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Gender Difference in the Supreme Court of Canada

by

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ABSTRACT

This study develops the proposition that there is a gender difference on the Supreme Court of Canada. It extends previous studies conducted in the United States that demonstrate there is a statistical difference between men and women judges' voting behaviour but this difference manifests itself only with respect to certain issues. The issues which appear to be most affected by gender relate to equality and women's issues. In order to replicate the findings of the American studies, this study uses quantitative as well as qualitative measures. The results support the claims made by the American studies. The Canadian female justices are more than twice as likely to decide in favour of equality rights claimants and fifty percent as likely to decide in favour of a claimant advancing a fundamental freedoms claim under the *Charter of Rights and Freedoms.* A second line of inquiry demonstrates that women judges make a difference in the development of legal rules. This hypothesis is tested by looking at the case law of the Supreme Court to determine if the women use tools of critical analysis developed by feminist theorists. The results of this second inquiry provide support for the proposition that women judges make a difference in legal adjudication.

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I would like to acknowledge my supervisor, Dr. F.L. Morton, who helped me to develop the research design for this study and dragged me reluctantly into the realm of empirical analysis. I would also like to acknowledge my friends, family and co-workers for their constant support over the last two years. It has been a difficult time trying to balance school and career while still maintaining daily commitments to myself and to others. I must make mention of my very special friend, Buddy the Cat, who provided company on those dismal weekends when I couldn't overcome writer's block. His paw prints are found figuratively throughout this paper and literally all over my computer keyboard. I also want to thank all the women who have encouraged me, taught me and shown me the value of possessing a free-spirit and retaining an independent attitude.

DEDICATION

This paper is dedicated to my late father, Reginald White, who more than anyone else supported me in pursuing my dreams and in particular this degree; and also my mother, Victoria White, who in her constant battle to stay well, has set the perfect example of strength and courage in the face of adversity.

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INTRODUCTION

Gender bias in the Canadian legal system and the under-representation of women in law-making processes continue to be concerns despite nearly three decades of campaigning for their elimination.[1] The following paper assumes that gender bias exists as a systemic dysfunction within Canadian law and argues in favour of appointing more women judges to the bench who will introduce an alternative perspective into the dominant legal discourse. The argument rests largely on proving that women judges are different, or introduce different attitudinal qualities to the decision-making process. Difference is measured in this study by quantitatively and qualitatively comparing the voting behaviour of the women and men on the Supreme Court of Canada.

Difference is difficult to explain and measure. Several American studies have tested the proposition that the presence of women judges makes a difference in the administration of justice. These studies conclude a gender difference does exist and can be measured empirically.[2] The American research also examines some of the factors to which the difference can be ascribed and identify the legal issues which appear to be most

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[1]Susan Boyd and Elizabeth Sheehy identify the 1970 Report of the Royal Commission on the Status of Women as the first formal feminist legal scholarship in Canada. The Report served as the catalyst for feminist groups such as the National Association of Women and the Law founded in 1975 with a view to promoting equality of the sexes: See S.B. Boyd & E.A. Sheehy, "Feminist Perspectives on Law: Canadian Theory and Practice" (1986) 2 CJWL 1 at 3.

[2] E. Martin, ed., "Women on the Bench: A Different Voice?" (1993) Vol. 77, No. 33 Judicature 126 (symposium edition).

affected. In explaining the reasons for this difference, the studies are clear that it is incorrect to assume the difference is attributable to women judges speaking with a feminist voice. Although feminism appears to have a role in the voting behaviour of women judges, the reason for the difference most likely resides in the fact that women judges speak from a lived experience unique from that of their male colleagues.[3]

This study is divided into five chapters. Chapter One examines the notion of gender bias within the Canadian judicial system and defines key concepts commonly used in critical analysis of gender as an incident of patriarchal discourse and practice. The chapter is divided into three parts. The first part deconstructs the myth of judicial neutrality by unpacking the contradictions of gender bias and power imbalance in the judicial system. It is argued that a significant factor contributing to the existence of gender bias has been the absence of women from law-making functions. This discussion touches on the feminist movement and what it hopes to achieve by exposing sites of systemic discrimination in the courts and recommending changes to include women's perspectives that counter "masculine" legal norms and principles.

The second part of Chapter One discusses work done by Canadian political scientists who have studied the composition of the judiciary and how this affects voting behaviour and the formulation of public policy. The assertion that "he who sits on the bench holds the balance of power" provides strong support for the proposition that appointing more women to the bench will result in a legal system more capable of

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[3] *Ibid.* at 128.

representing women's interests. Expanding on this theme, the third part of Chapter One discusses the notion of institutional representation and borrows from work done in the context of Canadian legislative politics. This part of the paper argues that women judges, although they cannot speak on behalf of all women all of the time, at least increase the court's potential for doing so.

Chapter Two reviews American studies that empirically examine the voting behaviour of women judges sitting at three different levels of courts in the United States to ascertain whether there is a gender difference. The first paper studies patterns of decision-making on selected state Supreme Courts. The second study compares male and female judges on the United States Courts of Appeal. The third study looks at the decisions of Sandra Day O'Connor of the United States Supreme Court to determine if her voting behaviour is comparable to her male colleague, Justice William Rehnquist. In the first two cases, the evidence generally supports the hypothesis that there is a gender difference on the judiciary. The O'Connor study concludes there does not appear to be a gender difference except in the area of workplace discrimination.

What is most interesting about the studies is that a gender difference is more readily discernible with respect to some legal issues than it is for other issues. A gender difference manifests itself most clearly on legal issues which appear to bear a special relationship to women's interests. For example, the study of Justice Sandra Day O'Connor's behaviour shows that although she generally votes on the conservative end of

the spectrum, she usually votes in a "liberal" direction in sex discrimination cases.[4] Unfortunately, the American studies provide inadequate theoretical explanations for why the gender difference is more prevalent with respect to certain issues than for others. To compensate for this short-coming, a theoretical explanation for the gender difference is offered in Chapter Four.

Chapter Three tests the hypothesis that a gender difference exists on the Supreme Court of Canada. The hypothesis is tested by comparing the rates of support given by the men and the women judges for claimants advancing legal rights claims, fundamental freedoms claims and equality rights claims under the *Charter of Rights and Freedoms*.[5] The results of the study largely confirm the earlier American work. The Canadian results illustrate that while there is no statistically significant gender difference on legal issues, there is a gender difference on fundamental freedoms issues and an even greater gender difference for equality rights claims. Evidence of a gender difference on the Supreme Court of Canada is reinforced by an additional measure of comparison which reveals that women judges dissent from the majority of the court across all *Charter* issues nearly twice as often as their male counterparts.

In order to explain the gender difference evidenced in both the American and Canadian studies of the judiciary, Chapter Four canvasses several theories of difference,

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[4] S. Davis, "The Voice of Sandra Day O'Connor" (1993) Judicature 134-39.

[5] Part I of the *Constititution Act*, 1982, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c.11 [hereinafter the *Charter*].

including the work of psychologist, Carol Gilligan. Gilligan's "difference theory" is frequently cited by writers struggling to understand why men and women appear to perceive the world differently. For instance, all three of the American studies summarized in Chapter Two refer to Gilligan's theory to explain their empirical findings. Gilligan's theory supposes that women see the world in terms of community, sharing and compassion, whereas men see the world in individualistic and competitive terms. Essentially, women make moral decisions from their position as nurturers and care-givers. Gilligan's theory is inadequate for a number of reasons, particularly its lack of capacity to explain why the gender differences in both the American and Canadian studies are not universally apparent across all the legal issues tested. As well, Gilligan's theory is unsatisfactory because it implies there is an innate difference between male and female morality, a proposition which is contrary to contemporary mainstream feminist thinking.

For this reason, Gilligan's work is supplemented by a summary of a similar theory developed in the context of women political leaders and their different conceptualization of authority as it applies to decision-making. Feminist Kathleen Jones develops a "theory of authority" based on the notion of woman as the "other" who interprets moral questions from outside the dominant social and political structure thereby bringing an alternative perspective to decision-making. Unlike Gilligan who posits that there is a fundamental difference in the way that men and women think, Jones approaches the question of difference as something arising out of women's historical exclusion from positions of authority. Women see things differently because they are forced to experience things

differently, from outside the dominant paradigm as the subject matter over which other people, men, exercise power and authority. Once again, however, Jones' theory fails to explain why the women judges studied do not approach all legal issues from the position of the outsider, only those issues which appear to resonant more personally for them.

Therefore, in an effort to explain the differences seen across the range of legal issues studied, Chapter Four concludes by considering a theory developed by political scientist, Paul Paolino. Paolino constructs his theory of "group issue salience" in the context of women candidates for the United States Senate to explain why women tend to vote differently when the issue has an especial salience to women. This theory explains why the gender differences in both the American and Canadian studies are not universally apparent for all issues judicially considered.

Chapter Five completes the study by contributing a qualitative analysis of selected Supreme Court decisions to determine if the gender difference uncovered in Chapter Three manifests itself in the written decisions of the Supreme Court. Is the statistical gender difference coincidental or is it equally apparent in the court's jurisprudence? Chapter Five brings additional proof to the assertion that appointing more women to the bench will result in substantive changes being made to Canadian law. In order to conduct this analysis of the case law, the writer extrapolates from the feminist legal theory of Catharine MacKinnnon to summarize some common themes in feminist jurisprudence. The feminist movement has been instrumental in developing the theoretical tools for unpacking the gendered constructions which sustain the normative values tacitly endorsed

by our legal system. The objective of Chapter Five is to first identify those feminist theoretical tools and then look for evidence of their application in the decisions written by the women on the Supreme Court of Canada.

Finally, the Conclusion draws together the several strands of the argument to arrive at the determination that there is a gender difference on the Supreme Court of Canada. This difference is both quantitative and qualitative and attributable to the fact that women judges bring a different life experience to their reasoning which allows them to relate better to the lived experiences of the women whose claims come before their court. This difference, it is submitted, has the potential to introduce greater balance into the decision-making of the court. Balance will be achieved, it is argued, by incorporating an alternative perspective into the highest levels of the judicial system noticeably absent prior to the appointments of Madame Justices Bertha Wilson, Claire L'Heureux-Dube and Beverley McLachlin.

CHAPTER ONE: JUDGING AND GENDER BIAS IN THE COURT SYSTEM

Defining Gender Bias within the Judicial System

The myth of "judicial neutrality" has been subjected to criticism in the last three decades by those who insist that the courts, like any other political institution, are prone to the same biased attitudes that permeate society in general. Feminists in particular have done extensive work to lay out the theoretical foundations for explaining how the law has been used to reflect male preferences and reinforce male power and privilege.[6] The very structure of the legal system, feminists assert, acts to perpetuate sexual discrimination in society through legal discursive practices which preserve existing distributions of political power, economic wealth and police interpersonal relationships to enable male appropriation of female sexuality. These power relations, feminists argue, affect all areas of life including the family, education and welfare, work and politics, culture and the law. Patriarchal power structures determine who is capable of doing what, for whom and for how much, what human beings are and what they might become.[7] "Feminism" is a politics directed at changing existing power relations between men and women in society.

