

University of Tennessee Law

**Legal Scholarship Repository: A Service of the Joel A. Katz Library**

---

UTK Law Faculty Publications

---

2019

## **And Then There Were Yellow Roses**

Penny White

Follow this and additional works at: [https://ir.law.utk.edu/utklaw\\_facpubs](https://ir.law.utk.edu/utklaw_facpubs)

---

## AND THEN THERE WERE YELLOW ROSES

PENNY J. WHITE\*

Tennessee has a unique appellate court structure. Not only is Tennessee only one of three states in which the intermediate appellate courts' jurisdiction is divided by case type,<sup>1</sup> Tennessee's intermediate and appellate courts are influenced by the State's historic adherence to and constitutional recognition of three "grand divisions."<sup>2</sup> The Judicial Article of Tennessee's state constitution refers to the grand divisions in its description of the composition of the state supreme court and further provides for the court to meet in three locations—one in the east, one in the middle, and one in the west.<sup>3</sup> This division was extended by legislation to the courts of appeals.<sup>4</sup>

Even more unique is the state law that provides for appellate judges to have a chambers in the county of their residence.<sup>5</sup> As a result

---

\* Professor of Law, University of Tennessee College of Law.

1. Tennessee, Alabama, and Oklahoma have intermediate courts of appeal that hear only civil or only criminal cases. *See Alabama Court of Appeals*, ALA. COURT OF CIVIL APPEALS, <http://judicial.alabama.gov/Appellate/CivilAppeals> (last visited Apr. 11, 2019); *Court of Appeals*, TENN. STATE COURTS, <https://www.tncourts.gov/courts/court-appeals> (last visited Apr. 11, 2019); *The Court of Civil Appeals*, THE SUPREME COURT OF THE STATE OF OKLA., <http://www.oscn.net/oscn/schome/civilappeals.htm> (last visited Apr. 11, 2019).

2. The three grand divisions of Tennessee are recognized in the state constitution and represented by the three stars on Tennessee's state flag. TENN. CONST. art. VI, § 2. Legislation divides the state roughly into thirds, TENN. CODE ANN. § 4-1-201 (West 2019), but the division also demarcates geographic, cultural, political, historic, and economic differences.

3. The Tennessee Constitution provides for five judges of the Tennessee Supreme Court, "of whom not more than two shall reside in any one of the grand divisions . . . . Said court shall be held at Knoxville, Nashville, and Jackson." TENN. CONST. art. VI, § 2.

4. The Tennessee Code provides that "[f]or the administration of justice in the supreme court, the court of appeals and the court of criminal appeals, the state is divided into the three (3) grand divisions described in §§ 4-1-201 -- 4-1-204." TENN. CODE ANN. § 16-2-101(a) (West 2019). Further, the Tennessee Code provides that "no more than four [judges] shall reside in any grand division of the state" and that each appellate judge "shall have been a resident of the grand division from which the judge is appointed for at least one (1) year." TENN. CODE ANN. § 16-5-102 (West 2019) (court of criminal appeals); *see also* TENN. CODE ANN. § 16-4-102(a) (West 2019) (court of appeals). Nonetheless, each appellate judge in Tennessee is "required to qualify as a candidate and be elected by the qualified voters of the state." TENN. CODE ANN. § 16-5-104 (West 2019) (court of criminal appeals judges); *see also* TENN. CODE ANN. § 16-4-102(c) (West 2019) (court of appeals judges).

5. "Each judge of the [appellate courts] shall be furnished office space in the county of the judge's residence by the state." TENN. CODE ANN. § 16-5-113 (West 2019)

of this statutory provision, when I was named to the Tennessee Court of Criminal Appeals, I established my judicial chambers in Washington County, Tennessee, in a small upstairs office of a previously vacant building in downtown Johnson City. Much of downtown Johnson City consisted of condemned or boarded-up buildings at the time, with the exception of the Downtown Center, the basement of a parking garage that served as the courthouse for several years. To reach my office, at 126 West Market Street, one had to climb more than two dozen stairs, which almost no one did. The only regular visitors to an appellate chamber are those who work for UPS, Fed Ex, and the United States Post Office who, depending on how briskly they mounted the stairs, I either welcomed or abhorred.<sup>6</sup> This location remained my judicial chambers throughout my tenure on Tennessee's appellate courts.

I was in that office in Johnson City in late July 1996, a few days before the voters across the state would decide whether I would be retained as a justice<sup>7</sup> on the Tennessee Supreme Court. For what seemed like an hour, I continually heard a thump-thump-thump sound of footsteps climbing that staircase. Exhausted and dispirited, I sat and listened but made no effort to determine what was happening. Finally, in the late afternoon, I walked out of my office, past Jan Freeman, my judicial administrator, and inquired about the foot traffic. She motioned me toward our small library, located next to her office, but not visible from mine. There I found more than a hundred yellow roses in single, double, and triple bud vases. A small card was attached to each vase. Most, but not all, bore the name of women attorneys from across the state, all expressing the same sentiment.

I had learned about the symbolism of the yellow rose<sup>8</sup> and its significance to my home state years earlier as a Girl Scout. I often

---

(court of criminal appeals judges). Judges on the Court of Appeals have the same right, but a parallel statute does not appear in the Tennessee Code.

6. In those days, the clerk's offices mailed appellate records to judges with satellite chambers. A brisk-walking delivery person meant that smaller records were being delivered, while a more laboring stride indicated more voluminous court records.

7. It was the late former Chief Justice Frank F. Drowota III who pointed out to me that the Tennessee Supreme Court actually consists of five judges, not justices. See TENN. CODE ANN. § 16-3-101(a) (West 2019) ("The supreme court shall consist of five (5) judges . . ."); TENN. CODE ANN. § 16-3-102 (West 2019) ("After their election and qualification, the judges shall designate one (1) of their number who shall preside as chief justice.").

8. Scott Bomboy, *The Vote that Led to the 19th Amendment*, NAT'L CONSTITUTION CTR. (Aug. 18, 2018), <https://constitutioncenter.org/blog/the-man-and->

used the story as a backdrop to presentations or speeches, emphasizing at times the courage of young Harry Burn, but just as often the wisdom and foresight of Febb E. Burn, Harry's mother.<sup>9</sup> A matter of days after I saw that library terrarium of yellow roses, I would become—and still remain—the only appellate judge in Tennessee history to lose<sup>10</sup> a retention election.<sup>11</sup>

But in some ways, I have started at the end of the story. Additionally, while poignant, the story's ending sheds little light on the issues of women in the profession in the 1980s and 1990s. Perhaps, it would be more interesting, and more informative, to start at the beginning.

With the benefit of hindsight, I now know that my totally unexpected journey to these chambers had begun decades earlier. Being a first-generation college graduate and having never met a lawyer before law school, I can't claim to have chosen a legal career in order to become a judge. Having such a goal would have been far beyond my imagination. What I did imagine, and aspired to do, was be a trial lawyer and, despite my family's incredulity, that is what I undertook to become. As a student at the University of Tennessee College of Law in the late 1970s, I was one of sixty-seven women in

---

his-mom-who-gave-women-the-vote ("Supporters of suffrage wore yellow roses in public; the anti-suffragists wore red roses.").

