SHE STANDS ON HER OWN, AMONGST MANY: THE WOMEN OF THE TENNESSEE SUPREME COURT

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"[W]omen, like persons of different racial groups and ethnic origins, contribute what a fine jurist, the late Fifth Circuit Judge Alvin Rubin, described as 'a distinctive medley of views influenced by differences in biology, cultural impact, and life experience.'"[1]

– Justice Ruth Bader Ginsburg

INTRODUCTION

In 1920, the ratification of the Nineteenth Amendment extended to women the right to vote, making women legally independent of men and giving women their own political voice. By that same year, every state had admitted women to the state bar.[2] Each of these events

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1. Ruth Bader Ginsberg, Associate Justice, Supreme Court of the U.S, Abriton Lecture at the University of Alabama School of Law; Women's Progress at the Bar and on the Bench: Pathmarks in Alabama and Elsewhere in the Nation (Feb. 2, 2004), *in* 36 U. TOL. L. REV. 851, 853 (2005).

2. Cynthia Grant Bowman, *Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn From Their Experience About Law and Social Change?*, 61 ME. L. REV. 1, 3 (2009).

marked significant strides toward women's equality, and each had an impact on women in the judiciary. Although women had been participating in the judiciary prior to 1920, they were the rare exception. The right to vote not only enabled women to elect officials who would protect their interests in politics and the judiciary, it also shifted society's view on a woman's role in society. Admission to state bars gave women the ability to participate fully in the legal field, putting women in a position to be selected or elected as judges. Thus, with the right to vote and be admitted to state bars, the door was opened a little more for women to enter the judiciary. However, women still faced an uphill battle to gain admission and acceptance in the judiciary. As the Honorable Rosalie E. Wahl, then Associate Justice of the Minnesota Supreme Court, noted in her 1986 article, "Some Reflections on Women in the Judiciary,":

> Women in this and preceding generations have struggled, in their private lives and in their professional and public lives, to have the talents of women and the contributions of women to the body politic accepted and valued. They have struggled to achieve power and to use that power to redress injustice and to create an environment in which all can live freely and fully, without fear or want. The struggle never ends. If women falter in their efforts, if they pause to regain strength, if the many dimensions of their lives distract them for the moment, the pervasive sexism of our social institutions sweeps like an incoming tide over the field of their endeavors, erasing all evidence of progress. Even though women are equal before the law as regards most responsibilities and burdens, bigotry persists, sometimes covert and disguised.[3]

Justice Wahl's reflections perfectly capture the struggle women have faced. Even as women began to enter the judiciary in greater numbers, society questioned their participation, wondering what, if any impact women would have in the judiciary and analyzing whether it is important to have women in the judiciary. Some thought that women would bring a different perspective to the bench and would make decisions differently as a result of their gender. Some considered

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3. Rosalie E. Wahl, *Some Reflections on Women in the Judiciary*, 4 LAW & INEQ. 153, 153 (1986). Rosalie E. Wahl was the first woman to serve on the Minnesota Supreme Court, where she served from 1977 until 1994. *See The Social Justice, Legal and Judicial Career of Rosalie Erwin Wahl*, *in* MINNESOTA JUSTICES SERIES (Marvin Roger Anderson & Susan K. Larson eds., 2000), https://mn.gov/law-library/research-links/mjseries.jsp.

the impact on women generally, seeing a woman in a position of power would likely inspire other women to do the same. All sought to justify women being part of the judiciary.

As we approach the 100th anniversary of the ratification of the Nineteenth Amendment, it seems appropriate to once again reflect on women in the judiciary but shift the focus of the reflection. It is true even today, after having come as far as we have, society does not fully reflect the promise of legal equality for women. There are still strides society must make in order to reach true equality. However, women are no longer in the position Justice Wahl described. Although sexism exists, it is no longer the same pervasive monster, ready to knock back women the minute they let their guard down. Rather, women have established an ever-growing presence in society, the legal field, and the judiciary. Though the numbers may fluctuate, women are here to stay. Not only are women here to stay, men are here, in ever-growing numbers, to support them. As a result, we can now afford to reflect on women in the judiciary, not as a means of showing that they belong or add value, but purely in celebration of their accomplishments and the contributions they have made. Rather than wondering what impact women will have in the judiciary and attempting to justify women being part of the judiciary, we should reflect on the impact women have had and consider how society can strive towards true equality.

While we would like to take time to celebrate the accomplishments of every woman that has paved the way for others in the judiciary, there are fortunately now too many to discuss seriatim. Thus, we limit our celebration to the six women to have served and are serving on the Tennessee Supreme Court: Justices Martha Craig Daughtrey, Penny J. White, Janice M. Holder, Cornelia A. Clark, Sharon G. Lee, and Holly M. Kirby.[4]

This Article celebrates the catalyst effect the extension of the right to vote had on women in the legal field and, in particular, in the judiciary, and pays tribute to the women of the Tennessee Supreme Court who forged and are forging a path for their peers and future generations. In Part I of this Article, we review the role of women in the legal field generally, as well as in the judiciary, prior to the passage of the Nineteenth Amendment. In Part II, we follow the rise of women in the judiciary after the passage of the Nineteenth Amendment and outline how studies and literature considered women in the judiciary. Finally, in Part III, we reflect on women in the

4. Though we cannot discuss every great female jurist to date in full, this Article cites in the footnotes to numerous articles written by some additional great female jurists, which we would highly recommend reading.

judiciary, focusing on the women of the Tennessee Supreme Court and the impact each of them has brought to the legal field.

I. WOMEN IN THE LEGAL FIELD AND JUDICIARY BEFORE THE NINETEENTH AMENDMENT

We begin with the entrance of women to the legal field, because beginning in the early 1900s, formal law training became a prerequisite for judicial candidates.[5] The story of women in the legal field prior to the Nineteenth Amendment begins in colonial times.[6] In the early colonial era, the legal profession did not exist as it does today. The Colonists disliked English law, finding it "mired in precedent, antiquity, and corruption."[7] As a result, the colonists intentionally kept the justice system informal and did not establish a legal education system.[8] Most people represented themselves before justices of the peace; if someone did represent another person, the colonies generally required the person to do so unpaid.[9] During this time, women were active participants in the justice system, often acting as counsel for themselves, their husbands, and others.[10]

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5. *See* Larry Berkson, *Women on the Bench: A Brief History*, 65 JUDICATURE 286, 287 (1982).

6. *See id.* ("During the colonial era . . . historians record women acting as their own attorneys, as counsel for their husbands and sometimes as unpaid attorneys for third parties.").

7. Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WIS. INT'L L.J. 335, 336 (quoting DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 201 (1963)). As Katchner further explains: "For the colonies founded on religious principles, the 'legal profession, with its special privileges and principles, its private, esoteric language, seemed out of place in a government that aimed to be both efficient and godly.'" *Id.* at 336 (quoting LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 54 (3d ed. 2005)).

8. *See, e.g.*, Katcher, *supra* note 7, at 337 ("The people of the American colonies would have been happy to do without lawyers and, for quite a while, did just that. For many years, as suggested by the Pennsylvania example, much of the legal work was done by lay 'attorneys-in-fact' and lay judges.").

9. *See* Berkson, *supra* note 5, at 287; *see also* Katcher, *supra* note 7, at 337 ("Everyone is to tell his own case, or some friend for him. . . . 'Tis a happy country.'" (quoting FRANCES R. AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM: SOME SELECTED PHRASES 13 (1940))).

10. Berkson, *supra* note 5, at 287. "One of the most professionally active women during the 1600s was Margaret Brent. In the eight years from 1624 to 1650, her name appeared 124 times in the records of Maryland's courts. . . . Other women entered courtrooms during the 1600s. In 1650, widow Gertrude James, an early settler of Kent Island, Maryland, not only defended her property but that of a friend as well against a challenger's claim of title. Thirty years later, Sarah Bland began her legal career by settling her husband's estate. Thereafter she acted as attorney for herself and third parties. In Virginia, Rebecca Heathersall agreed to handle all the legal affairs of a

Despite their detest for lawyers, the colonists eventually found lawyers to be a necessary part of society, and by 1750 a professional bar existed in all major communities.[11] As the legal system in the colonies formalized, so too did the educational and training requirements for those who wished to practice law.[12] Each colony set its own requirements for entering the bar, often requiring several years of apprenticeship in a law office or a college degree and a few years of apprenticeship in a law office.[13] The formalization of the legal system also marked the beginning of women's systematic exclusion from the field. Because women were excluded from higher education and most apprenticeships, they could not obtain the experience or education required to be admitted to the bar. As a result, the end of the colonial era left women disenfranchised from the legal profession.