Feminist writer, Chris Weedon, explains that the politics of contemporary feminism has its roots in the Women's Liberation Movement of the late 1960's whose

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[6] C.A. MacKinnon, *Toward a Feminist Theory of State* (Cambridge: Harvard University Press, 1989).

[7] C. Weedon, *Feminist Practice and Poststructuralist Theory* (Oxford: Basil Blackwell, 1987) at 1.

concerns are many, including campaigns against the sexual objectification of women, against rape, pornography, family violence and includes calls for equal access to education, welfare, equality of opportunity and pay. These political questions, states Weedon, "should be the motivating force behind feminist theory which must always be answerable to the needs of women in their struggle to transform patriarchy."[8]

Common to almost all feminist theory is the distinction between "sex" and "gender." Anthropologist, Ann Oakley, writes:

> "On the whole, Western society is organised around the assumption that the differences between the sexes are more important than any qualities they have in common. When people try to justify this assumption in terms of 'natural' differences, two separate processes become confused; the tendency to differentiate by sex, and the tendency to differentiate in a particular way by sex. The first is genuinely a constant feature of human society, but the second is not, and its inconstancy marks the division between 'sex' and 'gender': sex differences may be 'natural' but gender differences have their source in culture, not nature."[9]

The distinction is based, therefore, on the difference between nature and culture. Sex is seen as biological while gender is seen as cultural. Contemporary feminism therefore concerns itself with deconstructing the gendered categories of "masculine" and "feminine" that provide the foundations for male political, social and economic advantage while women are relegated to the bottom rungs of power, influence and value.

For the purposes of this paper, "gender difference" shall be used in the sense that the differences in voting behaviour between men and women judges are explained by a

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[8] *Ibid.* at 1 -2.

[9] A. Oakley, *Sex, Gender and Society* (London: Maurice Temple Smith, 1972) at 189.

lived social experience that is shared by the women members of the judiciary which is different from that experienced by the men. This lived experience entails viewing the world from the position of social, economic and political disadvantage. It is this difference in socialization which enables women judges, it is submitted, to empathize more readily with arguments that depart from traditional reasoning to incorporate perspectives not otherwise articulated by the law.

The law, like society, is not gender-neutral. "Sexism," or "sexual discrimination," is the making of unjustified or unsupported assumptions about individual capabilities, interests, goals and social roles solely on the basis of sex differences.[10] Unpacking the myth of judicial neutrality to expose sexism in the law is difficult, according to Professor Sheilah Martin, because the sexism of contemporary law-making is not direct but systemic, and therefore almost invisible without some further attempt at linking its existence to larger social, political and economic forces. The real difficulty lies, Martin argues, in overcoming opposition to the very notion that discriminatory practices occur within an institution that is, in theory, supposed to be unbiased.[11] The courts are seen as impartial bodies that operate as a remote, detached institution, mechanically applying

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[10] J. Brockman & D.E. Chunn, "Gender Bias in Law and the Social Sciences" in J. Brockman & D.E. Chunn, eds., *Investigating Gender Bias: Law, Courts, and the Legal Profession* (Toronto: Thompson Educational Publishing, Inc., 1993) at 3 citing J.D. Johnston, Jr. & Charles L. Knapp, "Sex Discrimination By Law: A Study in Judicial Perspective" (1971) 46 N.Y.U.L.R. 675.

[11] S.L. Martin, "Proving Gender Bias in the Law and the Legal System" in J. Brockman & D.E. Chunn, eds., *Investigating Gender Bias: Law, Courts, and the Legal*

"objective" principles in a fair, unbiased manner. Martin argues that women are constantly asked to "prove" that sexism in the courts exists, to identify examples, explain and describe the root causes using concrete illustrations, then make the case for their removal. Martin writes that "approaching gender bias in law as a distinct issue, rather than as a component or consequence of women's larger inequality, stems from the cultural esteem conferred on the legal system."[12] Gender bias in the law, she states simply, is not supposed to exist.

The debate becomes more complicated because use of the term "sexism" frequently engenders uncomfortable reactions from members of the bench.[13] To overcome this barrier, the term "gender bias" has been introduced into critical discussions centering on a judiciary traditionally dominated by men.[14] Educating the judiciary to appreciate the political role that the law plays in shaping women's disadvantaged status in society is similarly viewed as a direct threat to the very independence of the judiciary. Attempts at "influencing the influencers," educational campaigns aimed at introducing a perspective

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Profession (Toronto: Thompson Educational Publishing, Inc., 1993) 19.

[12]*Ibid.* at 36.

[13]J. Brockman & D.E. Chunn, *supra* note 10 at 3 citing L.H. Schafran, "Educating the judiciary about gender bias: The National Judicial Education Program to Promote Equality for Women and Men in the Courts and the New Jersey Supreme Court Task Force on Women in the Courts" (1985) 9 W.R.L.R. 109 at 110.

[14]*Ibid.*

different than the status quo,[15] often get obstructed because these arguments for improved fairness and equality are themselves perceived to be biased. Feminist theories, such as those advanced by Catharine MacKinnon, are opposed by conservatives thinkers who object to her characterization of the law as a bastion of male power is excessive, "anti-male" and therefore antithetical to productive, "rational" discussion

Martin contends that the problem of sexual discrimination by the courts is no longer one of overt acts of sexism on the part of individual judges. Rather, it is a problem of systemic discrimination often difficult to separate from socially constructed, stereotypical notions about women and therefore more difficult to remove. "Systemic bias," as distinguished from direct acts of discrimination, has been found to exist when decisions made or actions taken are based on stereotypes about the role or capacity of men and women. Myths and misconceptions about the economic and social realities of men's and women's lives and about the relative value of their work also underlie gender bias.[16]

Gender bias, feminist writers observe, should not be defined to suggest that judges, lawyers or other participants within the legal system act deliberately to injure women or others. Professor Kathleen Mahoney provides the following definition:

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[15] See S. Razack, *Feminism and Law: The Women's Legal Education and Action Fund and the Pursuit of Equality in the Eighties* (Toronto: Second Story Press, 1991).

[16] Australia, Parliament of the Commonwealth, *Report by the Senate Standing Committee on Legal and Constitutional Affairs: Gender Bias and the Judiciary* (Canberra: Senate Printing Unit, Parliament House, May 1994) at 20 [hereinafter Australian Senate Report] citing Massachusetts Gender Bias Study Committee, Final Report "Gender Bias Study: Gender Bias in Courthouse Interactions" (1989) 74

> "Gender bias falls into the systemic category. For the most part it is a form of subtle but potent discrimination. To begin to deal with it, one must realise that every decision-maker who walks into a court room to hear a case is armed not only with the relevant legal texts, but with a set of gender and race-based values, experiences and assumptions that are thoroughly embedded, some of which adversely impact and discriminate against women. To the extent that judges labour under certain biased attitudes, myths and misconceptions about women and men, the law itself can be said to be characterised by gender bias.
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> "Gender bias takes many forms. One form is behaviour or decision-making by participants in the justice system which is based on, or reveals reliance on, stereotypical attitudes about the nature and roles of men and women or their relative worth, rather than being based upon an independent valuation of individual ability, life experience and aspirations. Gender bias can also arise out of myths and misconceptions about the social and economic realities encountered by both sexes. It exists when issues are viewed only from the male perspective, when problems of women are trivialized or over-simplified, when women are not taken seriously or given the same credibility as men. Gender bias is reflected not only in actions of individuals, but also in cultural traditions and in institutional practices."[17] [emphasis added]

Bias of any sort can arise in statute law or in decisions of appellate courts and can also remain dormant within outdated decisions which no longer reflect community standards but which have not yet been challenged. Bias may be inculcated through the law taught in law schools. It may be reinforced through attitudes prevalent within the various legal associations constituting the "Bar." It may reveal itself in antiquated and inappropriate gender myths and stereotypes when judges sum-up to juries. It is a real, significant, but

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Mass.L.R. 50 at 51.

[17] *Ibid.* at 71-2 citing K. Mahoney, "Gender Bias in Judicial Decisions" (Lecture at the Supreme Court of Western Australia, Perth 14 August 1992) at 7.

largely unconscious, problem.[18]

There is no single solution to the problem of gender bias in the legal system. Since gender bias is systemic, strategies for its removal must be activated at a number of levels. For instance, proponents of legal education for reducing the negative affects of sexism in the court system acknowledge that while individual judges may not be responsible for creating "sexism" *per se*, each one of them has a responsibility not to perpetuate it. In the United States, the National Judicial Education Program to Promote Equality for Women and Men in the Courts ("NJEP") was initiated in 1980 to provide judges with education on gender bias in the courts. Canadian judges were introduced to the topic in 1986 at a national conference in Banff Alberta entitled, "The Socialization of Judges to Equality Issues." This was followed in 1989 by an education workshop in Vancouver presented by the Western Judicial Education Centre.[19] The goal of judicial education, according to Martin, is a "heightened judicial neutrality and an increased objectivity which contains an understanding of the life circumstances of both sexes."[20]

The problem of sexism in the courts is reflected and magnified in the very fact that few women, despite their influx into law schools and the legal profession, rise to positions of power and in particular, the bench. Martin maintains that the historic and

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[18]*Ibid.* at xiv.

[19]N.J. Wikler, "Researching Gender Bias in the Courts: Problems and Prospects," in J. Brockman & D.E. Chunn, eds., *Investigating Gender Bias: Law, Courts, and the Legal Profession* (Toronto: Thompson Educational Publishing, Inc., 1993) 49-61at 49.

systemic nature of discrimination against women reveals a direct link between gender bias in law and the exclusion of women from law-making functions. "If women did not help make, apply or interpret the law, it should come as less of a surprise that many laws do not represent their perspectives or adequately protect their interests."[21] Martin argues that legal norms and procedures overlook injustices to women because they were designed by men and this, along with exclusion of women from public office, has laid the foundation for gender bias in law and the legal system.

Judicial Attitudes, Composition of the Bench and the Formation of Public Policy

There has been very little work done in Canada to measure specifically what impact, if any, women judges have had on the administration of justice. On the other hand, the composition of the judiciary has been identified by social scientists as a factor material to voting behaviour and the outcome of legal questions. This section examines several Canadian studies relating to judicial attitudes as determinants of voting behaviour to demonstrate that the composition of judiciary is as important to the formation of the substantive law as the body of legal rules and principles used to interpret a particular question. These studies provide additional support for the proposition that increasing the number of women on the bench will result in voting behaviour that is favourable to women's interests.

