do not rule in favor of criminal defendants more often than white colleagues.[202] One study found a racial impact in criminal cases, but not in the expected direction. Black judges imposed *harsher* criminal sentences than others.[203]

Gender is a more relevant category of analysis, according to the research. Several studies show that in certain subject areas, the gender of jurists does affect judicial outcomes.[204] As compared to male judges, female judges are more supportive of "women's issues,"[205] particularly in cases alleging sex-based discrimination.[206]

Partisan preferences—not demographic characteristics—are the best predictor of judicial outcomes. Numerous studies show that political ideology, using the party of the appointing President as a proxy, best explains (or predicts) judicial outcomes.[207]

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200. Segal, Representative Decision Making, supra note 196, at 144.

201. Massie et al., supra note 6, at 11.

202. See Thomas G. Walker & Deborah J. Barrow, The Diversification of the Federal Bench: Policy and Process Ramifications, 47 J. Pol. 596, 606–07 (1985).

203. See Steffensmeier & Britt, supra note 11, at 761–62 (finding that black judges were more likely to be punitive in sentencing decisions, suggesting a potential correlation between "tokenism" and greater draconian tendencies, and that the differences between outcomes by black and white judges were largely similar).

204. See Farhang & Wawro, supra note 199, at 300, 304 (finding that the presence of a woman on a panel is a strong predictor that the outcome in a discrimination case will be in favor of the plaintiffs); Erin B. Kaheny, Susan Brodie Haire & Sara C. Benesh, Change over Tenure: Voting, Variance, and Decision Making on the U.S. Courts of Appeals, 52 Am. J. Pol. Sci. 490, 493 (2008) (finding a gender effect in sex discrimination cases); Elaine Martin, Men and Women on the Bench: Vive la Difference?, 73 Judicature 204, 208 (1990) (arguing that women judges will be more receptive to gender-coded cases, such as Title VII cases, given their experiences overcoming sex discrimination and balancing their parental and career roles); Jennifer L. Peresie, Note, Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts, 114 Yale L.J. 1759, 1761–62 (2005) (presenting data analysis and finding that plaintiffs in cases involving claimants alleging sexual harassment or sex discrimination were twice as likely to prevail when a female judge was on the bench).

205. Segal, Representative Decision Making, supra note 196, at 144–46; Christina L. Boyd, Lee Epstein & Andrew D. Martin, Untangling the Causal Effects of Sex on Judging 27–30 (July 19, 2007) (unpublished manuscript), http://ssrn.com/abstract=1001748 (on file with the *Columbia Law Review*).

206. Beiner, supra note 199, at 142; Peresie, supra note 204, at 1761; Boyd, Epstein & Martin, supra note 205, at 1, 27.

207. See Cass R. Sunstein et al., Are Judges Political?: An Empirical Analysis of the Federal Judiciary, at vii, 6, 8–9, 11 (2006) (discussing ideological and panel effects on courts of appeals in areas such as abortion, discrimination, gay rights, affirmative action, and campaign finance); Segal, Representative Decision Making, supra note 196, at 145–47.

B. *Empirical Research on Motley's Judicial Outcomes*

The empirical scholarship reaches conclusions that are invaluable benchmarks for this Essay's examination of identity and judging through the lens of Motley's career on the bench. Following the frameworks established in the political science scholarship, I compiled and analyzed a data set composed of over one thousand of Motley's decisions; I collected and analyzed the data in a further attempt to discern whether her sex and race, which many take as proxies for a liberal ideological orientation, appeared to affect her case outcomes. The large data set also helps to test whether Motley's decisions in the high-profile cases described in Part II, which demonstrate broad-mindedness rather than bias, are representative of her overall judicial record.

The data set consisted of 1,472 of Motley's decisions and included published and unpublished opinions. The broad data set filled out the picture of Motley's career furnished in the qualitative study of her cases, described above.[208]

The analysis relied on existing rubrics. It focused on categories of cases identified in other studies examining the relationship between ideology ("liberal" and "conservative") and decisionmaking by judges.[209] Specifically, I, along with a team that included a statistician and several research assistants, examined claims involving racial discrimination (e.g., Title VII), sex discrimination (e.g., Title VII, Title IX), other types of status-based discrimination (e.g., ADA, ADEA), constitutional issues (e.g., First Amendment claims, § 1983 claims, due process claims), and issues related to criminal proceedings (e.g., habeas corpus, *Bivens* claims, motions to suppress).[210] Two hundred sixty-two cases fell into the relevant

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208. Inclusion of unpublished as well as published opinions in the sample prevents selection bias. See Peter Siegelman & John J. Donohue III, Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases, 24 Law & Soc'y Rev. 1133, 1133–37 (1990) (demonstrating how the understanding of employment discrimination law "can at times dramatically alter" when unpublished cases are also taken into account); see also Deborah Jones Merritt & James J. Brudney, Stalking Secret Law: What Predicts Publication in the United States Court of Appeals, 54 Vand. L. Rev. 71, 72–75 (2001) (examining numerous factors associated with publication of decisions and discovering substantial evidence of partisan disagreement in unpublished decisions).

209. See Sunstein et al., supra note 207, at 4 (describing a methodology that tests the relationship between judicial outcomes in the federal courts of appeals and the party of the President who appointed the judges); Paul M. Collins, Jr., Kenneth L. Manning & Robert A. Carp, Gender, Critical Mass and Judicial Decision Making, 32 Law & Pol'y 260, 260–62 (2010) (analyzing whether "behavioral differences manifest themselves in the decision-making proclivities of male and female judges" by applying critical-mass theory); Susan W. Johnson et al., The Gender Influence on US District Court Decisions: Updating the Traditional Judge Attribute Model, 29 J. Women Pol. & Pol'y 497, 501 (2008) (proposing that gender has a more "complex influence" rather than "direct influence" that other studies focus on).

210. We coded only if the judge made a decision on a given claim, such as decisions on motions for summary judgment, motions to dismiss, motions to intervene, and

claim categories. Researchers coded outcomes "liberal" in the 262 cases if the court granted a plaintiff's motion for relief, denied a defendant's motion for dismissal or summary judgment, allowed a party to intervene, or certified a class of plaintiffs. The team coded outcomes "conservative" if the court denied a plaintiff's motion for relief, granted a defendant's motion for dismissal or summary judgment, denied certification of a class, or denied a party's request to intervene. A single "liberal" disposition in a multiclaim case rendered the entire decision "liberal" for the purpose of our analysis.