9. Febb Burn wrote a letter to her son, asking him to "be a good boy" and vote for suffrage. Bomboy, *supra* note 8 ("Burn also had a letter in his suit pocket, from his mother Febb E. Burn, in which she asked him to 'be a good boy' and vote for the amendment.").

10. In the August 1, 1996 election, 294,781 Tennesseans voted against my retention, and 239,614 favored my retention. STATE OF TENN., AUGUST 1, 1996 - - GENERAL ELECTION 2 (1996), <https://sos-tn-gov-files.s3.amazonaws.com/1996%20-%20August%20Judicial%20Retention%20and%20Judicial%20Offices%20.pdf>. I lost or tied seventy-five out of ninety-five counties, including Washington County (my home county). *Id.* at 1-2 (I won 20 counties—Bradley, Decatur, Fayette, Grundy, Hamilton, Hardin, Haywood, Jackson, Lake, Lauderdale, Madison, Marion, Meigs, Perry, Polk, Sequatchie, Shelby, Unicoi, Van Buren, and Wayne). Together, about eighteen percent of the Tennessee electorate voted in my race. *Id.* at 2 (534,395 voted in the retention election); STATE OF TENN., STATISTICAL ANALYSIS OF VOTER TURNOUT FOR THE AUGUST 1, 1996 ELECTION 1-2 (1996), <https://sharetn.gov.tnsosfiles.com/sos/election/data/turnout/1996-08.pdf> (2,891,796 registered votes in the retention election).

11. George Henry Brown, Jr. was appointed to the Tennessee Supreme Court by Governor Alexander in June 1980 but was defeated by Frank Drowota in a regular election in August 1982. Naomii Brack, *George Henry Brown, Jr. (1939 - )*, BLACKPAST.ORG (Mar. 25, 2018), <https://www.blackpast.org/african-american-history/brown-george-henry-jr-1939/>. He was later appointed Circuit Judge for the Thirtieth Judicial District in Memphis, serving from 1983 until 2005. *Id.*

the Class of 1981.<sup>12</sup> The number of women attending law school had steadily increased,<sup>13</sup> but I was in law school when women were very much in the minority.<sup>14</sup> At UT, for example, we heard that the restroom on the first floor designated for “Ladies” had been converted to that purpose from its previous use as a broom closet.<sup>15</sup> While we did not have to look far to find sister law students in our classrooms, finding female professional role models proved a difficult task, particularly in east Tennessee. Moreover, a large percentage of the women in my law school class never saw a female at the *front* of the classroom. Most of us were never taught by a female law professor.

During my three years at UT, the College of Law had one female law professor<sup>16</sup>—Professor Martha S. Black, but I did not have the opportunity to have Professor Black as a professor. The law school lore—likely more fact than fiction—was that Martha Black’s intellect had astonished her law professors when she was a student at UT,

---

12. E-mail from Cathrynn Dupes, Coordinator of Stewardship and Alumni Affairs, Univ. of Tenn. Coll. of Law, to Penny J. White, Professor of Law, Univ. of Tenn. Coll. of Law (Mar. 28, 2019, 05:11 EDT) (on file with author).

13. The number of women would not equal the number of men in law school until 2016, when the number of women would surpass the number of men in law school for the first time. Elizabeth Olson, *Women Make Up Majority of U.S. Law Students for First Time*, N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html>. See generally Richard K. Neumann Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEG. ED. 313, 314–18 (2000) (discussing and charting distribution of women in law school classes from 1947–2000).

14. To put this in perspective, I find it interesting that the term “glass ceiling” is reported to have been coined the year I started law school. At least two individuals claim to have coined the phrase, but both time their invention to either 1978 or 1979. Theresa Vargas, *She Coined the Term ‘Glass Ceiling.’ She Fears It Will Outlive Her.*, WASH. POST (Mar. 1, 2018), [https://www.washingtonpost.com/news/retropolis/wp/2018/03/01/she-coined-the-phrase-glass-ceiling-she-didnt-expect-it-to-outlive-her/?utm\\_term=.5123de844f12](https://www.washingtonpost.com/news/retropolis/wp/2018/03/01/she-coined-the-phrase-glass-ceiling-she-didnt-expect-it-to-outlive-her/?utm_term=.5123de844f12) (describing how Marilyn Loden coined the term in 1978); Ben Zimmer, *The Phrase ‘Glass Ceiling’ Stretches Back Decades*, WALL STREET J. (Apr. 3, 2015, 3:23 PM), <https://www.wsj.com/articles/the-phrase-glass-ceiling-stretches-back-decades-1428089010> (describing how Katherine Lawrence coined the phrase in 1979).

15. Judge Shirley Underwood who graduated in the Class of 1948 confirmed this story when she became a friend and mentor after I graduated from law school and began practicing in Johnson City, Tennessee. See *Notable Woman Award 2002: Judge Shirley B. Underwood*, THE UNIV. OF TENN., [http://web.utk.edu/~cfw/awards/notable\\_woman/winners/notable-2002.shtml](http://web.utk.edu/~cfw/awards/notable_woman/winners/notable-2002.shtml) (last visited Apr. 11, 2019).

16. The UT Legal Clinic, a pioneer in clinical education, had hired and promoted female staff attorneys for decades, but it was not until after Professor Black came to the College of Law that the Clinic also hired female law professors. During my last year, Professor Amy Hess would serve as a Visiting Professor at the College of Law, but it would be two years before she would join the faculty permanently.

eventually leading to her hiring. My perspective at the time (and one shared by a number of my law school classmates) was that she was an intellectual giant. Professor Black's teaching areas and my areas of interest did not align, so I was never in a position to benefit from her mentorship or role-modeling. Eventually, Professor Black would return to practice, but not before she became the College of Law's first tenured female professor in 1976.<sup>17</sup>

The only other female lawyer at the College of Law in the late 1970s and early 1980s was Associate Dean of Students Mary Jo Hoover. Dean Hoover would serve the College for many years handling course scheduling, class registration, grades, academic issues, and student discipline, a list of tasks now handled by many different people. Dean Hoover occasionally would teach our first-year writing course but neither the course nor its timing provided a platform for professional mentoring.

The College of Law would have its first female dean in 1987. Dean Marilyn Yarbrough<sup>18</sup> was not only the College's first female dean, but also its first, and to date its only, African American dean.<sup>19</sup> Before and after her tenure at UT, Dean Yarbrough had a remarkable legal career, serving as professor, dean, chancellor, and member of the NCAA.<sup>20</sup> Remarkably, but not uniquely,<sup>21</sup> the College of Law would not welcome its second female dean until 2014, when Dean Melanie Wilson accepted the position.