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[20] S. L. Martin, *supra* note 11 at 24.

The Canadian *Charter* has been instrumental in the evolution of the courts from their traditional function as an almost invisible institution into a highly political body responsible for the formulation of public policy. Prominent court-watchers, Professors Peter H. Russell, F.L. Morton and Rainer Knopff, among others, have maintained that the *Charter* has shifted power to the Canadian courts by allowing judges to use the constitution as a tool to override legislative decisions: "...in the decade since the *Charter* was proclaimed, it has had a broad, varied and significant impact on the practice of politics in Canada."[22] The *Charter* has enabled judges to become as influential in making public policy as their political counterparts, thus creating a more visible institution within Canadian society. With this increase in visibility, there is increased pressure to ensure that the judiciary, like any other institution, reflects and represents a plurality of social and political interests.

Morton has claimed that the *Charter* and the use of *Charter*-style politics has enabled interest group advocates, the most successful of these groups being women's rights advocates, to influence judge-made law in their favour. The success of these groups, he contends, is due in large part to their ability to influence judicial attitudes through legal and judicial education and through the appointment of judges sympathetic to

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[21] *Ibid.* at 23.

[22] F.L. Morton, P.H. Russell & T. Riddell, "The *Canadian Charter of Rights and Freedoms*: A Descriptive Analysis of the First Decade, 1982 - 1992" (1995) 5 N.J.C.L. 1-59 [hereinafter Morton et al.].

their point of view.[23] According to Morton, litigation-driven feminism has achieved significant policy change via the *Charter.* The *Charter* has transformed Canadian political processes by transferring power to the courts and interest groups by giving these interest groups "privileged" access to the judicial system. Morton refers to this phenomenon as the Court Party.

The Court Party is defined as a coalition of interest groups organized around shared characteristics, such as race, gender, ethnicity, disability, first peoples and environmentalists which have become invigorated and mobilized in their claims by their respective sections of the *Charter.* Morton writes:

> Interest groups can achieve courtroom influence directly through the presentation of legal argument and extrinsic evidence when a group litigates or intervenes in a case. They can also exercise influence indirectly through *Charter* scholarship, influencing appointments, or judicial education seminars after appointment.[24]

At the forefront of this new "political elite" is LEAF - the feminist Legal Education and Action Fund - whose founders heavily influenced the wording of the equality sections of the *Charter* and coordinated a campaign of "systematic litigation" to ensure that the *Charter* is interpreted by the courts in such a fashion as to engineer social change.

> "In 1985, the Women's Legal Education and Action Fund (LEAF) was founded to contribute to the goal of advancing women's equality in Canada. The founding

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[23]F.L. Morton, "The Charter Revolution and the Court Party" in P. Monahan & M. Finkelstein, eds., *The Impact of the Charter on the Public Policy Process* (North York: York University for Public Law and Public Policy, 1993) at 185.

[24]*Ibid* at 183-4.

> mothers had a dream that Canadian law could grow and expand to encompass equality for all women. LEAF works toward this dream through litigation using the constitutional guarantees of the Canadian Charter of Rights and Freedoms."[25]

LEAF acknowledges that even though the judiciary is an unrepresentative body, elected institutions are no more representative and in recent years, have displayed hostility to women's concerns and equality issues in general. Judicial independence can therefore work positively in women's favour since judges have the freedom to accept politically unpopular arguments.[26]

In a recent study, Professor Morton and Avril Allen test the assertion that judicial attitudes have a critical bearing on the outcome of a case. [27] They do this by reviewing the success rates of "feminist litigation,"[28] comparing non-*Charter* and *Charter* cases heard by the Supreme Court of Canada to determine if the *Charter* on its own has been responsible for shifts in social policy. The writers conclude that feminist litigators enjoyed slightly higher success in non-*Charter* cases resulting in positive policy changes,

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[25] Women's Legal Education and Action Fund, *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada* (Toronto: Edmund Montgomery Publications Limited, 1996) at ix [hereinafter LEAF].

[26] *Ibid* at xxiv.

[27] A. Allen & F.L. Morton, "Feminists and the Courts in Canada" (Paper prepared for delivery at the 1997 Annual Meeting of the Canadian Political Science Association, St. John's, Newfoundland, 8-10 June 1997) [unpublished].

[28] Although Professor Morton does not attempt to define more precisely what he means by his use of the term "feminist;" for the purposes of this paper it is sufficient to assume that he means the style or form of feminism most closely associated with the politics of LEAF.

implying that the distinction between *Charter* and non-*Charter* is legalistic. What is more important to the outcome of a case than constitutional law *per se*, according to the Morton-Allen study, is the preferences of the judges, more specifically a form of judicial activism which displays increased openness to the feminist position. They write:

> "The key is judicial attitude, and judicial attitude is not overly concerned with the Charter-non-Charter distinction. The extensive "influencing the influences' campaign mounted by Canadian feminists [in] 1982 implicitly recognizes the decisive role played by judicial attitude. If the Charter itself required judicial activism in support of feminist values, all the "advocacy research" and "gender sensitivity training sessions' for judges would be superfluous. Finally, if the Charter text and precedents are the crucial factors in judicial decision-making, then feminist litigators should enjoy more success in Charter cases. In fact, the opposite is the case. This study finds that feminists have enjoyed more success in non-Charter cases (73%) than in Charter cases (64%). For all these reasons, a study of feminist litigation "under the Charter" should thus include non-Charter cases."[29] [emphasis added]

The collective thrust of Morton's research, therefore, suggests the *use* of the *Charter* as a tool for assembling resources and focusing issues for interest group campaigns, as opposed to the substance of the *Charter,* has been the decisive factor in consolidating judicial power.

Morton's work statistically illustrates it is the willingness of the judicial panel hearing a dispute to entertain a given political perspective which will secure a litigation victory. If Morton and Allen are correct, then there is strong evidence to support the proposition that the policy changes being advocated by many feminists will enjoy more

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[29] *Ibid.* at 6.

success in the court room provided that the judicial panel hearing the case is amenable to these arguments. The ability to control or influence the composition of the Supreme Court of Canada would therefore be a significant political tool for policy change.

Morton and Allen's conclusion that judicial attitudes are more important than legislation is consistent with earlier studies conducted on the differences in judicial attitudes. The judiciary, like any other political or social institution, is subject to a human element such that the preferences of individual judges have an impact on judicial outcomes. For instance, political scientists Peter McCormick and Ian Greene argue that while judges try to be impartial, they cannot help being influenced by factors such as social background and the particular style of decision-making which each adopts unconsciously.[30] Other factors such as social class, ethnicity, age, religion, education, careers, achievements and sex were also found to influence judicial decision-making in the McCormick and Greene study.

McCormick and Greene interviewed several hundred lower and higher court judges and concluded that judicial decisions are very much dependent upon the human element; that is, the attitude and background of a particular judge. They conclude therefore that bias in judicial decision-making is inevitable. With particular reference to women's issues, they write:

"Our interviews all indicated that judges place a high premium on attempting to

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[30]P. McCormick & I. Greene, *Judges and Judging* (Toronto: James Lorimer, 1990).

> decide cases impartially. However, judges are human beings, not computers, and all of us have biases we are not conscious of that help to determine our decision-making processes. As Kathleen Mahoney and Sheilah Martin indicate, various studies of judicial decision-making in relation to disadvantaged groups have shown that male judges sometimes undervalue the testimony of female witnesses, and that stereotypes of women and minorities sometimes influence judicial decisions."[31]

Although McCormick and Greene provide no statistical evidence supporting the proposition that women judges possess different attitudes (their sample size was limited by the fact that in 1990 only 6 percent of provincially appointed judges and 7.5 percent of federally appointed judges were women),[32] the theory underlying their research is that as a result of their lived experiences, women judges should bring different insights and knowledge to the judicial decision-making process. These insights would serve, according to the theory, to counter-balance legal standards based on the experience of a predominantly white, middle-classed, male judiciary. Increased representation of women and other minorities would give the courts an ability to speak to the life circumstances of the poor, physically or mentally challenged, women, women of colour and different sexual orientation. The following discussion looks at the theory of representation in institutions to argue that women's presence on the bench is a necessary prerequisite to ensuring women's interests are heard and understood by the courts.

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[31] *Ibid.* at 247.

[32] *Ibid.* at 62.

Understanding the Theory of a Representative Role for Women

Increased appointment of women to the bench has been advanced by second-wave feminists as a method of improving the representational character of the bench. Second-wave feminism is a form of feminism which advocates affirmative action and an improvement of the number of women in high-profile institutional offices in political and legal spheres as well as in the business world. The argument is premised on the view that increased participation at these decision-making levels would both remove psychological barriers through role-modeling for other women as well as steer policy direction by increasing the number of women's voices heard in the decision-making process.[33] "Representative role" theory has been used frequently to study the behaviour of women political office-holders. This paper extrapolates from the conclusions of these studies conducted on women politicians and exports them into the judicial arena to support the view that appointing more women to the bench increases the opportunity for advancing women's issues within the legal system.

A representative judiciary is a concept based on the argument that judges cannot be fully objective and that this institution, like political and bureaucratic institutions, therefore must include representation that mirrors society. The representational argument was first made in Canada to support the recruitment of large numbers of francophones into

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[33] J. Arscott & L. Trimble, eds., *In the Presence of Women: Representation in Canadian Governments* (Toronto: Harcourt Brace & Company, Canada, 1997) at 366.

the Canadian federal bureaucracy. It was entrenched into the Constitution which requires that Quebec judges trained in the Civil Code are represented on the Supreme Court of Canada.[34] It has since been coined by the women's movement to organize efforts for achieving the goal of electing more women to Parliament and provincial legislatures as well as within the Canadian court system.

There are two basic arguments supporting increased representation of women on the bench. The first argument in favour of appointing more women judges is predicated on notions of public confidence and a fair reflection of the society which it represents. Women's symbolic presence on the court also serves an educational function by reducing hostile attitudes toward women lawyers, witnesses and litigants and helping to serve as role models for women legal professionals.[35] A second argument in favour of appointing more women to the bench is the resulting impact on the substantive law. Written decisions could be seen to reflect the "female voice" as a counter-agent to "male values" of objectivity, predictability and exclusion which strive to find a "right" answer. According to this view, women could introduce an ethic of "care" into their judgments leading lawyers and other court participants to be "concerned for other parties to the dispute so that a more co-operative, consensual approach to an issue could be adopted." [36]

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[34] *Ibid* at 365.

[35] Australian Senate Report, *supra* note 16 at 96.

[36] *Ibid.* at 97.