The quantitative analysis of Motley's judicial record and the qualitative analysis are consistent.[211] The empirical analysis showed that Motley overwhelmingly ruled against plaintiffs in discrimination cases and against defendants in criminal law cases.[212] Motley ruled against Title VII claimants in 56% of cases; against plaintiffs alleging Fourteenth Amendment violations in 57% of cases; and against litigants seeking habeas corpus review in 83% of cases.[213] The only exceptions to the pattern of ruling against plaintiffs in these cases occurred in age discrimination cases, in which she ruled in favor of plaintiffs in 58% of cases.[214]

Given my extensive research about Motley's life and work and about the life courses of other prominent figures involved in social justice struggles, I did not find these outcomes surprising. Unlike many observers, I hypothesized that Motley would readily distinguish the roles of judge and lawyer; therefore, the positions that she took as a lawyer would not unduly influence her judging.

Factors internal and external to law surely influenced the pattern of rulings in Motley's courtroom. I explore these factors in detail in Part V. Here, I simply observe that precedent itself posed the most obvious constraint on Motley. Over the course of her career on the bench, controlling precedent became less favorable to criminal defendants and to plaintiffs in discrimination suits.[215] Motley, as a judge on the United

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certification as a class. Interlocutory issues (regarding evidence, for example) did not merit coding.

211. See infra Appendix at Figure 1.

212. See infra Appendix at Figure 1.

213. See infra Appendix at Figure 1.

214. See infra Appendix at Figure 1. In a catchall category of cases that could not be grouped with others, Motley ruled liberal 50% of the time and conservative 50% of the time. Id. The miscellaneous cases include, for example, First Amendment claims and Title IX claims.

215. See Bernice B. Donald & J. Eric Pardue, Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment, 57 N.Y.L. Sch. L. Rev. 749, 750 n.8 (2012–2013) (discussing the frequency with which courts dismiss employment discrimination claims and how evidentiary burdens placed on plaintiffs make it difficult for them to prevail in court); Suzanne B. Goldberg, Discrimination by Comparison, 120 Yale L.J. 728, 750–51 (2011) (discussing how judicial demand for comparators—identifying

States District Court for the SDNY, had to follow controlling appellate authority when it existed.

At the same time, Motley sat on one of the most liberal district courts and presided in one of the most liberal appellate circuits in the nation. This context should have moderated the effect of the increasing conservatism of courts over time (to the extent that no controlling Supreme Court precedents demanded deference).

Moreover, even under the weight of generally "conservative" precedents, district court judges retain tremendous authority as fact finders, case managers, and interpreters of law.[216] A federal trial court judge sorts facts to determine which are relevant and which are disputed; through that process, the judge greatly influences whether a case proceeds to trial or judgment.[217] Therefore, in all of the case categories described above, Motley retained tremendous authority to exercise discretion.

The overwhelming number of rulings that Motley made for defendants in cases brought by alleged victims of discrimination (or for the government in cases brought by criminal defendants) does not support the enduring assumption that she overwhelmingly favored stereotypically liberal causes. The point is strengthened when one compares Motley's outcomes in relevant categories with those of some of her colleagues.

C. *Comparison Judges*

In addition to coding Motley's decisions in politically salient categories of cases, I conducted an empirical analysis of three comparable district court judges' decisions. The research team selected the comparison judges based on shared practice background—one of the predicates for persistent concerns that Motley favored victims of discrimination or other litigants who resembled her former clients. Like Motley, two of the three selected judges, Edward Weinfeld[218] and Robert

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individuals who are similarly situated to a plaintiff but lack a protected characteristic—acts as a barrier to bringing successful discrimination claims); Kate Weisburd, Prosecutors Hide, Defendants Seek: The Erosion of *Brady* Through the Defendant Due Diligence Rule, 60 UCLA L. Rev. 138, 148–50 (2012) (discussing the erosion of the *Brady* rule and the emergence of the due-diligence rule, which burdens the defense with finding evidence it often does not have access to).

216. See D. Brock Hornby, The Business of the U.S. District Courts, *in* Judges on Judging 86, 90–92 (David M. O'Brien ed., 5th ed. 2017) (discussing the fact-finding, fact-sorting, and legal interpretation that district court judges engage in); Robert J. Pushaw, Jr., The Inherent Powers of Federal Courts and the Structural Constitution, 86 Iowa L. Rev. 735, 760–66, 773–75 (2001) (discussing pretrial management and docket-control functions of federal district court judges).

217. Hornby, supra note 216, at 90.

218. See Weinfeld, Edward, Fed. Judicial Ctr., http://www.fjc.gov/history/judges/weinfeld-edward [http://perma.cc/TN84-XR9S] (last visited Aug. 4, 2017) (indicating that Judge Weinfeld worked for a variety of federal and state organizations before joining the federal judiciary).

Carter,[219] spent significant time practicing law in the public sector, whether in government or for a nonprofit organization. To the extent that one gives credence to the idea of practice-induced judicial bias, these judges would have been subject to it. The third judge, June Green,[220] was a pioneering female lawyer and jurist; appointed to the federal district court by President Johnson, Green, like Motley, would have experienced gender-based discrimination in the workplace. All three judges presided on courts perceived as liberal. Weinfeld and Carter sat on the same bench as Motley;[221] Green presided on the district court in the District of Columbia.[222] Yet, the three differed from Motley in terms of demographic traits thought to influence judicial outcomes generally and Motley's outcomes, in particular. A white woman, Green differed from Motley in terms of race but shared her sex. A black man, Carter differed from Motley in terms of sex but shared her race. Weinfeld, a white man, shared neither Motley's sex nor her race. The presence of these independent variables among judges otherwise similar in important respects permitted the team to draw conclusions about whether, in fact, demographic characteristics correlated with liberal or conservative outcomes in politically salient cases.

The Appendix includes tables that recount the coding outcomes for each judge in relevant case categories.[223] The results dispel the idea that Motley, the black woman and former civil rights lawyer, was more likely than others to favor plaintiffs in discrimination matters or criminal defendants. The analysis did not support the notion that alleged victims of discrimination gained an advantage in Motley's courtroom. Consider outcomes in the Title VII cases. As noted above, Motley ruled in defendants' favor in 56% of cases.[224] By comparison, Weinfeld ruled in defendants' favor in 63% of cases,[225] and Green ruled in defendants' favor in 60% of cases.[226] Notably, Carter ruled in *plaintiffs'* favor in 54% of

219. Robert L. Carter worked alongside Motley at the NAACP for many years. See Carter, Robert Lee, Fed. Judicial Ctr., http://www.fjc.gov/history/judges/carter-robert-lee [http://perma.cc/8HK2-S3RT] (last visited Aug. 4, 2017) (indicating that Judge Carter worked at the NAACP from 1944 to 1968 before joining the federal judiciary).

