

Golden Gate University Law Review

Volume 14

Issue 3 *Women's Law Forum - Symposium Issue:*
National Association of Women Judges

Article 4

January 1984

The Woman Has Robes: Four Questions

Justice Shirley S. Abrahamson

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>

 Part of the [Judges Commons](#)

Recommended Citation

Justice Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 Golden Gate U. L. Rev. (1984).
<http://digitalcommons.law.ggu.edu/ggulrev/vol14/iss3/4>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

THE WOMAN HAS ROBES: FOUR QUESTIONS*

SHIRLEY S. ABRAHAMSON**
JUSTICE, WISCONSIN SUPREME COURT

At mid-morning on August 6, 1976, the Governor of Wisconsin, Patrick J. Lucey, was in the State Capitol holding his usual Friday press conference. But the subject of the conference was unusual. Governor Lucey was announcing that he had appointed me, Shirley S. Abrahamson, a justice of the Wisconsin Supreme Court. In my typically shy and retiring way I did not attend the conference but was instead a block and a half away at my law office opening bottles of champagne to celebrate the event with colleagues. Within a few minutes of the announcement several women lawyers and nonlawyers joined us at the law office. They had anticipated the announcement and had gone to the press conference to congratulate me, only to find I was not there.

I welcomed these friends and strangers to our office because my appointment was a recognition of their efforts as much as mine. For many years these women had worked—in state and local politics, in volunteer organizations, in business offices, in the women's movement, and in their day-to-day lives to break down the barriers that prejudice against women had erected. That day an improbability had become a reality: a woman was named to the formerly all-male Wisconsin Supreme Court.

Not long after the women arrived, the Capitol press corps called to request a news conference. They explained that although all appointments to the highest court of the state are news, my appointment was especially newsworthy because I would be the first woman to serve on the Wisconsin Supreme Court, only the third woman ever to serve on any Wisconsin bench, and the only woman sitting on the Wisconsin bench in 1976.

The news conference was a first for me, and I had not thought about or planned for the event. The questions the re-

* The text is an edited version of remarks given on October 5, 1980, at a luncheon meeting at the Second Annual Meeting of the National Association of Women Judges in Washington, D.C.

** B.A. New York University, 1950; J.D. Indiana University School of Law, 1953; S.J.D. University of Wisconsin Law School (American Legal History), 1962.

porters asked in 1976 have been asked repeatedly since then and I am still trying to answer them—for myself and for others in both public and private settings. I share these questions and answers with you because I am sure every woman who has been appointed or elected to the bench or another position has faced similar questions. I wonder how you handle them?

* * *

Question No. 1: “Were you appointed because you are a woman?”

Had I anticipated the question, I would have realized how obvious it was, given society’s expectation that a woman could not make it on her own merit. I thought, “What a shocking question.” It implied that I was appointed not on the basis of professional and personal qualifications but due to the accident that I had been born a woman instead of a man. For years I had heard remarks of this kind: “You were able to go to law school, become a partner in a leading law firm, be a professor of law at the University of Wisconsin, despite being a woman? Fantastic! That means you must be twice as good as a man because in this male world a woman has to be twice as good and work twice as hard to get the same place a man does.”

On that August day I could only answer: “I am confident that I was appointed on the basis of merit. I am sure the governor selected the lawyer who he thought was best qualified for the position.”

In later years I decided that humor was the better way to handle the question. How many times had I heard my mother and father make their points with a funny story.?

So I now say: “I have it on good authority that when the governor pondered who should fill the vacancy on the Wisconsin Supreme Court, he asked the staff for a job description, a list of necessary and desirable qualifications, what hardships the job involved, and a list of nominees. The staff told the governor the nominee must be a lawyer who had at least five years of legal experience. The lawyer should be capable of rendering fair and

WOMEN’S LAW FORUM

impartial decisions, should have good 'lawyering skills', and should be able to work quickly and well under a heavy case load. Most important, the lawyer should realize that judges are overworked and underpaid. The governor muttered: 'Overworked and underpaid. Overworked and underpaid. That sounds like woman's work!' The governor then asked the staff to compile an alphabetical list of women lawyers. Needless to say, my name was at the top of the list and I got the nod."