The men of the colonies had an opportunity to remedy this disenfranchisement, along with the general disenfranchisement women historically faced, when forming the United States but did not take the opportunity. In 1776, men from the thirteen colonies gathered to draft the charter for the United States of America. As the men were preparing to form this country, the women of the colonies recognized the opportunity to make themselves seen and heard, knowing all too well the importance of the colonies' declaration of independence to their own. Amongst those women was future First Lady Abigail Adams. In advance of her husband joining with other representatives to draft the Declaration of Independence, Adams, wrote him, saying in part:

> I long to hear that you have declared an independency—and, by the way, in the new Code of Laws which I suppose it will be necessary for you to make, I desire you would Remember the Ladies and be more generous and favorable to them than your ancestors. Do not put such unlimited power into the hands of the husbands. Remember, all men would be tyrants if they could. If particular care and attention is not paid to the ladies,

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friend who had returned to England. In New York, Anna Meynders successfully represented a plaintiff in a case where the respondent had secured a well-known male attorney." *Id.*

11. Katcher, *supra* note 7, at 338–39.

12. *See id.* at 339 ("During the colonial period, an apprenticeship or clerkship was essential for being admitted to the bar. Those wanting to become lawyers in the colonial period sought out an established lawyer, paid a fee, and got practical experience working at the lawyer's office as well as more academic learning by receiving instruction from a lawyer." (internal citations omitted)).

13. *Id.*

> we are determined to foment a Rebelion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation.[14]

Nevertheless, the women were forgotten. In September of 1787, fifty-five men gathered to sign the Constitution of the United States of America, a document which provided for a nation governed by men and to which "[w]omen were subject . . . but 'unacknowledged in its text, uninvited in its formulation, [and] unsolicited for its ratification.'"[15] As Justice Sandra Day O'Connor noted, "[a]lthough neither the Constitution nor the Bill of Rights explicitly denied equal rights to women, it seems fair to say that the Framers envisioned no role for women in the new American government."[16] This exclusion, by lack of inclusion, made women legally subordinate to and dependent on the men in their lives. They were given no political voice of their own, meaning that as the contours of society in United States were being formed and designed, men created the roles for women, largely limiting them to domestic roles.[17] However, even as the role of women in society was being formed, women because to chip away at

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14. Letter from Abigail Adams to John Adams (Mar. 31, 1776) [electronic edition], *in* ADAMS FAMILY PAPERS: AN ELECTRONIC ARCHIVE, http://www.masshist.org/digitaladams/archive/doc?id=L17760331aa&bc=%2Fdigitaladams%2Farchive%2Fbrowse%2Fdate%2Fall_1776.php (last visited Mar. 26, 2019).

15. Sandra Day O'Connor, *History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657, 658 (1996) (quoting DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 20 (1989)). As Justice O'Connor described it: "In the early nineteenth century, American men and women moved in strictly separated spheres. The commercial, political, and professional realms were dominated by men, while women were relegated to the domestic arena. The notion of gender-specific spheres had its roots in the belief that women were subordinate to men by nature, almost certainly less intelligent, and biologically less suited to the rigors of business and politics. Even at the turn of the century, the law still firmly enshrined the separate-spheres theory of gender relationships. Women generally could not serve on a jury, as a justice of the peace, or as a notary public. In many states, they could not hold elected office or practice law. A married woman could not enter contracts, hold or convey property, retain her own earnings, bring legal actions, or acquire a passport based on her own nationality. In the words of the English poet, Alfred, Lord Tennyson, a wife stood in relation to her husband as something just 'better than his dog, a little dearer than his horse.'" *Id.* at 658 (quoting Alfred Tennyson, *Locksley Hall* 29 (Fields, Osgood, 1869)).

16. *Id.* at 657.

17. *See id.* at 658.

the box being built around them, using every opportunity to fight for equal rights.[18]

To enter the legal field, women capitalized on the fact that they had been forgotten, rather than outright excluded. Though women did not have enumerated rights under the Constitution, it was not illegal for women to practice law; however, there was nothing stopping state bars from denying women admission to state bars. The laws governing admission to the states' bars were largely similar, and none provided for women to be admitted as a matter of right. This resulted in women being largely excluded from the profession. Though the ability to deny women admission to the bar did, for a long time, largely keep women out of the legal field, this dichotomy left open a crack for women to re-enter the legal field after its formalization. The first woman to slip through this crack was Arabella Babb Mansfield, who was admitted to practice law by an Iowa district court in June of 1869, making her the first woman admitted to practice law in any state.[19] Mansfield was admitted to the Iowa state bar, despite the governing statute that required applicants to be "white male citizens."[20]

However, Mansfield was the exception at the time, not the rule. Women more commonly experienced the legal community systematically barring them from the profession by controlling admissions to law school and bar membership and through social ostracization.[21] Indeed, at nearly the same time Mansfield was admitted in Iowa, Myra Bradwell applied for a license to practice law in Illinois, but was denied by the Illinois Supreme Court under a law

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18. *See id*. at 658 ("As abolitionists, women first won the right to speak in public. They then began to put these newly acquired skills to use in pressing for their own rights, particularly the right to vote.").

19. Ellen A. Martin, *Admission of Women to the Bar*, 1 CHI. L. TIMES 76, 76–77 (1887); *see also* Berkson, *supra* note 5, at 288.

20. Martin, *supra* note 19, at 76–77. Mansfield did not attend law school; rather, she served as an apprentice in her brother's law firm. Upon review of her application, the committee stated: "Your Committee have examined the provisions of Section 2,700 of Ch. 114, of the Revision of 1860, concerning the qualifications of attorneys and counselors in this State, but in considering the section in connection with division 3 of Section 29, Ch. 3 of the Revision, on construction of statutes, we feel justified in recommending to the Court that construction which we deem authorized, not only by the language of the law itself, but by the demands and necessities of the present time and occasion. Your Committee take unusual pleasure in recommending the admission of Mrs. Mansfield, not only because she is the first lady who has applied for this authority in this State, but because in her examination, she has given the very best rebuke possible to the imputation that ladies can not qualify for the practice of law." *Id*.

21. *See* Berkson, *supra* note 5, at 288.

that provided for the admission of "persons" who had obtained a license to practice law.[22] In denying Bradwell's application, the court explained that, "as a married woman, [she] would be bound neither by her express contracts nor by those implied contracts, which it is the policy of the law to create between attorney and client."[23] Even more evident of the mindset within the profession at the time is Justice Bradley's concurrence in the Supreme Court opinion,[24] which affirmed the Supreme Court of Illinois' decision in *Bradwell*:

> [C]ivil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently fits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say the identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. . . . In the nature of things it is not every citizen of every age, sex, and condition that qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason and experience . . . .[25]

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22. *Id.* The Illinois Supreme Court did so "despite [having received] a certificate from the lower court testifying to her good character, and her successful passage of the required examination." *Id.*

23. *In re* Bradwell, 55 Ill. 535, 535–36 (1869). This decision did not, however, prevent women from applying to practice law in Illinois and, more importantly, did not prevent the lower courts from granting admission to women. In fact, shortly after the court refused Bradwell admission, Adah H. Kepley was admitted to practice by the court of Effingham, Illinois. Berkson, *supra* note 5, at 288. Contrary to the supreme court's findings, the admitting judge found that Kepley's "motion was proper and in accord with the spirit of the age." *Id.* (citing Martin, *supra* note 19, at 78).

24. Bradwell v. Illinois, 83 U.S. 130, 142 (1873) (Bradley, J., concurring). In affirming the decision, the Court held that the Fourteenth Amendment privileges and immunities clause did not protect the right to practice law; rather, the right to practice law was considered a matter for the states to determine themselves. *See id.* at 139.

25. *Id.* at 141–42.

Despite the *Bradwell* decision and the widespread societal disenfranchisement, women persisted, undeterred. The mid-nineteenth century saw a rising demand for women's equality. The women seeking to break the barriers to the legal profession soldiered forward with women demanding overall women's equality and the abolitionists fighting to end slavery.[26] Through the abolitionist movement, the women's movement learned organizational skills, the importance of holding public meetings, and how to conduct petition campaigns.[27] They used these skills to effectively speak out against women's legal subordination to men.[28] Even as *Bradwell* was on appeal to the United States Supreme Court, Adah H. Kepley was admitted to practice by a court in Effingham, Illinois, despite the Illinois Supreme Court's decision in *Bradwell*.[29] In the 1870s, women campaigned for sex-neutral statutes to allow women to be licensed attorneys, and by 1879, three states had passed such legislation,[30] even more had admitted women to practice law under the established legislation, and Congress passed a law permitting women to practice before the United States Supreme Court.[31]

Throughout the end of the nineteenth century, women continued to band together to advance women in the legal profession. In 1886, Lettie Burlingame founded the Equity Club for women law students and alumnae of the University of Michigan; the club later expanded

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26. *See* O'Connor, *supra* note 15, at 658.