220. See Green, June Lazenby, Fed. Judicial Ctr., http://www.fjc.gov/history/judges/green-june-lazenby [http://perma.cc/WVC2-USYR] (last visited Aug. 4, 2017) (indicating that President Johnson nominated Judge Green to the federal judiciary in 1968).

221. Carter, Robert Lee, supra note 219 (noting that Judge Carter served on the SDNY from 1972 until 1986); Weinfeld, Edward, supra note 218 (noting that Judge Weinfeld served on the SDNY from 1950 until 1988).

222. Green, June Lazenby, supra note 220. Because Motley was the sole woman on the SDNY, the research team looked elsewhere for a white woman comparison judge. We settled on Green, a pioneering federal judge on the federal district court in Washington, D.C.

223. See infra Appendix.

224. See infra Appendix at Figure 1.

225. See infra Appendix at Figure 3.

226. See infra Appendix at Figure 4.

cases.[227] The differences among Motley, Weinfeld, and Green are not statistically significant. To the contrary, these outcomes fit a pattern: Even in the courtrooms of "liberal" presiding judges, Title VII plaintiffs lose more often than not.[228]

D. *Conclusion*

Qualitative and quantitative analysis demonstrate that Motley embraced a pragmatic conception of judging. Identity did not drive her rulings, and she did not follow an ideologically oriented view of the judicial role.

Motley issued decisions that advanced the antidiscrimination priorities of the civil rights bar in a relatively few, high-profile cases. Until now, these cases, along with her identity and practice background, have played an outsized role in shaping Motley's judicial reputation.

V. ON IDENTITY AND JUDGING

The reality of Motley's record will surprise some observers and disappoint others, all of whom supposed that Motley, as an African American, a woman, and a former civil rights lawyer, would be especially sympathetic to victims of race and sex discrimination and issue decisions in their favor.

How does Motley's judicial career—a record that belies the assumption that she was especially likely to decide in favor of alleged victims of discrimination—relate to this Essay's subject on identity and judging? This Part answers that question by observing that many commentators who counted on Motley's background—her racial or gender identity or her background as a civil rights lawyer—to translate into particular case outcomes hold one-dimensional and inaccurate conceptions of both identity and the judicial process.

This Part seeks to shed light on the complexities of both identity and judging by discussing a variety of factors that can influence judicial behavior and the expression of identity. Some of these factors pertain to the legal process itself; others relate to factors external to the process.

A. *Factors Internal to Law and Courts*

1. *Doctrine and Stare Decisis.* — Motley's judicial record must be understood, first and foremost, within the context of the particular court on which she served—the federal district court. In this judicial role, Motley encountered constraints but also wielded significant discretion.

Federal district court judges serve vital and distinct functions in the judicial system. Managers of critically important yet inferior tribunals,

227. See infra Appendix at Figure 2.

228. See supra notes 195–207 and accompanying text.

district court judges must reconcile a commitment to the rule of law and stare decisis—which encapsulate the profession's commitment to predictability, stability, and efficiency in the law[229]—with the obligation to find and interpret facts in the context of novel scenarios.[230] Because the district courts are the first courts to review many issues with respect to which appellate rules are undeveloped or unclear, these courts are the workhorses of the federal judiciary.[231]

Nevertheless, precedent powerfully constrains the federal trial courts.[232] In cases in which there is law of the circuit or of the U.S. Supreme Court, there is no question that a district court must defer to the higher tribunal. In areas of great legal controversy, including subjects such as civil rights and discrimination, district courts may initially develop the law but eventually must apply the law as interpreted by the higher courts. If district court judges seek to issue innovative decisions, they must do so by finding bases upon which to persuasively distinguish the controlling authority.[233]

Hence, even if Motley or any other district judge had an inclination to favor particular litigants, doing so would not be as easy as some evidently assume.

2. *Appellate Review and the Possibility of Reversal.* — Appellate review makes the district judge's job of reconciling facts and law all the more challenging. Because district court judges can and may be reversed on appeal, they labor under strong incentives to apply precedent correctly

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229. See Hohn v. United States, 524 U.S. 236, 251–53 (1998) (describing values served by stare decisis). For a scholarly discussion of the concept, see generally Randy J. Kozel, Stare Decisis as Judicial Doctrine, 67 Wash. & Lee L. Rev. 411 (2010) (discussing the application of stare decisis in cases before the Supreme Court); Joseph W. Mead, Stare Decisis in the Inferior Courts of the United States, 12 Nev. L.J. 787, 790, 800–04 (2012) (distinguishing vertical from horizontal stare decisis and arguing that practices within district courts vary). To be sure, scholars, including legal realists and empiricists, debate the extent to which doctrine actually binds appellate courts, particularly the U.S. Supreme Court, in controversial and dynamic areas of law. See, e.g., Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 724 (1988) (evaluating "whether stare decisis can provide an acceptable ground for preserving the existing constitutional edifice without simultaneously licensing further departures from original understanding"). And courts sometimes do not follow precedent that is deemed wrong or outmoded. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55, 861 (1992) (explaining circumstances in which the Supreme Court may choose not to follow established precedent).

230. See Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817–18, 819 n.8, 820–21 (1994) ("Judges may also try to escape the fetters of hierarchical precedent by stretching to 'find' the facts so as to reach the desired result while virtually insulating themselves from reversal.").

231. See id. at 851 (noting that "even stable precedents cannot answer *all* legal questions" and so there is not always "absolute predictability").

232. See id. at 819 (explaining that "lower court judges more often nullify the doctrine through less visible subterfuge").

233. Id.

and faithfully.[234] Trial judges hope to avoid errors in order to build and maintain reputations as good jurists and to increase the possibility of promotion.[235] High reversal rates are fatal to a district judge's reputation and promotion prospects. [236]

Motley, like other district judges, undertook her work in the shadow of appellate review and the incentives that it creates.