Professor Carrie J. Menkel-Meadow, who has written extensively in the area of alternative dispute resolution, has argued the female voice would affect legal reasoning to entail a re-thinking of concepts such as relevance, disclosure of evidence, and the binding nature of precedent. Substantive law with its current emphasis on individual rights might be supplemented with, or replaced by, notions of inclusion, connection, collectivity and social responsibility. Menkel-Meadow acknowledges that women do not speak in a "united" voice but contends that increasing numbers of women's voices in the legal community will render changes to legal sensibilities and values. [37]

Although the research on women judges is quite sparse, it parallels in many respects the research that has been completed with respect to women legislators. Elaine Martin has pointed out that judicial scholars have not "forged more theories" on judicial representation for a number of reasons, including the fact that the notion of "representation" is an electoral concept and judges are supposed to be removed from electoral accountability. The traditional stress has been on the judiciary as an impartial, objective body which is antithetical to the very notion of representation. Moreover, the lack of diversity among American judges has made studying women judges a difficult task and where there is diversity on the bench, it tends to be exhibited at the trial level

[37]See for example, C. Menkel-Meadow, "Portia in a Different Voice: Speculations on a Women's Lawyering Process" 1 (1985) Berkeley Women's L.J. 39.

which is not as interesting to judicial scholarship.[38]

In the United States, early research on women in the political arena suggested that women officeholders had very little impact toward developing public policy that promoted women's issues any more than their male colleagues. Many of these studies explain this lack of expected support through the concept of "tokenism,"[39] minority representation which avoids drawing attention to itself by casting its vote with the majority. However, as women's representation in American political institutions has become less tokenistic, more complex research has revealed that female legislators are more likely to support women's interests when they are committed to feminist ideology, when there are greater numbers of female legislators and where there is a supportive network of other women legislators in place. By contrast, early American studies measuring the political orientation of women judges found that they tended to display more feminist attitudes on women's issues than did their male counterparts.[40] Subsequent studies of the American courts, summarized in Chapter Two, have found this difference in attitude is played out statistically in the voting behaviour of men and women.

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[38] E. Martin, "The Representative Role of Women Judges" Vol. 77, No. 3 (1993) Judicature 166 - 73.

[39] *Ibid.* at 166 citing Kanter, *Men and Women in Corporations* (New York: Basic Books, 1977).

[40] *Ibid.* at 166 citing Cook, "Will Women Judges Make a Difference in Women's Legal Rights" in Rendel & Anderson, eds., *Women, Power and Political Systems* (London: Croom Helm, 1980) at 216.

In Canada, as in the United States, more research has been conducted on the representation of women in the legislative process than on representation of women in the judiciary, and moreover, the work conducted in the electoral area has tended to focus on the numbers game of female representation as opposed to the quality of that representation. A recently published collection of studies on women's participation in the Canadian political system, however, measures the actual influence that female elected officials have had on the legislative process and on public policy outcomes.[41]

Professors Jane Arscott and Linda Trimble have gathered together a survey of essays which represent a movement toward more complex research at the level of analysis which asks whether or not women legislators make a difference:

> "Recognition of women's increased presence in legislative office inspires new research questions: Do women legislators make a difference to political life and public policy? Once elected, do women use their legislative roles to articulate women's interests and concerns, in all their diversity? Do female legislators press for policies that promote women's social, economic, and political equality? Do they do so in ways that appreciate the very real differences among women? Are female legislators more sympathetic than their male colleagues to the perspectives and policy demands of the women's movement?[42]

In view of the work compiled in the Arscott and Trimble collection, a study of the Canadian judicial system seeking to address many of the same questions is very timely.

As Arscott and Trimble note, however, it is far more difficult to measure the difference that women legislators make than it is to explain their presence or absence in

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[41] J. Arscott & L. Trimble, *supra* note 33.

[42] *Ibid.* at 3.

political office.[43] The same limitation applies to an assessment of the impact made by women judges. The studies in the Arscott and Trimble collection are useful because they employ both quantitative measures of difference as well as qualitative measures to explain that the conditions under which female legislators make a difference are complex but not inexplicable. They conclude there has been a difference in the political process because of the presence of women, but the real value of women's representation is its positive influence on the status of women's issues within electoral institutions.

The social value of gender representation within official institutions, and its limitations, are summarized by Jill Vickers in her paper, "Toward a Feminist Understanding of Representation."[44] Vickers notes there are three distinct concerns arising in discourse about women's representation in official institutions. These are:

> 1.Women have demanded to be included in institutions of official politics and civil society, originally on the same basis as men, and, more recently, as women, and hence not on the same basis as men.
>
> 2.Women's concerns about the adequacy of the "representational voice," especially in relation to the ability of our institutions to "represent" diversity, are expressed in relation to both official politics and autonomous women's organizations.
>
> 3.Some women have questioned the very possibility of adequate representation.[45]

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[43] *Ibid.* at 11.

[44] J. Vickers, "Toward a Feminist Understanding of Representation" in Arscott & Trimble, *supra* note 33 at 21.

[45] *Ibid.*

While the challenges to women's representation in the political arena are somewhat different to those in the judicial sector, these three issues are a common thread of concern. The limitations of representation noted by Vickers, in addition to assumptions about representation made within the discourse of liberalism itself, make it difficult to advance a sustained campaign for increased representation of women in institutional life.

The public at large generally perceives there is no incompatibility between representative democracy and the exclusion of women from full and equal participation in political life. According to Vickers, the common, or "liberal" conception of representation assumes "there is no link between the characteristics of a legislator, bureaucrat, or judge and his (or more rarely, her) ability to represent the interests of his (her) constituents."[46] Representational practices diverge from the principle of individualism, which assumes that individual interests are what are to be represented. Individuals who are considered to be representative of out-groups, unfortunately, often are expected to advocate common interests and uniform goals imposed on them by the dominant culture. This expectation is simplistic as well as unrealistic. "Whether legislators, bureaucrats, or judges, they are expected to know and re-present a single, unconflicted picture of the needs, desires, and experiences of their group." Feminist theoretical representation, on the other hand, does not presume a "monolithic" form of representation but rather seeks to align women with diverse interests in order to express both their common and diverse interests and views. This is the difference between

"speaking out" and "speaking for" one another.[47]

Professor Lisa Young argues that a legitimate representative relationship should include "the representation of identity," or that "identity-based representation requires both the presence of women in legislatures as well as the inclusion of women's perspectives, beliefs, interests and diversity in the representational process."[48] Young argues that this is the "Mandate of Difference," defined as the decision of women and women's groups to work within the political system to open up the political process for other women and serve as points of access for women's groups. As well, this mandate is intended to introduce "private" issues relating to home and family onto the political agenda as well as articulate the multiplicity of women's perspectives into political debate.[49] The theory assumes that once elected, women will act in the interests of women and this will be better achieved through increased numbers of women in political office.

The real value of increasing the representation of women judges appears to be their influence in broadening gender attitudes and the scope of judicial understanding to be able to detect and absorb the nuances of lived realities which come before the courts.

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[46] *Ibid.* at 23.

[47] J. Vickers, *supra* note 44 at 27 citing L. Young, "Women in National Legislatures: An Evaluation of the Strategy of Pursuing Power for Women" MA Research Essay, (Ottawa: Carleton University, Department of Political Science, 1991).

[48] L. Young, "Women in the Canadian House of Commons" in Arscott & Trimble, *supra* note 33 at 89- 90.

[49] L. Young, "Women in the Canadian House of Commons;" see also, Arscott & Trimble, *supra* note 33 at 363.

In addition, women judges seem to make a difference to the adjudication of legal questions in a less direct way by protecting the credibility of women lawyers and female witnesses. At the appellate level, this sensitivity to the personal integrity of female participants is played out through analyzing the law to ensure that it is applied without compromising this integrity. Women judges also make a substantive difference to the development of legal rules because they inform their interpretation of established principles with a unique perspective. In the following two chapters, the question of women's representation as reflected in substantive law will be measured empirically to determine whether there is a discernible gender difference in the voting behaviour of judges. In Chapter Five, women's representative role will be tested qualitatively by examining whether their jurisprudence displays the assumed level of sensitivity to the diversity of women's lives formerly absent from the adjudicative process.

CHAPTER TWO: LITERATURE REVIEW OF AMERICAN STUDIES OF WOMEN JUDGES

This chapter examines three American studies that empirically test the proposition there is a difference in voting behaviour between men and women judges. Early American studies of women justices were concerned primarily with increasing the numbers and representation of women on the bench through reforms to the process of judicial selection.[50] With the requisite doubling of women's representation on the various levels of American courts over the past decade, subsequent studies of women justices have been able to move on to the question of what happens after women have been appointed to the bench. These studies attempt to quantify the difference women bring to legal adjudication. Unfortunately, the implications of these studies may be somewhat limited because, even though their appointments are gradually increasing, the number of women judges continues to be minuscule in comparison to men.[51]

Two recent studies completed in the United States measure the patterns of agreement and disagreement between men and women judges on state Supreme Courts and U.S. Courts of Appeal.[52] These studies illustrate that a gender difference does exist but this difference is not universal across all the issues examined. The gender difference

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[50] E. Martin, *supra* note 2 at 126.

[51] D.W. Allen & D.E. Wall, "Role Orientations and Women Supreme Court Justices" (1993) Vol. 77, No. 3 Judicature 156-65 [hereinafter Allen and Wall]; S. Davis, S. Haire and D.R. Songer, "Voting Behavior and Gender on the U.S. Courts of Appeals" (1993) 3 Judicature 129-33 [hereinafter Davis et al.].

[52] *Ibid.*

was most profound on "gendered" issues which appear to have a distinct impact on women. A third study conducted on the only woman to serve on the United States Supreme Court, Sandra Day O'Connor, also concludes that O'Connor's voting patterns closely resembles those of her conservative colleague, William H. Rehnquist in terms of claims brought by criminal defendants. With respect to claims that involve equality, however, O'Connor is more supportive than Rehnquist.[53] Otherwise, there does not appear to be a gender difference between O'Connor and Rehnquist.

In their paper, "Role Orientations and State Supreme Court Justices"[54] Allen and Wall determine that women are the most "pro-women" members of their courts and are the most likely to be ideologically situated at the most extreme ends of the spectrum by taking positions at either the most conservative or most liberal ends of the political continuum. The study also found that women are most likely to engage in isolated dissenting behaviour in criminal and economic cases.

Allen and Wall set out to test four "role orientations" used to describe the functional importance of placing women on the bench. These role orientations are the "Representative Role," the "Token Role," the "Outsider Role" and the "Different Voice Role."[55] The Representative Role, described earlier in Chapter One of this paper in the

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[53]S. Davis, *supra* note 4.

[54] Allen & Wall, *supra* note 51.

[55] *Ibid.* at 158-59.

context of women office-holders, assumes that female representatives incorporate a woman's viewpoint in legal matters directly impacting on women as a category or class...that is, they represent a "pro-woman" stance on women's issues. The Token Role is fulfilled when a woman appointee adopts a posture which strategically avoids drawing attention to the characteristic that sets them off as a minority member of the group in order to obtain legitimacy within the group. This frequently results in the member taking a middle of the road approach to decision-making.

