

Michigan Law Review

Volume 121 | Issue 6

2023

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Recommended Citation

Melissa Murray, *Mothers in Law*, 121 MICH. L. REV. 909 (2023).

Available at: <https://repository.law.umich.edu/mlr/vol121/iss6/4>

<https://doi.org/10.36644/mlr.121.6.mothers>

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MOTHERS IN LAW

Melissa Murray*

CIVIL RIGHTS QUEEN: CONSTANCE BAKER MOTLEY AND THE STRUGGLE FOR EQUALITY. By *Tomiko Brown-Nagin*. New York: Pantheon. 2022. Pp. 2, 497. Cloth, \$30; paper, \$19.

INTRODUCTION

On February 25, 2022, President Biden nominated Judge Ketanji Brown Jackson, from the United States Court of Appeals for the District of Columbia Circuit, to the Supreme Court.¹ From the start, many hailed Judge Jackson's nomination as history-making—if confirmed, she would be the first Black woman to sit on the high court.² As she stepped to the podium to accept the nomination, Judge Jackson made familiar gestures: she praised her husband, Patrick, “for being my rock today and every day for these past 26 years.”³ And, like Justices O'Connor, Ginsburg, and Barrett before her,⁴ she spoke of her

* Frederick I. and Grace Stokes Professor of Law, New York University School of Law. I am extremely grateful to Leah Litman, Caitlin Millat, Doug NeJaime, and Karen Tani for helpful feedback and comments. Ry Walker and Kelsey Brown (NYU Law Class of 2024) provided outstanding research assistance. Many thanks to the editors of the *Michigan Law Review* for their first-rate editorial assistance. All errors are my own.

1. *Remarks by President Biden on his Nomination of Judge Ketanji Brown Jackson to Serve as Associate Justice of the U.S. Supreme Court*, THE WHITE HOUSE (Feb. 25, 2022, 2:02 PM) [hereinafter President Biden's Nomination Remarks], <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/25/remarks-by-president-biden-on-his-nomination-of-judge-ketanji-brown-jackson-to-serve-as-associate-justice-of-the-u-s-supreme-court/> [perma.cc/8VKW-TPMN].

2. See, e.g., Amy Davidson Sorkin, *Judge Ketanji Brown Jackson's Historic Nomination to the Supreme Court*, NEW YORKER (Feb. 25, 2022), <https://www.newyorker.com/news/daily-comment/judge-ketanji-brown-jacksons-historic-nomination-to-the-supreme-court> [perma.cc/54BG-PU3R] (noting that Judge Ketanji Brown Jackson is the first Black woman to be nominated to the Supreme Court); *The Historic Nomination of Ketanji Brown Jackson to the Supreme Court*, NAACP, <https://naacp.org/resources/historic-nomination-ketanji-brown-jackson-supreme-court> [perma.cc/F4NX-3S94] (same); Katie Rogers, *Biden Picks Ketanji Brown Jackson for Supreme Court*, N.Y. TIMES (Mar. 21, 2022), <https://www.nytimes.com/2022/02/25/us/politics/ketanji-brown-jackson-supreme-court.html> [perma.cc/B54B-UBTB] (same); *What You Need to Know About the Historic Nomination of Judge Ketanji Brown Jackson to the U.S. Supreme Court*, CTR. FOR REPROD. RTS. (Feb. 25, 2022), <https://reproductiverights.org/historic-nomination-judge-ketanji-brown-jackson-us-supreme-court-what-you-need-to-know> [perma.cc/Y9B2-MRM2] (same).

3. President Biden's Nomination Remarks, *supra* note 1.

4. See *The Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*,

children, daughters Talia and Leila, assuring them that despite her elevation to the highest court in the land, “I will still be your mom.”⁵ Having issued the expected familial acknowledgements, Judge Jackson then thanked her mentors, including the federal judges for whom she had clerked and the justice whose seat she had been tapped to fill.⁶

At this point, viewers might have expected Judge Jackson to nod to another history-making member of the Supreme Court: Justice Thurgood Marshall, who in 1967 became the first African American on the high court.⁷ But Judge Jackson chose another Black jurist—one who, like Justice Marshall, had been a pathbreaking figure, but whose legacy in life and law had been somewhat neglected. As Judge Jackson explained, she “share[d] a birthday with the first Black woman ever to be appointed as a federal judge: the Honorable Constance Baker Motley.”⁸ Accepting the nomination for a position to which Motley had once aspired but had never achieved,⁹ Judge Jackson praised her predecessor for her “steadfast and courageous commitment to equal justice under law.”¹⁰

This invocation of Judge Constance Baker Motley was, for many Americans, an introduction to the trailblazing litigator, politician, and jurist. Although Motley had worked alongside Thurgood Marshall as part of the NAACP-Legal Defense Fund’s civil rights litigation team and was the first

97th Cong. 58–59 (1981) (statement of Judge Sandra Day O’Connor); Ruth Bader Ginsburg, *Supreme Court Nomination Speech – June 14, 1993*, IOWA STATE UNIV.: ARCHIVES OF WOMEN’S POL. COMM’N, <https://awpc.cattcenter.iastate.edu/2017/03/09/supreme-court-nomination-speech-june-14-1993> [perma.cc/Q7MY-CEFA]; *Remarks on the Nomination of Amy Coney Barrett to Be a United States Supreme Court Associate Justice*, U.C. SANTA BARBARA: THE AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/node/343948> [perma.cc/WE9R-MDFV].

5. President Biden’s Nomination Remarks, *supra* note 1.

6. *Id.*

7. Fred P. Graham, *Senate Confirms Marshall as the First Negro Justice*, N.Y. TIMES, Aug. 31, 1967, at 1; Roy Reed, *Marshall Named for High Court, Its First Negro: Johnson Calls Nominee ‘Best Qualified,’ and Rights Leaders are Jubilant—Southerners Silent on Confirmation*, N.Y. TIMES, June 14, 1967, at 1.

8. President Biden’s Nomination Remarks, *supra* note 1.

9. See Tomiko Brown-Nagin, Opinion, *This Black Woman Could Have Served on the Supreme Court Decades Ago. She Has Some Lessons for Ketanji Brown Jackson*, POLITICO (Feb. 25, 2022, 9:30 AM), <https://www.politico.com/news/magazine/2022/02/25/supreme-court-justice-black-woman-constance-baker-motley-ketanji-brown-jackson-00011636> [perma.cc/A7E7-6N9B] (noting that Motley “was touted for the Supreme Court as early as the 1960s”); Meg Penrose, Opinion, *Nominate the ‘Most Qualified’ Woman? Reagan Certainly Didn’t*, L.A. TIMES (Mar. 10, 2022, 3:00 AM), <https://www.latimes.com/opinion/story/2022-03-10/ketanji-brown-jackson-most-qualified-constance-baker-motley> [perma.cc/6PJF-RMJV] (arguing that political affiliation played a role in Reagan’s nomination of Sandra Day O’Connor rather than Judge Motley); *10 Women Named as Caucus Choices for Court Seats*, N.Y. TIMES, Sept. 28, 1971, at 17 (noting that the National Women’s Political Caucus suggested that Judge Motley be considered for a Supreme Court nomination).

10. President Biden’s Nomination Remarks, *supra* note 1.

Black woman appointed to the federal bench, her legacy in the law has been more muted than that of her celebrated colleague.¹¹

Until now. Fortuitously, Judge Jackson's nomination—and her invocation of Judge Motley—coincided with the publication of Tomiko Brown-Nagin's *Civil Rights Queen: Constance Baker Motley and the Struggle for Equality*,¹² a biography of Motley and her life in the law. Meticulously researched and elegantly written, *Civil Rights Queen* traces Motley's improbable rise from a working-class immigrant family in New Haven, Connecticut to professional prominence as a civil rights litigator, state senator, and federal judge.

In Brown-Nagin's deft hands, Motley's journey has all of the trappings of a modern-day Horatio Alger story—a compelling heroine blessed with intelligence and pluck upon whom serendipity smiles, allowing her to scale improbable professional and social heights. But Brown-Nagin also illuminates a less glamorous story, of how Motley managed to combine the traditional feminine roles of wife and mother with a high-flying career in the law. It is an important intervention—one that makes clear both how much and how little social expectations around motherhood impacted Motley's career trajectory, as well as how much external assistance and scaffolding was required to allow Motley to successfully combine work and family. It also reveals the degree to which our understanding of the civil rights movement—and the charismatic male leaders who fronted it—has been starved for an account of how the struggle for racial justice was built on the unpaid, and often unsung, labor of the wives and mothers of the movement.

But beyond providing a more holistic account of what it means to fight for civil rights, *Civil Rights Queen* highlights the complicated legacy of working Black mothers and the difficult choices they have always made in combining family responsibilities with professional achievement. Brown-Nagin's depiction of Motley's unorthodox choices comes at a time when so many women—and Black women, in particular—have been stripped of agency to make decisions that profoundly impact work and family life.

This Review proceeds in three parts. Part I discusses *Civil Rights Queen*, focusing on the double bind that shadowed Motley's professional life. Race and gender shaped Motley's career trajectory, and Motley's role as a civil rights litigator shaped impressions of her within the civil rights movement and, later, within the federal judiciary.

11. See *Constance Baker Motley: Judiciary's Unsung Rights Hero*, U.S. CTS. (Feb. 20, 2020), <https://www.uscourts.gov/news/2020/02/20/constance-baker-motley-judiciarys-unsung-rights-hero> [perma.cc/2A29-X2W4]; Khalilah Brown-Dean, *Constance Baker Motley Is a Civil Rights Icon. Why Don't More People Know Her Name?*, DISRUPTED, at 02:05 (Apr. 20, 2022, 12:27 PM), https://omny.fm/shows/disrupted/constance-baker-motley-is-a-civil-rights-icon-why?in_playlist=disrupted!podcast [perma.cc/NTD8-9FPS] (“Civil rights icons like Dr. Martin Luther King, Jr. and Justice Thurgood Marshall have become household names. But the work and legacy of Constance Baker Motley is still unknown to many Americans.”).

12. Tomiko Brown-Nagin is the Dean of the Radcliffe Institute for Advanced Study and a Professor of History, Harvard University. Brown-Nagin is also the Daniel P.S. Paul Professor of Constitutional Law, Harvard Law School.