3. *Motley and Judicial Constraints*. — Laboring under the same professional norms as other judges, Motley sought to apply and interpret doctrine accurately. The possibility of reversal enforced accountability, but it did not cripple Motley.[237] When the situation demanded it, she reached innovative decisions that pushed the law into new frontiers. Her decisions in *Blank* and *Ludtke* fell into this category. So did several other opinions that favored plaintiffs in employment discrimination, civil rights, and civil liberties actions.[238] Most notably, in *Fisher v. Vassar College*, Motley found "sex-plus" liability under Title VII on grounds of marital status when a female college professor alleged discrimination.[239] In *Evans v. Connecticut*, Motley ruled in favor of a black state trooper in a Title VII racial discrimination case.[240] And in *Olivieri v. Ward*, Motley permanently enjoined the New York City Police Department from preventing gay Roman Catholics from demonstrating during the Gay Pride Parade.[241]

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234. For scholarship on judicial aversion to reversal, see Richard S. Higgins & Paul H. Rubin, Judicial Discretion, 9 J. Legal Stud. 129, 137 (1980) (evaluating whether the possibility of reversal acts as a constraint on judges and how it affects judges' promotions).

235. See Epstein et al., supra note 25, at 226 (predicting a relationship between reversal aversion and the pursuit of a good reputation).

236. See id. at 49, 103 (discussing reversal aversion among district court judges); Mitu Gulati & Veronica Sanchez, Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks, 87 Iowa L. Rev. 1141, 1143 (2002) (discussing the process by which superstar reputations of well-known and often-cited judges such as Henry Friendly, Learned Hand, Richard Posner, and Frank Easterbrook are built); see also Michael E. Solimine, Judicial Stratification and the Reputations of the United States Courts of Appeals, 32 Fla. St. U. L. Rev. 1331, 1332 (2005) (discussing and comparing the reputations of the thirteen courts of appeals over time).

237. See Motley, Equal Justice, supra note 33, at 224–25 (discussing resistance to Motley's appointment to the Second Circuit Court of Appeals despite a history of affirmed cases at the U.S. Supreme Court).

238. See, e.g., Danna v. N.Y. Tel. Co., 752 F. Supp. 594, 613 (S.D.N.Y. 1990) (finding a hostile work environment to constitute sexual harassment).

239. 852 F. Supp. 1193, 1229 (S.D.N.Y. 1994) (finding the college liable for sex-plus discrimination in a case in which a female professor alleged discrimination on the basis of marital status, pay, and age), rev'd, 114 F.3d 1347 (2d Cir. 1997).

240. 935 F. Supp. 145, 162 (D. Conn. 1996) (Motley, J., sitting by designation) (finding that the constructive discharge of a black trooper was motivated by race), aff'd, 24 F. App'x 35 (2d Cir. 2001).

241. 637 F. Supp. 851, 878 (S.D.N.Y.) (finding the government's interest in maintaining peace insufficient to prevent the demonstration), aff'd in part, rev'd in part on other grounds, 801 F.2d 602, 608 (2d Cir. 1986).

The Second Circuit reversed Motley in *Fisher* and other such cases, as she well knew it might.[242]

Motley's keen awareness that a pro-plaintiff ruling in discrimination or civil rights cases might lead to reversal by the Second Circuit did not merely reflect conventional legal wisdom. Race, gender, and institutional history, she believed, made some colleagues charged with reviewing her decisions less receptive to her. Despite Motley's sterling legal career, she encountered opposition when nominated to the bench—not only from the bar but also from prospective judicial colleagues.[243] Judge Edward Lumbard, the chief judge of the Second Circuit until 1971,[244] had "led the opposition to [Motley's] appointment" to the bench.[245] "[J]ust the mention of my name caused Lumbard to tremble with anger," Motley claimed in her autobiography.[246] The "resentment and opposition"[247] to Motley found expression in numerous slights by her colleagues, some of whom just could not imagine a woman, and a black woman at that, presiding in court. Her pioneering status and the animus it generated left Motley vulnerable to unusual scrutiny, including at the court of appeals.[248] The animus even gave rise to the false notion that Motley had a "high reversal rate."[249]

Motley's sense of how race and gender affected her experience on the court is particularly notable in light of a recent study that lends credence to the perception that appellate review can be fraught with bias. The study demonstrated that courts of appeals overturn the decisions of black district court judges at significantly higher rates than decisions by white judges.[250] If the research is accurate, it speaks to the disadvantageous dynamics that Motley navigated as the nation's first black

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242. *Fisher*, 114 F.3d at 1347. For insightful commentary on the Second Circuit's decision in *Fisher*, see generally David N. Rosen & Jonathan M. Freiman, Remodeling McDonnell Douglas: *Fisher v. Vassar College* and the Structure of Employment Discrimination, 17 Quinnipiac L. Rev. 725 (1998).

243. Motley, Equal Justice, supra note 33, at 212–13, 222.

244. Nick Ravo, J. Edward Lumbard, Jr., 97, Judge and Prosecutor, Is Dead, N.Y. Times (June 7, 1999), http://www.nytimes.com/1999/06/07/nyregion/j-edward-lumbard-jr-97-judge-and-prosecutor-is-dead.html (on file with the *Columbia Law Review*).

245. Motley, Equal Justice, supra note 33, at 222.

246. Id.

247. Id.

248. See Raymond J. Lohier, Jr., On Judge Motley and the Second Circuit, 117 Colum. L. Rev. 1803, 1812–21 (2017); Telephone Interview with José Cabranes, Judge, U.S. Court of Appeals for the Second Circuit (June 3, 2016) (on file with the *Columbia Law Review*); Telephone Interview with Kimba Wood, Judge, S. Dist. N.Y. (Sept. 14, 2016) (on file with the *Columbia Law Review*); Telephone Interview with Laura Taylor Swain, Judge, S. Dist. N.Y. (July 3, 2014) (on file with the *Columbia Law Review*); see also Motley, Equal Justice, supra note 33, at 222–23.

249. Motley, Equal Justice, supra note 33, at 225.

250. Sen, Is Justice Really Blind?, supra note 27, at S188 (finding a "significant and robust" gap in the reversal rates of ten percentage points, even after controlling for proxies for judicial quality).

woman judge. Motley's willingness to push the law in some cases, but not in others, must be understood in the context of these challenges.