By contrast, the Outsider Role is fulfilled when the Outsider disregards institutional traditions and addresses the interests of those situated outside of the institution. This, according to Allen and Wall, results in extreme voting behaviour. There are a number of distinct character traits associated with being an Outsider, including high degrees of intelligence, dominance, adventurousness, unconventionality and radicalism which, Allen and Wall submit, appropriately describe the women in their data set who by the very nature of the position, are not likely to be restrained by societal norms. Allen and Wall note all the women justices included in their study were among the first of their gender to enter a male-dominated profession. The writers feel comfortable assuming that these women share personality traits of high self-esteem and score high on intelligence, dominance etc.. The writers assume that the women in their sample have the emotional and psychological wherewithal necessary to maintain the Outsider role throughout their

tenure.[56]

Finally, the Different Voice role is most closely associated with the work of Carol Gilligan, described in greater detail in Chapter Four, whose research supports the proposition that women approach problem-solving from a different moral perspective geared toward cultivating a communitarian rather than an individualistic environment. According to this theory, if female justices have a different view of morality and place a higher value on relational concerns than their male counterparts, then there will be an absence of common ground between men and women on the bench. Female justices would therefore be expected to exhibit extreme and isolated voting behaviour.[57]

To create their data set and develop the methodology for their study, Allen and Wall realized that a meaningful quantitative analysis of judicial voting behaviour requires an adequate number of non-unanimous decisions. Their sample of women judges was selected on the basis of their length of service on the bench and the court's potential for high rates of dissent. A sample of twenty-four women judges was identified within the stated criteria of women who had sat on the bench for a minimum of two years. They also selected women sitting on "natural" courts known to produce a substantial number of split decisions.

Allen and Wall divide the decisions being studied into three policy or issue areas. These areas are women's issues, criminal rights, and economic liberties. They include

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[56] Allen & Wall, *supra* note 51 at 159.

[57] *Ibid.* at 159.

criminal rights and economic liberties decisions in their analysis to allow for an assessment of the Token, Outsider and Different Voice role orientations. They also include women's issues to evaluate the Representative Role.[58] To obtain a rank or score for each justice on an issue, the writers used the data to compute a voting norm deviation score for each male and female justice sitting on each natural court - that is a court organized according to a time period in which the membership of the court remains the same. The score is derived from the percentage of liberal, or supporting, votes cast.

Based on the results of their statistical analysis, Allen and Wall conclude that with respect to women's issues, the preponderance of the women justices studied have adopted the Representative role, a finding compatible with literature that reports women political elites engage in strongly pro-women decisional behaviour.[59] Moreover, the writers determine, the data indicate that women justices perceive a broad spectrum of women's issues as a single issue dimension. "Sex discrimination, sexual conduct and abuse, medical malpractice, property settlements, and the relationship between child and parent all appear to be parts of an agenda....even when the majority of the court opposes an expansion of women's rights, female justices still hold to their beliefs."[60]

On criminal issues and economic rights, the writers note the data reveal scant evidence of women adopting a Token role. Rather, the study finds that women tend to

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[58] *Ibid.* at 160.

[59] *Ibid.* at 161.

[60] *Ibid.*

adopt a position on this issues commensurate with their *ideological* orientation.[61] On criminal issues, Allen and Wall find evidence which distinguishes women justices, not only from each other on the basis of party, but also from same-party male colleagues (this gender difference is more pronounced for Democratic justices than for Republican justices). Allen and Wall also point out that their findings are inconsistent with previous American studies which discerned no behavioral differences between male and female U.S. district judges regarding criminal rights and economic liberties.[62] According to the authors, this deviation from other studies is attributable to their methods of measurement and case selection.

Overall, Allen and Wall conclude that women state supreme court justices act as Representatives when deliberating on issues that are of immediate concern to women. They also conclude that while it is possible to predict votes that involve women's issues according to the decision-maker's gender, similar predictions cannot be made with respect to criminal rights. Their research also supports the proposition that these women judges behave as Outsiders while a smaller proportion displayed a proclivity toward the Different

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[61] This is the point at which the Allen and Wall study differs from the statistical study of the Supreme Court of Canada in which follows in Chapter Three. Allen and Wall found that there is a slight difference on gendered criminal issues, particularly when both the men and women judges are Democratic appointees. The analysis in Chapter Three reveals that there is no statistically significant difference between men and women judges on criminal issues although there is a difference in the attitudes of two of the women justices, L'Heureux-Dube and McLachlin.

[62] Allen & Wall, *supra* note 51 at 158 citing Walker and Barrow, "The Diversification of the Federal Branch" (1985) 47 J. Pol. 596.

Voice model. In summary, the study determines that women justices tend to: (1) act as the most pro-woman member of the court on issues of immediate concern to women; (2) occupy positions at the extreme liberal and conservative ends; and (3) tend to engage in extreme and isolated dissenting behavior in criminal and economic cases. The bipolar behaviour of women in the areas of criminal rights and economic liberties is a phenomenon that can be partially explained by party of appointment.[63] The women Democrats tended to be liberal while the Republican women tended to be conservative.

Most importantly, Allen and Wall conclude from their investigations that female justices do influence the structure of the law with respect to women's issues. The one area in which women justices appear to have made a real difference relates to higher incidents of favourable sex discrimination rulings.[64] Women may be educating male justices and the broader legal community through their dissents, the writers argue, until over time, these dissents will gain in legitimacy and finally be adopted by the legal community as precedent. The risk, alternatively, is that the women included in the Allen and Wall study "who display a different voice" could be perceived as ideologues by their male colleagues and be accorded less respect as a result.

A second American study reaches similar conclusions as the Allen and Wall study, particularly with respect to the finding that a gender difference exists but does not cut across all legal issues examined. S. Davis, S. Haire and D.R. Songer examine the voting

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[63]*Ibid.* at 165.

behaviour of women intermediate appellate judges. Davis et al. note that after President Jimmy Carter reformed the judicial selection process in 1977, enough women have been appointed to the United States courts of appeals to make feasible a study comparing the women and men as well as testing for party of appointment. Davis et al. create their sample of decisions from cases in the areas of employment discrimination, search and seizure cases and obscenity law to test the theory that women judges can be expected to vote differently from their male colleagues in ways that reflect a tendency to emphasize interdependent rights. [65] By interdependent rights, Davis et al. mean the right to full membership in the community as opposed to rights against the community. When those values conflict, it was expected that women would support the former. Again, the authors refer to the work of psychologist Carol Gilligan as providing theoretical support for claims about the differences between how men and women understand themselves, their environment and the way they approach solving moral problems.[66]

To conduct their study, Davis et al. examine the votes of all judges on the United States courts of appeals. The writers justify their choice of level of court by the fact that courts of appeals play a vital role in interpreting the federal law, enforcing norms and creating public policy.[67] 239 obscenity decisions are reviewed and 200 each of criminal

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[64] *Ibid.*

[65] Davis et al. *supra* note 51 at 131.

[66] *Ibid.* at 129.

[67] *Ibid.* at 130.

and employment discrimination cases were randomly selected by the study. Votes were considered to be either "conservative" or "liberal" depending on whether the claimant's position was endorsed. Simple cross-tabulations of votes by sex controlling for party of appointing president and region were also performed.

The analysis reveals statistically significant differences between men and women judges in two of the three policy areas. Women supported discrimination claimants at a rate of 63% whereas men supported these claimants at a rate of 46% of the time. For criminal cases, women supported the defendant 17.7% of the time as compared to the men who supported the defendant 10.9% of the time, which the writers observe isn't a significant difference. The addition of a control for party produced differences in employment discrimination cases as women judges appointed by a Democratic president (Carter) supported the plaintiff's claims at a rate of 68%, whereas men appointed by Democrats (Carter and others) supported the plaintiff only 54.3% of the time. There were no statistically significant differences between men and women judges appointed by Republicans nor were there any statistically significant differences with respect to search and seizure cases or obscenity cases when controlled for appointing party.

When the researchers controlled for region, (a term which is undefined by the study) there was a finding of no statistically significant differences on any of the three issues included in the study. The authors conclude from these statistics that there is some support for the thesis that women judges bring a different perspective to the bench. This difference is most evident with respect to employment discrimination, a phenomenon best

explained, the authors contend, by the fact that women judges, by virtue of being women, are more likely to have suffered from exclusion in the workplace.

To explain their results, Davis et al. conclude the psychological and legal theories of difference are "simply wrong."[68] More likely, they posit, women may decide employment discrimination cases differently because they are likely to have experienced such discrimination directly themselves or encountered gender-related obstacles in their professional lives. Second, they argue, while a different voice might exist, it is not revealed readily in the data because recent studies show that men also, on occasion, speak with a different voice.[69] Third, Davis et al. suggest any real differences between genders may be neutralized by the law and legal processes themselves. Legal training in university, and later in practice, develops a reasoning process and socializes a theory of individualism most often associated with men in Gilligan's theory. As well, women may be particularly conscious about maintaining an appearance of neutrality because of their newness to the bench. They may be concerned about revealing a difference in their reasoning for fear of losing credibility with respect to the perception of their abilities and capacity to acquire the same legal skills as their male counterparts. A final factor may be the impact of the political party of the appointing president. These factors, Davis et al. submit, may overcome any inherent gender differences. The authors conclude that as the numbers of women increase, future research will be better equipped to detect any gender

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[68] *Ibid.* at 133.

[69] *Ibid.*

differences. These differences may develop as women judges become better socialized within their own numbers to offset the factors enumerated above which serve to obscure any gender differences presently in existence.

The third American research study which draws conclusions about women judges' voting behaviour which reveals similar patterns of voting behaviour as the survey of Supreme Court of Canada decisions discussed in Chapter Three looks at the decisions of Sandra Day O'Connor of the United States Supreme Court. Sue Davis reviews several aspects of O'Connor's voting behaviour and other members of the Supreme Court in order to assess the claim that "O'Connor's decision-making reflects a uniquely feminine perspective."[70] The author notes at the beginning of the study that O'Connor has recently become more independent in expressing her differences with Rehnquist in her votes and her opinions. This difference is particularly evident, Davis contends, in her written opinions in two recent decisions involving reproductive rights. Davis views this as an opportunity to test the growing body of "different voice" jurisprudence.

Davis begins by describing O'Connor's background as an established conservative whose views accorded strongly with those of President Ronald Reagan. Her political background and expressed views against abortion and support of judicial restraint produced the expectation that she would cast conservative votes in civil liberties cases. What set her apart from her Supreme Court colleagues, however, was her sex. When she

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[70]*Ibid.* at 136.

graduated from law school third in her class, she was unable to obtain immediate employment as a lawyer. Her gender shaped her subsequent legal career by leading her into the public sector rather than private practice.