---

17. Professor Black graduated from the College of Law in 1973 and became an Assistant Professor that same year. *Martha S. L. Black (Retired)*, KIZER & BLACK, ATTORNEYS, PLLC, <http://www.kizerblack.com/attorneys/martha-s-l-black> (last visited Apr. 11, 2019). After receiving tenure, she remained at the College of Law until 1981, when she joined Kizer and Black Attorneys in Maryville, Tennessee. *Id.*

18. I was a law alum by the time Dean Yarbrough was selected, but I worked with her as an active member of the College's Alumni Advisory Board and, eventually, as an adjunct professor. In 2004, after Dean Yarbrough had left UT for UNC, she was instrumental in my serving as a visiting professor at the University of North Carolina School of Law. While teaching at UNC, I received tenure at UT. Two days after my tenure vote, Dean Yarbrough hosted a dinner party for the UNC female faculty me at her home. She graciously explained that "no female law professor is going to get tenure and not get a celebration."

19. Dean Yarbrough also had the distinction of being the first African American female dean at a major law school in the south and one of the first African American female professors in the United States. *Marilyn Ainsworth Yarbrough, JD*, THE UNIV. OF KAN., <https://emilytaylorcenter.ku.edu/womens-hall-of-fame/yarbrough-marilyn> (last visited Apr. 11, 2019).

20. Charles E. Daye, *In Memoriam: Marilyn V. Yarbrough – "She Was a Great Woman"*, 83 N.C. L. REV. 323, 325 (2005).

21. Cynthia L. Cooper, *Women Ascend in Deanships as Law Schools Undergo Dramatic Change*, 24 PERSPECTIVES 8, 9 (Summer 2016) (reporting that the number of female law school deans doubled between 2006 and 2016 from 30 to 61).

Between my graduation in 1981 and my return to the College of Law as an Associate Professor in 2000, the number of female law students and the number of female law professors had increased dramatically. For the last several years, the number of men and women enrolling in law schools nationwide has been about equal, and the numbers at Tennessee are no different.<sup>22</sup> For example, the Class of 2018 had sixty-two male and fifty-six female students, while the Class of 2019 had sixty-seven male and forty-nine female students.<sup>23</sup>

Similarly, the number of female law professors has increased twenty-fold. When I returned to the College of Law in 2000, two of the most highly-regarded female professors were, like Professor Black, UT College of Law graduates. They shared the reputation of having wowed their professors while students, and both Professor Fran Ansley and Professor Judy Cornett had distinguished careers before joining the Academy.<sup>24</sup> In addition, by 2000,<sup>25</sup> the College of Law had attracted a number of other distinguished female professors—Amy Hess, Barbara Stark, Desiree Kennedy, and Colleen Medill. When I arrived, I was joined by Professor Joan Heminway<sup>26</sup> who, like me, is about to celebrate her second decade at the College of Law. When we

---

22. See Staci Zaretsky, *There Are Now More Women in Law School than Ever Before*, ABOVE THE LAW (Mar. 7, 2018, 12:27 PM), <https://abovethelaw.com/2018/03/there-are-now-more-women-in-law-school-than-ever-before/>.

23. Class of 2018 Student Photos, Univ. of Tenn. Coll. of Law (on file with author); Class of 2019 Student Photos, Univ. of Tenn. Coll. of Law (on file with author).

24. Professor Fran Ansley graduated from the College of Law in 1979. She worked at various law firms from 1981 until 1987, when she began teaching at the College of Law. She received her LL.M. from Harvard in 1988. Professor Judy Cornett graduated from the College of Law in 1981, after serving as Editor-in-Chief of the *Tennessee Law Review*. Professor Cornett acquired a prestigious clerkship with the United States Court of Appeals for the District of Columbia Circuit. After clerking, she worked in Knoxville for law firms and for Legal Aid. She sought and was awarded her Ph.D. in English from the University of Virginia in 1997, while serving as an Associate Professor of Law at the College of Law.

25. Long before the “upstairs” faculty—so-called because of their historical and current location in the College of Law Building—was experiencing an increase in gender diversity among the faculty, gender diversity was common among members of the UT Legal Clinic faculty. The UT Legal Clinic has long been a pioneer in clinical education not only because of its long existence but also because of its innovative teaching and its commitment to equal treatment for its faculty. But before full-time professors were the norm in the UT Legal Clinic, staff attorneys and part-time faculty taught the clinical courses and supervised the students in court. Many of the faculty were women. Within time, the Legal Clinic would add a number of full-time female law professors and would select female directors. These female members of the UT Law faculty were the early mentors and role models for female students with interests in trial and public interest work.

26. Professor Joan Heminway had a distinguished 15-year career with Boston offices of Skadden, Arps, Slate, Meagher & Flom LLP before beginning law teaching.

fast-forward two decades from my eventual hiring at the College of Law, we find a community of equally divided law students led by a faculty and staff that is two-thirds female with a female dean at the helm.

It was a mentor at the College of Law who first inspired me to dream beyond the small-town career aspirations I had envisioned. Since the summer after my first year of law school, when I clerked for Legal Services of Upper East Tennessee and was mentored by two strong female attorneys, Polly Peterson and Gloria Samuels, I had envisioned my legal career and my life being centered in the Tri-Cities. The Tri-Cities, Bristol, Kingsport, and Johnson City was where I had attended public schools and college. It was home but in addition, the nurture I had felt there as a student at East Tennessee State University made me want to return to that community to practice what I thought of as people law.<sup>27</sup> Sometime during the summer of my first year of law school, I believed that I knew exactly what kind of work I was supposed to do and where I was supposed to do it.

My interest in representing people in a general criminal and civil practice after graduation led me to the UT Legal Clinic in my second and third years of law school.<sup>28</sup> There, I was taught<sup>29</sup> and mentored by Professor Dean Rivkin.<sup>30</sup> First my professor and now one of my most cherished colleagues, Dean was my professor in what I would describe as the Legal Clinic's first appellate clinic.<sup>31</sup> After law school,

---

27. My goal was to develop a criminal defense practice, while also serving small-town people with common legal problems.

28. The UT Legal Clinic is the longest continually existing legal clinic in the country. It was the centerpiece of most of my colleagues' law school experience, and I was no exception.

29. Among Dean's many positive attributes is the method he uses in teaching his classes. Dean is a natural collaborator. His classes were all pure experiential, though the Academy had not latched on to that term at the time, and his students always felt more like his colleagues than his charges.

30. To have been taught by Dean Rivkin, Jerry Black, Joe King, and Joe Cook, and then to return to be their "colleague" was a heady experience. When Dean Tom Galligan had the first welcome back party during August 2000, I felt very much the imposter as I arrived and tried to force myself to address my colleagues by their names. That didn't happen and wouldn't for several years. But Professor Durwood Jones, who had discovered my complete lack of acumen for tax, summed it all up when he looked at me and dropped his head to his hands: "My God! He exclaimed, "we've gone to hell in a handbasket."

31. As I recall, Dean introduced me to post-conviction work. We handled a case in the Tennessee Court of Criminal Appeals. This was my first introduction to post-conviction work. During practice, I would both represent post-conviction petitioners and testify in post-conviction proceedings. Twenty-five years later, while a member of the Tennessee Supreme Court, I would be assigned the task of drafting the Supreme Court's Rules of Post-Conviction Procedure.