4. *Motley and the Judicial Virtues.* — Over the course of her judicial career, Motley took pains to demonstrate classic judicial virtues such as fairness and competence.[251] That is, she performed the judicial role in keeping with the conception of the judge as neutral arbiter of apolitical law.[252] Motley reached outcomes not because of an inclination to favor one side or the other but out of a concern for fairness for all litigants. Motley conducted herself with earnestness and conviction. Her decisions for or against Title VII plaintiffs, criminal defendants, or others genuinely reflected her best assessment of what the law demanded. As Judge Miriam Cedarbaum, Motley's longtime judicial colleague, explained: A "very honest person" and "stern judge," Motley "listened to the evidence" and decided cases as she saw them—without fear or favoritism.[253]

B. *Factors External to Law*

The factors noted above—internal to the law, the courts, and institutional history and dynamics—did not alone influence Motley's conception of the judicial role. A host of factors external to the bench shaped her social experience and political commitments. The discussion below highlights one factor particularly salient to Motley's experience: the concept of identity performance.

1. *Identity Performance.* — W.E.B. DuBois famously coined the term "double-consciousness" to describe the unique social experiences of black Americans.[254] The term referred to African Americans' "two-ness," the experience of being "an American, a Negro . . . two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder."[255] Decades later, in a play on this metaphor, scholars acknowledged that gender and other aspects of identity deepen the sense of "two-ness." They coined terms such as "multiple consciousness" and "intersectionality"[256] to capture the unique experiences and complex

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251. On judicial virtues, see, e.g., Lawrence B. Solum, The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection, 61 S. Cal. L. Rev. 1735, 1740 (1988) (citing intelligence, integrity, and wisdom as judicial virtues). References to fairness and competence in this Essay are analogous to Solum's intelligence and integrity rubrics.

252. See generally G. Edward White, The American Judicial Tradition: Profiles of Leading American Judges, at viii (3d ed. 2007) ("[F]rom Marshall through Rehnquist, American Justices have been expected to demonstrate that their decisions, despite often having major political consequences, are faithful to law as opposed to partisan ideology.").

253. Telephone Interview with Miriam Cedarbaum, Former Judge, S. Dist. N.Y. (June 18, 2014) (on file with the *Columbia Law Review*).

254. W.E.B DuBois, The Souls of Black Folk 11 (Henry Louis Gates, Jr. & Terri Hume Oliver eds., W.W. Norton & Co. 1999) (1903).

255. Id.

256. See, e.g., Patricia Hill Collins & Sirma Bilge, Intersectionality 1 (2016); Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241, 1244–45 (1991).

personhood of women of color and other subjects frequently sidelined in discussions of human existence. Still other scholars added the idea of identity "performance" to the lexicon.[257] This term acknowledged that identity is relational; subjects experience and express personhood in the context of others.[258]

While the lexicon may be unfamiliar, the concept of identity performance is deeply rooted in the African American experience. Blacks (and other people of color) have long managed their identities in racially mixed settings.[259] The skill of identity performance is especially important in racially oppressive contexts or in situations in which minorities are outnumbered. In order to ensure success in white-dominant professional settings, blacks must manage signals about their identities through sartorial choices, hair styles, mannerisms, demeanor, and a host of traits.[260] Black professionals must earn the acceptance and admiration that automatically are conferred upon others by virtue of their high-status positions.

Even those who reach professional pinnacles struggle to belong. Judges are a case in point. Racial-minority judges encounter barriers to entry such as ABA ratings and resistance during the nomination and confirmation processes that can be colored by identity.[261] Once they are members of the judiciary, minority judges face shows of disrespect, disproportionately high reversal rates, and motions for recusal predicated on the assumption that their backgrounds make them biased.[262]

2. *Motley's Identity Performance.* — These struggles beset Motley throughout her career as a lawyer and persisted once she ascended to the bench. As a pioneering black woman lawyer, as well as the first African American woman appointed to the federal judiciary, Motley embodied change and difference. Keenly aware of the scrutiny that accompanied her unique background, Motley consciously managed the multiple aspects of her identity. She performed them in ways that helped her undermine harmful stereotypes and gain acceptance. Motley's identity performance influenced how she conceived the judicial role and how she behaved as a judge.

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257. See, e.g., Erving Goffman, The Presentation of Self in Everyday Life 17 (1973).

258. See id.

259. See Claude M. Steele, Whistling Vivaldi: How Stereotypes Affect Us and What We Can Do 3–5 (2011).

260. See Kenji Yoshino, Covering: The Hidden Assault on Our Civil Rights, at ix–x (2006) (discussing disadvantages to minorities when they do not suppress disfavored elements of identity); Devon W. Carbado & Mitu Gulati, Working Identity, 85 Cornell L. Rev. 1259, 1262–63 (2000) (describing the extra "identity work" that minorities must engage in to succeed at work, including in terms of appearance, demeanor, language, and other social signifiers mediated by race).

261. See supra notes 31–73 and accompanying text.

262. See supra notes 89–115 and accompanying text.

Motley's identity-management strategy encompassed four major features: formality, social reserve, sartorial conservatism, and intellectual preparedness.[263] The first three aspects of Motley's strategy should be understood within the context of "respectability" politics—the pursuit of equal treatment by conforming to white middle-class norms of appearance, speech, and behavior.[264] As a child, Motley learned to embrace respectable attributes and mannerisms; as an adult, she performed and deployed respectability as a shield against discrimination.[265] Dignified and well dressed, Motley insisted on social formalities and proper etiquette. She wielded all of these attributes and behaviors as tools to demand respect, inside and outside of the courtroom, on and off of the bench.

For purposes of this discussion of her judicial career, the final element of Motley's identity management strategy—preparedness—is most vital. "You win," Motley emphasized after one of her landmark courtroom victories, through "preparation[] and experience."[266] As both a courtroom lawyer and a judge, Motley worked very hard and displayed extraordinary knowledge of the job at hand; always, she was well prepared.[267] She engaged in long hours of study to acquire the expertise necessary to complete the professional task at hand.[268] Through her preparedness, Motley aimed to prove to observers that she belonged, whether at the counsel's table or on the bench.[269]

Motley's main identity-management strategy—her showy preparedness—reinforced certain judicial virtues. The well-prepared and always-ready Motley demonstrated her intelligence and qualifications for her coveted position. Motley gave no one grounds based in fact (as opposed to stereotype) to question whether she could handle the job. By mastering relevant precedents, procedures, and practices, Motley forced observers to bear witness to her professional competence. Innovative when the situation absolutely demanded it, the judge took pains to write opinions that hewed closely to the law as it was, as opposed to the law as it might be. After seeing proof of Motley's intelligence and impartiality, perhaps observers would credit it instead of assuming that she made

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263. For a discussion of Motley's identity during her time as a lawyer, see Brown-Nagin, Civil Rights Queen, supra note 28 (manuscript ch. 5, at 5–9).