Davis then turns to the scholarship of Carol Gilligan to discuss whether O'Connor's different life experience might affect her views in important ways. In a previous study using Gilligan's theory, it was found that O'Connor manifested a communitarian emphasis in two areas in which she was allegedly more likely to support a claimant than were her fellow conservatives - the establishment clause and civil rights. This earlier study concludes that because O'Connor has not been as willing to permit violations of the right to full membership in the community, she has a "feminine perspective."[71] This study argues that O'Connor has tended to support individual rights claims only when they involve community membership which means that she does not support the rights of criminal defendants, expressing instead the need to protect the community from criminal activity. Davis looks to this earlier study to launch her own study of whether O'Connor's decision-making reflects a distinctly feminine perspective.

The first part of the Davis study investigates the assertion that O'Connor disagreed with Rehnquist in ways that revealed her emphasis on "communitarian values" in the areas of civil rights and the establishment clause. The author speculates that if O'Connor values the rights of the community, analysis of her votes in the area of criminal procedure should

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[71] S. Davis, *supra* note 4 at 136 citing S. Sherry, "Civic Virtue and the Feminine Voice in Constitutional Adjudication" (1986) 72 Va.L.Rev. 543-615.

show roughly the same level of support as Rehnquist's. As predicted, O'Connor and Rehnquist voted together in a greater percentage of cases involving criminal procedure than they did in cases concerning either civil rights or the establishment clause. On the other hand, and also as predicted, O'Connor was more supportive of claims involving equality than Rehnquist.

Overall, Davis concludes that her findings present very little to support the assertion that O'Connor's decision-making is distinct by virtue of her gender. She was, however, more liberal than Rehnquist regarding civil rights but she was also more liberal than Rehnquist in the area of criminal procedure. Davis contends, however, that although O'Connor does not appear to speak in "a different voice," the possibility remains that other women judges do. Davis believes her research is important because it points to the need to conduct more research in the area of women judge's voting behaviour since there is not enough of a conclusion to be drawn from studying one jurist.

The American studies of women judges illustrate the necessity of making a distinction between a different "feminine" voice and a "feminist" voice.[72] "Feminists" themselves are in disagreement over whether or not women speak in a different voice and in fact, many argue against such a proposition as a trap that will relegate women to peripheral roles, particularly those involving issues of morality. Nevertheless, despite the problems involved in attempting to define the differences between women and men

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[72]E. Martin, *supra* note 2 at 126-8.

judges, the American studies demonstrate that women judges are indeed changing the American legal system to incorporate women's different life experiences. This contribution appears most evident in areas involving issues of gender fairness.[73]

The question of whether women office-holders merely "stand for" other women in the numberical sense, or whether they "act for" women, continues to be problematic. As Elaine Martin notes, however, there seems to be consensus with the argument of simple fairness requiring increased numerical representation for women in political life, even if it isn't clear that such an increase will result in an increase in the interest representation of women.[74] In her own survey of attitudes of women judges who are members of the National Association of Women Judges, Martin concludes women office-holders tend to represent women's interests more actively when they belong to a supportive women's network. It is in this capacity they feel they have an important representative role to play.[75] This finding may have greater implications as the numbers of women judges being appointed to the bench increase.

The American studies included in this survey all conclude that the gender differences which do exist on the court manifest themselves only in respect of certain issues. While the studies make some attempt at exploring theories which explain the

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[73] *Ibid.* at 128.

[74] E. Martin, *supra* note 38 at 166.

[75] *Ibid.* At 173.

gender difference in a general sense, they do not adequately explore the possible explanations for why the gender difference is not universally apparent across the issues. To this end, the research of Professor Gayle Binion on how social institutions, such as the courts, are affected by the incorporation of women's experience into their principles, processes and outcomes may provide some insight into this question. Feminist theory, she asserts, is marked by a classical empiricism which strives to address actual experience, not abstract questions, in theorizing about human behaviour. [76] In the United States, particularly during the 1970's when the public was focused on the Fourteenth Amendment, feminist theory concerned itself most with the conceptual framework of equality rights questions which underscore a citizen's ability to exercise fully his or her rights of citizenship and economic and social options.

Binion argues that a "feminist" jurisprudence has evolved to recognize the diverse real-life experiences of women and demand that the law cease to be an instrument of women's disempowerment. This popular concentration on equality rights issues might help to explain partially why the three American studies summarized in this chapter demonstrate that women judges display a gender difference on questions of immediate concern to the lived experiences of women. A more satisfying explanation for the differences between legal issues is discussed in Chapter Four. The theory of "group-issue

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[76]G. Binion, "The Nature of Feminist Jurisprudence" (1993) Vol. 77, No. 3 Judicature 140-3.

salience" explains why some issues have more appeal to women than other issues.

The claims in all three of the American studies are consistent with the patterns of voting behaviour displayed on the Supreme Court of Canada described in the following chapter. These studies, in combination with the Canadian study, provide statistical support for the proposition that increasing the number of women on the bench will increase the opportunity for women's issues to be receive more evenhanded treatment by the judiciary. Chapter Three describes the methods used by the writer to test the hypothesis that there is a gender difference on the Supreme Court of Canada. The conclusions of the study fall roughly into the same categories as those in the American studies insofar as equality issues appear to be the most affected by the influence of women being on the bench. Chapter Four, which follows the Canadian study, pursues three theoretical explanations for the differences, not only between the voting behaviour of the men and the women judges, but also the differences between legal issues.

CHAPTER THREE: A QUANTITATIVE ANALYSIS OF THE WOMEN ON THE SUPREME COURT OF CANADA

The Design and Methodology of the Statistical Study

A statistical study conducted by F.L. Morton, P.H. Russell and T. Riddell in 1995 inquires into the topic, *inter alia*, of divisions and ideological differences among Justices sitting on the Supreme Court of Canada. [77] The Morton *et al.* study cites as its main objective the measurement of the incidence of judicial activism versus judicial restraint as a method for quantifying a perceived movement toward increased activism under the *Charter*. As one of many ancillary issues to their research, the authors examine gender as an incident of judicial voting behaviour and conclude that, "gender alone is not a reliable predictor of a Judge's *Charter* voting record."[78]

The current study proposes to update and expand on the Morton et. al article and demonstrate that, if not an exclusive predictor of a Justice's voting behaviour, there is at least some correlation between voting and gender on the Supreme Court of Canada. The data examined in this chapter incorporates the Morton et al. data set of 195 *Charter* decisions and updates this set of cases by including a further 85 decisions rendered by the Supreme Court between the beginning of January, 1993 and ending with the month of June, 1996 for a total of 280 cases in the current data set.

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[77]Morton et al. *supra* note 22.

[78]*Ibid* at 50.

A *Charter* decision was considered to be any case which had been argued before the Supreme Court of Canada giving consideration to a specific section or sections of the *Charter* that had been raised by one of the parties. For instance, if an appellant raised section 15 of the *Charter* as the cornerstone in support of his or her argument, this case was included in the data set as an equality rights case even though other provisions may have been used to argue the case. To test the results of the American studies, the data set was divided into three sub-sets in order to determine statistically whether the women on the Court tended to support certain *Charter* claims more often than did the men. For each of the three issue areas, the men and women justices were compared according to their respective rates of support for the *Charter* claimant advancing the particular section identified in this study as being most important to the structure of the argument.

The result of this comparison should prove or disprove the hypothesis of this study: are there differences between men and women judges? As Professor Morton notes in his 1992 paper, "The Supreme Court's First 100 *Charter of Rights* Decisions: A Statistical Analysis," the purpose of a study of this nature is to

> "...provide an overall picture of the main patterns of a court's work and, in this way, provide a broader context for interpreting the significance of an individual case or the performance of an individual judge."[79]

There were sixteen judges included in this survey, thirteen men and three women, who sat at some point during the noted period in which the 280 decisions were rendered.

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[79]F.L. Morton, "The Supreme Court's First 100 Charter of Rights Decisions: A Statistical Analysis" (1992) Vol. 30, No. 1 Osgoode Hall L.J. 1-56 at 3.

For the purposes of the study, the categories of *Charter* decisions were based upon the divisions established within the *Charter* itself as follows: the fundamental freedoms are contained in section 2, the legal rights in sections 7 to 14 and the equality rights in sections 15 and 28. There were 167 legal rights decisions, 17 equality rights decisions, and 37 fundamental freedoms decisions included in these sub-sets of data. In addition to testing cross-issue differences, these categories were selected on the basis that they would best illustrate rates of success and/or failure for arguments presented by organized interest groups at the Supreme Court level. Inclusion of a decision in a particular sub-category was based upon the characterization of a predominant *Charter* issue in each case as reported and indexed in the *Supreme Court Reports.*

Where more than one case considered a particular *Charter* issue, the issue was counted only once by the study. For those decisions where the Court did not reach consideration of the actual *Charter* issue as a result of the determination of a preliminary matter, i.e. standing or mootness, the decision was not included in the data set. The study did not examine decisions characterized as being within the democratic rights portion of the *Charter* (sections 3 to 5), mobility rights (section 6), language and educational rights (sections 16 to 23) or section 35 pertaining to Aboriginal rights. Where the Court allowed an argument to succeed on the merits of the *Charter* section but determined that the legislation or governmental action could be saved under section 1 of the *Charter*, the decision was counted as a *Charter* argument loss.

The data was then tabulated on a case by case basis to determine the frequency of success experienced by *Charter* litigants with respect to each individual member of the Supreme Court of Canada who sat, for some period, between 1982 and 1996. In order to determine whether or not a *Charter* argument has been successful, the current study modified the methodology used by Morton and Allen in their paper, "Feminists and the Courts in Canada: Measuring Interest Group Success."[80] Morton and Allen considered that a *Charter* argument had been successful based on the outcome of the dispute, the development of favourable legal precedents and/or jurisprudence, and policy change (presumably due to the nullification of legislation through the process of judicial review).[81] Unlike the Morton and Allen methodology, however, the current study only considered the actual outcome of the dispute: i.e. whether an individual Supreme Court Justice was seen to be in support of a *Charter* argument was based upon whether he or she held in favour of the claiming thus constituting a "win or victory" for the litigant raising the respective section of the *Charter*.

The second part of the study then goes on to compare the voting behaviour of the

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[80]Allen and Morton, *supra* note 27.