Part II then focuses on Brown-Nagin's choice to foreground Motley's efforts to balance her responsibilities as a wife and mother alongside her trail-blazing legal career. In balancing work and family, Motley defied the conventional notion that a woman's universe was cabined to the domestic sphere. Still, Motley hewed to some conventions, delegating household work to other female family members and paid caregivers, rather than disrupting gender norms around family work altogether. With this in mind, Part II examines the disparate aspects of Motley's experience of motherhood. On one hand, her household arrangements reflected core aspects of Black motherhood—reliance on “other mothers” and fictive kin and the creation of a “networked family” as a means of discharging family responsibilities. But interestingly, her delegation of household work to other women reflected durable gender roles within the family. In this regard, Motley's disruption of gender norms was uneven, perhaps reflecting the prioritization of certain gender norms in the Black family and community. Recognizing the inconsistencies in Motley's experience is an important corrective to a public discourse that frets about work-family balance¹³ but rarely views working motherhood through the lens of race.

The light Brown-Nagin sheds on one experience of Black motherhood is especially welcome at a time when many legal decisionmakers have overlooked the experiences of Black mothers. Accordingly, Part III pivots to reflect more broadly on the law's treatment of motherhood—and the role of Black mothers in shaping and articulating the law. Focusing on the recent Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*,¹⁴ this Part notes the decision's impact on the reproductive landscape and on Black women. Although the Court is utterly silent as to Black women's experience of pregnancy and motherhood, Black women have been particularly affected by the changing landscape of constitutional rights. The Review briefly concludes by considering some of the themes of *Civil Rights Queen* in the context of the current Court and its engagement with motherhood and women's rights.

I. CIVIL RIGHTS QUEEN

Constance Baker Motley's role in the tortured struggle for a more perfect union has often been eclipsed by her more storied male contemporaries and

13. See, e.g., Bryce Covert, Opinion, *Less Work, More Life*, N.Y. TIMES, July 25, 2021, at SR8 (arguing that the key to a better work-life balance is decreasing work hours); Ioana Lupu & Mayra Ruiz-Castro, *Work-Life Balance Is a Cycle, Not an Achievement*, HARV. BUS. REV. (Jan. 29, 2021), <https://hbr.org/2021/01/work-life-balance-is-a-cycle-not-an-achievement> [perma.cc/GAV5-EJPH] (suggesting five steps to maintain a better work-life balance).

14. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

colleagues: leaders like Martin Luther King, Jr., Malcolm X, Thurgood Marshall, and Medgar Evers.¹⁵ In *Civil Rights Queen*, Brown-Nagin claims space for Motley within this firmament of civil rights icons. One of the most respected historians of the civil rights movement, Brown-Nagin first detailed Motley's historic career, and her important role in desegregating Atlanta's schools, in a chapter of *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement*.¹⁶ "[A]stounded by how little attention" Motley received in other accounts of the civil rights movement, Brown-Nagin vowed to correct "historical malpractice" and provide "a more accurate and complete history" (p. 11)—one that included the exploits of the woman once dubbed "the Civil Rights Queen" (p. 5).

On this front, Brown-Nagin succeeds magnificently. *Civil Rights Queen* is a meticulously researched and elegantly written account of Motley's legal career. It charts Motley's improbable rise from New Haven, Connecticut, where she grew up in the ivied shadow of Yale University; to New York University and Columbia Law School; to the NAACP-Legal Defense Fund (LDF), the Manhattan borough presidency, and a federal judgeship. Especially deserving of excavation are Motley's many legal victories as a pioneering civil rights litigator in the South. The legal challenges that propelled James Meredith, Autherine Lucy, Hamilton Holmes, and Charlayne Hunter-Gault to the front pages of national newspapers are not unknown, but Brown-Nagin brings them to life as personal histories underlaid with a sense of deep purpose and urgency. And at the center of these narratives is Motley, the master tactician, advocate, and occasional therapist who steered her charges through the rocky shoals of Southern resistance to integrating the flagship public universities that were at once bastions of white privilege and a critical toehold for professional achievement and upward mobility.

This Part details *Civil Rights Queen* but does not do so exhaustively. Instead, it highlights certain aspects of Brown-Nagin's narrative that are especially noteworthy and add to our understanding of Motley and the social and legal milieu that she inhabited. Specifically, the Sections that follow consider the impact of race *and* gender on Motley's career, Motley's reluctance to embrace mainstream feminism, and the contradictions of her status as both a disruptor and an institutionalist.

15. See Patricia Sullivan, *A Black Lawyer Who Dismantled Barriers, for Herself and Many Others*, WASH. POST (Feb. 25, 2022, 8:00 AM), <https://www.washingtonpost.com/outlook/2022/02/25/black-lawyer-who-dismantled-barriers-herself-many-others/> [perma.cc/BEG6-XEH8] (reviewing *Civil Rights Queen*).

16. TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* 307–32 (2011) (tracing how Motley directed litigation in the years after *Brown* as the Atlanta Board of Education made no attempts to desegregate their schools).

A. *The Double Bind of Race and Gender*

In documenting Motley's career, Brown-Nagin is careful to underscore the binds that influenced Motley's professional exploits—chief among them race and gender. If the prospect of a Black lawyer was noteworthy (and it was), then the fact of a Black woman lawyer was even more unorthodox. And Motley and her colleagues at the NAACP Legal Defense Fund were not above exploiting this novelty to their advantage. Recognizing that the South's predisposition toward chivalry might lead to better treatment for Black women than Black men, LDF routinely sent Motley to the Deep South to litigate cases that challenged the color line and segregation (p. 144). This intuition assumed, perhaps naively, that Southerners, who would otherwise be inclined to regard Black lawyers with derision and contempt, might instead remember their mammies and their manners and extend basic courtesies to Motley (p. 144).

But as Brown-Nagin makes clear, the insulating impact of gender was often insufficient to override the significance of race in Southern courtrooms. Though some Southerners grudgingly extended gendered courtesies to Motley, others were not so inclined. In one Mississippi case, both the judge and opposing counsel refused to address her as "Mrs. Motley," as was the professional custom (pp. 147–49).

And if gender only intermittently insulated Motley from the shocks of racism, shared racial identity was often insufficient to distance her from the sting of gender discrimination. Even at LDF, where Motley was surrounded by other Black lawyers, her gender set her apart. In a truly stunning vignette, Brown-Nagin recounts Motley's initial job interview with Thurgood Marshall, LDF's legendary Director-Counsel and, later in his career, the first African American to sit on the United States Supreme Court. Marshall, well-known as "Mr. Civil Rights," "reportedly asked [Motley] to climb a ladder next to a bookshelf" so that he might "inspect her legs and feminine form" (p. 54). Intolerable to the modern ear, Marshall's request was hardly beyond the pale in 1954, Brown-Nagin notes, a time when men's sexual aggressiveness was condoned and even encouraged in mainstream media and culture (pp. 54–55). If anyone was transgressing social and cultural norms of that time, it was Motley herself, who, in pursuing a career as a lawyer, was defying ingrained boundaries that limited the ambitions of African Americans and women alike.

The interview with Marshall would not be the only time when Motley's gender would undermine the racial solidarity and community she might have found with her LDF colleagues. Gregarious by nature, Marshall strongly influenced LDF's work culture, which was marked by long hours and a "casual, fun-loving atmosphere" (p. 66). In this "bro" culture, where legal strategizing and work could easily spill into long sessions, and where after-hours drinking and card playing were *de rigueur*, Motley's gender kept her apart from her male coworkers. Unsurprisingly, women did not participate in the weekly poker games, which were laced with "'locker room bragging' and race-inflected humor" (p. 66). As one of the few women lawyers at LDF, Motley "mostly kept her own counsel," focusing on her work and going home to her husband, Joel Motley, Jr., most evenings (p. 66).

And while her single-minded pursuit of LDF's antidiscrimination mission resulted in a string of legal victories in lower federal courts and in the Supreme Court, Motley continued to butt up against the twin specters of race and sex discrimination. In 1949, she fired off a "sharply worded letter" to Marshall complaining about the disparity between her salary and title (p. 75). Colleagues like Robert Carter (a Black man), Jack Greenberg (a White man), and Marian Perry (a White woman) all received "assistant counsel" titles within months of joining LDF (pp. 74–75). Motley, who began working at LDF while a student at Columbia Law School, still retained the "legal research assistant" title she had earned upon her graduation three years earlier (p. 74). Moreover, Motley earned just \$2,400 a year—less than Carter's \$3,000 annual salary and Greenberg's \$3,200 annual salary (p. 74).

In the end, Motley prevailed in her title and salary battles, but gender would continue to set her apart. In 1961, in a show of support for civil rights, President John F. Kennedy nominated Marshall to a seat on the United States Court of Appeals for the Second Circuit,¹⁷ which filled a void on the federal bench, "but it created another at the nation's premier civil rights firm" (p. 128). Having worked at LDF for fifteen years, Motley "viewed herself [as] a worthy successor" to Marshall (p. 128).

Marshall, however, had months earlier identified his successor (p. 129). Within days of his nomination to the bench, LDF's executive committee announced that "Jack Greenberg would succeed Marshall as the general counsel of the NAACP Legal Defense Fund" (p. 130). Motley was appointed associate counsel, effectively making her Greenberg's lieutenant.

Being passed over for the top post was a bitter pill. For both professional and symbolic reasons, the firm's Black lawyers had hoped that Marshall would select his successor from among them (p. 134). But Motley "felt slighted on an additional basis"—she believed that Marshall "refused to champion her for the post . . . because of her gender" (p. 135). Although Motley was circumspect at the time, it became apparent that Marshall, "the same man [who gave] her a big break at a time when law offices systematically excluded women[] was also responsible for the biggest setback of her career" (p. 136). Despite being known as Mr. Civil Rights, Marshall "had difficulty with the idea of a woman in a leadership role in a male world."¹⁸

B. "Not a Feminist"

Although she experienced the sting of gender discrimination, Motley was reluctant to embrace feminism. As Brown-Nagin recounts, Motley assumed the role of Manhattan borough president—and the political power and clout that accompanied it—"just as debates about women's place in American society gained renewed prominence as a social and political issue" (p. 237). She

17. See Merriman Smith, *JFK to Submit Negro Leader as U.S. Judge*, DESERT SUN, Sept. 23, 1961, at 1; *Thurgood Marshall Named to U.S. Court*, SAN ANTONIO REG., Sept. 29, 1961, at 1.

18. CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW 151 (1998).

regularly spoke to women's groups in ways that displayed nuanced understandings of women's diversity. For example, when speaking to the American Association of University Women, a group comprised predominantly of white women, she praised the "genius and glory of the American system" and insisted that equality for all should be as "self-evident as the truths in the Declaration of Independence" (p. 240). When speaking to Black women, she implicitly recognized their exclusion from those "self-evident truths" by emphasizing "the numerous roles African American women played in society, at home, and in the workplace," and "the slow but sure breakdown in discrimination in employment" (p. 240).

Still, Motley bristled at the "feminist" label. Though she frequently crossed paths with Betty Friedan (their children attended the same exclusive private school), Bella Abzug, Shirley Chisholm, and Pauli Murray, Motley "set herself apart" from these feminist icons (p. 242). As she explained to a reporter, "she had been 'too busy fighting discrimination on the basis of race *for men and women* to become a feminist'" (p. 242). Indeed, she "played up her femininity," speaking softly, embracing feminine fashions, and peppering political profiles with "stories about her home life" and family (pp. 242–43). And while Chisholm and Murray frequently called attention to the "double discrimination" that Black women encountered, Motley "downplayed sex-based discrimination," insisting that "womanhood is no obstacle in elective office" (p. 242).

As Brown-Nagin suggests, Motley's "public disdain for feminism" was likely a strategic choice—one that allowed her to blaze trails where no Black woman (and few Black men) had gone before, without alienating her constituents (p. 244). Her disavowal of feminism (and embrace of traditional femininity) also allowed her to don the mantle of middle-class respectability, something that frequently eluded Black working women.¹⁹

C. Radical Institutionalism

The double bind of race and gender obviously shaped Motley's career. But a different, yet no less vexing, dynamic would also shadow her professional life: the conflict between political radicalism and institutionalism. In 1964, Motley was elected to represent Harlem in the New York State Senate. She would later go on to serve as Manhattan borough president. In 1966, she was appointed to a judgeship on the United States District Court for the Southern

19. See J. Celeste Walley-Jean, *Debunking the Myth of the "Angry Black Woman": An Exploration of Anger in Young African American Women*, BLACK WOMEN, GENDER & FAMS., Fall 2009, at 68, 69–73 (explaining how stereotypical perceptions of Black womanhood—the Mammy, the Jezebel, and the Sapphire—have placed Black women outside of the standard for femininity and respectability); MELISSA V. HARRIS-PERRY, *SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA* 4–97 (2011) (exploring how "[B]lack women in America have . . . wrestle[d] with derogatory assumptions about their character and identity," such as stereotypes concerning promiscuity and anger); Paisley Harris, *Gatekeeping and Remaking: The Politics of Respectability in African American Women's History and Black Feminism*, J. WOMEN'S HIST., Spring 2003, at 212, 213–14, 217 (noting that respectability politics prominent during the Progressive Era often excluded Black working class women).

District of New York (p. 6). After a career spent litigating pathbreaking challenges to make powerful institutions accessible to the historically excluded, Judge Motley found herself in a new posture: she was now an insider working within the system. But even as she navigated her new status as a player in powerful institutions, it was hard to shed her reputation as—and the expectations of being—“The Civil Rights Queen.”

The disjunction between Judge Motley’s new role as part of the legal establishment and her past in the civil rights movement was reflected in the shifting sands of the movement itself. As the 1950s gave way to the 1960s, the movement took a more radical turn, with leaders like Malcolm X eschewing nonviolent protest and integration in favor of Black nationalism and liberation. An institutionalist by nature, Judge Motley was betwixt and between. A 1961 televised debate with Malcolm X revealed these tensions. During the debate, Malcolm X argued that “the achievements of ‘the traditional black leadership’ class”—including the work that Motley had done at LDF—had done little to transform the material conditions of most African Americans (p. 221). Instead, the benefits of integration had accrued primarily to middle-class Black people like Motley (p. 219), leaving “20 million black people in America . . . begging for some kind of recognition as human beings” (p. 221).

But if Judge Motley was too moderate and institutionally minded for the likes of Malcolm X, her civil rights record rendered her too radical for the traditional political class, who viewed her as an existential threat to the power structures and institutions they had always known. Concerns about her career as a civil rights litigator “slowed her bid for the Senate’s confirmation” to a federal judgeship in 1966 (p. 251). Despite her coalition-building turns as a state senator and Manhattan borough president, it was her record of battling—and striking down—Jim Crow that stuck in the minds of the Southern senators whose votes she courted (pp. 251–52).

While Motley surely expected some opposition to her nomination from known segregationists, objections from mainstream white liberals, many of whom had supported her political career in New York, stung (p. 258). Adding insult to injury, the American Bar Association, the professional group charged with evaluating the credentials of judicial nominees, rated Motley merely “qualified,” citing her lack of trial experience in New York—and overlooking her years of experience litigating in federal courts throughout the country (p. 259). Tellingly, some worried that her professional experience litigating civil rights challenges was too narrow for the federal bench, where she would be responsible for a more varied docket (p. 259). And, perhaps predictably, some fretted that her civil rights background compromised her ability to be fair to all litigants, particularly in discrimination cases (p. 259).

As the first Black woman appointed to the federal bench, Judge Motley strove to be unfailingly prepared in her cases (p. 266). But she still had to contend with expectations that her courtroom would be an especially hospitable venue for civil rights plaintiffs. In a prominent case involving claims of gender discrimination, the defendant, Sullivan & Cromwell, a well-known New York law firm, sought to have Judge Motley recused, confident that it could not receive a fair hearing from a woman judge who had spent more than a decade

fighting for civil rights (pp. 309–10). Judge Motley bristled at the notion that her civil rights career rendered her incapable of the objectivity that the case—and her position—demanded. She issued a short opinion recounting her sterling record as a judge and explaining that “if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case.”²⁰ To this day, Judge Motley’s logic,²¹ enshrined in federal law as the *Blank* principle, guides questions regarding judicial recusal.²²

Still, the episode reflected a dynamic that dogged much of Judge Motley’s judicial career and shaped her work as a judge. By virtue of her civil rights work, Judge Motley was assumed to be an activist, even as her judicial record made clear that justice did not always bend toward civil rights plaintiffs in her courtroom (p. 310). More often than not, the judicial role, and her underlying institutionalism, “limited her capacity to advance the vision—nurtured since her youth and throughout the first two trailblazing phases of her career—of substantive justice premised on equal opportunity for all” (p. 352).

In the end, as Brown-Nagin deftly shows, Motley’s career was underwritten by a catalog of contradictions. A civil rights lawyer who experienced workplace sex discrimination. A pathbreaking woman lawyer who refused the feminist label. A heralded civil rights lawyer whose vision of racial justice was, ultimately, too tame for the movement’s more radical turn. A meticulous jurist whose judicial talents were frequently overshadowed by expectations of bias and activism. If Motley contained multitudes, her persona as “the Civil Rights Queen” often flattened these contradictions in service of an image that would eclipse her and all of her complexities.

II. MOTHERS OF THE MOVEMENT

One of the most indelible images of the civil rights movement is of three figures, clasping hands on the steps of the United States Supreme Court. Behind them, etched in the building’s marble pediment, are the words, “Equal Justice Under Law.” The three men, George Hayes, Thurgood Marshall, and James Nabrit, are frequently documented in civil rights history because they argued the various cases that comprised the *Brown* challenge before the Supreme Court.²³ Although Constance Baker Motley is credited with drafting the complaint in *Brown* and conceptualizing the litigation strategy that would challenge segregation in public schools across the country, she is not present in the photograph (pp. 83–84).

20. *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4 (1975).

21. *See, e.g., MacDraw, Inc. v. CIT Grp. Equip. Fin., Inc.*, 138 F.3d 33, 37 (2d Cir. 1998).

22. *See* RICHARD E. FLAMM, *JUDICIAL DISQUALIFICATION* 543 (3d ed. 2017) (discussing the *Blank* principle).

23. DeNeen L. Brown, *Cissy Marshall Recalls Day of Brown v. Board of Education Decision*, WASH. POST (Aug. 20, 2016, 11:51 AM) <https://www.washingtonpost.com/news/local/wp/2016/08/20/cissy-marshall-recalls-day-of-brown-v-board-of-education-decision> [perma.cc/Y7MM-2KLR].

Motley's absence—from this photograph and the larger narrative it represents—is hardly surprising. Popular accounts of the civil rights movement have often focused on the charismatic male leaders who served as the movement's public face, despite the meaningful contributions of Black women.²⁴ In particular, many women took on strategic roles at the local level, bridging the distance between local grassroots organizing and the national movement.²⁵

But it was not simply the gender politics of the civil rights movement that ensured that “men were the stars of the [*Brown* litigation] team” and remembered as such (p. 84). As Brown-Nagin explains, “At the same time as [Motley] was seeking to advance professionally and support the Inc. Fund's bid to overthrow segregation, she became a mother” (p. 86). After delivering her son, Joel Motley III, on May 13, 1952, Motley took a three-month leave of absence (p. 86). When she returned in August, the office was in the throes of “frenzied preparations” to file revised briefs in *Brown*, which were due in September (p. 86).

Brown-Nagin's decision to leaven her account of Motley's work on *Brown* with a discussion of Motley's maternity is notable on many fronts. As an initial matter, it relocates quotidian family responsibilities within the cultural and political milieu of the civil rights movement. The traditional focus on the movement's male leaders has not only belied the contributions of women; it also, in keeping with the extant gender roles of the time, has sidelined the family struggles that were adjunct to the movement. History heralds the exploits of male leaders like Martin Luther King, Jr., but prominent accounts frequently overlook *why* King and his contemporaries were able to lead the charge against Jim Crow segregation: in large part, it was because their wives performed the important work of “stay[ing] home and rais[ing] children” (p. 195). Familial sacrifices and burdens underwrote the civil rights movement. Just as frontline activists paid costs for their commitments, so, too, did their family members: they endured the strain of a loved one's long stints away from home, and those closest to the most active members lived with the persistent threat of physical violence.²⁶ *Civil Rights Queen* thus makes an important intervention, rendering visible Motley's pathbreaking role in the struggle for civil rights *and* foregrounding the quotidian sacrifices she and her family made to advance racial equality.