27. *Id*. As Justice O'Connor describes it: "The seeds of change were sown in the abolitionist movement of the mid-nineteenth century. As the nation struggled morally and intellectually with the continued existence of slavery, women entered the movement with enthusiasm. By 1850, women constituted a majority in Northern antislavery societies and were the leading organizers of abolitionist petition drives. It was in the abolition movement that women reformers sharpened their organizational skills and learned to hold public meetings and conduct petition campaigns. As abolitionists, women first won the right to speak in public. They then began to put these newly acquired skills to use in pressing for their own rights, particularly the right to vote." *Id*.

28. *See* Jennifer K. Brown, Note, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175, 2175 (1993).

29. *Id*.

30. Berkson, *supra* note 5, at 288–89.

31. *Id*. at 289. "In 1873, Mrs. Lockwood had been refused the right to plead a case before the U.S. Court of Claims. Later, she was also denied admission to the U.S. Supreme Court. During the next few years she fought for passage of a federal statute that would prevent the exclusion of women from practicing before the U.S. Supreme Court. The act, passed in 1879, enabled women who had been members of the state's highest bar for at least three years to be admitted to practice before the Court. In March of that year, Mrs. Lockwood became the first woman admitted to practice before the U.S. Supreme Court. The Court of Claims followed suit." *Id*.

to include women attorneys from other schools.[32] In 1893, the legal committee of the Queen Isabella Association organized the first nationwide meeting of women lawyers at the World's Fair in Chicago.[33] In 1898, Ellen Spencer Mussy and Emma Gillett founded the Washington College of Law in Washington, D.C., the first law school founded to accommodate female students who were rejected from other law schools based on their gender.[34]

As the number of women in the legal field increased, so did the number of women eligible to serve as judges. However, the ascension of women into the judiciary would move just as slowly, if not slower.[35] Beginning in the early 1900s, becoming a judge in most states required formal law training.[36] Although women had been gaining admission to state bars with increasing frequency, the pool of women able to apply for the bar was small, as law schools remained largely closed to women. Another barrier to women serving in the judiciary was the ability to vote. In many states, becoming justice of the peace did not require formal law training, but was an elected position. Even if a woman decided to run, without women's votes, election was nearly

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32. Professor Cunnea, *A Timeline of Women's Legal History in the United States*, STAN. (1998), http://wlh.law.stanford.edu/wp-content/uploads/2011/01/cunnea-timeline.pdf.

33. *Id.*

34. *See id.*; *see also* Mary L. Clark, *The Founding of the Washington College of Law: The First Law School Established by Women for Women*, 47 AM. U. L. REV. 613, 634 (1998).

35. However, this did not prevent some women from being appointed to judicial positions prior to the Nineteenth Amendment, including: Carrie B. Kilgore, Pennsylvania Chancery, 1886, Berkson, *supra* note 5, at 291; Marilla Ricker, U.S. Commissioner in the District of Columbia in 1891, *Marilla Marks Ricker*, DOVER PUB. LIBR., https://www.dover.nh.gov/government/city-operations/library/history/marilla-marks-ricker.html (last visited May 15, 2019); Ida L. Gregory, Denver Juvenile Court, Colorado, 1903, Mary J. Mullarkey, *A Brief History of Women of the Colorado Supreme Court*, COLO. LAW., Oct. 2012, at 27; Olga Melinda Victoria Miller, Las Cruces, Territory of New Mexico, 1910, *New Mexico's First Woman Judge*, B. BULLETIN, Apr. 10, 2006, at 10; Lydia Beckley Pague, Eagle Country, Colorado, 1911, Berkson, *supra* note 5, at 291; Clara Jess, Justice of the Peace, California, 1913, *Who Was California's First Woman Judge?*, L.A. DAILY MIRROR (Apr. 17, 2013), https://ladailymirror.com/2013/04/17/who-was-californias-first-woman-judge-a-puzzlement/; Frances Hopkins, Probate Judge, Missouri, 1915, Berkson, *supra* note 5, at 291; Jean H. Norris, Magistrate Judge, New York, 1919, Mae C. Quinn, *Fallen Woman (Re)framed: Judge Jean Hortense Norris, New York—1912-1955*, 67 U. KAN. L. REV. 451, 451 (2019), https://kuscholarworks.ku.edu/bitstream/handle/1808/27733/Quinn_2019_FallenWoman.pdf?sequence=1&isAllowed=y; Phoebe Ely Patterson, Justice of the Peace, Michigan, 1919, *Women's History Timeline*, MICH. WOMEN'S HIST. CENTER & HALL FAME, http://www.michiganwomenshalloffame.org/womens_history_timeline1.aspx (last visited May 15, 2019); and Ella Eggleston, Probate Judge, Michigan, 1919, *Id.*

36. Berkson, *supra* note 5, at 287.

impossible.[37] As an example, in 1866, Elizabeth Cady Stanton was angered by the lack of progress towards women's suffrage, so she decided to be the first woman to run for Congress. Of the 22,026 votes cast, she received only twenty-four.[38] In contrast, in 1870, Esther Morris was elected as justice of the peace in South Pass Mining Camp, Territory of Wyoming.[39] She was the first woman to be elected as justice of the peace, and her election came about in the year after women in the Territory were granted the right to vote. [40] Though women successfully entered the judiciary prior to the passage of the Nineteenth Amendment, it was not until women obtained suffrage that the path to the judiciary for women truly started to open.

II. WOMEN IN THE JUDICIARY POST-NINETEENTH AMENDMENT

On August 18, 1920, Tennessee ratified the Nineteenth Amendment, becoming the final, thirty-sixth state needed for the amendment to become law.[41] This time, unlike when Mary Adams encouraged her husband to "remember the ladies," a woman's appeal made the difference. Among the all-male legislature that gathered for a special session to vote on the ratification of the Nineteenth Amendment was Harry Burn, a twenty-four-year-old representative from East Tennessee.[42] Burn entered the capitol adorning a red rose, indicating his opposition to the Nineteenth Amendment, and a letter from his mother, which read:

> Hurrah, and vote for suffrage and don't keep them in doubt. I noticed Chandlers' speech, it was very bitter. I've been waiting to see how you stood but have not seen anything yet . . . . Don't

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37. Despite the difficulties women faced being elected to a judicial position, there were women who succeeded in being elected prior to the Nineteenth Amendment, including: Esther Morris, South Pass Mining Camp, Territory of Wyoming, 1870, *id.* at 287; Catherine Waugh McCulloch, Evanston, Illinois, 1907, *id.* at 291; Reah Whitehead, King County, Washington State, 1914, *id.*; and Nellie T. Bush and Emeline Ferguson, Justice of the Peace, Yuma County, Arizona, 1914, ARIZ. SUPREME COURT, A VISION FOR THE FUTURE OF THE ARIZONA JUDICIAL BRANCH 3 (2015), http://www.azcourts.gov/portals/86/strategicagendajustice2020.pdf.

38. O'Connor, *supra* note 15, at 661 (citing Minor v. Happersett, 88 U.S. 162, 178 (1874)).

39. Berkson, *supra* note 5, at 287.

40. Berkson, *supra* note 5, at 291.

41. *Women's Suffrage: Tennessee and the Passage of the 19th Amendment*, TENN. SECRETARY ST., https://sos.tn.gov/products/tsla/womens-suffrage-tennessee-and-passage-19th-amendment (last visited May 15, 2019).

42. *Id.*

> forget to be a good boy and help Mrs. Catt with her 'Ratts.' Is she the one that put rat in ratification, Ha! No more from mama this time. With lots of love, Mama.[43]

When Burn's name was called to vote, to everyone's surprise he voted "Aye," and in doing so pushed the vote from a deadlock to a victory for the suffragists.[44] With Burn's vote, for the first time in United States history, women stood on their own, no longer legally subordinated to men.

The freedom to voice their own political opinions guaranteed to women by the Nineteenth Amendment created a platform on which women stood to be seen and heard in their campaign for equality. More importantly, now armed with the ability to vote, women had the power to elect leaders who would fight for their rights and represent their interests. At the same time, the pool of women that had the potential to become judges continued to grow as women were inspired to enter the legal field and by that time women in every state had successfully petitioned to be admitted to the bar.[45] These two victories, together, served as a catalyst for women entering the judiciary. Not even one year after the Nineteenth Amendment's ratification, the women of Ohio came together to elect Florence Ellinwood Allen[46] to the Court of Common Pleas in Cuyahoga County, Ohio, making her the first woman to be elected, rather than appointed, to a court of general jurisdiction.[47] The following year, she was elected to the Ohio

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43. *See* Letter to Harry Burn from Mother (Aug. 17, 1920) (on file with the Knox County Public Library, http://cmdc.knoxlib.org/cdm/ref/collection/p265301coll8/id/699).

