



REFLECTING UPON AN **EXTRAORDINARY CAREER ON THE WISCONSIN SUPREME COURT**

RETIRING WISCONSIN SUPREME COURT JUSTICE SHIRLEY S. ABRAHAMSON was saluted in the capitol in Madison on June 18, 2019, in a ceremony hosted by Marquette Law School, the University of Wisconsin Law School, and the State Bar of Wisconsin.

Abrahamson was the first woman to serve on the state's highest court, and her 43-year tenure was the longest of any justice in Wisconsin history. In a video message closing the ceremony, U.S. Supreme Court Justice Ruth Bader Ginsburg said, "Among jurists I have encountered in the United States and abroad, Shirley Abrahamson is the very best."

Two of Abrahamson's former colleagues were speakers at the ceremony: Janine P. Geske, retired distinguished professor of law and a current trustee at Marquette University, and Diane S. Sykes, a judge of the U.S. Court of Appeals for the Seventh Circuit. Both are Marquette lawyers who served on the Wisconsin Supreme Court. Here are edited texts of their remarks.

“The Hardest-Working and Smartest Person I Ever Met”

Janine P. Geske, L’75, served as distinguished professor at Marquette Law School from 1998 until her retirement in 2014; she remains involved in the school’s Restorative Justice Initiative. Geske served on the Wisconsin Supreme Court from 1993 to 1998, where Abrahamson was a colleague and (beginning in 1996) chief justice.

This is really a great honor for me. Of course, to reduce to five minutes Shirley Abrahamson’s life—it can’t be done, and you all know it. And you all hold in your hearts stories of how Shirley Abrahamson affected your lives, your courts, your counties, your institutions. I am going to give a few highlights as we pay honor together.

Shirley grew up in New York and New Jersey (she denies the New Jersey part), the daughter of Polish Jewish immigrants who had barely finished high school. When she was four, she announced that she wanted to be president. (I wish she’d pursued that.) At six, she decided that she wanted to be a lawyer. And so she set upon a lifelong journey of study and success. She graduated from New York University, *magna cum laude*, in 1953. At age 19, she undertook her legal education at Indiana University, where she graduated first—and the only woman—in her class.

I cannot talk about Shirley without mentioning her husband, Dr. Seymour Abrahamson, who was so much of her support through her trailblazing career. They had met at camp in New York and started married life together in Indiana. Seymour passed away three years ago, after 63 years of an incredible marriage, but he’s here today, and we know that he’s celebrating with all of us. Despite his own significant and internationally acclaimed career in genetics, he adored and admired every one of Shirley’s accomplishments.

Shirley and Seymour moved here to Madison: At the University of Wisconsin, she worked and obtained her S.J.D. in legal history, and Seymour

had a postdoctorate fellowship. Gordon Sinykin and James E. Doyle of LaFollette & Sinykin soon hired Shirley Abrahamson as the firm’s first female attorney. She became a name partner and practiced law for 14 years, while in her spare time becoming the first tenured female faculty member at the U.W. law school.

In 1976, Abrahamson, at the age of 42, was appointed to the Wisconsin Supreme Court by Governor Patrick Lucey, where she would be the first woman to serve on that court.

Before she was sworn in, I first met Shirley in June 1976 at the state bar convention in Lake Geneva, Wisconsin. I remember because I was a young Legal Aid Society lawyer, nine months pregnant and looking for role models. I recall the thrill of meeting that warm and engaging woman who would soon be our first woman on the supreme court. She has subsequently inspired thousands of young girls and women to follow a path to becoming lawyers and, in many cases, judges.

Wisconsin voters elected her to a 10-year term on the court in 1979. She won reelection in 1989 and became the court’s first female chief justice in 1996. She again won reelection in 1999 and in 2009. During her time as chief, the supreme court instituted many innovative programs, found new sources of funding, engaged citizens and other governmental authorities in the court’s work, and became, truly, a national example of modern-day judging.

