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KEEP PASSING THE BATON: REFLECTIONS ON THE LEGACY OF RUTH BADER GINSBURG

Dean Angela Onwuachi-Willig¹

For those who care about justice, particularly for marginalized communities, September 18, 2020 brought immense heartbreak.² On that day, which happened to be Rosh Hashanah, Justice Ginsburg, who had previously written about how her religious background shaped her career as a lawyer,³ passed away.

When Justice Ginsburg passed, many highlighted that a person who dies on Rosh Hashanah, the start of the Jewish New Year, is a

1. Dean and Ryan Roth Gallo and Ernest J. Gallo Professor of Law, Boston University School of Law. Dean Onwuachi-Willig expresses gratitude to Provost Jean Morrison for her research support. She also gives special thanks to her husband, Jacob Willig-Onwuachi, and their children, Elijah, Bethany, and Solomon for their constant love and support. Finally, she extends her gratitude to the editors of the Thomas Jefferson Law Review for the invitation to give the Justice Ruth Bader Ginsburg Lecture and their hard work on this edited speech.

A renowned legal scholar and expert in critical race theory, employment discrimination, and family law, Angela Onwuachi-Willig began her service as Dean of Boston University School of Law in August of 2018. Previously, she served as Chancellor's Professor of Law at the UC Berkeley. Dean Onwuachi-Willig is author of *According to Our Hearts* with Yale University Press and numerous articles in leading law journals like the *Yale Law Journal*, *California Law Review*, *Northwestern University Law Review*, and *Virginia Law Review*, to name a few. She is a member of the American Academy of Arts and Sciences as well as the College of Labor and Employment Lawyers, and she is the recipient of numerous teaching awards, including the inaugural AALS Impact Award, the Clyde Ferguson Award, the Derrick Bell Award, and Law and Society's John Hope Franklin, Jr. Award.

2. See Linda Greenhouse, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87*, N.Y. TIMES (Sept. 24, 2020), <https://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html?smid=url-share>.

3. See, e.g., Justice Ruth Bader Ginsburg, *What Being Jewish Means to Me*, N.Y. TIMES, Jan. 14, 1996, at E13.

The Am. Jewish Comm, *What Being Jewish Means to Me*, N.Y. TIMES, (Jan. 14, 1996), http://www.ajcarchives.org/AJC_DATA/Files/Ginsburg,%20Ruth%20Bader.CV01.pdf.

“Tzadik,” which is a title given to people of great righteousness.⁴ For example, Nina Totenberg, a reporter for National Public Radio, explained, “A Jewish teaching says those who died just before the Jewish New Year are the ones God has held back until the last moment, because they were needed most, and were most righteous.”⁵ No truer words have been spoken about Justice Ginsburg. Throughout her career as a professor, practicing lawyer, and jurist, Justice Ginsburg revealed to the world exactly why she was among those persons who were most needed and most righteous in our society. She was a guiding light on the United States Supreme Court, a warrior for justice, and an inspiration to millions of people. Through her example, she reminded all of us who care about justice and equality how we have to be vigilant in the fight for these principles and goals every day.

Over the past six months, I, like many of you, have reflected on the incredible life and legacy of Justice Ginsburg. After all, there are few figures in recent history who more fully represent the progress that women have achieved in this country over the past several decades. Even fewer fought harder than she did to achieve these very gains.

Plain and simple, Justice Ginsburg is an important figure in our history, particularly to those of us in the law, not only because of the visibility she brought to so many struggles that women have had to overcome in our country, but also because of the voice that she gave to women through her work as a lawyer and later as a judge and a justice. Her willingness to not only share her own stories, but also to tell other women’s stories, fight for all women, and push us all to become more comfortable with discomfort, continually demonstrated to all who were watching how important it is to have the voices of women on the bench. Her stories enriched not only the knowledge and understanding of her

4. Joel Shannon, *‘May Her Memory Be a Revolution’: Supporters Say Rosh Hashanah Brings Special Meaning to Ginsburg’s Death*, USA TODAY (Sept. 19, 2020, 2:55 PM), <https://www.usatoday.com/story/news/nation/2020/09/19/ruth-bader-ginsburg-death-rosh-hashanah-brings-new-meaning/5832423002/>.