Dean and I stayed in touch periodically. He would figure prominently not only in helping to guide my career path but also in helping me adapt to unexpected professional challenges.

Despite my academic record and the experiences I had in law school—Editor in Chief, Research Editor, and Executive Editor of the *Tennessee Law Review*<sup>32</sup>—finding a job after law school was not easy for me. Part of the difficulty was the geographic limitation I had imposed on myself by wanting to return and practice law in the Tri-Cities. Although UT had a Career Services office, their focus was on helping students achieve placements in large and medium-sized firms in Tennessee's major cities. They had little experience in placing students in the hills and hollows of rural Tennessee. As a result, I undertook my job search alone, papering the Tri-Cities with letters and resumes and, ultimately, managed to be considered by all of the major firms in Bristol, Kingsport, Johnson City, and in Abingdon, Virginia. One interview stands out in my memory. I was being interviewed by the second named partner in what was, at the time, Kingsport's second largest firm. I sat across a large desk from him as he reviewed my resume. After a few minutes, he pushed my resume across the desk looked me directly in the eye, and said, "Miss, I think we both know that this is a waste of time." As I recalled, *I* apologized. For what? For wasting his time or for being a young woman who dared to want to practice law in her hometown?<sup>33</sup>

In my search for legal employment, I also sought judicial clerkships and was *almost* successful. Years later, my colleague Justice Frank Drowota, who served two terms as Chief Justice, would tell me that he *almost* hired me—he hired and retained Buck Lewis, also a College of Law graduate instead. Additionally, a federal judge from a neighboring state, *almost* hired me as well. He said if I could wait a year, I could be his judicial clerk. The clerkship was promised that year to his fraternity brother's son. I decided not to accept and

---

32. By the time I arrived at the College of Law in 1978, the *Tennessee Law Review* was in its fifty-sixth year. E-mail from Micki Fox, Bus. Manager, Tenn. Law Review, to Penny J. White, Professor of Law, Univ. of Tenn. Coll. of Law (Apr. 8, 2019, 2:29 PM). The *Tennessee Law Review* had its first female Editor in Chief in 1974. *Id.* When I became a member, the Editor in Chief was a female, Judy Black. The EIC after her, and before me, and after me were all women as well. They were Ann Short and Judy Cornett.

33. Years later, after I became a trial judge in the First Judicial District, which borders Kingsport, I had the opportunity on occasion to see that lawyer in court. At the time of my application, the spring of 1981, the firm, founded in 1966, had no female attorneys. In 2005, the firm merged with another Kingsport firm, founded in 1951. The merged firm now lists seventeen attorneys on its webpage with four female attorneys.

continued to look, finally securing the job I had hoped for in Johnson City.

When I finally secured a job, I was somewhat of a novelty, primarily because I went to work for a two-man criminal defense firm.<sup>34</sup> In August 1981, when I began my practice in Johnson City, there were about a dozen female lawyers sprinkled across the First, Second, and Third Judicial Districts,<sup>35</sup> none of whom were regularly practicing criminal defense.<sup>36</sup> Nonetheless, in Johnson City, in addition to the two female lawyers I had met at Legal Services during the summer of 1979, there were other extremely well-regarded women in the legal profession. Judge Shirley Underwood, who graduated from the College of Law in 1946, served as Juvenile Judge for Johnson City from 1961 to 2002.<sup>37</sup> Other women graduates from the College of Law who were practicing in upper east Tennessee in the early 1980s included Sharon Green, who would replace Judge Underwood as Johnson City Juvenile Judge in 2002; Jean Stanley, who would later be selected to serve as a Circuit Court Judge, the same seat I held as a trial judge; Margaret Fugate, U.S. District Court Bankruptcy Trustee, and Judith Fain, who practiced in Erwin, but became involved in her first lawsuit against the law faculty while still a student.<sup>38</sup>

In the autumn of my first year of practice, Sharon Green and Margaret Fugate summonsed all women attorneys in the tri-cities area to Sharon's home. That night—or soon thereafter—it was decided that the group would name itself FAME—Female Attorneys

---

34. I served as an associate to Richard W. Pectol, founder of Richard W. Pectol and associates. The firm, which also employed Robert Jessee, specialized in criminal defense and personal injury law, but also handled a variety of family law matters.

35. These three judicial districts cover the area from the Virginia-North Carolina border to Knox County, and include the Tri-Cities, Erwin, Elizabethton, Mountain City, Greeneville, Jefferson City, Morristown, and Rogersville, along with many smaller towns.

36. As I recall, when I first arrived in the Tri-Cities to practice, only Sullivan County had a female assistant district attorney. Within a few years, many would be added in both the First and Second Judicial Districts, including Lisa Nidiffer Rice, who now serves as Criminal Court Judge for the First Judicial District.

37. Judge Underwood was the longest serving juvenile judge in the history of Tennessee and one of the longest serving juvenile judges in the country. See *Notable Woman Award 2002: Judge Shirley B. Underwood*, UNIV. OF TENN., [http://web.utk.edu/~cfw/awards/notable\\_woman/winners/notable-2002.shtml](http://web.utk.edu/~cfw/awards/notable_woman/winners/notable-2002.shtml) (last visited Apr. 11, 2019). Room 135 at the College of Law is named in her honor.

38. See generally *Fain v. Faculty of the Coll. of Law of the Univ. of Tenn.*, 552 S.W.2d 752 (Tenn. Ct. App. 1977). The suit argued that the meetings of the College law faculty and meetings of faculty committees should be subject to Tennessee's Open Meetings Act.

of the Mountain Empire<sup>39</sup>—and would meet monthly. The group quickly decided that FAME would be governed by two simple principles. First, FAME would have no rules and second, FAME would have no officers. The purpose of the group was to assure that women lawyers from around the area could anticipate each month that they would have a designated place and time to join together to share, celebrate, communicate, and commiserate. FAME was our safe space, where we could gather to talk about our experiences and to support and nurture one another. Thirty-eight years later, FAME is still going strong.<sup>40</sup>

After I had practiced law for about two years, Dean Rivkin, who was aware of my interest in criminal defense, encouraged me to apply for a fellowship at the Georgetown University Law Center. The E. Barrett Prettyman fellowship is a program<sup>41</sup> in which fellows engage in a course of study while providing representation to indigent clients in local courts. The fellows receive intensive advocacy training but also provide service to the local courts through their client representation and to the Law Center through their teaching and through supervision of law students in court.

Professor Rivkin's timing was excellent. I had enjoyed the two years I had spent working in a criminal defense firm where I began practice. Through a criminal case that the firm acquired my first month with the office, I had become interested in civil rights litigation involving the conditions of incarceration. As my interest in this legal area expanded, I attended a seminar held at the Georgetown University Law Center. This area of litigation was beginning to feel as compelling to me as criminal defense work, but the firm where I practiced was small and not geared toward class action litigation. Nonetheless, as a result of intolerable conditions of confinement imposed on our juvenile client, I had convinced my boss to allow me to pursue a class action lawsuit against the local jail. The excitement of learning this new area of the law combined with the opportunity to

---

39. Many areas of the country, and several in Tennessee, including the area around Tri-Cities, have claimed to be the Mountain Empire. Our choice of that name for the organization was not prompted by anything specific that I remember, but it may be more than coincidental that the musical drama, FAME, filmed in New York City and tracking students attending performing arts school, was released by MGM studios in 1980. The film was nominated for six academy awards and won the Oscars for best original song ("Fame") and best original score.