Shirley has been awarded 16 honorary-doctorate degrees and many other distinctions. During her tenure as chief justice, she was elected “chief of

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the chiefs” (that is, chief of the national Conference of Chief Justices), served as chair of the board of directors of the National Center for State Courts, and was a member of groups from the board of directors of New York University School of Law’s Institute of Judicial Administration to the Council of the American Law Institute. She was chair of the National Institute of Justice’s National Commission on the Future of DNA Evidence, established by the attorney general of the United States, and she has served on many, many state bar committees.

There are real reasons for all of the awards, the honors, the service. I have always described Shirley as follows: She is the hardest-working and smartest person I ever met. She is brilliant. She has remarkable leadership skills and an incredible imagination as to how to make the justice system better and more responsive to all involved.

Shirley is the longest-serving justice in Wisconsin history, and let me be clear about this: she has given with her whole being to caring about the law and providing justice for each of those 43 years. She cares about the poor, victims, and criminal defendants; those who do not speak English; those who are veterans; those who have lived traumatic lives; domestic-violence survivors; those with mental disabilities; and pro se litigants. She always was looking for ways to shape our trial courts to be more sensitive to those issues while providing a just system for all. She set up many community-based committees and task forces to take on these issues. In 2013, there were 150 court-related programs in our Wisconsin courts. One of them I particularly enjoyed was the Court with Class program—a wonderful educational experience for students and their teachers.

Let me tell you a couple of last stories because they so epitomize Shirley Abrahamson. Shirley has

loved to talk about law and the courts to any group, regardless of how small it was or where in the state it was located. Some of you may recall some of her early speeches to the community. They were titled “Tootsie the Goldfish.” Tootsie the Goldfish lived in an apartment. And Shirley would pose to the community groups the problem of a lease that said “no pets”—and a case coming to the Wisconsin Supreme Court to decide whether Tootsie was a pet. People would understand how they had to think about judging. And then Shirley—as only Shirley could—turned her talk into a learned article about Tootsie the Goldfish.

And if that weren’t enough, here’s a final story: At one point she decided—of all people, the chief justice, well respected in the state—to sit as a judge in small claims court in Milwaukee. Now, some of us have sat in small claims court in Milwaukee, but Shirley had never sat in any trial court, not to mention small claims. But she had the courage and humility to do this. She did it with grace and modesty (“Where are these regs to which you refer?”). And then, having had the experience, what did she do? She turned it into a first-rate Hallows Lecture at Marquette Law School. If you want to know what it’s like to serve on small claims court, you can read it.*

Then she went to the American Law Institute—a scholarly group that studies and helps change the law, most of whose members do not spend their days in courtrooms—and she got up as the luncheon speaker. She gave a speech about small claims court in Milwaukee County, receiving a standing ovation.

That is Shirley Abrahamson. She experiences. She learns. She teaches. She inspires.

* See *Marq. Lawyer*, Summer 2004, at 38–41. – Ed.

An Unwavering Commitment to Law, to Context, and to Vibrant State Courts

Diane S. Sykes, L'84, serves as a judge on the U.S. Court of Appeals for the Seventh Circuit. Before her appointment to the appeals court in 2004 by President George W. Bush, Sykes served on the Wisconsin Supreme Court for five years while Shirley Abrahamson was the chief justice.

It's good to be back in the capitol, and it was indeed my privilege to serve with Justice Abrahamson on the court. She was the chief justice during my tenure, and she warmly welcomed me when I arrived in 1999. That warmth, and the spirit of shared commitment to the important work of the court, continued throughout our time together, and for that I am grateful.

I'm grateful as well for all the times Justice Abrahamson challenged me on my opinions, although that's easier to say now than back then, especially when I was on the receiving end of a long memo from her—often late at night—meticulously dissecting something I had just written. We agreed on many cases, disagreed on some, and the strength of her work always made mine better.