5. *Id.*

colleagues on the bench,⁶ but also the case law that she and her colleagues wrote.⁷

The stories of the sexism in the legal profession that influenced Justice Ginsburg's work as a litigator and a jurist started on her very first day of law school. When Ruth Bader Ginsburg entered Harvard Law School as one of only nine women among 552 men in 1956,⁸ the dean at that time famously asked her why she felt entitled to be in the class when she was taking a spot from a man.⁹ Later, despite the fact that Professor Albert Sachs had written the budding feminist lawyer and *Harvard Law Review* editor a glowing recommendation for a United States Supreme Court clerkship, Justice Felix Frankfurter refused to interview the young Ginsburg for a clerkship expressly because she was a woman.¹⁰ Indeed, although Justice Ginsburg had graduated from Columbia Law School at the top of her class,¹¹ no New York law firm extended her an offer to work there as an associate.¹² Ultimately, Ginsburg was able to obtain a federal district court clerkship, but only after one of her professors threatened to never send

6. See Press Release, Supreme Court of the United States, Statements from the Supreme Court Regarding the Death of Associate Justice Ruth Bader Ginsburg (Sept. 19, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-19-20; see also PBS NewsHour, *Justice Ginsburg Leaves a Legacy of Fighting for Equal Rights*, PBS NEWS HOUR (Sept. 19, 2020), <https://www.pbs.org/newshour/show/justice-ginsburg-leaves-a-legacy-of-fighting-for-equal-rights> (discussing how Ginsburg “served as a reminder to the other justices . . . of how the work world really operated,” as seen in her dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)).

7. See Goodwin Liu, *Ginsburg's Vision Led Us to a Better America. We Can Do the Same.*, WASH. POST (Sept. 20, 2020), https://www.washingtonpost.com/opinions/ginsburgs-vision-led-us-to-a-better-america-we-can-do-the-same/2020/09/20/e3f57194-fb51-11ea-b555-4d71a9254f4b_story.html (discussing Ginsburg's work to extend “equal citizenship” to women, “men, racial minorities, people with disabilities, and workers”).

8. Asher Klein, *At Harvard Law School, Ruth Bader Ginsburg Displayed the Steel She'd Be Famous For*, NBC10 BOSTON (Sept. 19, 2020, 9:26 AM), <https://www.nbcboston.com/news/local/at-harvard-law-school-ruth-bader-ginsburg-displayed-the-steel-shed-be-famous-for/2197397/>.

9. See Ira E. Stoll, *Ginsburg Blasts Harvard Law*, HARVARD CRIMSON (July 23, 1993), <https://www.thecrimson.com/article/1993/7/23/ginsburg-blasts-harvard-law-pin-testimony/>.

10. Greenhouse, *supra* note 2.

11. Ginsburg transferred to Columbia Law School to be near her husband after completing her first year at Harvard Law School.

12. Melissa Block, *Pathmarking the Way: Ruth Bader Ginsburg's Lifelong Fight for Gender Equality*, NPR (Sept. 24, 2020), <https://www.npr.org/2020/09/24/916377135/pathmarking-the-way-ruth-bader-ginsburgs-lifelong-fight-for-gender-equality>.

that judge another law clerk if he refused to hire her.¹³ When Justice Ginsburg joined the faculty of Rutgers Law School in 1963, she quickly learned, unsurprisingly, that she was earning considerably less than her male colleagues.¹⁴ When she confronted her dean about the wage disparity, he simply replied that one of her male counterparts had “a wife and two children to support,” while she had “a husband with a good paying job.”¹⁵ With what we would come to know as Justice Ginsburg’s indomitable spirit and courage, she then joined her woman faculty colleagues to challenge the pay inequity through the newly enacted Equal Pay Act.¹⁶