24. Allison Berg, *Trauma and Testimony in Black Women's Civil Rights Memoirs: The Montgomery Bus Boycott and the Women Who Started It, Warriors Don't Cry, and From the Mississippi Delta*, 21 J. WOMEN'S HIST., Fall 2009, at 84, 87–88 (observing that charismatic male leaders “dominate[] American cultural memory” about the civil rights movement). See generally BELINDA ROBNETT, *HOW LONG? HOW LONG?: AFRICAN-AMERICAN WOMEN IN THE STRUGGLE FOR CIVIL RIGHTS* (1997) (discussing the predominance of charismatic male leaders in accounts of the civil rights movement).

25. See Belinda Robnett, *African-American Women in the Civil Rights Movement, 1954–1965: Gender, Leadership, and Micromobilization*, 101 AM. J. SOCIO. 1661, 1667 (1996). See generally ROBNETT, *supra* note 24 (arguing that the work of Black women organizers in the civil rights movement has been overlooked and underemphasized).

26. See Berg, *supra* note 24, at 87–88. See generally ROBNETT, *supra* note 24.

Many of the sacrifices Brown-Nagin recounts involve the often irreconcilable demands of work and family. Almost immediately, the “thrill of victory” in *Brown* gave way to the reality of launching new legal challenges “to implement” the Court’s landmark decision (p. 87). For Motley and her colleagues, “[t]he coming months and years promised more long hours” and stress as they “began to prepare cases that would not just change legal precedent, but the everyday lives of Black southerners” (pp. 87–88). The weight of this realization prompted Motley to worry, “[H]ow will we manage? The staff was small, our funds were meager, our plans sketchy . . .” (p. 88). Motley was, of course, referring to LDF, but she could as easily have been referring to her own domestic situation. How would she, “a sleep-deprived mother” experiencing bouts of “depression,” manage her family while maintaining the “ruthless schedule” that her work demanded (p. 87)?

Motley did not trumpet her experiences juggling work and family. In her autobiography, *Equal Justice Under Law*, she made only passing references to her family life and said nothing substantive about her experiences as a working mother.²⁷ Although she expressed considerable pride in, and love for, her husband and son—referring to the latter as “her greatest accomplishment” (p. 357)—she never explained how she managed to thread the needle, achieving tremendous success in a male-dominated profession while simultaneously balancing the family demands that society considered (and still considers) women’s work.

Drawing on magazine profiles of Motley, as well as interviews with friends and family members, Brown-Nagin provides a clearer portrait of Motley’s balancing act. As Brown-Nagin explains, Motley was “unabashed” about her reliance on paid domestic help, encouraging other women to “[w]ork [i]f [y]ou [c]an [p]ay the [m]aid” (pp. 89–90). Her son Joel III recounted a number of housekeepers who helped care for him in his early years when his mother was frequently traversing the South litigating cases (pp. 89–90). The Motleys also relied on a network of extended family members who routinely pitched in to help when Motley was away or working (p. 89). When Motley began her career in politics, her “networked family” expanded further to include Philips Exeter Academy, the New Hampshire boarding school that Joel III attended during the “whirlwind period” when his mother, as New York state senator and Manhattan borough president, was “required . . . to attend . . . countless dinners, banquets, award ceremonies, and holiday parties” (p. 244).

Brown-Nagin’s account of Motley’s family life not only embeds these quotidian family responsibilities in the history of the civil rights movement; it also recounts a brand of family life that is typical in minority and immigrant communities. Although Motley’s professional life as a lawyer was a sharp departure from prevailing norms of the time, her life as a Black working mother was not. As Brown-Nagin acknowledges, from enslavement forward, Black mothers routinely have worked—though not necessarily in the professional classes in which Motley circulated (p. 89). The ubiquity of Black working motherhood

27. See generally MOTLEY, *supra* note 18.

may be part of the reason why Motley did not foreground her work-family struggles in her autobiography. She may have believed that her courtroom victories, and their impact on the lives of Black people, were more noteworthy—and more inspirational to readers—than the everyday struggles that so many Black mothers experienced.

But it was not just the fact of Motley's working motherhood that accorded with Black life; it was also the way in which she managed the demands of work and family, cobbling together a network of care that enveloped and supported her family, even in her absence.²⁸ The travails of slavery often required Black families to band together in networks of care and support that transcended kinship ties.²⁹ As sociologist Carol Stack has documented,³⁰ this tradition of "fictive kin" and "othermothering" persists in many minority and immigrant communities as a means of providing care to children in an environment where adults often work outside of the home and household resources are limited.³¹ Although the Motleys were not financially constrained, their home life, with its scaffolding of paid help and extended family caregivers, resembled the kind of "othermothering" networks that have existed in Black families for years.³²

Locating Motley's family life in the broader tradition of Black family caregiving suggests the intersection of race and gender dynamics in many working households. Though Motley defied extant gender norms by pursuing a high-flying career as a litigator, politician, and judge, she did not challenge extant gender roles in the organization of her household. As Brown-Nagin suggests, the Motleys' marriage was unconventional in terms of Motley's high-profile career, but completely conventional in terms of her husband's role as breadwinner (p. 357). While Brown-Nagin notes that Joel Motley, Jr. remained in New York when his wife was litigating throughout the South, she does not suggest that he spent his days doing dishes and childcare. Instead, other women filled the void that his wife's absence created (p. 89). And meaningfully, Motley herself intimated that their adherence to some traditional gender roles, even as they abandoned others, contributed to the success of their partnership (p. 357). In a world where Black men were often forced to bear certain indignities, the Motleys' adherence to some conventions allowed Joel, Jr. to be the king of his castle.

28. See Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 390–92 (2008) (“[P]arents routinely rely on those outside of the nuclear family to help them discharge their caregiving responsibilities.”).

29. See Crystal S. Mills, Debra Usher & Emily Jean McFadden, *Kinship in the African American Community*, 13 MICH. SOCIO. REV. 28, 32 (1999).

30. See generally CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* (1974) (discussing Black families' use of extended and fictive kin as a means of navigating and surviving poverty).

31. *Id.* at 62–66 (noting that Black communities experiencing the burdens of poverty often responded with “child-keeping” or shared parental responsibilities).

32. See Murray, *supra* note 28, at 391–92.

In surfacing Motley's family life, Brown-Nagin also reveals the way that Motley's "networked family" model translated into her professional life. As Brown-Nagin makes clear, an underappreciated aspect of Motley's lawyering prowess was her ability to skillfully shepherd her litigants through the bruising fight for integration. Nowhere was Motley's steadying hand more obvious than in her work with James Meredith, the plaintiff in *Meredith v. Fair*, a case which sought the integration of the University of Mississippi (Ole Miss). A former serviceman who was nearly thirty years old, Meredith believed, with a messianic zeal, that God had selected him as the vessel to integrate Ole Miss (pp. 142–43). After submitting an application for admission, Meredith wrote to Thurgood Marshall, requesting LDF's assistance in his quest to integrate this bastion of the Old South (pp. 141–42). Motley was assigned to the case, which consumed her life for almost two years.³³

As the case, in fits and starts, made its way through the courts, Meredith was subjected to innumerable indignities and threats.³⁴ After months of these slings and arrows, and years of putting his life on hold to tilt at integration's windmill, Meredith's faith in himself and his cause faltered (p. 158). He told Motley he was abandoning his bid to integrate Ole Miss (p. 158). Motley sprang into action, shedding her lawyerly demeanor to adopt a more therapeutic tone with her skittish client. She brought Meredith to New York City to her apartment, where she "cajoled" him into staying the course (p. 159).

More than a year later, Meredith, "[u]nder the protection of federal marshals and accompaniment of Department of Justice lawyers," (p. 167) was grudgingly admitted to Ole Miss. But his ordeal continued. He was housed apart from other students and guarded by federal marshals (p. 168). When he made his way onto campus, he was simultaneously ignored and insulted. Some classmates threw rocks and eggs (p. 168). His torment was ceaseless.

Once again, Meredith faltered. And once again, Motley flew to his side (p. 170). Recognizing that it was imperative that Meredith finish the semester and pass all of his classes, she again summoned him to New York for a respite (p. 170). With her encouragement, Meredith agreed to spend the winter break in New Haven, where Motley and a colleague arranged tutors to coach him in all of his subjects (p. 170). Motley even drove Meredith from New York City to New Haven and helped him settle into the apartment where he would be living during the break (p. 170).

This vignette is remarkable in so many ways. As an initial matter, it underscores Motley's incredible dedication to her clients and their cause. On one level, Motley's representation of her clients reflects contemporary models of holistic representation, in which lawyers view their clients as whole people and

33. See pp. 141, 171.

34. See pp. 151–58.

understand the lawyer's role as a counselor, advisor, and problem-solver, rather than as litigation representation.³⁵ But even as Motley's lawyering approach reflects more recent paradigms of client-centered representation, it may also reflect something closer to home. In the integration cases, where she represented Black students, Motley's role as lawyer might be viewed as assuming a more maternal cast. As Brown-Nagin recounts it, Motley's relationship with Meredith was almost filial. Although they were peers in terms of age, the power dynamic of the attorney-client relationship meant that their interactions could at times assume the contours of a mother-son relationship. Indeed, the image of Motley driving Meredith north to New Haven, and settling him into his apartment, recalls the annual parental pilgrimage to settle a child at college.

Maternal elements also underlay Motley's representation of the Birmingham Crusaders. In the spring of 1963, on the heels of Martin Luther King, Jr.'s protest and imprisonment,³⁶ Birmingham leaders organized "the Children's Crusade," in which Birmingham schoolchildren, some as young as six years old, marched through the city streets for equal rights and an end to the indignities of segregation.³⁷ Although the protesters were literally *children*, the state showed no solicitude for their tender years.³⁸ The Crusaders were "mowed down, clubbed, and dragged off to jail" (p. 188), where many of them waited in overflowing facilities before being released to their horrified parents.³⁹

And it did not end there. In "a stunning act of retaliation" against the young activists, the Birmingham school superintendent ordered their immediate suspension or expulsion from school (p. 189). These actions would be documented in the students' permanent records, potentially compromising their graduation and future prospects (p. 189). In the end, an emergency appeal to the Fifth Circuit, where Motley had appeared before and had amassed considerable goodwill, resulted in the vindication of all 1,080 students (pp. 189–93).

