

SUSAN JORDAN

THE WOMAN QUESTION

I see women's issues in most criminal defense situations. I do this by asking what at least one writer has called "the woman question." Sometimes it's a perplexing, if not downright painful, exercise. Asking the woman question often places me in a very lonely corner of the criminal defense world. For example, many years ago I made a decision not to represent alleged rapists. In this decision, I have long been a minority of almost one.

As long as there are others willing and able to represent an alleged rapist, I choose not to. Do I believe alleged rapists deserve a competent and aggressive defense? Of course I do; but not conducted by me. If the accused can secure other competent counsel, then I let myself off the hook. I long ago realized that undermining the credibility of a rape victim, if I found her sympathetic, was too much of a conflict of interest for me. My own cross-examinations have had on occasion the result of convincing me, though not always the jury, that the victim was truthful and accurate in her testimony describing the rape and identifying her assailant. It's not a way I want to spend my time, if I have a choice.

I know that women in public defender offices don't have the luxury of making this choice, and I also know that many female defenders in private as well as public practice don't feel the way I do. For me, asking the "woman question" has brought me to my position. Interestingly though, it also brought me to work on what was once seen, by at least the men in criminal defense, as an anti-criminal defense position. Hopefully, history has changed their view.

Instead of representing rape defendants, I worked to change the status of the rape victim in court. In this one situation, it seemed important to balance the status of the victim with that of the defendant. Until 1975, juries used to be instructed that "rape is a charge easily brought and hard to disprove..." In that year, following public debate and feminist activism, the Supreme Court decided *People v. Rindon-Pineda*, 14 Cal.3d 864 (1975), which outlawed the giving of that "cautionary" instruction. The instruction had been given in California for a hundred years, to the dis-

Susan Jordan is a California criminal defense attorney and criminal defense consultant. This article is reprinted from the *Women Defenders Newsletter*, Winter 1995-96.

tinct advantage of criminal defendants. It was not only unfair to the victim to have to testify under such a bias, but it simply wasn't true that "rape is a charge easily brought and hard to disprove."

Similarly, we worked to change the California Evidence Code which used to permit unlimited use of the sexual history ("promiscuity") of the victim as cross-examination material. Evidence Code section 782 now requires a written motion containing a sworn offer of proof, and a court determination of relevance both under sections 780 (going to truthfulness of the witness) and 352 (more probative than prejudicial).

Asking the woman question isn't always easy, and the answers to the question aren't always obvious. In my own backyard of Mendocino County, a race for a Superior Court judgeship is raising the woman question in a stark and personal context for me. I am torn once again, between my feminist principles and experience and my loyalty to the principles of criminal defense. Ironically, both leanings are under attack in the 1990s and both could use my help.

The judicial race pits Susan Massini, the current District Attorney, against Ron Brown, the current Public Defender. Susan, who is a friend, was a Deputy Public Defender before becoming District Attorney, is a Republican, and has been District Attorney for seven years. She has made an adequate DA, infuriating some and pleasing others. She is not especially rabid as DA's go, and has a strong history in the area of women, juveniles, domestic abuse and moderate sentencing for first offenders. She enforces the law, and you could not call her pro-defense.

Ron Brown, her opponent, is a Democrat, and also a friend. He is a caring defense lawyer with a healthy distrust of the cops, a clear understanding of Due Process and the rights of defendants. He is said to be an inefficient administrator, though I personally know little of how his office runs internally. He was once a Deputy District Attorney.

Not surprisingly, Ron has the support of the majority of the criminal defense community, and Susan does not. I am torn between two strong loyalties—to women and to criminal defendants. I reason that, if elected, Ron will view my motions with more sympathy and understanding, and will select the lower term as opposed to the upper, when he has the discretion to do so. I think that Susan will grant only a rare motion to suppress, and that more often than not she will select the middle term or the upper term, when given the option. Thinking only of my criminal defense clients and sympathies, I would clearly vote for Ron.

But several factors complicate this decision. First and foremost is the fact that Mendocino County has never has a female judge or person of color on the bench. The old boy network reigns supreme and has for decades. Defendants who appear before our courts, people who meet our judges, and litigants who appear before them all see only the faces of Anglo men. They neither see nor experience the healthy and pleasant diversity of a bench made up of women as well as men, people of color alongside those of Anglo-Saxon background. We have three Superior Courts and a six-judge Municipal Court. There is not and has never been a woman in any of those seats, by election or by appointment.

Do I want to contribute to the demise of this utterly backward situation, by voting for the present District Attorney over the present Public Defender? Because the election is still two months off, I haven't fully made up my mind, but my leanings as of today are to answer this question with a yes. Yes, at this point in history, even with the criminal justice system under attack, I think it is urgent to continue to make diversity—sexual and racial—a priority.

I think this for several reasons. I think that symbols change reality. I think that simply the appearance and reality of a woman or person of color on the bench changes the question, as long as that person doesn't stand for solely the status quo. When litigants have to address a woman or person of color as "Your Honor," I am convinced it changes their perceptions immediately if they have never viewed women or persons of color as people in authority. As these perceptions change, the social realities change.

Much of the present diversity of the bench statewide and in the Federal District courts is due to appointments made under political pressure to diversify the bench and public office in general. Changing the courtroom from an all white male bastion has had an unquestionably positive effect.

I am not sure I can argue that Susan Massinni's sensitivity to victims and juveniles assures us that she will prove an asset to the defense community. Her previous background makes me believe she will not become our enemy, however. Her background and the work she has done in both the District Attorney's and Public Defenders' offices, as well as being a woman, qualify her to listen with sympathy to the stories of women in dissolutions, to listen to single women with children, to deal evenhandedly with juveniles, and even perhaps to retain a healthy attitude of

skepticism towards the largely male fraternity of law enforcement officers. Perhaps lawyers and potential plaintiffs will feel more welcome in bringing sex discrimination and sex harassment law suits before a court presided over by a woman. Will I lose more motions to suppress? Maybe, but in the currently worsening climate, who can say whether any judge of any political persuasion will ever be able to grant one of those again.

It may be that none of my hopes for this woman judge will materialize and she will fulfill the stereotype of Republican right-wing District Attorney that is being thrust upon her by the largely male criminal defense community. Important to me, though, is the chance to change the status quo and for the first time in my almost twenty years in Mendocino County be able to say "Good morning, Your Honor" to a woman in a dress instead of a man in a dress. I'd like to watch my male colleagues and the local citizens doing that as well. In fact, I think they will be pleased to do so. It could be that I'm wrong in thinking that her presence on the bench will improve things; but at the very least we will have broken the line of succession where the scales of justice, in Mendocino County, hang from a scale held exclusively by men.