

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

FOREWORD

THE PAST AS PROLOGUE

Only a week after seeing Judith Kaye's obituary last winter, I learned that Marie Garibaldi had died. Here were two distinguished judges, one the first woman appointed to the New York Court of Appeals who later became the first woman to serve as Chief Judge of the State of New York,¹ the other both the first woman president of the New Jersey State Bar Association and the first woman justice of the New Jersey Supreme Court.² But here also were two women whose names I never heard growing up.

This is no surprise: It was the rare woman who managed to become a lawyer—let alone a judge—when I was a girl,³ a situation that changed only slowly. I started college in 1974, when just twenty percent of the law students in this country were women, and that figure had yet to reach thirty percent by the time I finished in 1978.⁴ Women still accounted for fewer than

1. Sam Roberts, *Judith Kaye, New York's Chief Judge for Almost 16 Years, Is Dead at 77*, N.Y. TIMES, Jan. 8, 2016, at B8.

2. Sam Roberts, *Marie Garibaldi, Ex-Justice in New Jersey, Is Dead at 81*, N.Y. TIMES, Jan. 20, 2016, at A23.

3. Fifty-seven of sixty-three law-school placement offices surveyed in 1963 “ranked discrimination against women law students by legal employers as either extensive or significant.” Ruth Bader Ginsburg, *Women at the Bar—A Generation of Change*, 34 SEATTLE U. L. REV. 649, 652 (1978). There were in any event few women applicants for those legal employers to spurn: Judge Kaye was one of only ten women in the NYU class of 1962, and Justice Garibaldi one of only twelve in Columbia's class of 1959. Roberts, *supra* note 1; Joseph F. Sullivan, *Woman in the News: A Woman for the Court*, N.Y. TIMES (Sept. 29, 1982), <http://www.nytimes.com/1982/09/29/nyregion/woman-in-the-news-a-woman-for-the-court.html>.

4. *First Year and Total J.D. Enrollment by Gender, 1947–2011*, ABA (n.d.), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf (showing 1974–75 total as 20.1 percent and 1977–78 total as twenty-eight percent).

forty percent of the students in American law schools when I graduated with the class of 1984.⁵ And had I gone directly to law school after college, I would have graduated into a world in which neither the highest court of the state in which I attended law school nor that of the state in which I first practiced law had ever included a woman.⁶

Seeing Judge Kaye and Justice Garibaldi memorialized as outstanding judges seems natural today, as does simply seeing Justices Ginsburg, Sotomayor, and Kagan on the United States Supreme Court. Yet women in the judiciary have still not achieved parity with men, either in numbers⁷ or in salary.⁸ But I am not disheartened, largely because I have lived to see the inspiring professional achievements of women like Judge Kaye and Justice Garibaldi. Their careers remind me that the appellate judge can draw strength from the past as she builds her future,

5. *Id.* (showing 1983–84 total as 38.3 percent).

6. Roberts, *supra* note 1 (noting that Judge Kaye was appointed to the New York Court of Appeals in 1983 and to the position of chief judge a decade later); David Sharp, *Caroline Glassman, 90, Judge on Maine SJC*, BOSTON GLOBE (July 13, 2013), <https://www.bostonglobe.com/metro/obituaries/2013/07/12/woman-serve-maine-supreme-judicial-court-dies/aw3tdz0UbKzJAs6UJTUOBL/story.html> (noting that Justice Caroline Glassman, the first woman to serve on the Supreme Judicial Court of Maine, was appointed in 1983). Here in Arkansas, the first woman on the state Supreme Court was appointed in 1975 to fill an unexpired term originally held by a man. The first woman elected to the Arkansas Supreme Court won her seat more than twenty years later. William B. Jones, Jr., *Justices, Judges and Officers of the Courts*, ARK. S. CT. HISTORICAL SOC'Y (n.d.), <https://courts.arkansas.gov/courts/supreme-court/historical-society/background-pg-2> (noting that Justice Elsjane Trimble Roy—later the first woman to become a federal district judge in Arkansas—was appointed to a partial term on the Arkansas Supreme Court in 1975, and that Justice Annabelle Clinton Imber was elected to a full term on the Arkansas Supreme Court in 1997).

7. Although a third of the Supreme Court's current Justices are women, only four women have ever been appointed to the Court, and only thirty-five percent of judges on the federal courts of appeals are women. *Women in the Federal Judiciary: Still a Long Way to Go*, NAT'L WOMEN'S L. CTR. (Mar. 2016), <https://nwlc.org/wp-content/uploads/2016/03/JudgesCourtsWomeninFedJud3.22.16.pdf>.

8. On average, female judges earn less than male judges. *Median Earnings 2016 Final*, U.S. CENSUS BUREAU (2016), http://www.census.gov/people/io/publications/table_packages.html (showing that the average salary paid to a woman serving as a judge amounts to 71.8 percent of the salary paid to the average man serving as a judge). Because judicial salaries tend to be level within categories, however, we should probably expect this gap to close as more women join courts on which salaries are higher. See, e.g., *Judicial Compensation*, UNITED STATES COURTS—JUDGES & JUDGESHIPS (2016), <http://www.uscourts.gov/judges-judgeships/judicial-compensation> (showing salary for all judges on the federal courts of appeals as \$215,400).

for “what’s past is prologue, what to come / In yours and my discharge.”⁹

IN THIS ISSUE

This issue begins with Professor Berger’s intriguing essay, which uses the tools of rhetorical analysis to examine the opportune moment—one that might mark a turning point in the law. We also have a look at preservation rules in the federal courts of appeals; an analysis of issue advertising in judicial races; a study of attorney performance in criminal appeals; and an update on state rules addressing the publication, citation, and precedential value of unpublished opinions. Each strikes me as likely to interest many law professors, lawyers, and judges, so I encourage you to begin with whichever seems most likely to be of use in your corner of the appellate world.

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9. WILLIAM SHAKESPEARE, *The Tempest* 2.1.277–78 in *THE YALE SHAKESPEARE* (Barnes & Noble 1993) (reprinting 1918 Yale text).