Motley viewed her work on behalf of the Birmingham Crusaders as "her greatest 'professional satisfaction'" (p. 193). This was perhaps unsurprising. The case laid a foundation for constitutional protections for students subjected to differential school punishments, while crediting Motley's profound faith in "education as an engine of social mobility" (p. 193). But more than this, as Brown-Nagin muses, the lead plaintiff, eleven-year-old Linda Woods, likely recalled for the pioneering litigator her own son, Joel III (p. 194). Motley

35. See Robin G. Steinberg, *Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients*, 30 N.Y.U. REV. L. & SOC. CHANGE 625, 627–33 (2006).

36. See GLENN T. ESKEW, *BUT FOR BIRMINGHAM: THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE* 240 (1997).

37. See *id.* at 259–97 (1997).

38. *Id.* at 268 (noting that the Birmingham police used water blasts of up to "one hundred pounds" against the protesting schoolchildren, sending students "spinning down the street, dreadfully skinning exposed flesh").

39. *Id.* at 293.

viewed her work as “helping these kids go to school”—just as she, as a mother, had imparted a love of learning and respect for education to her own son (p. 194). As Brown-Nagin reminds us, “Through her representation of the Birmingham Crusaders, Motley had forged a special connection not only to her clients, but also to her son, hundreds of miles away” (p. 194).

Viewing Motley’s representation of her clients through a maternal lens adds texture to Brown-Nagin’s account of Motley’s heroic struggle to balance work and family. As Brown-Nagin notes, in order to provide Meredith with “the representation he needed, Motley once more left behind the comforts of her family life,” leaving her son in the care of his father and a network of othermothers (p. 145). But while Joel III was being cared for by othermothers in Motley’s household network, Motley herself was serving as an othermother to Meredith and all of her young charges—standing by them and fiercely advocating for their rights to participate in society as the equals of whites.⁴⁰

III. BLACK MOTHERS IN LAW

Brown-Nagin’s decision to foreground Motley’s experience of motherhood enriches the book’s account of a dazzling career in the law. It also renders visible the world of working Black mothers, which is not often viewed as newsworthy. Consider the recent discussion of Supreme Court nominee—now Justice—Ketanji Brown Jackson: When Judge Jackson was nominated in February 2022, much was made of the racial and gender diversity that she would add to the Court,⁴¹ but there was little discussion of the fact that Judge Jackson would join Justice Amy Coney Barrett as the Court’s second working mother of school-aged children.⁴² By contrast, when then-Judge Barrett was

40. The prospect of “othermothering” in a professional context is not limited to Motley’s holistic representation of her clients. Historically, Black teachers have often served this “othermother” role to their young charges. See Karen I. Case, *African American Othermothering in the Urban Elementary School*, 29 URBAN REV. 25, 25 (1997) (“[The] othermothering tradition exists within the urban elementary-school context, and African American female educators play an integral role in fulfilling the psychoeducational needs of the urban child.”); Veronica H. Shipp, *Fewer Black Female Teachers: Progress or Problem?*, WOMEN’S STUD. Q., Fall/Winter 2000, at 202, 207 (“‘Othermothering’ refers to the . . . tendency of Black female teachers to develop a sense of family toward their students and be involved in varying degrees with them and their problems outside as well as inside of school.”); David Sandles, Jr., *Black Teachers: Surrogate Parents and Disciplinarians*, J. LEADERSHIP, EQUITY & RSCH., May 2018, at 1, 8 (noting that Black women teachers often act as “surrogate mothers” to their students, “imbu[ing] Black students with skills essential for survival and success in a patently racist society”).

41. See Chandelis Duster & Priya Krishnakumar, *Ketanji Brown Jackson’s Nomination Brings Renewed Attention to Lack of Black Judges on the Federal Bench*, CNN (Apr. 3, 2022, 12:44 PM), <https://www.cnn.com/2022/04/02/politics/ketanji-brown-jackson-diversity-federal-bench-black-judges/index.html> [perma.cc/UM8Y-FJ73]; John Fritze, *Judge Jackson’s Supreme Court Confirmation Adds Diversity, Ends Idea of ‘Black Seat,’* USA TODAY (Apr. 10, 2022, 11:04 AM), <https://www.usatoday.com/story/news/politics/2022/04/08/ketanji-brown-jacksons-confirmation-adds-diversity-supreme-court/7268038001> [perma.cc/8QC2-MGXT].

42. See Melissa Murray, Opinion, *Another Working Mother for the Supreme Court*, N.Y. TIMES, Mar. 8, 2022, at A21.

nominated in September 2020, her supporters touted her status as a working mother as additional evidence of her fitness for the high court.⁴³ At her confirmation hearings, she was praised as “a working mother of seven with a strong record of professional and academic accomplishment.”⁴⁴ As the logic went, despite her conservatism and the unseemly speed with which she was nominated and confirmed, Judge Barrett’s ability to successfully combine work and family made her a worthy successor to the feminist icon Justice Ruth Bader Ginsburg, whose death in September 2020 created the vacancy that Judge Barrett was poised to fill.⁴⁵ When Senator John Kennedy of Louisiana teasingly asked Judge Barrett “who d[id] the laundry” for her large family,⁴⁶ her stature as the Court’s “supermom” was cemented.⁴⁷

What accounted for the difference? Perhaps it is because there is nothing especially novel or unexpected about the fact of a Black working mother—even one as accomplished as Ketanji Brown Jackson (or Constance Baker Motley). Since enslavement, Black women in America have combined motherhood with work outside the home.⁴⁸ Among mothers, Black women have the highest rate of labor force participation.⁴⁹ Indeed, the notion of Black working mothers is so fixed that departures from this norm may seem unorthodox—even

43. See *Remarks by President Trump Announcing His Nominee for Associate Justice of the Supreme Court of the United States*, WHITE HOUSE (Sept. 26, 2020, 5:04 PM), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-announcing-nominee-associate-justice-supreme-court-united-states> [perma.cc/73PL-JB69]; *Nomination of the Honorable Amy Coney Barrett to Be an Associate Justice of the Supreme Court of the United States*, S. COMM. ON THE JUDICIARY, 116th Cong., at 2:46:39 (Oct. 12, 2020), <https://www.judiciary.senate.gov/meetings/nomination-of-the-honorable-amy-coney-barrett-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states> [perma.cc/9Y3W-B3DR] (remarks of Sen. Thom Tillis); Claire Cain Miller & Alisha Haridasani Gupta, *Mothers in Public Office Still Walk a ‘Tightrope,’* N.Y. TIMES, Oct. 15, 2020, at A1.

44. *Amy Coney Barrett Senate Confirmation Hearing Day 1 Transcript*, REV (Oct. 12, 2020), <https://www.rev.com/blog/transcripts/amy-coney-barrett-senate-confirmation-hearing-day-1-transcript> [perma.cc/AN9V-YH43].

45. See Erika Bachiochi, Opinion, *Amy Coney Barrett: A New Feminist Icon*, POLITICO: ON THE BENCH (Sept. 27, 2020, 7:00 AM), <https://www.politico.com/news/magazine/2020/09/27/amy-coney-barrett-supreme-court-nominee-feminist-icon-422059> [perma.cc/SNH9-N883] (arguing that Judge Barrett’s status as a working mother reflects a “new kind of feminism, a feminism that builds upon the praiseworthy antidiscrimination work of Ginsburg but then goes further”).

46. Eliza Relman, *Republican Senator John Kennedy Asks Amy Coney Barrett ‘Who Does the Laundry in Your House’ During Supreme Court Hearings*, INSIDER (Oct. 14, 2020, 6:16 PM), <https://www.businessinsider.com/republican-senator-john-kennedy-asks-amy-coney-barrett-laundry-question-2020-10> [perma.cc/K37Y-LTA4].

47. See Murray, *supra* note 42.

48. See Jacqueline Jones, “My Mother Was Much of a Woman”: Black Women, Work, and the Family Under Slavery, 8 FEMINIST STUD. 235, 238–260 (1982).

49. See *Labor Force Characteristics by Race and Ethnicity, 2020*, U.S. BUREAU LAB. STATS. (Nov. 2021), <https://www.bls.gov/opub/reports/race-and-ethnicity/2020/home.htm> [perma.cc/Z5ZB-W4JS] (“Among mothers living with children under 18 years old, Black mothers were more likely to participate in the labor force (76.0 percent) than White mothers (71.3 percent), Asian mothers (64.3 percent), or Hispanic mothers (62.8 percent).”).

heretical. Michelle Obama ignited a media firestorm in 2008 when she announced that she would be relinquishing paid employment to assume full-time duties as the first lady and “mom-in-chief.”⁵⁰

In this regard, Brown-Nagin’s recounting of Motley’s experience of motherhood is at once subtle and subversive. She presents the balancing act of working motherhood as an obvious—and necessary—complement to a career devoted to creating equal opportunity. And in relating Motley’s twin priorities of work and family, Brown-Nagin suggests that there is something notable about the way that Black women have navigated the terrain of the personal and the professional. Whether because of economic circumstances or personal preference, Black women historically have eschewed the stay-at-home mother role that has so often been the exemplar of (white) motherhood.⁵¹ In this regard, Black women have not only worked outside of the home; they have also framed motherhood as a communitarian endeavor.⁵² Rather than focusing singularly on raising *their* children, they have understood motherhood to entail a commitment to “raise” and “mother” the *other* children in their communities.⁵³ This might involve anything from keeping an eye on neighborhood children to stepping in to raise someone else’s child when the family falls on hard times.⁵⁴ Accordingly, Brown-Nagin’s depiction of Motley’s work-family conflict renders visible the particular challenges of Black mothers, whose maternal roles often stretch beyond immediate family to include caregiving for extended family and the community writ large.

Brown-Nagin’s effort to surface and give voice to the experience of Black motherhood comes at an especially critical moment. On June 24, 2022, the Supreme Court announced its much-anticipated decision in *Dobbs v. Jackson Women’s Health Organization*,⁵⁵ overruling *Roe v. Wade* and *Planned Parenthood v. Casey*,⁵⁶ once the twin pillars of the Court’s abortion jurisprudence. According to the *Dobbs* majority, the decision simply “return[ed] the issue of abortion to the people’s elected representatives,” as “the Constitution

50. Sara Hayden, *Michelle Obama, Mom-in-Chief: The Racialized Rhetorical Contexts of Maternity*, 40 WOMEN’S STUD. COMM’N 11, 12 (2017).