I am convinced that governors in other states fill vacancies in their courts in a similar way. Soon after my appointment, Ruth Abrams was appointed to the Massachusetts Supreme Judicial Court and Rose Elizabeth Bird to the California Supreme Court.

Question No. 2: "Do you think you were appointed as the token woman on the bench?" (These reporters obviously were going to stay on this tack.)

I answered that "I am not a token anything. I expect to see more and more women on the bench in years to come. When I was in law school, women comprised only 4 percent of the bar; today that percentage is nearly 15. Women comprise 35 to 40 percent of the student body at the University of Wisconsin Law School, whereas I was the only woman in my law school class. Indeed it would not surprise me to see seven women on the Wisconsin Supreme Court some day. I don't view that possibility as any stranger than seeing seven men on the bench, as we have for 128 years."

Now I say, in the words of Patricia Wald, Circuit Judge, D.C. Circuit, that women appointees are not tokens but beacons.

Question No. 3: "Do you view yourself as representing women in the courts?" (There is a pattern to these questions, a pattern I still see.)

Answer: "I represent all the people of the State of Wisconsin. If you view me as representing only women, then you must view male judges as representing only men. If that were the case, men would be overrepresented and the women shortchanged. Just as we expect men judges to treat fairly and impartially, that

is, to represent and be responsive to, to judge justly, all persons who appear in court, regardless of gender, race, religion, or national origin, we must expect the same of women judges.”

Question No. 4: “Do you think women judges will make a difference in the administration of justice? Will they bring to the bench the important feminine qualities of warmth, love, sensitivity, forgiveness, understanding of human nature, sympathy with the poor and the downtrodden, a desire to help and ‘do good’, patience, a willingness to listen, an appreciation of children, family, and humanistic values, an understanding of the harms caused by discriminatory practices?”

I always take a deep breath when I hear this question or one of its variants. The questioner usually has a stock list of the wonderful qualities he or she associates with women. Now I’m trapped. Naturally I want to have all these wonderful traits attributed to me. It may be useful for me to claim that women have a different perceptual capacity they can bring to the bench. But do I believe that? I have spent a lifetime fighting society’s urge to stereotype both men and women. I believe, and I have often said, that men and women are more alike than different, and that there should be equal opportunity for all. We must look not at gender but at the individual, judging each on his or her own merits. So what am I to do now?

Well, I answer honestly. “What does my being a woman specially bring to the bench? It brings me and my special background. All my life experiences—including being a woman—affect me and influence me. I have been a practicing lawyer and a law professor specializing in tax and business law. Being a woman never stopped me from pursuing a goal. I decided to be a lawyer when I was six years old. My parents were just happy that I no longer wanted to be President of the United States, a career choice I had made when I was four.”

At 19, 13 years after I had decided to be a lawyer, I went on to law school at Indiana University. In my second year of law school I began to hear that women really didn’t become lawyers. I couldn’t get a part-time job while I was in law school because

WOMEN’S LAW FORUM

the practicing lawyers, all males, were reluctant to have me in their offices. They were concerned about what people in the community would think if the male lawyer and I had to work together late at night. That was not a persuasive argument to me, a respectable married woman, because the male lawyer already worked with another woman in the office, his secretary.

When I graduated, the dean of the law school told me he was really happy I was leaving the state of Indiana. That may sound like a curious thing for the dean to say to someone who was graduating first in her class and was considered a good law school citizen. He was telling me that despite my aptitude for law, probably no one in the state would hire me, except perhaps a very large firm that might need a librarian. Now, being a law librarian is a fine career, if that's the career you want and are trained for, but I did not want to be a law librarian.

In Madison I joined a law firm that had been all-male until then. These were men committed to the idea of social justice. My partners and I practiced law together for 14 years. We were a team, but each of us was also an individual. And I, as an individual, was willing to fight for change in laws and law practice where I thought change was needed.

But being a woman, and being a lawyer, are not the only important parts of being me. Part of what I bring to the court is my background as a child of immigrants, raised in New York City, a product of the New York City public schools. When I was born, my parents were relatively new to the United States and they had had probably less than a high school education. My father owned a small neighborhood grocery store. We all worked in it. I am also a wife and a worried parent of a teen-ager who insists on using his driver's license.