264. See, e.g., Evelyn Brooks Higginbotham, African-American Women's History and the Metalanguage of Race, 17 Signs 251, 271–72 (1992) (defining respectability politics as the pursuit of belonging and of civil rights while also embracing white middle-class notions of proper behavior, particularly for women).

265. See id.

266. Peggy Lamson, Few Are Chosen: American Women in Political Life Today 146 (1968) (internal quotation marks omitted).

267. See Brown-Nagin, Civil Rights Queen, supra note 28 (manuscript ch. 6, at 14) (describing Motley's extensive preparations for trial).

268. Id. (manuscript ch. 8, at 26).

269. Id. ch. 8, at 26.

decisions based on intuitions or biases. Through her identity performance, that is, Motley sought legitimacy.

CONCLUSION

Ideology did not overwhelm legal precedents in Motley's courtroom. She deferred to the constraints imposed by statutes and case law, as well as by her conception of the judicial role and her own sensibilities. A judicial pioneer, she tended not to be a judicial entrepreneur.

If Motley's conception of the judicial role reassured some critics, it likely disappointed some of her fans. After all, for every skeptic who feared that Motley's days as a civil rights lawyer would unduly shape her judicial career, another hoped that Motley's past advocacy for civil and human rights would correlate with outcomes that advanced these imperatives. These observers expected that judges from communities historically excluded from the judiciary would serve as substantive representatives of the interests of excluded communities.[270] However, Motley distinguished the roles as lawyer and judge, and she did not view herself as a representative of her race or her gender.

Nevertheless, Motley did endorse greater representation of women and racial minorities in the judiciary. Her argument for diversity on the bench did not turn on the view that women and people of color have a different voice or would reach different or better decisions than white men.[271] Motley advocated judicial diversity because, she believed, inclusion reinforced democracy. By affirming openness and fairness, the mere presence of women and racial-minority judges built confidence in government.[272] Motley touted symbolism, not substance.

Ultimately, Motley's judicial career reveals a paradox of opportunity. This remarkable and trailblazing historic figure embodied change for and by African Americans and women. Yet her record of judicial decisionmaking confounds the expectation that diversity of opinion and background necessarily results in a substantive difference on the bench. But Motley's identity shaped her judicial career notwithstanding the pains she took to separate her work on the bench from her career as a civil rights lawyer and her personal characteristics. Regardless of how Motley viewed herself, how she behaved, and how she decided cases, many observers invariably regarded Motley through the prisms of her race, her gender, and her background.

* * *

In the Symposium essays that follow, scholars examine several additional dimensions of Motley's unique life and remarkable legacy.

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270. See, e.g., Ifill, Judging the Judges, supra note 11, at 97–98.

271. Linn Washington, Black Judges on Justice: Perspectives from the Bench 132 (1994).

272. Id.

Three judges honor Motley with contributions that place her life in the law and on the court in historical context. The Honorable Denny Chin and Kathy Hirata Chin recount Motley's role in one of the most pivotal cases in twentieth-century American legal history: the desegregation of the University of Mississippi. The Honorable George Daniels considers other landmark cases that Motley litigated during her illustrious career at LDF. The Honorable Raymond Lohier examines Motley's interactions with the United States Court of Appeals for the Second Circuit, first as a lawyer and then as a district court judge subject to appellate review.

Inequality in elementary and secondary education animated many cases that Motley and LDF litigated—most notably, *Brown v. Board of Education*. Several authors assess the unfinished struggle for equal opportunity in education. Professor Elise Boddie critically examines the enduring problem of school segregation and its treatment in equal protection doctrine. Professor Michael Heise analyzes two landmark federal education statutes and assesses how ongoing debates over the proper role of the federal and state governments shaped the design and content of each law. Professor William Koski considers the evolution of school-funding-equity litigation—in particular, the turn to more narrowly drawn and judicially manageable claims. Professor Eloise Pasachoff examines the role of evidence in education policy and the extent to which it constrains or inspires innovation.

While applauding the broad systemic changes wrought by the public law litigation pioneered by Motley and LDF, two authors tout new models of law and social change. Professor Olatunde Johnson theorizes that regulatory regimes offer great promise as levers of change for underserved communities. Professor James Liebman argues that the old and once-successful litigation-based model of social change must be replaced by a newer one premised on a constitutional duty to responsibly administer public schools.