44. *Women's Suffrage: Tennessee and the Passage of the 19th Amendment*, *supra* note 41.

45. Bowman, *supra* note 2, at 3. Between 1910 and 1930, the percentage of women lawyers nearly doubled, found from one percent to 2.1 percent. Berkson, *supra* note 5, at 289.

46. Florence Allen attended the University of Chicago Law School in 1909 for her first year of law school, the only woman in a class of about 100. Ruth Bader Ginsberg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilerating Change President Carter Wrought*, 64 FORDHAM L. REV. 281, 282 (1995). After finishing the winter quarter second in her class, her classmates complimented her on how she thought like a man, a comment with which she did not agree. *Id.* She once said: "When women of intelligence recognize their share in and their responsibility for the courts, a powerful moral backing is secured for the administration of justice." *Id.* (citing FLORENCE E. ALLEN, TO DO JUSTLY 48 (1965)). She completed her legal education at New York University, after Columbia University refused to admit women. *Id.* Prior to taking the bench, Judge Allen was an assistant prosecutor in the City of East-Cleveland, the first woman to hold that title. *Id.*

47. *See id.* As Justice Ginsburg and Laura Brill describe Justice Allen's time in the court of common pleas: "Allen's fellow judges greeted the former prosecutor with

Supreme Court, becoming the first woman in the country to serve on a state supreme court.[48] At the same time, Mary O'Toole became the first female municipal judge in the United States, appointed to the Municipal Court of Washington, D.C.[49]

However, the initial excitement of the victory for women's suffrage tapered, and as it did, women's ascension to the bench slowed as well. Though women were no longer legally subordinate to men the instant the Nineteenth Amendment was ratified, the necessary changes in society to reflect this came much more slowly. Despite the widespread campaign for women's suffrage and the victory in 1920, a 1936 Gallup Poll found that eighty percent of Americans, men and women, agreed that a wife should stay at home if her husband had a job.[50] Sexism continued to be apparent in judicial opinions, evidencing a continued social view that women were in some regard less than men.[51] This thinking was exacerbated by the Depression, when women whose husbands had a job were made to feel guilty about taking a position away from a man with a family to support.[52]

Regardless, women persisted. Though still largely denied acceptance to law schools, women continued to apply, and increasingly gained entrance. Women who attended law school faced hostile professors and colleagues,[53] only to then face a legal field outside of

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the suggestion that she confine her judging exclusively to domestic disputes. Allen, who never married, turned down the suggestion, saying that, unlike her brethren, she lacked sufficient experience in the domestic domain. In twenty months on the trial court bench, Florence Allen disposed of nearly 900 cases. During one trial, which led to the conviction of a mob boss for murder, Allen and members of the jury received death threats. The judge carried on, undeterred." *Id.*

48. *Id.* Judge Allen was later appointed to the Sixth Circuit Court of Appeals in 1934 by President Franklin D. Roosevelt, making her the first women in the nation appointed to an Article III federal court. *Id.* Twelve years later in 1934, Judge Allen made history again when President Roosevelt appointed her to the Sixth Circuit Court of Appeals, making her the first female federal appeals court judge. *Id.*

49. *See Appoints Woman As Judge; President Names Mary O'Toole to Washington Municipal Court.*, N.Y. TIMES, July 22, 1921, at 4.

50. O'Connor, *supra* note 15, at 671 (citing GEORGE H. GALLUP, THE GALLUP POLL: PUBLIC OPINION, 1935–1971, at 39 (1972)).

51. *See* J.D. Johnston & C.L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 676–77 (1976).

52. Bowman, *supra* note 2, at 5.

53. Frances Marlett, a 1922 Barnard graduate, recalled: "At the time I was ready to enter law school, women were looked upon as people who should not be in law schools. New York University, fortunately, was more liberal than most of the colleges. I wanted very much to go to Columbia, but I couldn't get in. I went over to see Harlan Stone, Dean Stone, who was later Chief Justice, and asked him to open the law school and he said no. And I asked why he couldn't open the law school to women, and he

law school that was equally as hostile.[54] Nevertheless the number of women in the legal field continued to grow: Between 1920 and 1960, the number of women lawyers increased from 1,738 to 7,543.[55] In the late 1960s and 1970s, the legal field underwent major changes, both in practice and education. As a result, the field grew in numbers, including both men and women: In 1976, there were 38,000 women lawyers who made up 9.2% of the legal field, and in 1980, the number jumped to 62,000 women, making up 12% of the legal field.[56]

With the increase of women in the legal field in the 1970s and 1980s, appointment of women to the judiciary became more widely accepted, resulting in women establishing themselves as a significant minority within the judiciary.[57] By 1979, a woman had served at some level of the judicial system in all fifty states, and in 1980, women made up 2.1% of judges in state judiciaries.[58] Today, women make up a much more substantial minority. Starting with Minnesota in 1991, there have been sixteen states that have had a female-majority supreme court; there are twelve states that continue to have a female-majority today.[59] In 2018, women made up 33.3% of Supreme Court

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said, 'We don't because we don't.' That was final and I didn't get in. But N.Y.U. did accept me and I went there." CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 51 (1981).

54. Women graduating law school found it nearly impossible to find a job, often settling for "employment in the lower rungs of government service, in family firms, or . . . in volunteer work" and many women were forced to turn to other occupations or become legal secretaries." Cynthia Fuchs Epstein, *Women in the Legal Profession at the Turn of the Twenty-First Century: Assessing Glass Ceilings and Open Doors*, 49 U. KAN. L. REV. 733 (2001). When World War II hit, women lawyers caught a small break. With male lawyers entering the armed forces, law firms had no choice but to fill their positions with women lawyers. However, when the men returned from war the legal field returned to the status quo, and women once again struggled to find jobs. Bowman, *supra* note 2, at 5.

55. EPSTEIN, *supra* note 53, at 4. Although the number of women lawyers increased drastically, the percent of women in the legal field rose from 1.4% to only 3.3%, which was in fact a decrease from the previous year, when women made up 3.5% of lawyers in the United States. *Id.*

56. *Id.* at 4.

57. Berkson, *supra* note 5, at 293.

58. EPSTEIN, *supra* note 53, at 243.

59. This does not include Texas, which was the first state to have female-majority supreme court and, in fact, the only state to ever have an all-female supreme court. *See* Mary G. Ramos, *Texas' All Woman Supreme Court*, TEX. ALMANAC (2018), https://texasalmanac.com/topics/history/texas-all-woman-supreme-court. This court was convened in 1925 for a special session of the Supreme Court of Texas. *Id.* The case involved the Woodmen of the World, an influential group in Texas politics of which most lawyers and elected officials were members. *Id.* As a result, the sitting Justices were forced to recuse themselves, and the Governor was forced to search for replacements. *Id.* Finding that every male judge or attorney he approached was a

Justices, 36.8% of active judges on the Circuit Court of Appeals, and 34% of active judges in Federal District Courts. The total representation of women in federal and state judgeships was 27.1%.[60]

As women have come to the bench in greater numbers, many have questioned whether and how it will make a difference. This question has been posed by judges, lawyers, and others outside the legal field, both men and women. Much literature, particularly in the 1970s and 1980s, was published addressing this question. However, the question was best answered in just a few short sentences by the late Judge Patricia Wald, former federal judge on the United States Court of Appeals for the District of Columbia Circuit:

> Do women on the bench really make a difference in the development of the law? The maxim that a wise man and a wise woman come to the same conclusions is endlessly repeated, but I think it somewhat simplistic. . . . Nearer the truth, I think, is that being a woman and being treated by society as a woman can be a vital element of a judge's experience. That experience in turn can subtly affect the lens through which she views issues and solutions.[61]

The diversity women bring to the bench has played an important role in the development of the justice system; evidence of this is all over the judiciary. For example, upon becoming a county judge in Tulsa, Oklahoma in 1995, Linda Morrissey quickly noticed a correlation between unpaid child support and domestic violence cases—when one parent failed to pay, the other would refuse visitation and the situation would escalate.[62] To help remedy the problem, Judge Morrisey created a "rocket docket" for child support cases, which sped up child support cases where the defendant failed to pay after arraignment.[63] The court generated $1 million in child

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member of the Woodmen, he decided to turn to the women, who were not permitted to join the organization. *Id.*

60. COMM'N ON WOMEN IN THE PROFESSION, AM. BAR ASS'N, A CURRENT GLANCE AT WOMEN IN THE LAW 5 (Jan. 2018), https://www.americanbar.org/content/dam/ aba/administrative/women/a-current-glance-at-women-in-the-law-jan-2018.authchec kdam.pdf.