40. *Id.*

41. The program began in 1960 and honors the work of the Honorable E. Barrett Prettyman, the distinguished former Chief Judge of the United States Court of Appeals for the District of Columbia Circuit.

live and work in D.C., while securing advanced advocacy training at Georgetown, was an appealing proposition.

While it was Professor Rivkin's prominence in the clinical world that likely secured the interview, it was a strong Tennessee woman who I had never met who helped me secure the position.<sup>42</sup> Professor William Greenhalgh, the Director of the Georgetown Criminal Justice Clinic and the Prettyman Fellowship Program,<sup>43</sup> after hiring me would often say that he was intrigued because I sounded like Dolly Parton. Professor Greenhalgh was searching for a fellow to represent clients in the state courts of Maryland and thought that my background in criminal defense in rural east Tennessee would serve me well. His belief that there were similarities between east Tennessee and the Maryland suburbs surrounding the District of Columbia was completely unfounded but worked to my benefit. In all candor, the Maryland suburbs where I practiced as a Prettyman fellow—Anne Arundel, Prince George, Montgomery, and Howard—could not have been more different than the courts I was accustomed to in east Tennessee. The opportunity to appear in those courts, and the differences I encountered because of Dean Rivkin's urging and Bill Greenhalgh's stereotype, set me on a career path to serve as a judge in Tennessee.

It is not an overstatement to say that my selection as a Prettyman fellow changed my life. As a fellow, my responsibility was to represent clients and to supervise students who were representing clients. Traveling to the District and Circuit Courts in Upper Marlboro, Rockville, Silver Springs, Bethesda, and Ellicott City, I encountered many female lawyers and, astonishingly for me, many female judges. While I had regularly appeared on delinquency and dependency and neglect matters before the Juvenile Judge in Johnson City, Shirley Underwood, even as late as 1985, I had never been to a court of record presided over by a female judge. The opportunity to observe women jurists presiding in all types of civil and criminal cases had a lasting impression on me. But it was not only the women judges who

---

42. I am proud that I was the first Tennessean, and the first UT law graduate, to be chosen as a Prettyman fellow, but much more proud that two additional alums—Tucker Carrington, Class of 1997, and now Director of the University of Mississippi Innocence Project, and Sarah Graham McGee, Class of 2011, statewide coordinator for the Tennessee Alliance for the Severe Mental Illness Exclusion (TASMIE), followed.

43. Professor William Greenhalgh began his academic career at Georgetown University Law Center in 1963. He served in various positions and was highly regarded as an expert in constitutional criminal procedure. He directed the Georgetown Criminal Justice Clinic and the Prettyman program for decades before his untimely death in 1994. See generally Greta C. Van Susteren, *Tribute to a Great Guy*, 31 AM. CRIM. L. REV. 1009 (1994).

impressed me, it was most of the dozens of judges before whom I appeared alone and with my students. To these judges, we—more than half of my students were female—were not women lawyers, we were simply lawyers. In Maryland, I never heard the phrase “lady lawyer” or “lady judge,” though I had heard the former phrase and would hear the latter phrase (and worse) frequently in Tennessee. That, I began to think, was exactly how it should be not just outside of the Nation’s capital, but back home as well.

When I completed the fellowship in the Fall of 1985, I was prepared to teach but again limited my options. My first choice of law schools, the University of Tennessee, was searching for a clinical professor, but I was unsuccessful in my application for the job. When I considered other law schools, and returning to private practice, I opted for the latter and returned to Johnson City to begin my own firm, concentrating on criminal defense and civil rights cases.

I started my firm by requesting appointments in criminal cases. That, too, would at first prove more difficult than it should have been. At that time, Tennessee did not have a state-wide public defender system.<sup>44</sup> In the General Sessions Courts in my county, lawyers would take turns representing everyone who was cited to court on a given day. In time, those judges were more than willing to have me join the rotation, but when those cases were not resolved at that level, the cases would proceed to the criminal courts. Again, in time, I would be regularly appointed by the criminal court judge as well, but my early efforts there were stymied by an event that played out while I was away at Georgetown. In 1983, a classmate, Mary Evans, helped a client serving sixty-five years for armed robbery escape from Brushy Mountain Penitentiary.<sup>45</sup> When I appeared before a local criminal court thereafter, the judge cautioned me, in open court, not to fall in love with my client and help him escape.

In addition to fumbling with what to call us and how to treat us, lawyers, judges, and, at times, the general public, examined how we should dress. For decades, women lawyers dared not wear pant suits to court. Once, when a ten-day trial depleted my wardrobe of lawyer suits, I wore a dress to deliver a closing argument in a murder trial.

---

44. The state’s patchwork system of criminal defense was the topic of my dissertation, which I completed in 1987, in order to receive my LL.M. degree. See generally Penny J. White, *A Noble Idea Whose Time Has Come*, 18 MEM. ST. U. L. REV. 223 (1988).

45. Art Harris, *The Lady, the Loser, the Lam*, WASH. POST (Apr. 29, 1983), [https://www.washingtonpost.com/archive/politics/1983/04/29/the-lady-the-loser-the-lam/a51d5f52-8c88-480b-82e0-8b0b28b23c94/?utm\\_term=.5977005c3f9d](https://www.washingtonpost.com/archive/politics/1983/04/29/the-lady-the-loser-the-lam/a51d5f52-8c88-480b-82e0-8b0b28b23c94/?utm_term=.5977005c3f9d).

The writer for the *Johnson City Press* shared my choice of attire with the readers in the Sunday paper.<sup>46</sup>

Thus, it didn't take long after my return to Tennessee for me to realize that while my perspective had changed, others' perspectives had not. I continued to emphasize criminal defense work, but I also became more involved in civil rights litigation. I continued to sue local governments based on unconstitutional conditions of confinement,<sup>47</sup> but I also expanded my practice to include employment and housing discrimination.<sup>48</sup>

My work incensed more than one local government official and prompted others to attempt to undermine my practice, as evidenced by some examples. In 1988, I traveled to a neighboring county jail to interview a potential client whose family hoped to retain me. I had visited this facility before, but I also had sued the sheriff and county officials over conditions that a former juvenile client had endured while incarcerated there.<sup>49</sup> Upon my arrival, a deputy sheriff, serving as jailer, decided that I might be a security risk. Before I would be allowed to visit, she placed me in a small room where she, joined by a male colleague, explained that I would have to be searched. I was required to face and place my palms against the wall. The female deputy dramatically put on plastic gloves, while her male colleague watched and rifled through my belongings. She then conducted a thorough search, forcefully prodding body cavities. While I remained clothed, the search was intrusive and extreme. When I asked for an explanation, the male deputy asked his female colleague whether I had used profanity and become disruptive, in violation of "jail policy." The two concluded that I had—I had not—and advised me that if I did

---

46. The nation saw similar puzzlement over how women should look and act in court during the O.J. Simpson trial when the commentators speculated as much about Marcia Clark's change in hairstyle as they did her trial strategy. News sources speculated that Prosecutor Clark got a "perm" to "soften her image."