There is no doubt that these forms of discrimination that Ginsburg experienced at the beginning of her legal career stoked the fire inside of her that ultimately worked to change the course of history in our country. In fact, we see the unique voice that Justice Ginsburg brought from her experience as a woman in the legal profession in cases like *Ledbetter v. Goodyear Tire and Rubber Company*, where she passionately dissented from the majority.¹⁷ There, the majority held that Ledbetter’s paid discrimination claim was untimely because the later effects of past discrimination do not restart the clock for filing an EEOC charge in pay discrimination cases.¹⁸ Perhaps recalling the period of time in which she did not know about the pay inequity she was experiencing as a woman faculty member at Rutgers Law School, and perhaps recalling the indignities she experienced as a result of that pay inequity, Justice Ginsburg dissented in *Ledbetter*, explaining precisely why it was unfair to preclude Ledbetter’s claims from being heard when she had no way of knowing about the pay inequities she was experiencing. Justice Ginsburg even read her dissent directly from the bench. She proclaimed in part:

The realities of the workplace reveal why discrimination with respect to compensation that Ledbetter suffered does not fit within the category of singular discreet acts “easy to identify.” A worker

13. Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020), <https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87>.

14. Business Journals Staff, *Ginsburg Talks about Her #MeToo Moment*, BUSINESS JOURNALS (Jan. 23, 2018), <https://www.bizjournals.com/bizwomen/news/latest-news/2018/01/ginsburg-talks-about-her-metoo-moment.html?page=all>.

15. *Id.*

16. *Id.*

17. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 643 (2007). (See Ginsburg, J., dissenting).

18. *Id.* at 621.

knows immediately if she is denied a promotion or transfer, if she is fired or refused employment. And promotions, transfers, hirings, and firings are generally public events, known to co-workers. When an employer makes a decision of such open and definitive character, an employee can immediately seek out an explanation and evaluate it for pretext. Compensation disparities, in contrast, are often hidden in sight. It is not unusual, decisions in point illustrate, for management to decline, to publish employee pay levels, or for employees to keep private their own salaries Tellingly, as a record, in this case, bears out Goodyear kept salaries confidential; employees had only limited access to information regarding their colleagues' earnings.

The problem of concealed pay discrimination is particularly acute where the disparity arises not because the female employee is flatly denied a raise but because male counterparts are given larger raises. Having received a pay increase, the female employee is unlikely to discern at once that she has experienced an adverse employment decision.¹⁹

Fortunately, Justice Ginsburg, who was famous for her dissents, recognized that one did not have to win every argument to continue the march toward justice. Justice Ginsburg once proclaimed, "I do hope that some of my dissents will one day be the law."²⁰ In January of 2009, Justice Ginsburg had the opportunity to see this hope realized when President Barack Obama, inspired in part by the justice's dissent, formally signed the Lilly Ledbetter Fair Pay Act into law.²¹ However, the Ledbetter Act was not the first time that Ginsburg had seen her hopes and work become the actual law of the land.

Indeed, before President Jimmy Carter first appointed the "legal giant" to the United States Court of Appeals for the D.C. Circuit in 1980, Ginsburg had successfully argued a number of seminal cases before the United States Supreme Court that ultimately helped to dismantle entrenched forms of sex and gender discrimination. Her strategy to argue many of sex and gender discrimination cases on behalf of male victims is often cited as evidence of her impressive

19. *Id.* at 649–50.

20. Adam Liptak, *Court Is 'One of Most Activist,' Ginsburg Says, Vowing to Stay*, N.Y. TIMES (Aug. 24, 2013), <https://www.nytimes.com/2013/08/25/us/court-is-one-of-most-activist-ginsburg-says-vowing-to-stay.html>.