51. See Rose M. Kreider & Diana B. Elliott, *Historical Changes in Stay-at-Home Mothers: 1969 to 2009*, at 3 (Feb. 29, 2000) (unpublished working paper), <https://www.census.gov/content/dam/Census/library/working-papers/2010/demo/asa2010-kreider-elliott.pdf> [perma.cc/9CXC-TJ8Q] (“There is evidence that married black women have always been employed outside of the home in large numbers. Even black mothers with young children were in the work force following World War II, when many of their white counterparts had withdrawn from the labor force.”) (citations omitted).

52. See STACK, *supra* note 30, at 46–49.

53. See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* 178 (2d ed. 2000).

54. See STACK, *supra* note 30, at 61–67.

55. 142 S. Ct. 2228 (2022).

56. *Dobbs*, 142 S. Ct. at 2284 (“The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.”).

and the rule of law demand.⁵⁷ In the months since the decision was announced, however, it has become clear that *Dobbs* has done more than simply return the abortion issue to the states; it has completely reoriented the reproductive rights landscape.⁵⁸ And critically, these changes in reproductive access will have profound implications for all individuals, but especially Black women.

In a briefing issued just after the *Dobbs* decision was announced, the Brookings Institution predicted that the decision would “continue, if not exacerbate” existing health inequities.⁵⁹ As it noted, “In states restricting access to abortions, the women most likely to face immediate negative health and socioeconomic consequences are low-income women and/or women of color.”⁶⁰ Historic exclusion from, and more limited access to, health care—a problem that worsened in the years of the COVID-19 pandemic—meant that communities of color were “more likely to die from treatable conditions; more likely to die during or after pregnancy and to suffer serious pregnancy-related

57. *Id.* at 2243.

58. In thirteen states, “trigger laws,” which effectively ban abortions upon the Court’s decision to overturn *Roe v. Wade*, went into effect. See Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here’s What Happens When Roe Is Overturned*, GUTTMACHER INST. (June 6, 2022), <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned> [perma.cc/RNU2-NWQ9]. In a handful of states, so called “zombie laws,” pre-*Roe* abortion restrictions that were never repealed and remained on the books in a state of desuetude, may now be enforced to limit abortion access. See Rose Wagner, *It’s Not Halloween: Post-Roe America Could See Rise of ‘Zombie’ Abortion Bans*, COURTHOUSE NEWS SERV. (May 6, 2022), <https://www.courthousenews.com/its-not-halloween-post-roe-america-could-see-rise-of-zombie-abortion-bans> [perma.cc/WQ4S-DLRA]; see also *Abortion Policy in the Absence of Roe*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe> [perma.cc/3W5N-XB96] (last updated Oct. 1, 2022). Other states have taken steps to clarify and strengthen abortion bans. See Geoff Mulvihill, *Undoing of Roe Quickly Shifts Abortion in States*, L.A. TIMES (Dec. 21, 2022, 2:30 PM), <https://www.latimes.com/world-nation/story/2022-12-21/explainer-undoing-of-roe-quickly-shifts-abortion-in-states> [perma.cc/U9P8-ZKML]. And yet others will maintain abortion access and codify the abortion right either in new laws or in state constitutional amendments. See *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES, <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [perma.cc/Y24X-A6H9] (last updated Mar. 17, 2023, 1:00 PM). The momentum behind the shift in where reproductive health care will be available is also being accelerated by several major corporations, which have already communicated and are examining policies to cover costs for abortions in other states. See Jacqueline GaNun & Dustin Jones, *JP Morgan, Disney Join Wave of Companies That’ll Cover Employee Abortion Travel Costs*, NPR (June 24, 2022, 2:14 PM), <https://www.npr.org/2022/06/24/1107419127/jp-morgan-disney-companies-employee-abortion-travel-cost> [perma.cc/CM3M-FZZW]; Barbara Ortutay, Dee-Ann Durbin & The Associated Press, *Companies from Amazon to JPMorgan Pledged to Cover Abortion Travel Costs. But It’s Not Clear How and If They’ll Be Able To Do So*, FORTUNE (July 5, 2022, 4:40 AM), <https://fortune.com/2022/07/05/abortion-travel-costs-promised-by-companies-from-amazon-to-jpmorgan-may-be-hard-to-cover> [perma.cc/7Q7T-YK22].

59. Keon L. Gilbert, Gabriel R. Sanchez, & Camille Busette, *Dobbs, Another Frontline for Health Equity*, BROOKINGS: HOW WE RISE (June 30, 2022), <https://www.brookings.edu/blog/how-we-rise/2022/06/30/dobbs-another-frontline-for-health-equity> [perma.cc/672S-SDU8].

60. *Id.*

complications; and more likely to lose children in infancy.”⁶¹ This “legacy of health inequity,” in tandem with “a very thin social safety net, a lack of parental leave policies and adequate childcare,” suggests that “the U.S. will continue to cultivate the conditions for a permanent underclass of low-income families and families of color.”⁶²

In briefs filed before the Court, various amici underscored these health disparities and the particular impact of restrictive abortion policies on Black women.⁶³ One amicus brief highlighted the national “maternal health crisis.”⁶⁴ As this brief explained, the United States reported a maternal mortality rate of 17.4 deaths per 100,000 live births—more than double the rate of most other high-income, industrialized nations.⁶⁵ The brief went on to explain the disproportionate impact of the maternal health crisis on the Black community. In 2019, the maternal mortality ratio for Black women in the United States was 44.0 deaths per 100,000 live births.⁶⁶ The maternal mortality ratio for white women was just 17.9 per 100,000 live births.⁶⁷ Black women were also more likely to experience maternal morbidity—short- or long-term health problems that result from being pregnant and giving birth—than their white counterparts.⁶⁸ For example, Black women are more likely to experience certain types of hemorrhage, preeclampsia, asthma, cardiac events, and infections during pregnancy and childbirth than their white counterparts.⁶⁹ And when they experience these pregnancy-related complications, they “are less likely to have their conditions adequately managed and more likely to experience complications from these conditions.”⁷⁰

61. *Id.*

62. *Id.*

63. See Brief for Amicus Curiae The Howard University School of Law Human and Civil Rights Clinic in Support of Respondents at 16–26, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392); Brief *Amici Curiae* for Organizations Dedicated to the Fight for Reproductive Justice—Mississippi in Action, *et al.*—in Support of Respondents at 9–25, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392); Brief of Social Science Experts as *Amici Curiae* in Support of Respondents at 25, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

64. Brief of *Amici Curiae* Birth Equity Organizations and Scholars in Support of Respondents at 5–16, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

65. *Id.* at 9 (citing Roosa Tikkanen, Munira Z. Gunja, Molly FitzGerald & Laurie Zephyrin, *Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries*, COMMONWEALTH FUND (Nov. 18, 2020), <https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries> [perma.cc/8BJU-LPVH]).

66. *Id.* at 11.

67. *Id.*

68. *Id.* at 12.

69. *Id.*

70. Brief of *Amici Curiae* Birth Equity Organizations and Scholars in Support of Respondents, *supra* note 64, at 12–13. Critically, the maternal health crisis was even more pronounced in Mississippi, which boasted a maternal mortality rate of 20.2 deaths per 100,000 live births, one of the highest in the nation. *Id.* at 9. And, not surprisingly, in Mississippi, where Black people comprised 37.8 percent of the state’s population, the impact of this crisis was disproportionately

Other amici in *Dobbs* went beyond simply discussing the racialized disparities in present-day healthcare provisions and connected the challenged Mississippi abortion restriction to a broader history of state control of Black reproduction. As one amicus explained, “From bondage in chattel slavery, where they were forced to bear children that the law regarded as property of their masters, through compulsory sterilization, where they were forced into infertility, Black women were robbed of any sense of bodily autonomy.”⁷¹ On this account, Mississippi’s assault on reproductive autonomy was especially pernicious, recalling a not-too-distant past when Black women were conscripted into forced procreation as a means of expanding an enslaved labor force,⁷² violently raped in a campaign to reinstate white supremacy and dominion over Black bodies,⁷³ and forcibly sterilized as a means of limiting Black reproduction and perceived demands on state resources.⁷⁴

In all, these amici painted a harrowing portrait in which upholding Mississippi’s fifteen-week abortion ban and overruling *Roe v. Wade* would recast the reproductive care landscape in ways that would exacerbate racialized health disparities and further deprive Black women of reproductive freedom. And yet, despite these compelling arguments, Black women are scarcely mentioned in the Court’s opinions in *Dobbs*. While the dissenting opinion, jointly authored by Justices Breyer, Sotomayor, and Kagan, adverts to the racial disparity in maternal mortality,⁷⁵ it is the only opinion in *Dobbs* to explicitly mention Black women’s experience of pregnancy and motherhood—and it does so only glancingly.⁷⁶

By contrast, the three separate concurrences, authored by Chief Justice Roberts and Justices Thomas and Kavanaugh, do not mention Black women or their maternal prospects at all.⁷⁷ And critically, Justice Alito’s majority opinion only references Black women by implication in a curious footnote.⁷⁸ In footnote forty-one of the majority opinion, Justice Alito notes that “[o]ther

borne by Black women. *Id.* at 10–11. Indeed, from 2013 to 2016, the pregnancy-related mortality ratio in Mississippi was three times higher for Black women than for white women. *Id.* at 12.

71. Brief for Amicus Curiae The Howard University School of Law Human and Civil Rights Clinic in Support of Respondents, *supra* note 63, at 4.

72. *Id.* at 5–6.

73. *Id.* at 8–10. (citing Shawn Leigh Alexander, *Introduction* to RECONSTRUCTION VIOLENCE AND THE KU KLUX KLAN HEARINGS 11 (Shawn Leigh Alexander ed., 2015)).

74. *See id.* at 10 (noting that in the twentieth century, many states passed laws mandating the sterilization of “the feeble-minded, those on welfare, or those with genetic defects,” with Black women being “staggeringly overrepresented in the ranks of the sterilized”).

75. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2338 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (“Experts estimate that a ban on abortions increases maternal mortality by 21 percent, with white women facing a 13 percent increase in maternal mortality while black women face a 33 percent increase.”).

76. *Id.*

77. *See id.* at 2300–04 (Thomas, J., concurring); *id.* at 2304–10 (Kavanaugh, J., concurring); *id.* at 2310–17 (Roberts, C.J., concurring in the judgment).