47. From the early 1980s until 1994, the Tennessee Department of Corrections was under federal oversight as a result of a class action lawsuit filed by prisoners challenging the living conditions in Tennessee's prisons. While the unconstitutional conditions were several, overcrowding was a major concern. As a result of the litigation, the federal court imposed a cap on the number of inmates who could be housed in each prison. When the prison populations reached their cap, sentenced inmates were held in local jails, which then led to the deterioration of conditions and the overcrowding of many of those facilities. *Grubbs v. Bradley*, 552 F. Supp. 1052, 1131-32 (M.D. Tenn. 1982); *see also Grubbs v. Bradley*, 821 F. Supp. 496, 497 (M.D. Tenn. 1993).

48. The nature of my law practice would lead my opponent in the 1990 election for Circuit Court to nickname me "Sue Happy."

49. *Causby ex rel. Causby v. Papantoniou*, No. Civ. 2-81-230 (E.D. Tenn. Nov. 5, 1981).

not leave, I would be subject to a more intrusive search, and potentially, charged. I refused to leave before having an opportunity to introduce myself to the potential client, which I eventually was allowed to do in the presence of the two deputy sheriffs.

Nothing about this treatment was ordinary. Lawyers frequently went to the jail to interview prospective clients before they were retained. Visitation rooms were provided for these visits so that the lawyers could talk to the potential clients in private. Lawyers routinely brought brief cases, books, and papers to be reviewed and signed and, without question, could take these materials with them into the visiting room.

After introducing myself to the prospective client, I returned to Johnson City, where I sought the assistance of James T. Bowman, one of Tennessee's most respected criminal defense lawyers. After I explained to Jim what happened, he prepared a letter to the Sheriff and the two of us drove back to the neighboring county to present the letter. The letter demanded that I receive the same treatment and access to incarcerated individuals as that accorded to male attorneys and advised the sheriff that we were willing to seek federal court intervention to assure that our demands were met. Ultimately, the sheriff allowed me to meet in private with the client, and his family retained me to represent him.

But it wasn't just law enforcement officials who expressed dissatisfaction with women in the courts. Judges routinely referred to female lawyers as "lady lawyer," "Missy," or quite ridiculously, "lawyeress." A Sullivan County General Sessions Court Judge, holding court in Kingsport, refused to allow me to speak on behalf of my client in his court until I produced my law license. While these routine humiliations were troubling, many women suffered far greater indignities than I did.<sup>50</sup> Many women were subject to far worse treatment than I was. Some male attorneys and male judges simply did not want us to become members of their "club," and that sentiment extended beyond a perception that criminal law was too rough and tumble for women. In a deposition in a wrongful discharge case, counsel for the city board of education, a member of the largest

---

50. See generally DEBORAH L. RHODE, *THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION* (2001), <http://womenlaw.stanford.edu/pdf/aba.unfinished.agenda.pdf>; Lara Bazelon, *What It Takes to Be a Trial Lawyer if You're Not a Man*, ATLANTIC (Sept. 2018), <https://www.theatlantic.com/magazine/archive/2018/09/female-lawyers-sexism-courtroom/565778/> (citing more recent examples, including male lawyers filing motions to "preclude emotional displays" by a female attorney and a judge scolding a female lawyer, while slapping her on the hand).

firm in Greeneville, Tennessee, commented on the record in the presence of my client and the board members, that I should have children so that I would “have something to do. Then you could stay home where you belong.” On another occasion, again in a civil case and in federal court, the judge grew angry with my impatience at a county that, despite agreeing to build a new jail in settlement of our civil rights suit, was dragging its feet long after it had signed a consent agreement. He equated my aggressiveness to “fighting the Nazis” and asked, “do you know how long it takes to build a building, Ms. White? No, I guess you don’t.”

It was also the more subtle disparate treatment during hearings and trials, the failure to be invited to so-called “pretrial” hearings that took place in judge’s chambers or the local drugstore, that finally led me to realize that if I wanted things to change, I was going to have to change things. When a long-serving Circuit Court judge announced his retirement, I decided to run for the seat.<sup>51</sup> I had witnessed women judges serve with distinction and had seen the impact that their presence could have on the profession. I wanted to bring that diversity and dignity to the bench in my home judicial district.

My 1990 campaign for Circuit Court Judge in the First Judicial District was based on my legal experience. I counted the number of cases I had tried and the number of judges before whom I had appeared. I touted the many kinds of cases I had tried in state and federal courts and the resulting opportunities I had had, both in Tennessee and in Maryland, to observe good judges and seek to emulate their judicial temperament and habits.

My opponent was male and politically connected. Reportedly, his campaign was influenced (perhaps designed) by Lee Atwater, a personal friend of a long-time local politician and my opponent’s primary supporter. His campaign slogan mimicked the most popular political slogan of the time—traditional family values. He illustrated his qualifications by displaying photographs of his family and by leasing a red, white, and blue “Family Values” van. I, too, was married, but I did not have children and that fact would figure prominently in his campaign as we moved toward election day. But, initially, the main concern that was raised, by my opponent and the voters, was that, although I was married, I did not have my husband’s

---

51. Tennessee trial judges have always been subject to election, but different judicial districts have chosen different election methods. Some use primaries, others party nominations, and still others have non-partisan elections. In the First Judicial District in 1990, the tradition had been that judges ran non-partisan and that primaries were not held for circuit court judgeships.



last name. Many could not accept a woman not “choosing” to share her husband’s family name.

But in time, my opponent would urge that there was a much greater concern about me as a candidate. I did not have children. In the summer of the campaign, at a public forum, my opponent struck a chord that he would repeat frequently. I was not a qualified candidate because I did not have children. Having not produced offspring, how could I possibly have the judgement to sit as a judge in a circuit court with general jurisdiction? During one live radio debate, a caller asked whether each of us had ever smoked marijuana, borrowing the question from those who asked the same question of United States Supreme Court nominee Judge Douglas Ginsburg in 1987.<sup>52</sup> I quickly (and honestly) answered that I had never smoked marijuana or used illegal narcotics. My opponent paused. Rather than respond to the question, he suggested that we should both sign releases allowing full public access to our pharmaceutical records, insinuating that if we did so the public would find that I, heaven forbid, had been prescribed contraceptives. He ultimately would argue that because the judgeship we were seeking included family law jurisdiction, one needed to have parented children to handle the docket, but his message cut deeper, suggesting that I had failed as a woman by not fulfilling my primary purpose.

Along with many volunteers who were, like me, political novices, I walked the 1,200-square mile judicial district, knocked on doors to ask for votes, never missed a pancake breakfast or spaghetti supper, and played piano and served ice cream sundaes at every senior center that would let me. On election night, we were astounded. It was a landslide—in our favor. The First Judicial District had elected its first “lady judge.”