21. Sasha Zients, *Lilly Ledbetter: RBG's Dissent in Landmark Case Still Gives Me 'Chills'*, CNN (Aug. 22, 2018), <https://www.cnn.com/2018/08/22/politics/rbg-podcast-lilly-ledbetter-cnntv/index.html>

abilities as a legal strategist.²² She understood, as the late Professor Derrick Bell's interest convergence theory provides, that the interests of those marginalized in society tend to be recognized only when such interests converge with those of the governing elite.²³ Time and time again, she pressed the nine male justices before her in her oral arguments to consider the impact of sex-based discrimination against a man, and in so doing, she gradually helped to establish important legal precedents that would provide greater protections for women. In fact, in *Craig v. Boren*, her arguments challenging an admittedly "non-weighty" Oklahoma state statute that allowed women to buy "near beer" at age 18, but required men to wait until age 21, resulted in the United States Supreme Court's decision to apply heightened scrutiny to all laws governed by gender classifications.²⁴ For all the gains that Justice Ginsburg's litigation strategy earned for women, history will count her among the greatest legal minds of all time.

Justice Ginsburg was also remarkably gracious in extending credit to those who came before her, those whose shoulders she stood on as she worked to improve the lives of women in our nation. For example, she generously shared that the strategy and arguments that she used in her legendary cases before the Supreme Court were not hers alone. She shared that they came from Pauli Murray, the African American valedictorian of her class at Howard Law School²⁵ whose ideas also laid the groundwork for the arguments that Thurgood Marshall,²⁶

22. Stephanie Buck, *The On the Basis of Sex Story Wasn't the Only Time Ruth Bader Ginsburg Used Cases About Men to Argue for Women's Equality*, TIME (Dec. 24, 2018), <https://time.com/5481422/rbg-movie-male-plaintiff-history/>.

23. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); see also David Shih, *A Theory To Better Understand Diversity, and Who Really Benefits*, NPR CODE SWITCH (Apr. 19, 2017), <https://www.npr.org/sections/codeswitch/2017/04/19/523563345/a-theory-to-better-understand-diversity-and-who-really-benefits>.

24. *Craig v. Boren*, 429 U.S. 190 (1976).

25. Kathryn Schulz, *The Many Lives of Pauli Murray*, NEW YORKER (April 17, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-many-lives-of-pauli-murray>.

26. Justice Thurgood Marshall became the first black person to serve on the United States Supreme Court in 1967. Before he was appointed to the Court, he had won 29 of the 32 cases he had argued before the Court and remains one of the most important civil rights attorneys in history. See 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, 934 n.11, 1007 (2005).

Spottswood Robinson,²⁷ and others used to ultimately overturn *Plessy v. Ferguson*'s²⁸ separate but equal doctrine in *Brown v. Board of Education*.²⁹ Justice Ginsburg credited Pauli Murray — who coined the term “Jane Crow,” and who the late Justice Thurgood Marshall called the author of the “bible” of *Brown v. Board of Education* — for initially formulating the very argument that she used to gain so many rights for women.³⁰ That argument was that the Fourteenth Amendment Equal Protection Clause also applied to women. In fact, Justice Ginsburg listed Pauli Murray as a co-author of the brief she volunteered to write in the case *Reed v. Reed*, a 1971 Supreme Court case that extended the Equal Protection Clause of the Fourteenth Amendment to women.³¹

In essence, Justice Ginsburg realized that she was simply one member of a long and sustained movement. In fact, speaking of Pauli Murray and a colleague named Dorothy Kenyon at the ACLU, Ginsburg proclaimed, “we’re standing on their shoulders. We’re saying the same thing they said. But now at last, society is ready to listen.”³² As her words reveal, Justice Ginsburg understood that she was not here to win a marathon alone. She knew that no person achieves lasting progress on the people’s behalf all by herself, not even her, the “Notorious RBG.”³³