61. Patricia Wald, *Six Not-So-Easy Pieces: One Woman Judge's Journey to the Bench and Beyond*, 36 U. TOL. L. REV. 979, 989 (2005).

62. Jay Newton-Small, *More Women in the Judiciary Means Justice for All*, NAT'L L.J. (Jan. 11, 2016), https://www.law.com/nationallawjournal/almID/1202746612056/ More-Women-in-the-Judiciary-Means-Justice-for-All/.

63. *Id.*

support payments in the first year and the court's number of domestic violence cases decreased.[64]

As Judge Anita Blumstein Brody, a federal district judge in Philadelphia, Pennsylvania, noted in a 2002 panel on women judges at Columbia Law School:

> [W]e now have five [women] judges on my bench and it makes a big difference. I think that the lawyers, the male judges have become sensitized to issues and look us in the eye the way they didn't look us in the eye ten years ago when I went on the bench. There seems to be a much higher comfort [level] with women, and the lawyers have told me they can sense the difference throughout the whole courthouse of having more women on the bench, and that the males are more comfortable with having women lawyers . . . I think it goes to the importance of having women on the bench because I think they sensitize their colleagues and perform in certain accepting kinds of ways."[65]

It is clear from the women, past and present, who have served in the judiciary that not only do women deserve to be included in the judiciary, but they also add great value to the system.

III. WOMEN OF THE TENNESSEE SUPREME COURT

The first Justices of what would become the Tennessee Supreme Court were appointed by President George Washington in 1791, when Tennessee was still a territory.[66] Since then, there have been 105 Supreme Court Justices, six of whom have been women.[67] In the 228-year span of justices, women have been on the bench for twenty-nine years.[68]

Needless to say, a lot had to happen in front of the bench before women were behind it. First came Lutie Lytle, the first African

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64. *Id.* As Newton-Small explains: "It is no coincidence that in the past 35 years, as women's presence on courts has increased dramatically, so too have extracurricular programs designed to prevent people from ending up on trial, including employment skills training, counseling, drug rehab, divorce mediation and children's corners." *Id.*

65. *Panel Transcript: Women on the Bench*, 12 COLUM. J. GENDER & L. 361, 381 (2003).

66. *Justices*, TENN. SUPREME COURT HIST. SOC'Y (2014), https://www.tschsociety.org/ justices.html. President Washington appointed three Article IV judges of the Southwest Territory, which would later become Tennessee. *Id.*

67. *Id.*

68. *Id.*

American woman to earn a law degree in Tennessee and the first woman (of any color) to be certified to practice law in any court in Tennessee.[69] Lytle was admitted to practice in the Criminal Court in Memphis, Tennessee after taking an oral bar examination and being deemed qualified in 1897.[70] Next, in 1900, Marion Griffin sought admission to the Tennessee bar. Although she was certified as qualified to practice law in Tennessee by a sitting judge of the local Circuit Court and a sitting chancellor of the local Chancery Court, the Tennessee Supreme Court denied her application. Griffin petitioned the Supreme Court in 1900 and in 1901, each time being denied licensure based solely on her gender.[71] Undeterred, Griffin enrolled in the School of Law of the University of Michigan and graduated in 1906 with a Bachelor of Laws.[72] She then returned to Tennessee, where she campaigned for the Tennessee Legislature to pass an act giving women the right to practice law.[73] On February 13, 1907, the Legislature passed the bill, and on July 1, 1907, Griffin became the first woman admitted to the state bar by the Supreme Court of the State of Tennessee.[74]

Women entered the judiciary in Tennessee in 1920, with Camille Kelley becoming the first women to serve on a court in the state, serving on the juvenile court in Shelby County, Tennessee.[75] Judge Kelley was not joined by another woman on the bench until 1975, when Martha Craig Daughtrey became an associate judge of the Tennessee Court of Criminal Appeals. As women were entering the judiciary in Tennessee, the Tennessee Supreme Court was undergoing changes that reflected developments in the legal field. In the late 1960s and early 1970s, the court was made up of white males who met only during court sessions and avoided speaking to each other by conducting all other court business in writing.[76] In 1974, the court

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69. *Lutie Lytle*, EMILY TAYLOR CTR. FOR WOMEN & GENDER EQUALITY, https://emilytaylorcenter.ku.edu/pioneer-woman/lytle (last visited May 15, 2019).

70. *Id.*

71. *Marion Griffin*, WOMEN OF ACHIEVEMENT, http://www.womenofachievement.org/ heritage/marion-griffin (last visited May 15, 2019).

72. *Id.*

73. *Id.*

74. *Id.*

75. Thos F. Kelley, *CAMILLE KELLEY, A MEMPHIS JUDGE; First Woman Appointed to Municipal Juvenile-Court in the South Is Dead*, N.Y. TIMES, Jan. 29, 1955, at 15, https://www.nytimes.com/1955/01/29/archives/camille-kelley-amemphis-judge-first-w oman-appointed-to-municipal.html.

76. Frank F. Drowota III, *Recent Tennessee Supreme Courts Have Had Distinct Qualities*, TENN. B.J., Feb. 2006, at 22.

drastically changed the way it functioned and operated, creating an overall collegial and energetic court.[77] This court created a foundation for future courts to build on, the next of which—the 1990–1998 court—was the most diverse in the court's history. In an eight-year span, nine different judges served on the court, including the court's first, second, and third female justice and the first African American justice.[78]

In 1990, when Justice Daughtrey was appointed to the Tennessee Supreme Court, she stood alone, literally, as she was the first and only women to have been appointed to the court. More importantly, however, Justice Daughtrey stood on her own, figuratively, thanks to the Nineteenth Amendment. Today, Justice Daughtrey continues to stand on her own, but she is no longer alone. She now stands with Justices Penny J. White, Janice M. Holder, Cornelia A. Clark, Sharon G. Lee, and Holly M. Kirby, the five other women who have sat or are sitting on the Supreme Court of Tennessee, as well as thousands of other women who hold positions in both the federal and state judiciaries. Each of these women have made their mark on the court and offered invaluable contributions to the Tennessee judiciary. We now celebrate their contributions.

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77. *Id.* at 23. As Judge Drowota explained: "The '74 court was composed of Bill Harbison, 51; Ray Brock, 52; Bob Cooper, 53; Bill Fones, 56; and Joe Henry, 57. They were bright, energetic enthusiastic and compassionate individuals who were disciplined enough to set aside egos and personalities and operate as a five-member team, as the court does today. Bill Fones, as the first chief justice, played a major role in the significant changes that were to occur. The '74 court made several campaign commitments, which contrasted the old and new Supreme Courts. The '74 court committed: 1) to read briefs prior to oral argument—many on the prior court were not known to read the briefs; 2) to use law clerks to better prepare for oral argument; 3) to have a new procedure for assigning cases—blind draw—the prior court rotated assignments therefore they would know before oral argument which cases they would be assigned; 4) to have no more one-judge opinions; 5) to have all opinions reflect the collective thinking of the entire court; 6) to adopt court rules, particularly the rules of appellate and criminal procedure; 7) to carefully consider the ABA Code of Judicial Conduct; and finally 8) to have a more open system for selecting the attorney general." *Id.*

78. *Id.* at 24.

A. Justice Martha C. Daughtrey[79]

Justice Daughtrey was the first woman appointed to the Tennessee Supreme Court in April 1990, was retained in August 1990, and served on the bench until her nomination to the U.S. Court of Appeals for the Sixth Circuit in November 1993.

When Justice Daughtrey began her legal career, she sat alone at Vanderbilt Law School in a class of sixty-four men. At the time, Vanderbilt Law allowed only three women per class, and the other two women in her class had been assigned to another section.[80] From the beginning of law school, Justice Daughtrey was consistently reminded that she was a woman in a "man's world,"[81] and often suffered the consequences of the serious lack of understanding held by male professors and colleagues.[82] Despite the sexism she faced in

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79. Justice Daughtrey was born July 21, 1942, in Covington, Kentucky. She received her B.A. from Vanderbilt University in 1964 where she was a member of Phi Beta Kappa. She received her J.D. from Vanderbilt University in 1968 where she was Order of the Coif. Before her appointment to the Supreme Court, Justice Daughtrey was an Assistant U.S. Attorney in Nashville from 1968–1969, Assistant District Attorney in Nashville from 1969–1972, Vanderbilt Law School Faculty member from 1972–1975, and Court of Criminal Appeals Judge from 1975–1990.