[81]The Allen and Morton paper also draws the distinction between offensive and defensive losses in their analysis of success in feminist litigation. This distinction is based on the fact that an offensive loss is considered to be less serious because the interest group didn't lose anything it previously had due to the fact that it was attempting to secure "new rights." A defensive loss, on the other hand, is more deleterious to the feminist cause because "a favourable policy status quo is altered in a disadvantageous direction." See Allen & Morton, *supra* note 27 at 9.

women among themselves. To accomplish this comparison, the second part of the study broke down the data set further in order to compare Wilson, L'Heureux-Dube and McLachlin with one another to discover what differences, if any exist, among the women and on which issues these differences seemed to manifest themselves most sharply. These patterns of inter-agreement were established by comparing only those decisions on which the women sat together, a technique which narrowed the scope of inquiry and produced a more accurate picture of difference and similarity than could be produced by the aggregate analysis of all the decisions considered globally.

Results of the Study and Analysis

The first part of the study compared the percentage of *Charter* support between the male and female Justices of the Supreme Court of Canada for each of the three sub-categories of legal issue in order to operationalize the study's hypothesis that there is a gender difference on the Supreme Court. The results of the cross-gender comparison are summarized in **Tables 1** to **3** divided into the three *Charter* issues examined, legal rights, fundamental freedoms and equality rights. For each issue studied, the tables show the total number of supporting votes for each justice and provides a statistical mean for the whole field as well as a mean of support for the men as compared to the women.

TABLE 1

LEGAL RIGHTS

	Percentage of Support	Total Number Cases
Wilson	**57.50%**	**80**
Chouinard	50.00%	12
Estey	47.83%	23
Lamer	45.51%	156
Sopinka	42.62%	122
Dickson	38.36%	73
LaForest	36.91%	149
LeDain	37.93%	29
Cory	37.86%	103
McLachlin	**37.74%**	**106**
Mean	**37.70%**	**1297**
Beetz	35.14%	37
Iacobucci	34.15%	82
Gonthier	33.00%	109
Major	32.61%	46
L'Heureux-Dube	**23.28%**	**116**
McIntyre	22.22%	54
Mean of Support by Men	37.79%	995
Mean of Support by Women	37.42%	302

Table 1 summarizes the data for legal rights by calculating the number of cases on which each respective Judge rendered a positive decision and then establishing an average rate of support by the Court in order to achieve a ranking in overall support. The results in **Table 1** reveal that Madame Justice Wilson is the highest supporter of *Charter* claims relating to legal rights, well above the Court average with Justice McIntyre being well below the Court average. Madame Justice McLachlin exhibits an average level of support

for these claims while Madame Justice L'Heureux-Dube finishes near the bottom in the second last position in support of legal rights claims. These results by themselves do not appear to support the first hypothesis of this paper insofar as the data indicate that a gender difference does not exist. This finding is further evidenced by the proximity of the statistical means representing support by the men versus support by women. Since the two values are virtually identical, it is possible to conclude that a gender difference does not exist with respect to legal rights issues.

TABLE 2

FUNDAMENTAL FREEDOMS

	Percentage of Support	**Total Number Cases**
Wilson	**60.87%**	**23**
McLachlin	**61.11%**	**18**
Beetz	50.00%	10
Major	40.00%	5
McIntyre	36.36%	11
Lamer	36.36%	22
Sopinka	36.00%	25
Mean	**34.00%**	**250**
Chouinard	33.33%	2
Cory	30.00%	20
Dickson	28.57%	21
Iacobucci	25.00%	10
L'Heureux-Dube	**23.08%**	**26**
LaForest	22.58%	31
Gonthier	21.05%	19
Estey	00.00%	1
LeDain	00.00%	6
Mean of Support by Men	**29.51%**	**183**
Mean of Support by Women	**46.27%**	**67**

The results summarized in **Table 2**, on the other hand, provide support for the claim that there is a gender difference than the data with respect to legal rights claims. According to the data compiled in this table, the women Justices on the Supreme Court of Canada appear to be significantly more sympathetic with fundamental freedoms claims than their male counterparts. Madame Justices Wilson and McLachlin are both well above the overall judicial mean of support for this category. Moreover, there is a significant gap between these two women and the next highest supporter of fundamental freedoms claims, Justice Beetz. Madame Justice L'Heureux-Dube, on the other hand, appears in the bottom third of supporters for fundamental freedoms claimants. This difference might be partially explained by the fact that L'Heureux-Dube sat on more of these decisions than either of Wilson or McLachlin and may have reviewed different issues in combination with the fundamental freedoms claim which she favoured. This difference among the women should be better explained in the second half of the study which compares the rates of inter-agreement between the women members of the Court.

Of particular note from **Table 2**, however, is the difference between the average rate of support for the men Justices and the women Justices. This comparison of the aggregate mean of support between men and women reveals that the women of the Court are almost 50% more likely to support fundamental freedoms claims than are the men of the Court. The data compiled in **Table 2** therefore provides evidence in support of the claim that there is a gender difference between men and women judges serving on the Supreme Court of Canada.

TABLE 3

EQUALITY RIGHTS

	Percentage of Support	Total Number Cases
McLachlin	**75.00%**	**8**
L'Heureux-Dube	**71.43%**	**14**
Wilson	**50.00%**	**8**
Beetz	50.00%	2
Estey	50.00%	2
Chouinard	n/a [84]	0
Cory	45.45%	11
Iacobucci	**44.44%**	**9**
Lamer	36.36%	11
Mean	**35.20%**	**125**
Dickson	25.00%	8
LaForest	17.65%	17
Sopinka	16.67%	12
Gonthier	15.38%	13
LeDain	n/a	0
Major	00.00%	6
McIntyre	00.00%	4
Mean of Support by Men	**25.53%**	**94**
Mean of Support by Women	**66.67%**	**30**

Table 3 represents the sharpest distinction between voting patterns for men and women of all three categories of *Charter* issues. All three of the women top the list as the strongest supporters of a *Charter* argument based on the equality rights sections. The data, when manipulated to produce an aggregate of support for the men and an aggregate of support for the women, also indicates that the women are more than twice as likely than the men to support an equality claim.

The updated empirical evidence presented in this paper brings into question the conclusions about the predictive value of gender drawn by Morton, *et al.* in their 1995 study, at least with respect to equality rights. The results of the current study would seem to suggest that for equality rights claims and to a lesser extent, fundamental freedoms, there is a gender difference on the Supreme Court of Canada. Morton, *et al.* noted in their 1995 study that L'Heureux-Dube "occupies two different wings of the Court depending on the issues."[82] This conclusion is further borne out by the current study because Madame Justice L'Heureux-Dube stands out against McLachlin and Wilson on the issues of legal rights and fundamental freedoms as being one of the least supportive of the Court for these claims.[83]

For the second part of the study comparing the voting behaviour of the women amongst themselves, it is possible to see finer distinctions between the respective views of the women. These distinctions are particularly obvious with respect to legal rights claims. It could be argued from the results that the distinctions between the women in the criminal rights area reflect a larger division on the Supreme Court representing two fundamentally different approaches to constitutional adjudication. In the legal rights area, the women display a difference which roughly accords with the competing theories of judicial restraint

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[82]Morton, *et al.*, *supra* note 22 at 48.

[83]The writer posits that this phenomenon is best explained by an examination of L'Heureux-Dube's legal writing and predicts that she most closely approximates a consistent "feminist" position (i.e. a position which ranks women's concerns and interests higher against competing rights claims).

versus judicial activism insofar as the first theory typically adheres to the traditional rules of evidence while the latter informs these rules by taking into account the impact these rules have within a greater social context. Madame Justice McLachlin consistently demonstrates a proclivity to support the traditional emphasis on the "procedural" rights of the accused, even where that emphasis usurps the collective rights of a disadvantaged group, most notably female sexual assault victims. On the other hand, Madame Justice L'Heureux-Dube displays a consistent desire to identify with the female complainants in sexual assault appeals heard before the Supreme Court.

Madame Justice Wilson demonstrates a clear propensity to support *Charter* arguments, a position which doesn't appear to be as pronounced on the issue of equality rights, presumably because Wilson heard only eight of these cases during her tenure on the Supreme Court. On the issue of equality rights Madame Justice Wilson has been surpassed in her activist approach by Madame Justice McLachlin and Madame Justice L'Heureux-Dube who each support these types of arguments at a rate of 75.00% and 71.43% respectively. Madame Justice L'Heureux-Dube, on the issues of legal rights and fundamental freedoms, appears to be a fairly strong proponent of judicial restraint[84] unlike

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[84]Implicit throughout this paper is an understanding of the distinction between "judicial activism" which refers to the judicial readiness to veto the policies of other branches of government on constitutional grounds and/or accept political arguments which seek to change or alter the law as society changes, versus "judicial restraint" which connotes a judicial predisposition to find room within the constitution for established legal traditions, and especially for the policies of democratically accountable decision-makers. See P.H. Russell, R. Knopff and F.L. Morton, eds., *Federalism and the Charter: Leading Constitutional Decisions* (Ottawa: Carleton University Press, 1989) at 19.

Wilson and McLachlin who tend to support *Charter* arguments to a higher degree than their male colleagues. Overall, the data provide evidence to support the conclusion that a gender difference exists on the Supreme Court of Canada. This conclusion is especially true for equality rights claims where the distinction between men and women is very sharp. Chapter Four will address the issue of whether or not this distinction can be attributed to a greater willingness on the part of the women members of the Court to apply tools of analysis derived from the work done by feminist theorists. The use of feminist tools of analysis, it is argued, should provide evidence in further support of the proposition that women bring a different perspective into their written opinions.

Patterns of Inter-Agreement Among the Women Justices

The second method of comparing the women on the bench obtained a set of data which reflected the percentage of inter-agreement among the women. To calculate this number, the writer established a three sub-sets of decisions for which the women heard the same arguments and evidence and rendered judgment together (that is to say, sub-sets which included only those decisions on which Wilson and McLachlin, Wilson and L'Heureux-Dube and McLachlin and L'Heureux-Dube sat together so that the total number of cases heard by each woman is the same). This measurement provides an accurate indication of similarities and/or differences in judicial mind-set by narrowing the scope of examination to precise instances of agreement or disagreement on a specific *Charter* issue where the evidence and the arguments were the same.

The measurement used in this part of the study controls for variations which might be accounted for by individual interpretation of variables other then the selected issues of legal rights, fundamental freedoms and equality rights. This comparison is helpful in determining whether a sense of common judicial approach exists among the female members of the bench with respect to each category of *Charter* issue where all other variables influencing their decisions are consistent. If gender is a strong predictor for voting behaviour on issues could be referred to as "gender salient," a term discussed in the next chapter, then the results of this data should be a high percentage of inter-agreement between the women judges. The results of that comparison are summarized as follows in **Tables 4** to **6**:

TABLE 4

WILSON AND McLACHLIN

	Rate of Inter-Agreement	**Total Number Cases**
Legal Rights	64.71%	17
Fundamental Freedoms	60.00%	5

(Note that Wilson and McLachlin did not sit on any Equality Rights decisions together)

The data acquired pursuant to this measurement indicates that there is a somewhat significant pattern of inter-agreement between Madame Justices Wilson and McLachlin with respect to legal rights and fundamental freedoms claims. This rate of inter-agreement is not as strong a relationship as the inter-agreement on equality rights issues demonstrated

for the women in **Tables 5** and **6**. The statistical finding in **Table 4**, therefore, does not lend strong support to the central proposition of this paper, namely, that there is a gender difference in voting behaviour on the Court. Unfortunately, the two women did not sit on any cases characterized as involving equality rights so that this variable could not be measured. It should be noted, of course, that the women sat together on the Supreme Court for less than two years and heard very few decisions together. This factor would serve to skew the meaning of the results as calculated.