27. Like Justice Marshall, Judge Spottswood Robinson is widely known as one of the greatest civil rights attorneys in history. See Harry T. Edwards, *In Memoriam: Spottswood W. Robinson, III*, 15 HARV. BLACKLETTER L.J. 25, 26 (1999). He taught at Howard Law School for many years, teaching among others, Justice Marshall and Pauli Murray, and he became the Dean of Howard Law School in 1960. See Edwards, *supra* at 26; *Biographies*, 63 GEO. WASH. L. REV. 917 (1995). He was appointed to the U.S. Court of Appeals for the District of Columbia Circuit in November 1966, and he served as Chief Judge for that court from May 1981 to July 1986. See *Biographies*, 63 GEO. WASH. L. REV. 917 (1995).

28. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

29. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

30. Schulz, *supra* note 18; Meghan White, *The Dynamic Woman Who Shaped Ruth Bader Ginsburg*, NAT’L TRUST FOR HISTORIC PRES. (Oct. 6, 2016), https://savingplaces.org/stories/how-pauli-murray-helped-shape-notorious-rbg#X2d_O2hKiUk.

31. *Reed v. Reed*, 404 U.S. 71 (1971).

32. White, *supra* note 23.

33. While she was a law student at New York University School of Law in 2013, Shana Knizhnik was inspired to give Justice Ginsburg the nickname “Notorious RBG,” based on the name of rapper Notorious B.I.G., also known as Christopher Wallace, in a Tumblr post. Knizhnik “explained that it was the juxtaposition of Ginsburg’s small

Since learning of Justice Ginsburg's death, particularly in the midst of the horrific COVID-19 pandemic, I find myself thinking a lot about the incredible resilience that Justice Ginsburg displayed throughout her life. The death of her mother that she experienced the day before she graduated from high school and her husband's battle with cancer when they were both law students. The recurring explicit sex discrimination she faced on the job market when she was looking for jobs at New York law firms and the recurring explicit sex discrimination that she faced in her jobs as a lawyer. The lonely years she faced as the only woman on the United States Supreme Court after Justice Sandra Day O'Connor retired.³⁴ And, her own repeated battles with cancer and other illnesses while she was on the Court,³⁵ coupled with too many hard fought, but lost battles that resulted in dissents instead of majority opinions, most of which, I hope, ultimately also become the law.

We are all in debt to Justice Ginsburg for her contributions to our society. Justice Ginsburg is a model of strength and forbearance during what many of us view as a period of mounting resistance to our calls for true equality, justice, and dignity for all and our calls for greater accountability for those who fail to show respect for those values and principles. Justice Ginsburg leaves behind a remarkable legacy that has truly changed the course of history. She is a symbol of hope and

stature and powerful presence that inspired her to create the nickname influenced by Notorious B.I.G." Emily Beaman, *Notorious RBG: The Legacy of Ruth Bader Ginsburg*, THE WITCHITAN (Oct. 1, 2020), <https://thewichitan.com/67958/news/notorious-rbg-the-legacy-of-ruth-bader-ginsburg/>. Ginsburg embraced the nickname. In 2017, she asserted, "I think about how this Notorious RBG was created. People ask me, 'Don't you feel uncomfortable with a name like the Notorious B.I.G.?' Why should I feel uncomfortable? We have a lot in common. And first and foremost, we were both born and bred in Brooklyn, New York." Cedric "Big Ced" Thorton, *The Notorious B.I.G. 'S Son C.J. Wallace Says His Father 'Would Be Honored to Share the 'Notorious' Title with' Ruth Bader Ginsburg*, BLACK ENTERPRISE (Sept. 28, 2020) <https://www.blackenterprise.com/the-notorious-b-i-g-son-c-j-wallace-says-his-father-would-be-honored-to-share-the-notorious-title-with-ruth-bader-ginsburg/>. Upon Justice Ginsburg's death, the son of the Notorious B.I.G. explained that his dad would be proud that they shared the "Notorious" title, proclaiming: "Brooklyn, New York, represents no fear, confidence, and speaking your truth, and my dad and Justice Ginsburg lived those words I think he would be honored to share the 'Notorious' title with her, and it's up to us to honor their legacies by continuing to fight for equality and justice for all by voting and getting into good trouble." *Id.*