80. Martha C. Daughtrey, Circuit Judge, United States Court of Appeals for the Sixth Circuit, *Going against the Grain: Personal Reflections on the Emergence of Women in the Legal Profession*, 67 MONT. L. REV. 159, 161 (2006).

81. Justice Daughtrey illustrated this point through one of her many stories: "I am going to take you back to the fall of 1963. Visualize yourself, sitting in your first-year section of criminal law, in which there are sixty-four men and you. You are the only woman in the room. The other two women in the first-year class are in the other section, where there are sixty-three men and the two of them. The criminal law professor has just called on you to analyze a case involving the search of a house under the recent Supreme Court decision in *Mapp v. Ohio*, and the evidence seized turns out to be a handkerchief that implicates the defendant in the crime of rape in some non-explicit way. Though not germane to the holding of the opinion, the professor, a man of course, wants to know what it is about the handkerchief that is inculpatory. "I don't know exactly," you venture, "Maybe it has his initials on it?" At which point the entire rest of the class erupts in howling laughter, aimed at you, because they know—and you fail to realize—that the handkerchief had the suspect's seminal fluid on it." *Id.*

82. In another story, Justice Daughtrey explains that she had put off going to law school because of the hostility she knew she would face because of her gender and the expectation that women would waste the spot by getting pregnant; in the story she describes her first day of law school: "That day, the constitutional law professor asked me to stand and recite *Poe v. Ullman*. For those of you rusty on your right-to-privacy precedents, *Poe* was the 1961 case in which the United States Supreme Court left standing a Connecticut statute that made it a crime to use or aid and abet the use of contraceptives, even if the defendant was married. The statute was eventually struck down in *Griswold v. Connecticut*, but that was long after my daughter had arrived in the world. Over the years, I have asked various members of the academy whether they thought that there was any possibility that the professor had called on me

law school, Justice Daughtrey kept on. As she began her job search near the end of law school, Justice Daughtrey faced both blatant and subtle sexism.[83] She eventually landed a job as an Assistant U.S. Attorney through her husband's connections at the newspaper where he worked.

Justice Daughtrey's legal career has landed her in the position of being "the first woman" numerous times, resulting in many war stories in her record. However, through it all, Justice Daughtrey persisted and carried herself like the professional she is. Her sacrifice of being the first woman to take on so many of the positions she did contributed greatly to not only making way for women to enter the judiciary, but also to making men more comfortable with having women in the judiciary.[84]

As a justice, Justice Daughtrey contributed greatly to the development of law in Tennessee. While Justice Daughtrey has great respect for *stare decisis* and the separation of powers, she also recognizes when the legal field is calling for a change, judges have a duty to listen and consider whether the change is appropriate. Such was the case in *McIntyre v. Balentine*, where the court's decision transitioned Tennessee from a contributory negligence to comparative fault approach in negligence cases. Prior to Justice Daughtrey joining the court, the court had received repeated requests from lawyers to change to a comparative fault approach. However, the court would

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inadvertently that day. So far, I have not found any-one who thinks the incident was merely a coincidence." *Id.* at 161–62.

83. Upon the advice of some of her professors, who thought getting a job in trust work was feasible for a woman, Justice Daughtrey applied to and interviewed with a local bank that needed an attorney in its trust department. As she describes it: "The bank vice president, during my interview, did ask me why a woman would want to go to law school, but thankfully not whether, as a married woman, I was using birth control, as some of my classmates were asked. I took his interest seriously, describing my record and indicating my desire to join Nashville's practicing bar, only to be told, when I had finished my somewhat breathless recitation, that the vacancy in the bank's trust department was at the level of bank officer and that the bank had a policy against hiring women as officers. Thank you very much, next please." *Id.* at 163.

84. For example, when Justice Daughtrey served as an Assistant District Attorney in Nashville, the time came for her to be promoted from the juvenile court to the felony court. As she explains: "After I relinquished my previous posts in juvenile court and domestic relations court, I was replaced with two new full-time assistants, one of them a woman, as a result of having convinced the District Attorney that those assignments were too important to be handled on a part-time basis. That also marked the first time I was able to experience the satisfaction of making sure that the door I had pushed open stayed open long enough to allow another woman to come in behind me. Although I did not yet think of myself as a feminist, it was truly the beginning of what has become a personal commitment to pull, push, or drag other women through the blinking wheat field with me." *Id.* at 167.

consistently decline the request and defer to precedent and the Legislature. When *McIntyre* came before the court, Justice Daughtrey, along with two other new justices on the court, believed that waiting for the Legislature to change the law was not the right answer and took the steps necessary to effect change in the law.[85]

Justice Daughtrey shows restraint in using the court's authority to make changes in the law. As she has explained:

> It may be that you have to be a little careful about choosing the case. I am always reminded that when the United States Supreme Court was faced with *Mapp v. Ohio* in 1961, the case that they chose to incorporate the Fourth Amendment exclusionary rule was not a case where a murder conviction was going to be thrown out. Police Officers entered Mapp's house without a warrant and seized a trunk that had something largely innocuous in it. All that was at stake was contraband consisting of some nude sketches and a few books. It may be that you have to pick the right case. I think the other thing that has not been mentioned here today is the need, if you are about to undertake a major change in the law, to have, if at all possible, a unanimous Court behind it. That is what gave us some pause in the *McIntyre* case. There was pretty much a consensus that the law had to be changed, but the question was how far we should go, and what the ramifications were. It is very hard when you are making a change to try and envision everything that may be affected by it, but it is a good exercise to try and go through. And then to bring everybody on the Court in is also a very good idea. I do not think I am talking out school or out of chambers or out of the robing room when I say that there was a lot of effort that went into that, to get to the end result. There was compromise. There was at least one judge who did not want to go as far as the rest of us did, and it showed up in the final opinion. But I think when we were done, it was some really solid progress. Compare that to these wild split opinions that you get out of the United States Supreme Court. Sometimes there are changes in the law where there are plurality opinions, and you have to futz through all these opinions trying to figure out if there are as many as five people

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85. Justice Cornelia A. Clark, Senior Judge Martha Craig Daughtrey & Justice William C. Koch, Jr., *Judicial Panel: Tennessee Legal Reform from a Judicial Standpoint*, 1 BELMONT L. REV. 201, 202, 210, 213 (2014).

> who agree on any one point. It seems to me that is not a particularly good way to do it.[86]

B. Justice Penny J. White[87]

Justice White was appointed to the bench in 1994 and served until 1996, when she did not receive a majority in a retention election, the first and only person in the court's history who has been ousted in a retention election.

White's tenure as justice was short lived, due to the court's controversial decision in the 1996 death penalty case *State v. Odom*.[88] The defendant in the case was convicted by a jury of first-degree murder committed in the perpetration of rape and sentenced to death.[89] The Criminal Court of Appeals affirmed the conviction but reversed the sentencing outcome and remanded the case for a new sentencing hearing.[90] All five justices of the supreme court agreed with the Court of Appeals that the case should be remanded for new sentencing.[91] However, Justice White and two other justices commented on Tennessee's heinous, atrocious, and cruel aggravator, explaining that the evidence presented was insufficient to establish that aggravating circumstance beyond a reasonable doubt, as state law required.[92] Notably, after the court decided the case, the decision received no publicity.[93] However, as a recent appointee, White was up for retention election that year.[94] Six weeks before the date of the retention vote, the headlines of a Nashville newspaper read, "Court

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86. *Id*. at 204.

87. Justice White was born May 3, 1956, in Kingsport, Tennessee. She received her B.S. from East Tennessee State University in 1978, her J.D. from University of Tennessee College of Law in 1981, and her LL.M. from Georgetown University Law Center in 1985. Prior to her appointment to the Supreme Court, Justice White was in private practice from 1981–1983 and 1985–1990, served as Circuit Court judge on the First Judicial District from 1990–1992 and on the Court of Criminal Appeals from 1992–1994. Justice White was also an adjunct professor of law at the University of Tennessee College of Law from 1987–1997 and returned in 2000 and served as a visiting professor at Washington and Lee University, West Virginia University, and Denver University between 1997–2000.

88. 928 S.W.2d 18 (Tenn. 1996).

89. *Id*. at 20.

90. Penny J. White, *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, 31 COLUM. HUM. RTS. L. REV. 123, 138 (1999).

91. *Id*.

92. *Id*. at 139.

93. *Id*.

94. *Id*.