APPENDIX

FIGURE 1

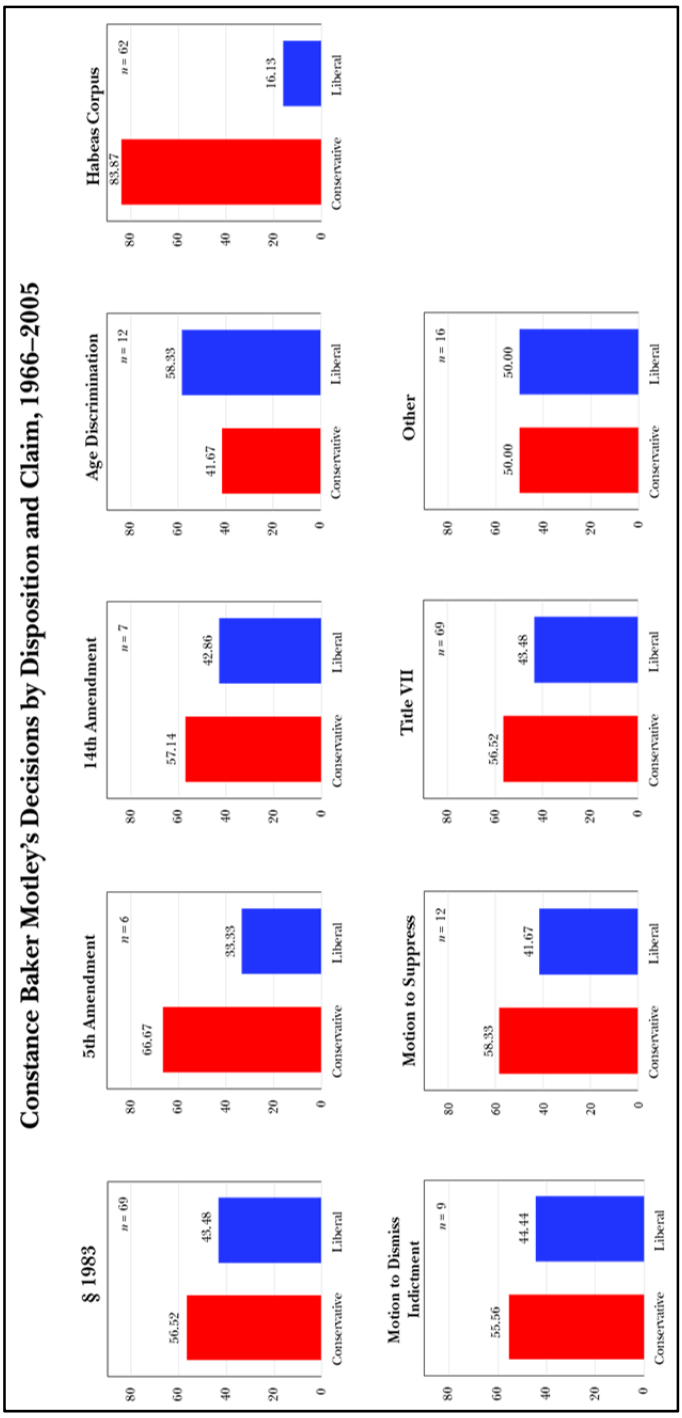


FIGURE 2

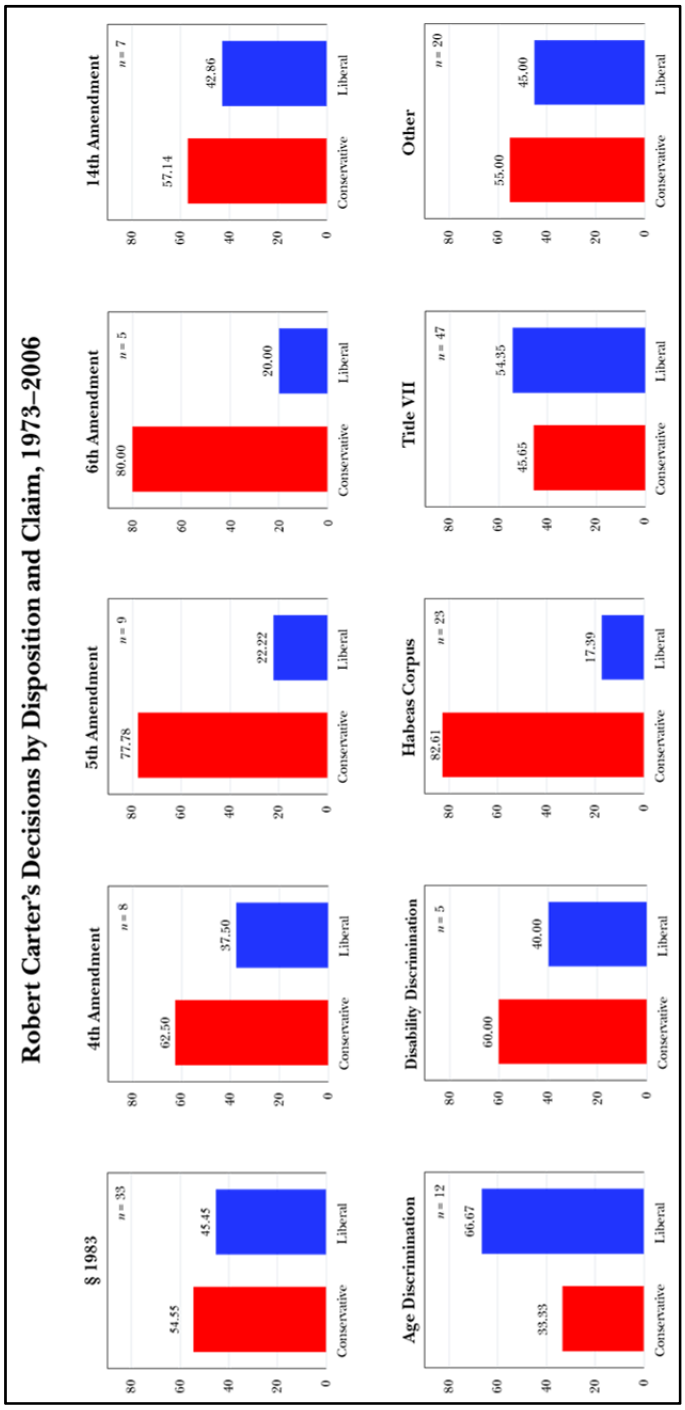
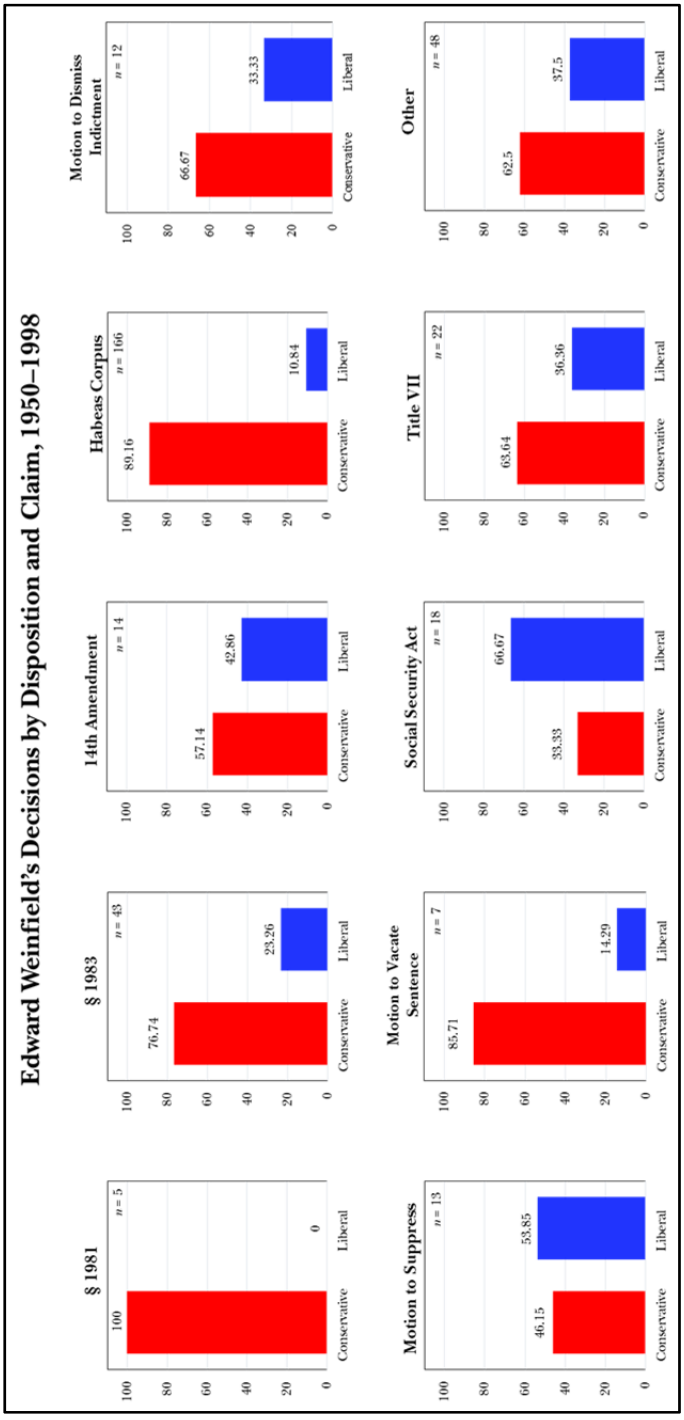