Because I was determined not to remain just “the lady judge,” I was likely viewed in those early days as stern and serious. I relaxed eventually, but always strived to follow the balance my dad had prescribed, which he wrote on an index card and handed to me on the morning of my swearing in: “[r]un a tight ship and render justice with a touch of mercy.”

Gender likely played a role in my appointment to the Tennessee Court of Criminal Appeals in 1992. Judge Martha Craig Daughtrey had served on the Tennessee Court of Criminal Appeals from 1975 to

---

52. Steven V. Roberts, *Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana 'Clamor'*, N.Y. TIMES (Nov. 8, 1987), <https://www.nytimes.com/1987/11/08/us/ginsburg-withdraws-name-as-supreme-court-nominee-citing-marijuana-clamor.html>.

1990, when she was elected to the Tennessee Supreme Court. Judge Daughtrey was the first woman to serve on an appellate court in Tennessee and the first woman Supreme Court justice. She would be the only female appellate judge in Tennessee for seventeen years. In 1994, eight judges on the Court of Criminal Appeals and all nine judges on the Court of Appeals were male: I was the only female on either court.<sup>53</sup>

When a member of the Tennessee Court of Criminal Appeals for the Eastern Section retired, Governor McWherter, who had a reputation for promoting diversity, likely did not want to appoint another male appellate judge. But Governor McWherter did not tell me that. Candidly, before I was appointed to serve on the Tennessee Court of Criminal Appeals, I never met Governor McWherter. He was just the kind of man who honored women and their contributions. But undoubtedly of additional importance was the fact that I had achieved a landslide victory in the Republican stronghold of upper east Tennessee in 1990. Additionally, I was an incumbent. By appointing me to fill out the unexpired appellate term of Judge Byers on the Tennessee Court of Criminal Appeals, Governor McWherter would create a vacancy on the Circuit Court in the First Judicial District, which, by law, he would also have to fill. That is a circumstance any savvy politician would savor. Governor McWherter appointed me; he appointed my replacement; and I became the second female appellate judge in Tennessee. The same phenomenon would benefit me two years later when Justice Charles O'Brien unexpectedly retired from the Tennessee Supreme Court, creating a vacancy there.<sup>54</sup>

When I became a judge in 1990, about a dozen females held judgeships in courts of record in the state. I was the first who held a judgeship east of Knoxville. Most were located in Nashville and Memphis, and Knoxville had two women judges serving on courts of record.<sup>55</sup> Their saturation there was no accident. Not only were the areas more urban and more accustomed to women in the profession, the reputation of Judge Daughtrey and the efforts of lawyer-leaders

---

53. THE SEC'Y OF STATE, STATE OF TENN., TENNESSEE BLUE BOOK 1991-1994, at 252-58 (1994).

54. Justice O'Brien held an at-large seat and because two of the remaining members of the Court were from Nashville, the appointment had to come from either the east or the west grand division. Justice O'Brien had hailed from Crossville and so, to follow tradition, Governor McWherter would name his replacement from the east grand division as well.

55. Chancellor Sharon Bell and Criminal Court Judge Mary Leibowitz were the first two female judges to serve on courts of record in the eastern part of the state.

like Margaret Behm<sup>56</sup> to attract and elect female candidates had paid off. Yet, even as late as the fall of 1992, four years before the celebration of the state's two-hundredth birthday, Tennessee had only one female appellate judge. After my appointment, we would have two, until August of 1993, when Judge Daughtrey was confirmed as a judge on the United States Court of Appeals for the Sixth Circuit.

Over the course of my short tenure on the Tennessee Court of Criminal Appeals, our court traveled to network with other states that had divided courts of appeal. On those occasions, I remained the only woman among the multi-state judges. The Tennessee Court of Criminal Appeals finally secured its second female jurist in 1998 when Judge Norma Ogle joined the court, and its third, and first African American female jurist in 2008, with the addition of Judge Camille McMullen.<sup>57</sup>

When Justice O'Brien surprisingly announced his retirement from the Tennessee Supreme Court at a judicial conference in the fall of 1994, I was in Bar Harbor, Maine. I was scheduled to teach a multi-day judicial education program. I had become involved in judicial education through the work of Dr. Patricia Merrill, a professor at the University of Memphis and an organization then called the Leadership Institute in Judicial Education. Leaders in the Administrative Office of the Courts, including Assistant Executive Director Suzanne Keith and Education Director Mary Tom Plummer, and later Sherry Ross, had undertaken to assure diversity among the presenters in Tennessee's judicial education programs. As a result, I had attended courses on adult learning principles and course development through both Dr. Merrill's program and the National Judicial College, headquartered at the University of Nevada. Those experiences had led to my becoming involved in judicial education both in Tennessee and in other states where I was invited to speak.

As I prepared to present in Maine, I learned about Justice O'Brien's retirement from a colleague who called to encourage me to apply. In many ways it was too early. I had only two years' experience as an appellate judge, but it was not unusual for lawyers with no experience to be appointed to judicial positions. While I had a great deal of encouragement, there were equal amounts of discouragement. One applicant, a male, told me I should withdraw because it was not

---

56. Margaret Behm received both her undergraduate and law degrees from the University of Tennessee. She is one of the most honored lawyers in Tennessee and practices with the firm of Dodson Parker Behm & Capparella in Nashville.

57. THE SEC'Y OF STATE, STATE OF TENN., TENNESSEE BLUE BOOK 2009-2010, at 314, 316 (2010).

“my time.” He actually had his father, who was at least fifty years my senior, approach me during the selection hearings and ask me to withdraw. But in elections, and with appointments, timing is everything. In my case, the timing could not have been better and, as it turned out, could not have been worse.

I followed my colleague’s advice and applied. This time I met the governor and had the opportunity to share with him my personal and professional background. At the close of our meeting, I had no idea what to expect. When the governor’s assistant, Harlan Matthews, called to tell me that the governor was going to appoint me, I was both elated and humbled.

Being the youngest and only female member of the court had its advantages. I was appointed by the Chief Justice to liaison a number of boards and commissions that proved essential to the development of the legal profession in the state.<sup>58</sup> From my first sitting, Chief Justice Anderson treated me exactly the same as all other members of the court, assigning me the same number of cases with the same level of difficulty. No member of the court ever treated me differently or acted as if they expected any more or less of me.<sup>59</sup> My time on the court was magnificent; it gave me the opportunity to serve in ways I never expected. From the Court’s SCALES project,<sup>60</sup> to delivering college commencement addresses, I was rewarded in ways I could never have imagined.

But then, timing is everything. In 1994, when I became a member of the Tennessee Supreme Court, women judges and women justices were still not the norm.<sup>61</sup> The uniqueness of my gender and my youth,

---

58. I chaired or co-chaired the Alternative Dispute Resolution Commission and the Judicial Performance Evaluation Commission. I also worked with the gender and racial fairness commissions and was tasked with drafting the post-conviction rules of procedure and the judicial performance evaluation program.