34. See Greenhouse, *supra* note 2.

35. Jamie Ducharme, *How Cancer Shaped Justice Ruth Bader Ginsburg's Life and Work*, TIME (Sept. 18, 2020), <https://time.com/5507530/ruth-bader-ginsburg-cancer-history/>.

optimism that the arc of history truly does bend toward justice, to paraphrase Boston University alumnus, Dr. Martin Luther King, Jr., and she worked tirelessly to always fight for what she believed was right.

As a Justice, she always exhibited the most integrity, never wavering from her principles even in the face of strong opposition. Importantly, she spoke in a voice that often resonated with my experience and that enabled me to feel like someone on the court was speaking for me and other women. And, I have been thinking even more about Justice Ginsburg's voice as I have pondered President Joe Biden's campaign promise to add greater intersectional, gender and racial diversity to the federal bench, particularly his promise to add more Black women to the federal bench and to appoint a Black woman to the United States Supreme Court.

In fact, as Professors Trina Jones and Catherine Smith have pointed out, it is rather astonishing that a Black woman has not been appointed to the United States Supreme Court yet, given the fact that a Black woman was first placed on a Supreme Court shortlist more than forty years ago.³⁶ As Jones and Smith highlighted, President Ronald Reagan was the first occupant of the White House to place a Black woman on a United States Supreme Court shortlist, and that woman was Judge Amalya Kearse of the United States Court of Appeals for the Second Circuit.³⁷ As of May 2021, Judge Kearse, who has served four distinguished decades on the bench, is "one of only [eight] Black women judges . . . currently confirmed to the federal circuit courts of appeal,"³⁸ and the federal courts of appeals are critical seats to have because twelve of the last thirteen Supreme Court justices have been drawn from the federal courts of appeal.³⁹ As Jones and Smith argued, and as President Biden's most recent judicial nominees reveal, this underrepresentation of Black women in the federal judiciary has not been due to a lack of talent, but instead a lack of willingness of those in power.⁴⁰

36. Catherine Smith & Trina Jones, *'Too Often Overlooked': Black Women Are Nearly Absent From the Federal Bench – It's Time to Change That*, NAT. L. J. (Dec. 8, 2020), <https://www.law.com/nationallawjournal/2020/12/08/too-often-overlooked-black-women-are-nearly-absent-from-the-federal-bench-its-time-to-change-that/?sreturn=20210627180653>.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

As the Joint Center for Political and Economic Studies has highlighted, these intersectional appointments and those that will follow them are critical for a number of reasons.⁴¹ First, they are important because the nation currently has only twenty-one Black federal appellate judges.⁴² Those judges, unfortunately, are overrepresented among the judges who are eligible to retire, meaning who meet the 80 rule by being 65 years of age or older and having at least 15 years of service. If all Black federal appellate judges who are eligible to retire did so, only a very small percentage of active federal appellate judges would be Black.⁴³

Another reason why these appointments are critical is because federal appellate courts are significant to Black communities as they have been the final arbiters in so many critical lawsuits. Black people have sought the protection of federal courts when there was nowhere else to turn. These intersectional appointments are also important because of the diversity of thought they would bring to the bench, the trust that they may restore in our judicial system, the sense of belonging that they convey to future judicial prospects, and the greater diversity they may bring to the hiring of judicial law clerks.