I think that when people ask if "being a woman" brings anything special to the court, they really are asking whether there is any special sensitivity that a person's background might bring to the court. My gender—or, more properly, the experiences that my gender has forced upon me—has, of course, made me sensitive to certain issues, both legal and nonlegal. So have other parts of my background. My point is that nobody is just a woman or a man. Each of us is a person with diverse exper-

iences. Each of us brings to the bench experiences that affect our view of law and life and decision-making. The concept of a collegial court is to bring together people who will have different life and legal experiences, who may have different views of law and facts. If all the judges were the same, why have seven?

Four years have passed since the press conference, and today I am delighted to be here, speaking to nearly two hundred women judges. Before this meeting I had never seen more than five women judges in the same room. Each of us in the 1980s still faces the basic question underlying the four questions I just set forth: Why is it important that women be appointed or elected judges? It is easy to state that we should not discriminate against women in appointments to the bench. Clearly a society where any group—women, blacks, Hispanics, Irish, Muslims, Jews—is repressed is an unhealthy society, not only for the repressed or oppressed group, but for the majority. All suffer when the talents of more than 51 percent of the population are not used to the fullest.

But that answer is not, to my mind, sufficient. I must have other reasons for pressing for more women judges. What makes me think that women judges as a group can make a difference in the quality of law—the quality of justice? Look around the room. We are all women, but we are not the same. We look different. We're young and old, short and tall, slender and unsuccessful weight-watchers, white, brown, and black. We've had different life experiences. Some of us are married, some single, some divorced, some mothers. We come from different political backgrounds. We have had different legal training and experiences. There's as great a diversity of people in this room as in any group I have seen, no matter the criteria chosen, including our views on what are popularly referred to as "women's issues."

What is our common denominator? The common denominator—which comes from our mutual experience of dealing as women in a formerly men's world—is this: We all have combined a gutsy opposition to accepting the status quo with a commitment to working within the status quo for change. That combination is our common denominator. And it can be, I believe, the

WOMEN'S LAW FORUM

basis of our unique contribution to the bench.

We women judges all have had the experience of being “outsiders” in the American legal system, and this experience can make a difference on the bench. Each of us comes from a world that defines a woman’s role as wife, homemaker, mother. We saw the role and indeed some of us embraced it. Nevertheless, each of us said, “I must be able to choose to do something else in life, something different from the traditional role. I am going to choose a path that is right for me and my family.” Each of us said, even though not many lawyers are women, “that a woman can be a lawyer.” Each of us said, “I can take a different path, not because there’s anything wrong with the traditional one but because it is not right for me.” For some of us it took great courage to depart from the traditional; for others it took little courage. But all of us were willing to stand up and say, “I believe in myself. I shall follow the career I think right for me. I do not think being different is the equivalent of being wrong. Being different is okay.”

We women judges of the 1970s and 1980s by definition did not accept the status quo in our lives. We went to law school and proved our willingness to be different, to think and act outside the traditional and expected mold, to take our own path. We did not go to law school or become judges under Lyndon Johnson’s adage, “You go along to get along.” We became judges by refusing to “go along,” and by being creative instead.

Women judges can make an important contribution to the justice system if, as we get older and have “made it,” we do not lose the qualities that initially brought us here: Our readiness to act contrary to others’ expectations and our willingness to work as team players within the system, and to work doggedly for change. Just as we reformed traditional roles in our own lives, we must see reform of the traditional legal system as our own issue, as a “woman’s issue,” and as “woman’s work.” We work in the traditional legal community and wear three-piece skirted suits and black robes, but we need not don all the traditional views of the old-time male-dominated bench and bar. The lawyers’ workplace, the legal system, and the courts can and must be made to change in recognition of the disintegration of stereotypes, whether male or female, ethnic, religious, or racial, and to

provide equal justice under the law.

I think some of you have just gulped hard and thought about the flack you might take from your male colleagues on the bench and in the bar who do not want the bench rocked. You are right. Flack may fly. Flack inevitably flies from those who fear change. But we cannot be afraid of the flack. Change is needed. If I had the courage at six—and then at 19—to be a lawyer, to try to do what was right, I should not lose this courage at 46. I keep in mind the words spoken by federal district court Judge James E. Doyle, western district of Wisconsin, and a former law partner of mine, “I would rather fall in flight than smother on the ground in the dust of fear.”