So it's an honor to be here today to help celebrate Justice Abrahamson's extraordinary 43 years of service on the Wisconsin Supreme Court. My assignment is to capture her most important contributions to the law—in 10 minutes or less. Needless to say, that cannot be done. Her work ethic is legendary, as is her high standard of excellence in legal scholarship. She has authored 530 majority opinions, 490 dissents, and 325 concurrences—and that's not counting the current term. She's written dozens of law review articles and given countless speeches and lectures. It's impossible even to summarize such a prolific and illustrious judicial career in so short a time. So I offer a few thoughts—modest and necessarily quite general, but I believe that they will give us a sense of her extraordinary contributions.

Let's get our bearings by trying to describe the essence of Justice Abrahamson's approach to deciding cases. Judges often reject labels and resist association with comprehensive theories of legal interpretation, and Justice Abrahamson is no different. But we can find an anchoring statement of her general philosophy of judging in a pair of speeches she gave in the 1990s, when she had been on the court for about 15 years. Both were commentaries on the judicial thought of the

renowned Justice Benjamin Cardozo, who served on the United States Supreme Court for just six short years in the 1930s but had come to prominence during his earlier service as a judge of New York's highest court.

In 1921, then-Judge Cardozo gave a series of lectures at Yale Law School that were promptly published in a slim volume titled *The Nature of the Judicial Process*. It became an instant classic, and Cardozo is widely admired for charting a middle course between legal formalism, which hews closely to the text of the written law and the black-letter elements of the common law, and the ascendant legal realism of the twentieth century, which rejected these traditional forms of legal reasoning. Justice Abrahamson told her audience that she had read Cardozo's lectures in law school, and then again in 1976 just before taking her seat on the Wisconsin Supreme Court, and then again in the 1990s. At each reading, she said, she "found new merit in Cardozo's description of decision-making."

In the first of these speeches, Justice Abrahamson endorsed Cardozo's view (and I'm quoting her now) that "the law calls for the balancing of stability and progress; liberty and constraint; promotion of individual rights and protection of the public interest; and adherence to general rules and dispensation of individualized equity." In the second speech she went further, revealing a deep admiration for Cardozo's approach to judging, which she described as achieving a proper balance between the imperative of judicial *detachment*—meaning impartiality, lack of prejudice, and fidelity to the law—and the need for judicial *compassion* and understanding.

She synthesized that philosophy in this way. First, she said judges must of course be "detached in the sense that they must place their allegiance to the rule of law and the judicial institution above their personal considerations or predilections." At the same time, she said, "the judge must be interested in and concerned about the lives of the litigants who appear before her." She warned that "[a] judge

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who is disengaged from the real world cannot fully grasp how her courtroom decisions will play out in that world.” Here is the heart of the matter, in her own words:

“When the judicial process transforms either judges or those who appear before them into abstractions rather than individuals, the rule of law becomes a mindless law of rules—an amalgam of regulations without rhyme, reason or relation to the people whose aspirations the law should reflect.

“Judging requires more than such a mechanical application of pure reason to legal problems. To be sure, legal principles and logic necessarily influence the outcome of every case. But though they alone will determine many cases, in other cases they will not suffice. Principles may admit of more than one interpretation, conflicting principles may apply, or the application of principles to the facts may be unclear. In cases such as these, the blindfolded judge who is blind to the real world in which the parties live is blind indeed, bereft of a basis on which to make an intelligent, let alone fair, decision.”

With that eloquent articulation of her philosophy of judging now in place, we can take a brisk walk through some illustrative cases. A Westlaw search of Justice Abrahamson’s most frequently cited cases brings up opinions across a wide spectrum of subjects, including constitutional law, statutory interpretation, tort law, criminal procedure, evidence law, and insurance law. (Don’t worry: I’m not going to talk about insurance law.)

But let’s take a quick look at a few examples from this group of her most-cited cases. Near the top is *Cook v. Cook* (1997), an institutionally important case in which the court had to decide whether the court of appeals has the power to overrule its own decisions. Justice Abrahamson began by considering the constitutional and statutory provisions that created the court of appeals, divided it into four districts, and allocated the appellate power between the court of appeals and the supreme court. She focused on the purposes behind this division of power—a common mode of analysis for her. She explained that the court of appeals is a unitary court—not four separate courts—and then identified the shared and distinct functions of the court of appeals and the supreme court, and the policy

consequences of a decision one way or the other. Here’s her conclusion:

“If the court of appeals is to be a unitary court, it must speak with a unified voice. If the constitution and statutes were interpreted to allow it to overrule, modify or withdraw language from its prior published decisions, its unified voice would become fractured, threatening the principles of predictability, certainty and finality relied upon by litigants, counsel and the circuit courts. . . .