78. *Id.* at 2256 n.41 (majority opinion).

amicus briefs” reiterated the view that some supporters of liberal abortion access are “motivated by a desire to suppress the size of the African-American population.”⁷⁹ According to Justice Alito, the prospect of abortion being used as a tool of racial genocide is not beyond the pale. He writes, “it is beyond dispute that *Roe* has had that demographic effect.”⁸⁰ After all, he notes, “[a] highly disproportionate percentage of aborted fetuses are Black.”⁸¹

As further support for this narrative linking abortion to eugenics and racial genocide, Justice Alito cited Justice Thomas’s separate concurrence in 2019’s *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*,⁸² in which Thomas sketched a selective history linking abortion to the eugenics movement.⁸³ Specifically, throughout his *Box* concurrence, Thomas invoked Margaret Sanger, the founder of what is now known as Planned Parenthood and the modern birth control movement.⁸⁴ Sanger, Thomas recounted, was an unrepentant eugenicist whose interest in eugenics often tilted toward the elimination of the “unfit,” a group that often included nonwhites.⁸⁵ As an example of Sanger’s alleged antipathy for racial minorities, Thomas cited her campaign to expand the use of birth control in communities of color, including Harlem; her work in the “Negro Project,” which sought to popularize the use of birth control among Southern Blacks; and her coauthorship of a report titled “Birth Control and the Negro,” which identified Blacks as “the great problem of the South”—“the group with ‘the greatest economic, health, and social problems.’”⁸⁶

With this narrative of abortion and eugenics in mind, it is worth reflecting on the role of Black women in the Court’s disposition of *Dobbs*. Curiously, in a decision that most agree will have an outsized impact on Black women and their lives, Black women are mentioned just twice: in the dissent’s account of racialized maternal health disparities and in the majority’s account of abortion as eugenics. Neither depiction presents a holistic account of Black women as mothers or as citizens. Though well-meaning and descriptively accurate in terms of the health risks associated with pregnancy and childbirth, the dissent’s account risks painting Black women as the unwitting victims of systemic

79. *Id.* (citing Brief for Amici Curiae African-American, Hispanic, Roman Catholic and Protestant Religious and Civil Rights Organizations and Leaders Supporting Petitioners at 14–21, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) and *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782–93 (2019) (Thomas, J., concurring)) (maintaining that abortion has “eugenic potential”).

80. *Dobbs*, 142 S. Ct. at 2256 n.41.

81. *Id.*

82. *Id.*

83. *See Box*, 139 S. Ct. at 1782–93 (Thomas, J., concurring).

84. *Id.* at 1783 (arguing that the birth control movement “developed alongside the American eugenics movement. And significantly, Planned Parenthood founder Margaret Sanger . . . emphasized and embraced the notion that birth control ‘opens the way to the eugenist.’”).

85. *Id.* at 1784.

86. *Id.* at 1788.

forces that devalue their lives and their experiences of pregnancy and motherhood.

By the same token, however, the majority's account linking abortion to eugenics and the disproportionate incidence of abortion among Black women figures Black women as unwitting coconspirators in a racist plot to deracinate the Black community.⁸⁷ By adverting to Justice Thomas's argument linking birth control, abortion, and eugenics, the majority fuels a narrative in which Black women who terminate their pregnancies (or make use of contraception) are working with eugenicists like Margaret Sanger (a white woman) to facilitate the Black community's destruction.⁸⁸ Inattentive to the systemic and institutional constraints that may underlie a decision to terminate a pregnancy,⁸⁹ the majority's narrative insists that Black women—the *matriarchs* of the Black community—have put self-interest ahead of community uplift.⁹⁰ Their exercise of individual rights is instead an uncritical invitation to the (white) eugenicist to access the part of the Black community that is absolutely vital to the community's future: the womb.⁹¹ On this account, Black women's pursuit of their own individual interests as women and citizens is not just selfishness but rather a complete denunciation of the community's collective interests.

Taken together, the majority's account of Black women as unwitting coconspirators in a eugenic effort to suppress the Black community, and the dissent's account of Black women as the victims of systemic maternal health disparities, reflect two extremes: one in which Black mothers unselfishly face death in their effort to bring forth the next generation, and one in which Black women selfishly prioritize their own needs—for education, employment, or whatever—ahead of motherhood and the collective interests of the Black community. These competing tropes of saint and sinner reflect a duality that is not confined to *Dobbs* but rather is projected onto so many Black women.

As Brown-Nagin's account of Motley's life suggests, the competing archetypes of devoted mother and dedicated professional dogged Motley, emphasizing the tension between personal self-fulfillment and collective uplift. Brown-Nagin's complex and nuanced account suggests that competing narratives disserve the complexity of Black motherhood and the lives of Black women. For Motley, motherhood and work may have produced day-to-day *management* conflicts, but she took on both roles with the view that each would fulfill her personally while contributing to the betterment of the Black community. In tandem with a network of caregivers, she raised her son to be

87. See Melissa Murray, *Foiling Clarence Thomas*, A HOUSE DIVIDED (Jan. 28, 2020), <https://ahousedividedapd.com/2020/01/28/foiling-clarence-thomas> [perma.cc/575K-H64W].

88. See *id.*; "The Most Dangerous Place for an African-American Is in the Womb": Black Politician Criticises Anti-Abortion Billboard, DAILY MAIL (Feb. 24, 2011, 7:03 AM), <https://www.dailymail.co.uk/news/article-1360125/The-dangerous-place-African-American-womb-Black-politician-criticises-anti-abortion-billboard.html> [perma.cc/JB6M-RH4V].

89. Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2090–92 (2021).

90. See Murray, *supra* note 87.

91. See *id.*

an upstanding member of the Black community.⁹² And if her professional exploits pulled her away from domestic life and the project of molding her son into manhood, it meaningfully advanced the collective interests of the Black community and its children.

While President Johnson's confidence that Constance Baker Motley would eventually sit on the Supreme Court never came to fruition, one cannot help but be wistful for what might have been. True, Motley never championed reproductive rights in her time as "the Civil Rights Queen" and never heard an abortion case in her tenure as a district court judge. However, it is likely that, in much the same way Justice Thomas's experiences as a Black man have informed his views of issues before the Court,⁹³ Motley's experience as a Black woman and a Black mother would have informed her understanding of the various reproductive rights issues that have perennially peppered the Supreme Court's docket in the trajectory from *Roe* to *Dobbs*.⁹⁴

Brown-Nagin's account of Motley's experience of working motherhood also illuminates *how* these experiences might have been translated into the Court's work. In the forty-nine years between *Roe* and *Dobbs*, few of the Court's abortion decisions have *explicitly* implicated the interests of Black women and women of color in reproductive rights. The obvious exception is *Harris v. McRae*,⁹⁵ a 1980 decision in which the Court held that states participating in the federal Medicaid program were not obligated to fund abortions

92. See *supra* Part II.

93. Murray, *supra* note 89, at 2085 n.424 (discussing Thomas's "epistemic authority" as the only Black member of the Court); Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 938 (2005); Melissa Murray, *supra* note 87; Stephen F. Smith, *Clarence X? The Black Nationalist Behind Justice Thomas's Constitutionalism*, 4 N.Y.U. J.L. & LIBERTY 583 (2009); Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Crits?*, 93 GEO. L.J. 575, 611 (2005).

94. *E.g.*, Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2370 (2018); Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016); McCullen v. Coakley, 573 U.S. 464 (2014); Gonzales v. Carhart, 550 U.S. 124, 132–33 (2007); Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 323–24 (2006); Stenberg v. Carhart, 530 U.S. 914, 921–22 (2000); Hill v. Colorado, 530 U.S. 703, 735 (2000); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 883, 844–46 (1992); Rust v. Sullivan, 500 U.S. 173, 177–78 (1991); Webster v. Reprod. Health Servs., 492 U.S. 490, 499–501 (1989); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 464 U.S. 416, 452 (1983); H.L. v. Matheson, 450 U.S. 398, 413 (1981); Harris v. McRae, 448 U.S. 297, 326 (1980); Bellotti v. Baird, 443 U.S. 622, 651 (1979) (plurality opinion); Colautti v. Franklin, 439 U.S. 379, 401 (1979); Maher v. Roe, 432 U.S. 464, 474 (1977); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 84 (1976).

95. 448 U.S. 297 (1980).

for indigent women.⁹⁶ *McRae* also concluded that the right to choose an abortion does not entail “a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.”⁹⁷

The impact of the Court’s decision in *McRae* on Black women was obvious and immediate. Indeed, even before the Court announced its decision, the appellees and a handful of amici highlighted the disproportionate impact of existing funding restrictions on women receiving public assistance, many of whom were Black.⁹⁸ But, as with *Dobbs*, the *McRae* majority studiously avoided any sustained discussion of the impact of funding restrictions on Black women.⁹⁹

And, perhaps more curiously, so did the four *McRae* dissenters, including Justice Thurgood Marshall, the first African American to sit on the high court and Motley’s LDF colleague and mentor. The four dissenters saw the majority’s decision in *McRae* predominantly through the lens of class, emphasizing the degree to which the withdrawal of federal subsidies for abortion would “coerce indigent pregnant women to bear children that they would otherwise elect not to have.”¹⁰⁰ Justice Marshall, the lone Black voice among “the Brethren,” briefly acknowledged that “[t]he class burdened by the Hyde Amendment consists of indigent women, a substantial proportion of whom are members of minority races,”¹⁰¹ and that “nonwhite women obtain abortions at nearly double the rate of whites.”¹⁰² But he too was preoccupied with socioeconomic status and its intersection with race, insisting that distinctions that fell disproportionately on poor minorities “may call for a correspondingly more searching judicial inquiry.”¹⁰³

Perhaps the Court’s understanding of the Hyde Amendment’s racialized impact would have been more nuanced if Motley had been a member of *McRae*. Rather than a flat account of Black women as the indigent recipients of Medicaid and other forms of public assistance, Motley might have offered or sparked a more varied discussion—one that considered the prospect of state support and subsidization of family planning and families, regardless of indigency, as well as the impact of motherhood on employment and educational

96. *Id.* at 317–18 (“Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.”).

97. *Id.* at 316.

98. See Brief Amici Curiae of The Association of Legal Aid Attorneys, et al. at 15, *McRae*, 448 U.S. 297 (No. 79-1268) (noting that the impacts of the Hyde Amendment, including the “availability of public funding for sterilization, . . . invidiously discriminates against poor and minority women and deprives them of their constitutional rights to privacy, liberty and equal protection”).