59. Perhaps, as evidence of our mutual respect, my colleagues selected me to serve as Chief Justice. My term was to follow Chief Justice Birch’s and begin after the 1996 August retention election. Because I was not retained, I would not serve as Chief Justice. The court would not have its first female chief justice until 2008, when Justice Janice Holder became the Chief. Tennessee has now celebrated three female chief justices and has a majority female supreme court.

60. The Supreme Court Advancing Legal Education for Students project educates high school students about the judicial system by hearing oral arguments in local communities and providing students an in-depth curriculum on the cases that they are hearing argued. *Supreme Court Advancing Legal Education for Students (SCALES)*, TENN. STATE COURTS, <https://www.tncourts.gov/programs/scales-project> (last visited Apr. 11, 2019).

61. In 1999, women still only represented 21.14% of state appellate judges. Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches, 1985 and 1999*, 85 JUDICATURE 84, 89 (2001).

for that matter, made me an easy target. The novelty of a female jurist prompted confusion and debate about the appropriate role that women on the bench should play. While some accepted that the role of women on the bench was to add a diversity and benefit of perspective, others thought that women judges should speak for and actually *represent* women's interests in every case, even when that meant veering from the rule of law. When I came under attack for the majority's decision in *State v. Odom*,<sup>62</sup> for example, some expressed their disappointment in me for not deciding the case consistent with the interests of the female victim in the case.<sup>63</sup>

It was not the gender card that those who opposed me played, however. The Governor, both United States Senators, various members of the House of Representatives, and both members of the Tennessee Conservative Union who orchestrated the campaign against me, were all male, but they were also presumably aware of the importance of the female vote. More significantly, they were likely aware that judicial elections regularly produced very low voter turnout.<sup>64</sup> To energize the electorate, they would need a stronger, more emotive issue. They chose what has become the signature surrogate for campaigns against sitting jurists—crime and capital punishment.<sup>65</sup>

In 1996, Tennessee had not executed a condemned inmate since the 1972 United States Supreme Court decision in *Furman v. Georgia*.<sup>66</sup> Almost one hundred inmates were on Tennessee's death

---

62. 928 S.W.2d 18 (Tenn. 1996). Richard Odom was convicted of felony murder based on his rape and murder of an elderly woman. The issues before the court were evidentiary—the admissibility of expert testimony and the sufficiency of proof of a death-qualifying aggravating circumstance. Much more detail has been written about the decision and the role it ostensibly played in the public's vote against me in the 1996 election, but the details of the decision and the retention election are of little relevance to the point of this discussion.

63. It was not only women who felt that I had compromised my role by ruling in favor of Odom's retrial. Men, too, questioned the decision and one suggested a way to teach me the meaning of "heinous, atrocious, and cruel," the death penalty aggravating circumstance that we reviewed in the *Odom* case. I should be "locked in a cage with rapists and raped repeatedly."

64. Not only is overall turnout lower, but many voters who do turn out to the polls do not enter votes for any judges. This phenomenon is known as "roll-off." See generally Melinda Gann Hall, *Voting in State Supreme Court Elections: Competition and Context as Democratic Incentives*, 69 J. POLITICS 1147 (2007).

65. The Brennan Center for Justice has studied the last two decades of judicial elections. The issues raised most frequently and featured most prominently in attack ads against judges are criminal justice issues. Labeling a judge "soft on crime" or "anti-capital punishment" is the most common way to attack and unseat a sitting judge.

66. 408 U.S. 238 (1972).

row. Although the *Odom* decision was the first direct appeal of a capital case that I'd ever had on my docket, as a judge,<sup>67</sup> the public was led to believe that I was responsible for stopping the machinery of death in Tennessee. The campaign brochure that circulated state-wide simply stated: "If you are for capital punishment, vote against Penny White."<sup>68</sup>

I have often been asked whether my gender played a role in my being turned out as a justice. To the extent that women, even some I knew personally, could not reconcile my role as a judge with my role as a woman, the answer would be "yes." But perhaps the greatest impact was the under-representation of women in government and in many other aspects of public and political life. To the extent that women still did not occupy many seats at the political table, the answer would certainly be "yes"—the fact that I was female played a role in my not being retained. Few women were at the table when the decision to wage a campaign against me was reached. Additionally, as a relative newcomer and a true political novice, I did not have personal relationships with Tennessee's governor or senators, so their willingness to characterize me falsely—as not sharing the views of the average Tennessean—and to urge the public to vote against me did not carry any of the difficulty that it would have had I known them personally or professionally.

And then there were yellow roses. While it would be misleading to suggest that I bounced back quickly, the memory of those beautifully symbolic and thoughtful yellow roses inspired me, eventually, to redouble my efforts to serve the state. That too proved challenging, but after a three-year departure and with the encouragement of two female faculty members at the University of Tennessee, I was able to return to Tennessee and teach at the College of Law.<sup>69</sup>

---

67. I had represented those facing death as a lawyer and had been on panels of the Court of Criminal Appeals that had reviewed capital cases on post-conviction, but *State v. Odom* was the first capital case that I had ever reviewed as a judge on the merits.

68. See Colman McCarthy, *Injustice Claims a Tennessee Judge*, WASH. POST (Nov. 26, 1996), [https://www.washingtonpost.com/archive/lifestyle/1996/11/26/injustice-claims-a-tennessee-judge/f0a28c33-fcb1-4c1b-9471-2d5704d56a88/?utm\\_term=.a55c663e5025](https://www.washingtonpost.com/archive/lifestyle/1996/11/26/injustice-claims-a-tennessee-judge/f0a28c33-fcb1-4c1b-9471-2d5704d56a88/?utm_term=.a55c663e5025) ("A campaign against her had been waged by the Tennessee Conservative Union, a far-right group that flooded the state with literature accusing White of leniency toward criminals and laxness on capital punishment.").

69. While it was Dean Richard Wirtz who drew me a roadmap for being hired as a law professor, it was Professor Fran Ansley and Professor Carol Parker who encouraged me to apply for a position at UT in 2000, two years after I had applied for,

Fortunately, I was replaced by a female jurist in 1996 who went on to become Tennessee's first female chief justice. As of January 2018, Tennessee had six female appellate judges and thirty-two female judges presiding over courts of record.<sup>70</sup> The number of women lawyers in Tennessee and the number of women beginning law school continues to increase. That progress honors the symbol of the yellow rose, but still our state has had no female Governor; no female United States Senator; no female State Attorney General. Equally problematic, even when women hold the same position as men, we regularly make less than our male counterparts. We are a long way from the circumstances that led Febb Burn to successfully prod her son, Harry, to do the right thing, but we are equidistant from achieving full equality in our profession and in society. By archiving the struggles, we aim to empower and inspire women to quicken the pace toward achieving that ultimate goal.

---

but not received, the position I now hold, Director of the Center for Advocacy and Dispute Resolution,

70. THE SEC'Y OF STATE, STATE OF TENN., TENNESSEE BLUE BOOK 2017-2018, at 454-55, 457, 463, 465, 468-73 (2018).