One of the most critical reasons for increasing intersectional diversity on the bench is institutional legitimacy, particularly in light of this nation's history of discrimination, including in the courts. As Justice Sandra Day O'Connor explained about the importance of diversity in institutions of higher education in *Grutter v. Bollinger*, having greater diversity on our federal bench is critical, so that everyday citizens and non-citizens can look at the court and believe that their interests and their voices will be included and heard.⁴⁴ A democracy is simply not at its best if all of its people are not included.

Similarly, including more Black women on the federal bench will instill greater trust in the court system. Governmental systems should reflect the composition of the populations they serve. Defendants and plaintiffs, as well as attorneys of all races and all sexes and gender identities, will have greater trust in a court system that is reflective, at least on its face, of their realities.

41. Spencer Overton, *Biden Should Prioritize Black Appointments to the U.S. Court of Appeals*, JOINT CTR. FOR POL. & ECON. STUD. (Feb. 9, 2021), <https://jointcenter.org/biden-should-prioritize-black-appointments-to-the-u-s-court-of-appeals/>.

42. *Id.*

43. *Id.*

44. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Additionally, having more Black women on the bench or women of color on the bench will send the message that Black women also belong on the bench. The presence of Black women judges will remove from people's minds the unspoken statement that Black women are not good or competent enough to serve on the bench. In fact, we saw some of these dangers experienced by some of the first Black women judges like Constance Baker Motley. After Constance Baker Motley began her service, there was pushback against the view that she could be a neutral arbiter.⁴⁵ For example, in one case, a defendant in an employment discrimination case pushed to disqualify her from adjudicating the case, arguing that she as a Black woman would identify with those who were alleged to have suffered race or sex discrimination.⁴⁶ Rightfully, Judge Motley refused to recuse herself, explaining,

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, or many others by virtue of the fact that all of them were attorneys of a sex and a race, often with distinguished law firm or public service backgrounds.⁴⁷

Lastly, Black women judges might make a difference in opportunities for others, particularly in opportunities for judicial law clerks. As we know, people of color are nearly absent from the pool of people who are serving as law clerks. Indeed, a 2017 study found that whites comprise 82.5 percent of all federal law clerks, Asians comprise only 6.5 percent of federal law clerks, Latinx individuals comprise only 4 percent of federal law clerks, and Blacks comprise only 5 percent of federal law clerks.⁴⁸ As we also know, the judges who are most likely

45. See Tomiko Brown-Nagin, *Identity Matters: The Case of Judge Constance Baker Motley*, 117 COLUM. L. REV. 1691, 1697 (2017) (“[Motley] took her seat after a long delay in the Senate’s consideration of her appointment, occasioned by concerns about her background and work as a civil rights lawyer. Skeptics of her appointment assumed that Motley, as a judge, would seek to vindicate the legal and policy preferences for which she had advocated as a lawyer.”).

46. *Blank v. Sullivan & Cromwell*, 418 F. Supp.1, 4 (S.D.N.Y. 1975).

47. Justice Ruth Bader Ginsburg, *Human Rights Hero: Tribute to Constance Baker Motley*, A.B.A. HUM. RTS. MAG.(Oct 1, 2005), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol32_2005/fall2005/hr_Fall05_bakermotley/.

48. Danielle Root, Jake Faleschini, & Grace Oyenubi, *Building a More Inclusive Judiciary*, CTR. FOR AM PROGRESS (Oct.3,2019),<https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/>.

to hire clerks of color are judges of color themselves.⁴⁹ Because many federal judges today were also once themselves judicial law clerks, it is important that we keep this pipeline of opportunities open to as diverse a group as possible.⁵⁰

If there is anything we have learned from Justice Ginsburg, it is that we have to keep passing on the baton to the next generation, much like Pauli Murray passed on the baton to her so many decades ago. In summary, as we mourn the death of this historic champion of women's rights, Justice Ruth Bader Ginsburg, we should avoid what would be easy, falling into a sense of despair about what we have lost.