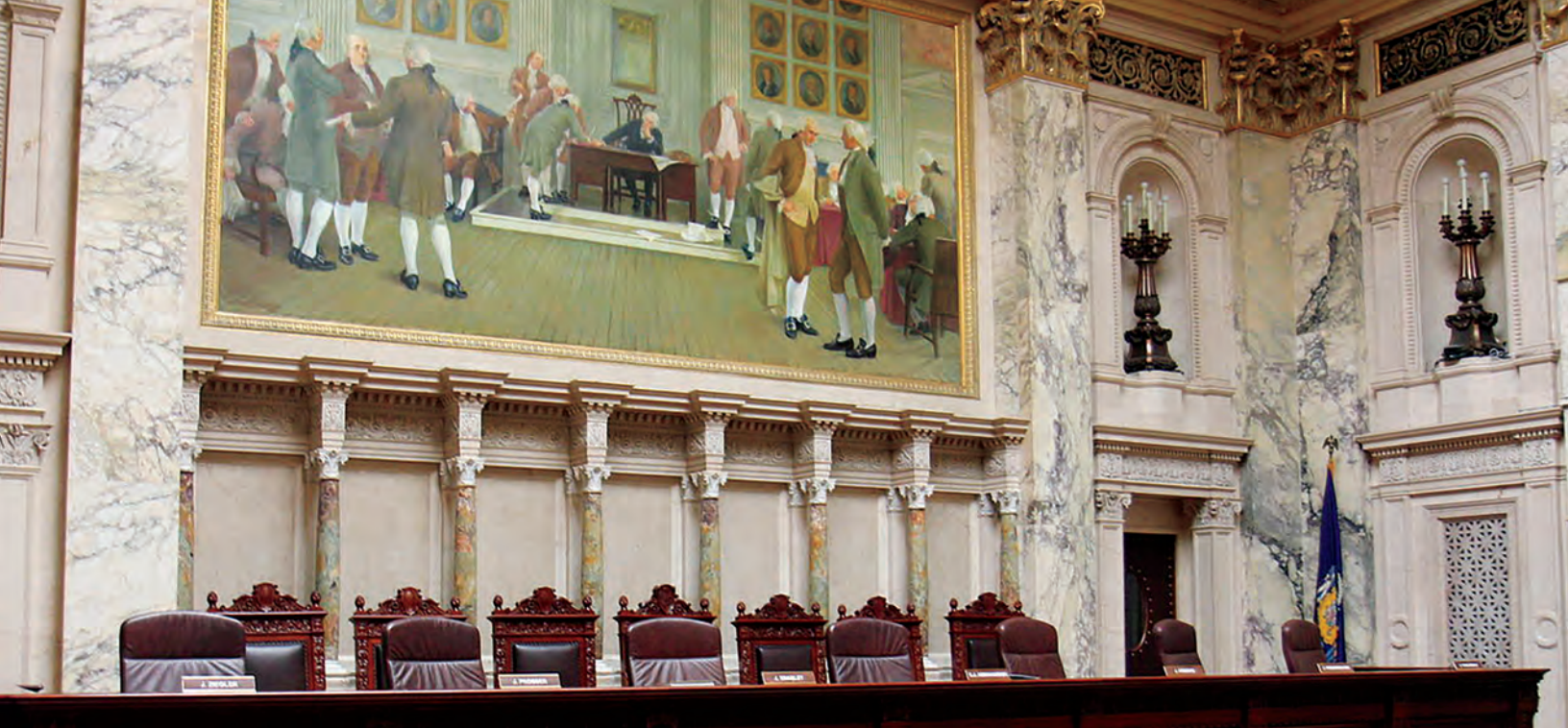
“[Accordingly,] only the supreme court, the highest court of the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals.”