Finds Rape, Murder of Elderly Virgin Not Cruel," with a sub headline that read "Tennessee Conservative Union Says 'Just Say No to Justice White.'"[95] During the election, she was targeted for defeat by victims' rights advocates, conservatist groups, and death penalty proponents, as well as publicly opposed by the governor.[96] On the day of the election, the governor commented, "Should a judge look over his shoulder to the next election in determining how to rule on a case? I hope so. I hope so."[97]

Justice White has taken this experience and turned it into both a learning and teaching opportunity. As she has said, "when you become a former judge the way I did, you become a favorite speaker in states on the issue of judicial independence."[98] In just three years after losing her seat, Justice White spoke on the topic of judicial independence to judges from almost every state. In addition to speaking on the topic of judicial independence, she has used her experience to encourage judges to carry out their responsibilities in the manner the law requires, despite the potential consequences. In her own words:

> I think we can broadly put judges into three categories. There are some that are lost. They will never do the right thing. They never would and never will. They only care about job security. Then, there's the category of those who always do the right thing, like Judge Baird. I think that the final group, with the rising attention paid to the issue of judicial independence, will hopefully have their integrity reinforced and think about, especially in capital cases, how absolutely horrific the politicization of judicial decision making is.[99]

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95. *Id.*

96. *Id.* Similarly, Chief Justice Marsha Ternus of Iowa's Supreme Court was recalled in 2010 over a unanimous 2009 ruling that legalized same-sex marriage. Lee Rood, *Justices Ousted over Gay Marriage Ruling Worry About Politics Affecting the Bench*, DES MOINES REG. (Oct. 29, 2016), https://www.desmoinesregister.com/story/news/2016/10/29/justices-ousted-over-gay-marriage-ruling-worry-politics-affecting-bench/92786554/. In addition to Chief Justice Ternus, Justices David Baker and Michael Streit were recalled in the same retention election. *Id.*

97. White, *supra* note 90, at 140.

98. *Id.* at 137.

99. *Id.* at 142. White continues: "Just a few weeks ago, I gave a presentation on judicial independence to a separate group of judges. Afterwards, a judge came up to me and, as sincerely as he could said, 'You know, I got some really bad press over a bond motion not long ago. I'm here to tell you, I haven't granted bond since, and I won't. I can't take the heat.' I said, 'Judge, you're thinking about it. I want you to keep thinking about it. And I want you to know that you'll sleep and rest a lot easier if you do that which you know you ought to be doing, despite the consequences.'" *Id.* at 141–42.

C. Justice Janice M. Holder[100]

Justice Holder was appointed to the bench in 1996 and retained for full eight-year terms in 1998 and 2006. In 2008, Justice Holder because the first female chief justice in the history of the Tennessee Supreme Court.

As a judge of the Division II Circuit Court for Shelby County, Justice Holder instituted a pilot program for both civil and family mediation in her court.[101] When parties requested a court date for either type of case, Justice Holder would automatically send a memorandum to the parties to tell them she had selected their case for a form of alternative dispute resolution, including all the information the parties would need for selecting a neutral mediator.[102] Justice Holder's pilot program was significantly effective in reducing the number of cases that went to trial.[103] Statistics showed that Justice Holder sent out forty-two letters; of those forty-two, seventeen chose mediation, six chose nonbinding arbitration, four chose case evaluation, and twelve settled prior to receiving the letter.[104] Out of the entire project, 78% of the cases settled.[105]

As Chief Justice, Justice Holder made the problem of access to justice in the state the court's number one priority. Within a few months of announcing the initiative, the court hired a staff member dedicated to access to justice, held five public hearings across the state, and formed the Tennessee Access to Justice Commission. Created in 2009 under Justice Holder's leadership, the Commission is a dedicated group of volunteers committed to improving access to justice in Tennessee. The Commission is made up of ten members from all three grand divisions of the state who are appointed by the Supreme Court and serve staggered terms of one to three years.

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100. Justice Holder was born August 29, 1949, in Canonsburg Pennsylvania. She attended Allegheny College from 1967–1968, received her B.S., summa cum laude, from the University of Pittsburgh in 1971, and received her J.D. from Duquesne University School of Law in 1975. Before her appointment to the Supreme Court, Justice Holder served as a law clerk to the Honorable Herbert P. Sorg, Chief Judge of the U.S. District Court for the Western District of Pennsylvania from 1975–1977, was in private practice from 1977–1990, served as Circuit Court Judge for the Thirtieth Judicial District at Memphis, Division II from 1990–1996.

101. Marietta Shipley, *Family Mediation in Tennessee*, 26 U. MEM. L. REV. 1085, 1096 (1996).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

Justice Holder has used her position as justice to speak to law students and lawyers about the importance of balance in the practice of law. She encourages lawyers to use transitions in between projects or cases as an opportunity to regroup. As she puts it: "In other words, take a break, lighten up, do something other than think about the law."[106] In particular, Justice Holder educates lawyers about the problem of impairment in the legal profession, including substance abuse, compulsive behavior, and suicide. After losing her law partner to suicide, she began to explore the role of lawyer assistance programs and, finding that there were very few, decided to create the Memphis Bar Association's Lawyers Helping Lawyers Committee, which eventually became the state-wide Tennessee Lawyers Assistance Program in 1999.[107] She encourages lawyers to assess their stress level and their ability to cope with the large amounts of stress lawyers face and to seek out strong support groups and mentors.

D. Justice Cornelia A. Clark[108]

Justice Clark was appointed to the Tennessee Supreme Court in 2005 and was retained for full eight-year terms in 2006 and 2014. When Justice Clark was appointed, she joined Justice Holder, marking the first time in the court's history that two women served on the court simultaneously. She served as chief justice from 2010 to 2012, becoming the second woman in Tennessee history to serve in that role.

Throughout her tenure, Justice Clark has brought to the bench an innate understanding of the need for consistency, stability, and predictability from judges for the benefit of the lawyers that come before the court.[109] Justice Clark recognizes that, although there must be room for growth and change in the law, the court is best served on a daily basis when attorneys can be certain that a judge will decide

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106. Janice M. Holder, *Balancing Act*, 65 TENN. L. REV. 829, 830 (1998).

107. Janice M. Holder, *Completing the Puzzle: Lawyer Assistance and Conditional Admission*, 49 DUQ. L. REV. 439, 440–41 (2011).

108. Justice Clark was born September 15, 1950, in Franklin, Tennessee. She received her M.A.T. from Harvard University in 1972 and her J.D. from Vanderbilt University in 1979. Before her appointment to the Supreme Court, Justice Clark was in private practice from 1979–1989, served as circuit judge on the 21st Judicial District from 1989–999, and served as the Administrative Director of the Tennessee Courts from 1999–2005.

109. Clark et al., *supra* note 85, at 205.

cases in a consistent manner, allowing those attorney to give their clients good advice.[110]

Further, Justice Clark brings to the court a sense of camaraderie, not only with her fellow justices and other state judges, but with officials in the other branches of the government. Justice Clark believes that it is appropriate, and perhaps even necessary, to try to cultivate and maintain good and respectful relationships among the branches of government. As Chief Justice, Justice Clark ensured that the lines of communication between the judiciary and the other branches of government were not only open but utilized in order to ensure each branch was best able to carry out its duties and to ward off as many possible separation of powers issues on the front end as possible.[111]

One of Justice Clark's greatest contributions has been her commitment to the Tennessee Access to Justice Commission. Justice Clark serves as the Court's liaison to the commission and has been a driving force in its success. Her drive to secure access to justice for all comes from her belief that "a community is only as strong as the justice it provides to its weakest citizens" and that "at a minimum [justice] must be a guarantee of equal access to the rights and protections, rather than merely the risks and disadvantages, of a civil legal system that is complicated, costly, and slow."[112] Justice Clark works tirelessly to educate attorneys about the need for greater access to legal aid in Tennessee and encourage them to actively participate in pro bono programs.[113] Most importantly, Justice Clark encourages lawyers to be the people who care about whether all people receive justice. "Why must we care?" she asks.[114]

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110. *Id.*

111. *Id.* at 214.

112. '*We Must Care,' Clark Tells Pro Bono Summit*, 47 TENN. B.J., Mar. 2011, at 5, 7.