Justice Ginsburg would be the first to caution against letting her death distract us from fighting the good fight. As I stated earlier, Justice Ginsburg recognized that the road ahead was long, but she was not here to win the marathon alone. Instead, she was running one leg in a relay race toward a more equitable future. She was carrying the baton passed on from suffragettes, who ran earlier legs in the same relay by fighting tirelessly for the Nineteenth Amendment.⁵¹ She was carrying the baton from Black women, like Mary Church Terrell and Ida B. Wells, who ran earlier legs in the relay.⁵² She was carrying the

49. Perry Cooper, *Black Clerks 'Like Unicorns' at Court Without Judges Like Them*, BLOOMBERG LAW (July 7, 2020), <https://news.bloomberglaw.com/ip-law/black-clerks-like-unicorns-at-court-without-judges-like-them>.

50. Indeed, one criticism that has been made of Justice Ginsburg is that she did not hire a racially diverse group of law clerks. For example, since joining both the D.C. Circuit and the United States Supreme Court in 1993, Justice Ginsburg had hired only one Black law clerk. See Paul Butler, *Ruth Bader Ginsburg Can Learn Something from Brett Kavanaugh*, WASH. POST (Oct. 15, 2018), https://www.washingtonpost.com/opinions/ruth-bader-ginsburg-can-learn-something-from-brett-kavanaugh/2018/10/15/b8974a86-cd77-11e8-a360-85875bac0b1f_story.html; Tony Mauro, *Supreme Court Clerks Are Overwhelmingly White and Male. Just Like 20 Years Ago*, USA TODAY (Jan. 8, 2018, 5:00 A.M. EST), <https://www.usatoday.com/story/opinion/2018/01/08/supreme-court-clerks-overwhelmingly-white-male-just-like-20-years-ago-tony-mauro-column/965945001/>; That one Black clerk, Paul Watford, now serves as a judge on the United States Court of Appeals for the Ninth Circuit. Megan Coggeshall, *Visiting Jurist Tells Students About His Path to a Federal Judgeship*, UNIV. CHICAGO LAW SCH. NEWS (Nov. 14, 2017), <https://www.law.uchicago.edu/news/visiting-jurist-tells-students-about-his-path-federal-judgeship>.

51. See Danielle M. Conway, *Black Women's Suffrage, the 19th Amendment, and the Duality of a Movement*, 13.1 ALA. C.R. & C.L. REV. 1 (forthcoming 2022), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3910837.

52. Lorraine Boissoneault, *The Original Women's March on Washington and the Suffragists Who Paved the Way*, SMITHSONIAN MAG. (Jan. 21, 2017), <https://www.smithsonianmag.com/history/original-womens-march-washington-and-suffragists-who-paved-way-180961869/>.

baton in race that stretches back from women who ran earlier legs for centuries. Justice Ginsburg understood her role in this race well. She fully recognized that progress is slow, that it is incremental, and that it may often require compromise.

She said, “The court generally moves in small steps rather than one giant step. Real change, enduring change, happens one step at a time.”⁵³ As we reflect on Justice Ruth Bader Ginsburg’s legacy and as we envision the future course of equality in our nation for all people, including all the complexities and intersectionalities at play, I urge you to think about the leg that you’re running in this relay toward justice, and about how you will prepare the next generation to take the baton when it’s their turn to enter the race. Most of all, I urge you to live by these words of Justice Ginsburg: “Fight for the things that you care about but do it in a way that will lead others to join you.”⁵⁴ At the same time, I urge you to learn to become more comfortable with discomfort. That way, when you find yourself fighting for the things you care about and you see that others have not yet joined you, you also find the courage to embrace it and push on.

53. *Nomination of Ruth Bader Ginsburg to be Associate Justice of the U.S. Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 103rd Cong. 610 (1993).

54. Colleen Walsh, *Honoring Ruth Bader Ginsburg*, HARVARD GAZETTE (May 29, 2015), <https://news.harvard.edu/gazette/story/2015/05/honoring-ruth-bader-ginsburg/>.