Robert Carter's Decisions by Disposition and Claim, 1973–2006
§ 1983
n = 33
54.55
45.45
4th Amendment
n = 8
62.50
37.50
5th Amendment
n = 9
77.78
22.22
6th Amendment
n = 5
80.00
20.00
14th Amendment
n = 7
57.14
42.86
Age Discrimination
n = 12
33.33
66.67
Disability Discrimination
n = 5
60.00
40.00
Habeas Corpus
n = 23
82.61
17.39
Title VII
n = 47
45.65
54.35
Other
n = 20
55.00
45.00
80
60
40
20
0
Conservative
Liberal

FIGURE 3


Edward Weinfield's Decisions by Disposition and Claim, 1950–1998
§ 1981
n = 5
100
0
Conservative
Liberal
§ 1983
n = 43
76.74
23.26
Conservative
Liberal
14th Amendment
n = 14
57.14
42.86
Conservative
Liberal
Habeas Corpus
n = 166
89.16
10.84
Conservative
Liberal
Motion to Dismiss Indictment
n = 12
66.67
33.33
Conservative
Liberal
Motion to Suppress
n = 13
46.15
53.85
Conservative
Liberal
Motion to Vacate Sentence
n = 7
85.71
14.29
Conservative
Liberal
Social Security Act
n = 18
33.33
66.67
Conservative
Liberal
Title VII
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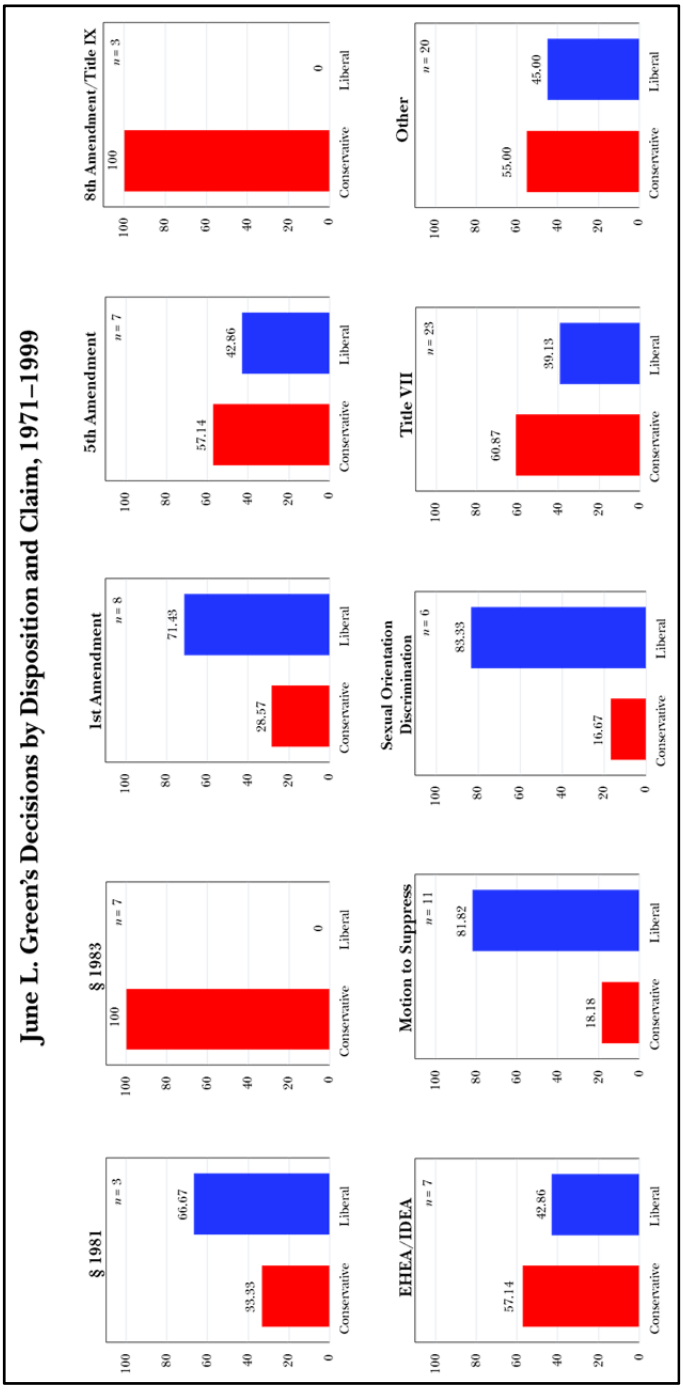
63.64
36.36
Conservative
Liberal
Other
n = 48
62.5
37.5
Conservative
Liberal

FIGURE 4


June L. Green's Decisions by Disposition and Claim, 1971–1999
§ 1981
n = 3
66.67
33.33
§ 1983
n = 7
100
0
1st Amendment
n = 8
71.43
28.57
5th Amendment
n = 7
57.14
42.86
8th Amendment/Title IX
n = 3
100
0
EHEA/IDEA
n = 7
57.14
42.86
Motion to Suppress
n = 11
81.82
18.18
Sexual Orientation Discrimination
n = 6
83.33
16.67
Title VII
n = 23
60.87
39.13
Other
n = 29
55.00
45.00
100
80
60
40
20
0
Conservative
Liberal