If you think that by lying low, not making waves, you can buy peace with men who are threatened by women, I suggest you are mistaken. There is no way to buy peace with them. Remember—to quote one of my favorite t-shirts—men of quality are not threatened by women of equality.

* * *

Change calls for courage. And all judges will need courage and the capacity to change in the 1980s. I agree with Chief Justice Rose Elizabeth Bird of the California Supreme Court who predicts that the 1980s is going to be a challenging time for the judiciary.

Each judge can do something in her courtroom now to improve the administration of justice. Improvement can be inexpensive and incremental; it need not take massive reform directed by the highest appellate court or massive amounts of money. Look around your courthouse with new eyes and new vision. Turn back the clock—remember what it was like before law school, before lawyering, before judging. Is your court sensitive to lay persons and lawyers who appear in court as litigators or observers? Public opinion polls and court studies show those people who have first-hand experience with the courts—like jurors and witnesses—are not happy with the way the courts operate.

WOMEN'S LAW FORUM

We women judges can help make the courts operate better by humanizing the court in the same way that women police officers and women correctional officers have been shown to humanize their professions. I suggest we ask ourselves how we treat witnesses, jurors, defendants, counsel, and court observers. Are we still courteous at the end of the day? Do we make sure that the clerks, bailiffs, and reporters treat everyone with respect? Consider using a questionnaire or taking a few minutes after a trial or a court appearance to get responses from jurors or witnesses, or parties or lawyers about their experiences in your court. We might find that simple things like coffee or bathroom breaks, darker chalk, seating arrangements, microphones, a smile, a nod, or allowing a juror to take notes, can make a difference.

Let me tell you about my experiences in one of your own courtrooms. Wherever my family and I travel, we visit courtrooms. We do so for several reasons. Courtrooms are usually in convenient downtown locations and have clean bathrooms and a comfortable place to sit quietly. The architecture and paintings are interesting. And a courtroom drama generally proves to be the best show in town at the right price. Last summer, dressed in my t-shirt, wrap-around jean skirt, and sandals, I entered one state courtroom with my 16-year-old son. Several clerks sat at counsel table and checked people in. Lawyers and litigants sat in clusters in the courtroom. There was no judge. I approached one of the clerks who was shooting the breeze with a fellow clerk and politely asked if the court would be in session soon since my son and I were interested in observing the proceedings. The clerk was abrupt and unfriendly, saying that the judge was hearing motions in chambers. It was painfully obvious to me that the clerk considered me an intruder and a nuisance. I was not told that the proceedings were open to the public and that I could go into chambers if I wished.¹ I asked a lawyer why court was not being held in public as required by law. I also asked if he weren't interested in how the judge handled the cases heard in chambers. He looked at me with surprise and indicated that of course he was interested. I asked why he didn't request an open session

1. Several women judges came up to me after this talk and were concerned that I was talking about their courtroom. Each of them assured me the chambers were open to the public. That may be true in theory but not in practice, as my experience illustrates.

or just walk into chambers. The lawyer viewed my questions as naive. He couldn't understand why he or I should question the system, even though his basic right, and the people's, was being violated. It was obvious he wasn't going to risk the wrath of the judge or the clerk.

I asked my son if we should risk contempt by walking into chambers unannounced. My son, as usual, thought I should behave myself, and I did. He and I both knew that if I gave the clerk my business card, she would treat me royally and usher me into chambers. But that's the point—every Ms. Citizen, not only every visiting Ms. Justice, should be treated royally and ushered into chambers. That's what this country is all about.

Do your courts treat citizens with respect? Consider appointing a committee of lawyers and lay persons from the community to observe the courts and the court's staff and offer suggestions for making the court experience less formidable for lay persons. Things happen in your courtroom and in the clerk's office when you are not there that tell people how you administer justice.