Moving now to the common law, Justice Abrahamson played a major role in the court’s evolution of tort and contract remedies to address the changing needs of modern society. Her common-law opinions can fairly be characterized as adapting the rules of liability, with an emphasis on remedial flexibility, to ensure a remedy for tort and contract injuries. A good example is *Ollerman v. O’Rourke Co.* (1980). There she traced the evolution of the law of misrepresentation and established new rules, based on modern transactional realities, for when *silence*—the omission of a material fact—is actionable as a misrepresentation.

Some other common-law opinions by Justice Abrahamson: *Wangen v. Ford Motor Co.* (1980) addressed the question whether punitive damages should be recoverable in product-liability cases. After an exhaustive study of precedent, policy, and the academic literature, Justice Abrahamson held for the court that punitive damages are recoverable and set a standard for proving them up. *Bowen v. Lumbermens Mutual Casualty Co.* (1994) established an analytical framework for tort claims of negligent infliction of emotional distress. *Watts v. Watts* (1987) addressed the vexing question whether the law provides any remedy for property disputes between unmarried cohabiting couples who break up. Spoiler alert: It does, and Shirley explained why and how.

Justice Abrahamson’s criminal-law opinions are characterized by scrupulous attention to procedural fairness and vigilant enforcement of the constitutional rights of the accused. A sample:

- *State v. Dean* (1981) explains why polygraph evidence is unreliable and categorically inadmissible in Wisconsin courts.



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- *State v. Knight* (1992) establishes a framework for vindicating the defendant's Sixth Amendment right to effective assistance of appellate counsel.
- *State v. Sullivan* (1998) establishes a rigorous standard for admissibility of other-acts evidence against the accused.
- *State v. Santiago* (1996) provides a method for resolving Miranda claims by non-English-speaking defendants who maintain that they did not voluntarily waive their right to counsel.
- *State v. Tye* (2001) holds that the constitutional requirement of an oath or affirmation in a warrant application is a matter of substance, not mere form, and is so essential that its absence cannot be excused by the good-faith exception.

This smattering of cases cannot even begin to scratch the surface of Justice Abrahamson's lifetime of work. But I must close now, and I will do so with two points about her contributions to legal interpretation more generally.

First, a few words about Justice Abrahamson and statutory interpretation. She served for decades before the textualist revolution and gave powerful voice to the resistance when textualism arrived. Her approach to reading statutes is perhaps best characterized as "holistic." She herself describes it as "comprehensive," which I suppose makes my own textualist approach "non-comprehensive," and that sounds pretty terrible. In reality, our disagreements about interpretive method were always in good faith, and on statutory interpretation in particular, I

think it's helpful to recall the influence of Justice Cardozo on her thinking. Justice Abrahamson's "comprehensive" approach starts with the language of the statute but also considers "all relevant evidence of legislative intent." She aims to arrive at the best interpretation of the statute, considering the practical realities of its application to real people in real-world circumstances.

And finally, Justice Abrahamson is rightly credited for her prominent role in the movement to reinvigorate state constitutional law—in particular, state constitutional protection of individual rights. Known as the "New Federalism," this school of thought reminds us that the state supreme courts may interpret their state constitutions to provide greater protection than the federal constitution. Justice Abrahamson's scholarly work in this field has been nationally influential, even if it has not quite gained a strong foothold in our state—yet.

But she never wavered. So I leave you with one of her favorite passages from Wisconsin caselaw on this subject, one that inspired her and formed the foundation of her deep commitment to state constitutionalism. It's a quote from Justice Abram Smith in the 1855 case of *Bashford v. Barstow*. He wrote this of the Wisconsin Constitution: "The people then made this constitution, and adopted it as their primary law. The people of other states made for themselves respectively, constitutions which are construed by their own appropriate functionaries. Let them construe theirs—let us construe, and stand by ours."

Thank you, Shirley, for your truly extraordinary lifetime of service to Wisconsin law and the people of this state. ■

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