113. As Justice Clark explained to a group of lawyers at the Pro Bono Summit: "More than 35 million Americans are still living below the poverty level, and another 10 million have incomes that are less than 25 percent higher than that level. At least 40 percent of these Americans have a legal problem of some kind each year. Low-income Tennesseans are no different. 70 percent of low-income Tennesseans experience some type of legal problem each year. One million Tennesseans need legal counsel. But with slightly less than 22,000 licensed attorneys in the state, and far fewer participating actively in pro bono programs, most of those low-income individuals have limited or no access to legal counsel. They feel shut out from the legal system. They do not turn to the system for solutions because they believe the system will not help them." *Id.*

114. *Id.*

> First, we must care because we are part of a profession which imposes on us the responsibility to help others as a condition of enjoying the privilege of our right to practice law. In our own preamble to the Code of Professional Conduct, the Tennessee Supreme Court has set high expectations for giving as a part of one's professional life in the law: "A lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service, and engaging in these pursuits as part of a common calling to promote justice and public good." And also: "A lawyer is a . . . public citizen having special responsibility for the quality of justice." We in the law are especially privileged, and we must give especially generously in return. That is a promise we made when we took our oaths, and it is one we must keep every day.
>
> Second, we must care because the people who need our help are those most at risk and most underserved in our society: children, victims of domestic violence, the elderly, the physically or mentally challenged, veterans, those who do not speak or understand our language, and others who have no place else to turn when they are facing critical legal problems. How can we not want to help them?
>
> Third, we must care because the problems faced by these persons affect the most critical aspects of their lives—income, employment, adequate housing, personal safety, access to health care, sometimes even life itself—the most basic guarantees in a land of plenty.
>
> Finally, we must care because we know if we don't, no one else will.[115]

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115. *Id.*

E. Justice Sharon G. Lee[116]

Justice Lee was appointed to the Tennessee Supreme Court in 2008 and retained by voters in 2010 and 2014. When Justice Lee came on to the court, she joined Justices Holder and Clark, and became part of the court's first female-majority court. She became the third woman to serve as chief justice, doing so from 2014 to 2016.

Justice Lee has contributed greatly to improving the function of the judiciary in Tennessee, taking her role as public servant seriously and always seeking to make the experience of those who come before the judiciary better. As Chief Justice, Justice Lee "opened Tennessee for business" by spearheading the creation of the Tennessee Business Court, a business-specific docket designed to better meet the litigation needs of Tennessee businesses.[117] Recognizing that businesses in the twenty-first century had modernized faster than traditional litigation practices, Chief Justice Lee and her colleagues decided to create a means by which the particular issues faced by modern businesses could be addressed in a more efficient manner.[118] Not only does this docket serve judicial efficiency, it is designed as a means for drawing in and retaining new businesses to Tennessee.[119]

In addition to using judicial efficiency to promote business within the state, as Chief Justice, Justice Lee directed the court's focus to the people of Tennessee, particularly those seeking indigent legal services, and has also made strides in combating the rising cost of indigent legal services. During her tenure as Chief Justice, the Court put together an indigent representation task force to review Tennessee's system of providing constitutionally-mandated representation to indigent parties.[120] The task force was charged with determining how legal services could be delivered more effectively and

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116. Justice Lee was born December 8, 1953, in Knoxville, Tennessee. She received her B.S. in Business Administration from the University of Tennessee in 1975, graduating with high honors, and received her J.D. from University of Tennessee College of Law in 1978. Before her appointment to the Supreme Court, Justice Lee was in private practice in Madisonville, Tennessee, from 1978–2004 and served on the Tennessee Court of Appeals, Eastern Section from 2004–2008.

117. Chief Justice Sharon Lee & Justin Seamon, *Tennessee Is Open for Business: What You Need to Know About Tennessee's New Business Court*, TENN. B.J., Sept. 2015, at 14–19.

118. *Id.* at 15.

119. *Id.*

120. *See Indigent Representation Task Force Presents Report Recommendations to Tennessee Supreme Court*, TENN. ADMIN. OFF. COURTS (Apr. 10, 2017), https://www.tncourts.gov/press/2017/04/10/indigent-representation-task-force-presents-report-recom mendations-tennessee.

efficiently. Similarly, Justice Lee has set the Court's focus on addressing the reality of a declining budget and an increased caseload. Justice Lee has pushed for top-to-bottom review of judiciary spending, emphasizing that the judiciary is being a good steward of the tax payer's dollars and delivering the judiciary's services in the most efficient and effective manner.

In addition to contributing to a better-functioning court, Justice Lee continues to push for greater equality in the legal profession. In speaking about gender equality in the legal profession, she stated:

> This must be our mission: to close the gap within our profession and to be a model so that we may better effect change in society as a whole. Disparity in opportunity and professional advancement does not benefit anyone, and it harms everyone. Change has to come from all corners of our profession: from employers, local bar associations and organizations, colleagues and spouses, and yes, from women ourselves.[121]

121. Diane Rynerson, *Tennessee Chief Justice Sharon Lee Speaks Out on Gender Equality in the Legal Profession*, NAT'L CONF. WOMEN'S B. ASS'NS (May 13, 2015), https://ncwba.org/tennessee-chief-justice-sharon-lee-speaks-out-on-gender-equality-in-the-legal-profession/.

F. Justice Holly M. Kirby[122]

Justice Kirby is the newest woman on the Tennessee Supreme Court, appointed to the Court in 2014. Though she is last in time on the current list of female justices, Justice Kirby has had her share of "firsts," including first female partner at the law firm of Burch, Porter & Johnson and the first woman to serve on the Tennessee Court of Civil Appeals.[123] Even as Justice Kirby continues to settle into her role as Justice, she is a premier example of a woman who contributes greatly to the judiciary and the legal community as a whole. Her resume details a legal career that makes her extremely qualified to sit as a Justice and provides her with a breadth of knowledge on which she can rely in her decision-making. But more than just her impressive legal background from which she can draw in deciding cases, Justice Kirby brings to the court a personal background with which many people of Tennessee can relate and a strong commitment to community involvement.

As she explained in her application for the Supreme Court, "like many litigants [she] ha[s] spent years caring for aging parents, ha[s] been the divorced mother of young children, and ha[s] struggled to care for a child with a disability."[124] Justice Kirby understands and appreciates that the law cannot be devoid of human understanding and empathy, and that every case directly impacts a person's life. As she further explained, "I am mindful that lawsuits are not dry academic exercises; they are people's lives . . . . In writing opinions for the Court, I work hard to tell the human story underlying the legal issues so that, no matter the result, litigants will know they have been heard."[125]

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122. Justice Kirby was born July 9, 1957, in Memphis, Tennessee. She received her B.S. in Engineering from the University of Memphis in 1979, where she was a Herff Scholar, graduated first in the College of Engineering Class, was an Honors Alumni Scholar, and was Speaker of the Student Senate. She received her J.D. from the University of Memphis School of Law in 1982, where she was third in her class, a Herff Scholar, and Law Review Notes Editor. Before her appointment to the Supreme Court, Justice Kirby served as a law clerk to the Honorable Harry W. Wellford on the Sixth Circuit Court of Appeals from 1982–1983, worked at Burch, Porter & Johnson from 1983–1995, and served on the Court of Appeals from 1995–2014.

123. Tennessee Courts are divided between civil and criminal divisions. While Justice Daughtrey was the first woman to serve on the Court of Criminal Appeals, Justice White was the first to serve on the Court of Civil Appeals.

124. Erik Schelzig, *Gov. Haslam Names Holly Kirby to State Supreme Court*, TENNESSEAN (Dec. 18, 2003), https://www.tennessean.com/story/news/politics/2013/12/18/gov-haslam-names-holly-kirby-to-state-supreme-court/4100397/.

125. *Id.*

Justice Kirby has used her position as justice to serve as a guide and mentor for other lawyers.[126] She has spoken to young lawyers about the importance of humility and modesty in the legal profession and the importance of admitting when you make a mistake or don't know the answer. On the bench she is quick to tell a lawyer who is attacking the integrity of the lower court judge or opposing counsel that doing so is inappropriate and unprofessional.[127] As the liaison to the Tennessee CLE Commission, Justice Kirby seeks to gear the program toward providing lawyers with the knowledge they need, that is geared toward their practice, rather than a routine exercise of getting the required hours at the end of the year.[128]

CONCLUSION

From before the passage of the Nineteenth Amendment, when the number of women in the judiciary didn't even register on the scale, to today, where women make up nearly a third of the judiciary, we have come a long way. It is safe to say that women pushed open the doors to the judiciary and those doors will forever remain open. The question whether women make a difference in the judiciary has been asked and answered in the affirmative. One of the most important differences women have made in the judiciary is making the judiciary more reflective of the people it serves. No longer do women have no option but to plead their cases to a male who, depending on the circumstances, has no frame of reference to understand her position. However, while we take time to celebrate the difference and contributions women have made, we recognize that the judiciary has a ways to go before it is reflective of the makeup of society, concerning not only gender, but also in terms many other factors that make up a person's experience, including race, ethnicity and socioeconomics, to name a few.

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126. *See generally* Chief Justice Jeffrey S. Bivins & Justice Holly Kirby, *Judicial Perspectives Panel 2015*, 3 BELMONT L. REV. 147 (2016).

127. *Id.* at 155.

128. *Id.* at 157.