If you appoint a committee, think carefully about the appointments. I find that judges usually appoint people they know to these committees, people who think as they do and are their friends. Thus my white male colleagues ages 58 to 67 select white male lawyers ages 58-67 with whom they went to school, go to ball games, or practiced law. Do you suggest names of younger persons, of women, of people of different ethnicity? Of lay persons as well as lawyers? Do you seek out volunteers? I do not suggest that we never appoint someone we know personally. We women should network—like the old boys—but we should not make the same mistake the “old boys” do; we should remember how difficult it was for us when we were left out of the old boys network. We should make our network open to all.

What about your court's personnel hiring procedure? Recent studies show that the judiciary is far behind the executive and legislative branches of government in creating equal oppor-

WOMEN'S LAW FORUM

tunity hiring practices.² Does your court have open hiring on the basis of individual capability, or does it discriminate directly or indirectly against women and minorities?

I had the opportunity recently to hire a secretary. The job is demanding. As you know, an appellate judge's secretary today should be a skilled word processor, a grammarian and editor, a paralegal, an office manager, and a diplomatic gatekeeper. The job is a challenging one, much sought after, and the selection is totally within my discretion. I toyed with the idea of letting the word out to just a few select friends and hiring someone quickly and effortlessly. The idea was very appealing but it made me uncomfortable. All these years I had advocated open hiring as not only the fair way but also the only way to ensure getting the best-qualified person. I asked the court personnel office to advertise in all the newspapers and publications to satisfy the most stringent requirements of an "equal opportunity employer." I had over 125 applicants, almost all of whom were well qualified. I hired a homemaker who, before she interviewed, had taught herself to use a word processor at the local vocational school. She had worked part-time, not full-time, while her children were growing up. She was a book editor, not a legal secretary. Much of her part-time work had been done at home. It was apparent that she wanted a full-time job and this job in particular. She was committed to learning new skills. As a "fellow homemaker," I knew that her years at home juggling children, husband, house, volunteer work, and part-time jobs were vital experience that count in the job market and would make her a valuable office partner. She proved me right. But I would not have found her through my friends.

We can change our practices in the courtrooms and our hiring practices. We can also change our writing and speaking styles to ensure that the traditional notion—that everyone who counts is male—does not creep into our communications. When we speak and write we should avoid referring to lawyers and judges as men only. I am repeatedly surprised—really surprised and pleasantly so—when I read law review articles and texts

2. See Bremson, Culhane, Mayson and Milton, *Equal Employment Opportunity in the Courts*, 3 STATE CT. J., Summer 1979, at 11; Neisser, *Using Affirmative Action in Hiring Court Staff*, 21 JUDGES' J., Fall 1982, at 20.

that consistently use “she,” not “he,” to include both the male and female, or sometimes use he and other times she. It feels good! Now I know why men resist getting rid of all the “he’s.”³ I use the plural to avoid the he/she problem or I use both he and she. In a world made up of many small things, I classify these points as trivia, but worth some thought and worth the effort to make changes in our personal habits. It’s so easy.

We can also humanize the legal system by letting the public know more about courts and judges. When was the last time you spoke at a community function—a high school class, a civic organization, a service club? Every time we make public appearances we accomplish two goals. First, our very presence helps break down stereotypes. It is a message: women hold important jobs in government and are doing a good job. I frequently describe our court as having seven members—six men and one person. Second, we are fulfilling part of our jobs as judges. Although much information about the judiciary is available on television, in the movies, and in print, people know very little about the legal system. When I ask an audience how many persons have ever been to a trial or appellate court, ordinarily only about 10 percent respond affirmatively. When I ask them how many have seen courtroom dramas on television, they all have. As we all know, though, television seldom mirrors real life courtrooms.

Speaking to the public also helps us to understand the people whose lives our decisions affect. We don’t need studies to tell us that there is a gap between what people expect of courts and

3. I call your attention to the following “Special Note” in Professor E. Allan Farnsworth’s hornbook on Contracts: “Following the practice of the Uniform Commercial Code and the Restatements, I have used the masculine singular pronoun to include the feminine and the neuter in order to avoid distraction.” E. FARNSWORTH, *CONTRACTS* xxiii (1982). I wonder who E. Allan Farnsworth thought would be “distracted” by the feminine pronoun? The women who make up 40 to 50 percent of law school classes today? The men who make up 50 to 60 percent of law school classes? The all-male editorial advisory board of Little Brown and Company, the publisher of this book?