99. *McRae*, 448 U.S. 297.

100. *Id.* at 330 (Brennan, J., dissenting); *id.* at 348–49 (Blackmun, J., dissenting).

101. *Id.* at 343–44 (Marshall, J., dissenting).

102. *Id.* at 343.

103. *Id.* at 343–44.

prospects. In this vein, Motley's presence—and her experience as a working mother—may have prompted some members of the Court to acknowledge, years before the Court did so in *Casey*, that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”¹⁰⁴ Motley's own life was surely testament to this sentiment. At a time when prevailing social norms favored stay-at-home mothers and large families, Motley had her only child at the ripe old age of thirty, well after most women of the time were experiencing motherhood.¹⁰⁵ Although it is unclear whether this timing was purposeful,¹⁰⁶ it is certain that her delayed motherhood and the fact that she had only one child contributed to her pathbreaking career as a litigator and judge.¹⁰⁷

CONCLUSION

Tomiko Brown-Nagin's *Civil Rights Queen* comes at a moment of tremendous urgency for Black women and the law. In laying waste to almost fifty years' worth of precedents, the *Dobbs* majority has made the legal and reproductive landscape infinitely more precarious for Black women. Although Constance Baker Motley never sat on the high court, one cannot help but consider her legacy and experience in relation to the Court's decision in *Dobbs*. As Brown-Nagin notes, in 1992, Judge Motley, by then “a dean” of the Southern District of New York, welcomed a new colleague: Judge Sonia Sotomayor (p. 354). Over the course of Judge Sotomayor's tenure on the district court, and later the Second Circuit, the two cultivated a warm relationship, with Judge Motley providing mentorship and guidance to her younger colleague (p. 354).

Critically, Motley's legacy shadows the dissenting opinion in *Dobbs*, in which now-Justice Sotomayor joined. In assessing the majority's treatment of precedent and fidelity to the principle of stare decisis, the dissenters cited the litany of LDF-litigated cases that had incrementally chipped away at *Plessy v. Ferguson*'s separate but equal mandate,¹⁰⁸ culminating in the overruling of *Plessy* in 1954's *Brown v. Board of Education*.¹⁰⁹ As the dissenters explained, the

104. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

105. See Kay B. Forest, Phyllis Moen & Donna Dempster-McClain, *Cohort Differences in the Transition to Motherhood: The Variable Effects of Education and Employment Before Marriage*, 36 SOCIO. Q. 315, 319–20 (1995).

106. Brown-Nagin does not speculate as to whether the Motleys engaged in family planning methods.

107. See *Casey*, 505 U.S. at 856.

108. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2341–42 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (collecting cases).

109. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (“Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.”) (footnotes omitted).

intervening period between *Plessy* and *Brown* reflected “changed facts and attitudes that had taken hold throughout society” and to which *Brown* responded by overruling *Plessy*.¹¹⁰

To be sure, some aspects of these “changed facts and attitudes” were cultural and personal—subtle shifts in the way individual Americans understood race and racism and the nation’s emerging intolerance of a system of domestic apartheid. But meaningfully, these cultural and personal shifts also were facilitated by law and the legal landscape that Motley, as part of the LDF team, painstakingly cultivated, one case at a time.

Yet Motley’s experience in the law is apparent in other aspects of *Dobbs*—and in ways more complicated and difficult to reconcile and resolve. As Brown-Nagin emphasizes, Motley “never escaped her reputation” as the “Civil Rights Queen” (p. 348). “In every phase of her career,” Brown-Nagin writes, but particularly during her time on the bench, “observers expected her to channel the views of those wedded to social justice” (p. 348). Although Judge Motley worked doggedly to dispel views that she was outcome-oriented in her judging, her civil rights reputation “sabotaged” her prospects for elevation to an appellate seat (p. 348).

But if Judge Motley sought to avoid being seen as outcome-driven and results-oriented—and saw her professional prospects diminished anyway because of just that perception—the members of the *Dobbs* majority have not been similarly constrained.¹¹¹ Indeed, their lofty perches on the highest court in the land are likely rewards for being outcome-driven and results-oriented.¹¹² Like Judge Motley,¹¹³ most of the *Dobbs* majority came to the bench with particular professional expertise and experience. But while Motley came of age as a lawyer under the tutelage of Thurgood Marshall and the LDF, all of the members of the *Dobbs* majority were professionally formed in the crucible of

110. *Dobbs*, 142 S. Ct. at 2341–42 (Breyer, Sotomayor & Kagan, JJ., dissenting).

111. See e.g., Linda Greenhouse, Opinion, *Religious Doctrine Drove the Abortion Decision*, N.Y. TIMES, July 24, 2022, at SR9 (arguing that the *Dobbs* opinion was motivated by religion rather than “artificial arguments about originalism and history” or “constitutional analysis”); Margaret Talbot, *Justice Alito’s Crusade Against a Secular America Isn’t Over*, NEW YORKER (Aug. 28, 2022), <https://www.newyorker.com/magazine/2022/09/05/justice-alitos-crusade-against-a-secular-america-isnt-over> [perma.cc/XX3Z-DUF2].

112. See Joseph P. Williams, *Trump: Next Supreme Court Nominee Will Come from Conservative List*, U.S. NEWS & WORLD REP. (May 1, 2017, 11:23 AM), <https://www.usnews.com/news/politics/articles/2017-05-01/trump-next-supreme-court-nominee-will-come-from-conservative-list> [perma.cc/PHA5-5KCD]; Jackie Calmes, *How Republicans Have Packed the Courts for Years*, TIME (June 22, 2021, 10:40 AM), <https://time.com/6074707/republicans-courts-congress-mcconnell> [perma.cc/3YVR-XM8Y]; Lawrence Baum & Neal Devins, *Federalist Court*, SLATE (Jan. 31, 2017, 10:12 AM), <https://slate.com/news-and-politics/2017/01/how-the-federalist-society-became-the-de-facto-selector-of-republican-supreme-court-justices.html> [perma.cc/8F4D-K2L8].

113. See pp. 265, 267 (discussing Motley’s “legendary professional accomplishments” and “competence”).

the conservative legal movement.¹¹⁴ Indeed, some have argued that the three most recent appointees to the Court's conservative bloc were specifically selected because of both their conservative credentials *and* their avowed antipathy for abortion rights.¹¹⁵ And despite each member's strong associations with the conservative legal movement and its attacks on abortion rights, the five-member *Dobbs* majority did little to dispel the view that its decision overruling *Roe* and *Casey* was preordained.

Maybe that is to be expected. Motley, perhaps paradoxically, became more constrained in "her ability to advance the imperatives of the disadvantaged" as she drew closer "to the pinnacle of American power" (p. 352). By contrast, the Court's conservatives' assumption of unbridled power has emboldened them to move swiftly and decisively toward their preferred vision of the constitutional order—whatever the costs and optics of doing so.¹¹⁶

Indeed, it has been relatively easy for the Court's conservatives to so proceed. Unlike Motley, for whom race and gender coincided to heighten the perception of a social justice bent, the members of the *Dobbs* majority do not labor under the weight of intersectional expectations. Rather, most of them approach the act of judging secure in the assumption that the views of white men bear the patina of objectivity and neutrality that eludes the perspectives of women and minorities.¹¹⁷

But if the *Dobbs* majority opinion is understood as a neutral expression of the rule of law, then its reality on the ground—and in the lives of so many—reveals the lie. What has unfolded in the months since *Dobbs* was announced is hardly neutrality. The decision's disproportionate impact on the lives of so many, and Black women particularly, was predictable—and indeed, predicted.¹¹⁸ And in its predictability, this fallout seems as purposeful and outcome-driven as the decision itself. With all of this in mind, one longs for a

114. See generally STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* (2008).

115. Charlie Savage, *Triumph, and Turning Point, for a Legal Movement*, N.Y. TIMES, May 4, 2022, at A15 (noting that, even prior to their appointments to the Court, Justices Gorsuch, Kavanaugh, and Barrett "[a]ll appear to have given preliminary approval to overturning *Roe*").

116. See Josh Gerstein & Alexander Ward, *The Conservative Supreme Court Is Just Getting Warmed Up*, POLITICO (June 30, 2022, 7:12 PM), <https://www.politico.com/news/2022/06/30/the-conservative-supreme-court-is-just-getting-warmed-up-00043656> [perma.cc/R53E-AKE9].

117. See Brie Thompson-Bristol & Kathy Roberts Forde, *Journalism Has Long Conflated Objectivity with White Perspectives*, WASH. POST (July 14, 2022, 6:00 AM), <https://www.washingtonpost.com/made-by-history/2022/07/14/journalism-has-long-conflated-objectivity-with-white-perspectives/> [perma.cc/Q9FN-FVX9].

118. *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong. 1134–42 (2018) (statement of Melissa Murray) ("Judge Kavanaugh has ruled repeatedly against women seeking to make their own reproductive health decisions. His record shows a cramped reading of the right to liberty and personal decision-making that distorts or ignores existing precedent. If Judge Kavanaugh were to join the Supreme Court, his record suggests that he would overturn or eviscerate these critical rights.").

member of the Court who could draw on her own experiences of motherhood to give voice—and legal authority—to these disparities.

While Motley was unable to reach the pinnacle of the Supreme Court, the prospect of a Black woman’s voice and experiences enriching the Court’s deliberations was finally realized in October Term 2022, when Justice Ketanji Brown Jackson took her seat.¹¹⁹ This development would undoubtedly thrill Motley, who advocated for greater diversity in the judiciary, not because she believed that underrepresented voices would approach judging differently, but because she believed firmly that greater inclusion “reinforced democracy” and inspired “confidence in government” (p. 355).

Motley was surely right that judicial diversity facilitates confidence in democratic institutions and the rule of law. But perhaps she gave the prospect of judging “in a different voice” short shrift—hardly surprising given the way her past experiences haunted her own career and prospects. But such experience seems more crucial than ever. At a time when the rights and liberties of so many are at stake, the ability to draw on one’s experience to concretize the outsized harms to various communities is, in fact, both urgent and necessary.

119. Annie Karni, *Ketanji Brown Jackson Becomes First Black Female Supreme Court Justice*, N.Y. TIMES (June 30, 2022), <https://www.nytimes.com/2022/06/30/us/politics/ketanji-brown-jackson-sworn-in-supreme-court.html> [perma.cc/S7XW-T5NN].