See also P. CARRINGTON, D. MEADOR, and M. ROSENBERG, *JUSTICE ON APPEAL* 11 n.23 (1976).

If the issue really is “distraction,” why not use the pronoun “she” and define it as including the male and the neuter?

And the parent of the Restatements, the American Law Institute, of which I confess to being a member, ought to be ashamed of itself too.

WOMEN’S LAW FORUM

judges and the judges' view of their jobs. A public that is cynical or ignorant about the law does not believe there is justice. We judges have a responsibility to help the citizenry understand the judicial system and how it works. We also have a responsibility to listen to our citizens and understand their perceptions of the system of justice and their difficulties with it in order to improve that system and make it more accessible, more efficient, and more economical.

We can also educate people who come to the courtroom. We can open our courts by inviting classes and community groups to visit, and we can take time to talk with them about what they observed. Jurors spend a lot of time sitting outside the courtroom. They can be educated about the system.

We can carry out such simple changes without a large expenditure of money or time. Remember, we got to be judges because we thought that the system should be changed and were sure each of us as women could bring about the change. The time to act is now. If not you, who? If not now, when?

* * *

In closing I ask you to remember three things. First, it is important to be active in the National Association of Women Judges. As women we are still an oddity in the legal world. Each of us as individuals needs the group support that the NAWJ can give. This association offers an opportunity for women as judges to speak with a collective voice in these challenging times. I fully support the National Association of Women Judges.

"Women's" organizations are also important in giving support to the new women coming into the profession. They, more than others, recognize and promote issues that have been labeled women's issues. I refer to victims' rights, sexual abuse, child abuse. By working on these issues, many women lawyers and judges have played an ever-increasing role in influencing and changing the values of the traditional organizations in the legal community. In reality, however, these issues are no more and no less women's issues than are corporate law, securities law, and tax law. All issues are human issues; women lawyers and judges must be knowledgeable about and work in all areas of the law.

Second, because we strive to make “women’s issues” human issues, and because we strive to make ourselves part of the legal establishment, I also urge you to be active in the traditional, long-established judges’ and bar associations. As I urge you to be active in the National Association of Women Judges, I ring a bell of caution and concern about women segregating themselves into predominantly women’s organizations. Although male members are welcome in the NAWJ, few men have joined. Unless we women judges join and are active in the powerful traditional judges’ associations we allow these organizations to remain all male and to exercise power without our input.

Third, we should remember that many men and women—law people and nonlaw people—are supportive of women judges. I have traveled across my home state of Wisconsin a great deal since that press conference in August, 1976, talking with and listening to people in rural and urban communities. I have found great support among the men and women of my state for the concept that people should not stereotype one another. Wherever I go I hear men and women say, “I am not a feminist *but* I think we should get rid of the illogical barriers such as discrimination against blacks, Jews, Hispanics. . . . I am not a feminist *but* I think women should be given a fair shake at any job they want. . . . I am not a feminist *but* I think there should be equal pay for equal work.” These people don’t like to be labeled, but they, like us, are working to change perceptions.

Others tell me, “My wife/mother/daughter/niece is a firefighter/mayor/a member of the school board, etc.” In the early 1970s men and women would proudly say, “Ms. ___ is the first ___ in our community.” In the 1980s I hear men and women proudly say that women make up one third of the city council, two thirds of the school board, et cetera.

Times are changing and people expect us to make changes in the courtroom. The citizenry will support our efforts to humanize the courtroom. We owe them our best efforts.

* * *

We all still face the four questions: Are you in office because

WOMEN’S LAW FORUM

you're a woman? Are you a token woman? Do you represent women? Will you, as a woman, make a difference in the administration of justice? I hope that we all have answers to these questions, for ourselves and for others. But I also hope that by the efforts of ourselves and others we will see the day when people are no longer more curious about our gender than about our ideas and ideals. It will take time to reach that day, but I am confident that we will.

Society has come a long way since I was told that nobody would hire a woman lawyer. There is a little poem affixed to bulletin boards and refrigerators in many homes in Wisconsin that brings me great cheer whenever I see it because it reminds me that we can achieve our goals. It goes like this:

I swear to you
On my common woman's head
A common woman is
As common as a common loaf of bread—
AND WILL RISE.