Tables 5 and **6** provide the most persuasive evidence that McLachlin and L'Heureux-Dube in particular are aligned with respect to equality rights claims that have been heard before the Supreme Court:

TABLE 5

WILSON AND L'HEUREUX-DUBE

	Rate of Inter-Agreement	**Total Number Cases**
Legal Rights	66.67%	39
Fundamental Rights	84.62%	13
Equality Rights	100.00%	6

Table 5 shows that Madame Justices Wilson and L'Heureux-Dube tend to exhibit a moderate rate of inter-agreement with respect to the issue of legal rights and very high rates of inter-agreement with respect to the fundamental freedoms and equality rights

claims. These figures would tend to support the view that there is a pattern of similarity in decision-making consistent with the central hypothesis of this paper. Madame Justices Wilson and L'Heureux-Dube are in exact agreement on the equality rights issue decisions, noting that they heard six such cases together.

TABLE 6

McLACHLIN AND L'HEUREUX-DUBE

	Rate of Inter-Agreement	Total Number Cases
Legal Rights	65.00%	80
Fundamental Rights	64.71%	17
Equality Rights	100.00%	8

The comparison between Madame Justice McLachlin and Madame Justice L'Heureux-Dube, like that of Wilson and L'Heureux-Dube, indicates a relatively low rate of inter-agreement on the issues of legal rights and fundamental freedoms. On the issue of equality rights, however, the women are once again in complete agreement with each other, noting that they heard eight equality cases together.

Therefore, the results of the inter-agreement study, particularly with respect to equality rights claims, provide additional evidence that there is a correlation between gender and the decisions which emanate from the Supreme Court. This finding is consistent with the data presented in **Tables 1** to **3**, although the categories of legal rights and fundamental freedoms provide less conclusive proof that any similarity in judicial

approach exists among the three women Justices. It should also be noted that the sample of equality rights decisions is quite small and therefore may not be sufficient to launch the sweeping claim that the women on the Supreme Court of Canada speak with a different voice as evidenced by their voting behaviour.

Patterns of Dissenting Judgments between the Men and the Women on the Court

As a final measurement of comparison, the study went on to gauge the judicial disposition of the women to of the Supreme Court of Canada versus the men through measuring the frequency of dissenting opinions. This measurement is intended to establish a yardstick for judicial independence, which it might be supposed, might also be indicative of gender difference. (One might also stretch the argument further to say that judicial independence could, by implication, disclose greater receptiveness to a non-traditional legal arguments such as those espoused by feminist litigants; again, an assertion of this nature requires qualitative analysis of the decisions themselves and the reasons for dissent). The Morton et. al study concluded that the three women Justices on the Court have been the most independent in terms of their willingness to dissent.[85] In order to obtain this figure, the study took the total number of times an individual member dissented divided by the total number of decisions on which he or she deliberated within the selected set of 280 *Charter* cases used for the purposes of this paper. The resulting number is

[85]Morton, *et al, supra* note 22 at 40.

therefore derived as the gross aggregate of all the *Charter* decisions that each individual heard. The results are summarized in **Table 7**:

TABLE 7

RATES OF DISSENT

	Percentage of Dissent	Total Number Cases
L'Heureux-Dube	**21.82%**	**165**
Wilson	**20.87%**	**115**
McLachlin	**18.80%**	**133**
McIntyre	15.94%	69
Mean	**11.78%**	**1689**
Cory	10.45%	134
Lamer	9.95%	191
Gonthier	9.63%	135
Sopinka	9.49%	158
LaForest	9.00%	200
Iacobucci	7.84%	102
Estey	7.69%	26
Major	7.02%	57
Beetz	5.88%	51
Dickson	5.83%	103
LeDain	2.86%	35
Chouinard	0.00%	15
Mean Dissent for Men	11.29%	1276
Mean Dissent for Women	20.58%	413

The figures in **Table 7** provide perhaps the most startling contrast between the male and female members of the Supreme Court of Canada because it illustrates very clearly that the women of the Court demonstrate a greater willingness to contradict the majority, just as Morton et. al found in their 1995 study. The aggregate averages for male

dissent as compared to female dissent reveals that once again, the women are almost twice as likely to dissent than the men on the Court. Moreover, Wilson, L'Heureux-Dube and McLachlin are so close together in their respective rates of dissent while the rest of the field is well below these rates, the next closest male Justice being almost 10% lower than the women. It is argued that the rate of the women's dissent is so high as compared to the men that their figures skew the calculation of an overall mean for the Court.

From his statistical analysis of the first 100 *Charter* decisions, Morton would explain this outcome as being indicative of a rise in judicial activism on the Supreme Court and an increasing politicization of judicial decision-making.[86] Morton contends that a study of dissenting voting patterns reveals and reflects the existence of shared judicial philosophy. His 1992 study concludes, for instance, that Justices Wilson and McIntyre dissented most frequently, although they had never dissented together. The results of the current study indicate that Wilson and L'Heureux-Dube dissent most often for the women while McIntyre shows the highest predisposition toward favouring a dissenting position for the men on the Court. The complete polarization of male and female dissent on the Court provides a strong argument for gender-based differences in judicial decision-making.

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[86] Morton, *supra* note 79.

Conclusions Based on the Data

The data set in this study provides considerable evidence to support the claim that there is a gender difference in the voting behaviour on the Supreme Court of Canada. In particular, there are two measurements extracted from the data to support the claim that gender-based differences exist on the Supreme Court of Canada. These measurements are, first, a higher level of support for equality claims by the three women Justices than the men of the Court and second, a higher frequency of dissent from the majority among Wilson, L'Heureux-Dube and McLachlin than any of the men on the bench. There does not appear to be a gender-based difference with respect to legal rights claims and while there may be room to argue for a gender cleavage on the issue of fundamental freedoms, this evidence is relatively weak because it is inconsistent among the three women Justices.

In addition to these gender differences, there are also notable differences among the three women of the Supreme Court. According to the calculations in the study, Madame Justice Wilson remains the most consistently supportive member of the Court for all three categories of *Charter* rights, although she slips behind L'Heureux-Dube and McLachlin on equality claims. L'Heureux-Dube and McLachlin are especially interesting because they align themselves diametrically on legal rights issues, and to a lesser extent fundamental rights, so that McLachlin appears more supportive of the individualistic position represented by legal rights arguements. Alternatively, this difference could be explained by the fact that McLachlin appears to apply the traditional rules of evidence and the fundamental principles of justice in a judicially restrained manner in order to ensure

that only the guilty are convicted. On the other hand, L'Heureux-Dube tends to represent what might be referred to as a more "communitarian perspective" by interpreting legal issues and fundamental freedoms in light of the greater social context and potential impact on otherwise disadvantaged members of society.

The data collected in this study appears to support the conclusion that, like the American studies, there is a gender difference on the Supreme Court of Canada which is not universally apparent across the spectrum of issues tested. This gender difference manifests itself most visiblely when the issue being deliberated by the court is a "woman's" issue, that is, it speaks more to women's lived experience than it does perhaps to men's experience. A possible explanation for this difference, not only between men and women Justices, but also among the range of issues examined, is that women judges speak with a different voice. The statistical analysis reveals that women judges vote differently than men judges. The empirical findings of the study alone do not provide sufficient data to determine whether the statistical gender difference is coincidental or supports the larger proposition that women judges view the world differently than their male colleagues.

CHAPTER FOUR: THEORIES OF GENDER DIFFERENCE

Difference Theory

The American studies summarized in Chapter Two and the Canadian study summarized in Chapter Three demonstrate empirically that women bring something different or unique to the judicial process, something which would otherwise be lacking if the administration of justice continued to be dominated by men. Characterizing or explaining the source for this difference, however, is a more difficult goal, particularly when the difference is inconsistent, or is inconsistently revealed depending on the issue being considered by the court. This chapter examines three theories which may help to explain and understand why women judges decide legal issues differently than their male colleagues.

The American studies in Chapter Two all make reference to the "difference theory" of Carol Gilligan in explaining the reasons for the gender differences seen on the various courts in the United States. Similarly, in speaking to her "responsibilities" as Canada's first woman on the Supreme Court of Canada, Madame Justice Bertha Wilson cites Gilligan and observes the following:

> "Taking from my own experience as a judge of fourteen years' standing, working closely with my male colleagues on the bench, there are probably whole areas of the law on which there is no uniquely feminine perspective. That is not to say that the development of the law in these areas has not been influenced by the fact that lawyers and judges have all been men. Rather, the principles and underlying premises are so firmly entrenched and so fundamentally sound that no good would be achieved by attempting to reinvent the wheel....in some areas of the law, however, a distinctly male perspective is clearly discernible. It has resulted in legal principles that are not fundamentally sound and that should be revisited when the

> opportunity presents itself. Canadian feminist scholarship has done an excellent job of identifying those areas and making suggestions for reform. Some aspects of the criminal law in particular cry out for change; they are based on presuppositions about the nature of women and women's sexuality that, in this day and age, are little short of ludicrous."[87]

Madame Justice Wilson points to the work of sociologist, Norma Wikler who confirms that male judges tend to adhere to traditional values and beliefs about the natures of men and women and their proper roles in society. Gender-biased attitudes are shown to be deeply embedded in the attitudes of many of the male judges so that the conclusion of many of these studies has been that gender difference is a significant factor in judicial decision-making.[88] Wikler's work was subsequently used to spearhead the program in the United States for sensitizing judges about gender bias.

The theoretical argument that women could introduce a more humane element to the law constitutes the second half of Madame Justice Wilson's essay wherein she discusses Gilligan who conceptualizes morality under what is more popularly known as her "difference theory."[89] Gilligan postulates that girls and women develop a different moral focus than do men. She bases her study on observations made while watching young girls and boys at play, noting their differing strategic approaches and interactions

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[87]B. Wilson, "Will Women Judges Really Make a Difference?" (1990) 28 OHLJ 507 at 514-15.

[88]N.J. Wikler, "On the Judicial Agenda for the 80s: Equal Treatment for Men and Women in the Courts" (1980) 64 Judicature 202.

[89]C. Gilligan, "In a Different Voice: Women's Conceptions of Self and Morality" (1977) 47.4 *Harvard Educational Review* 481-517.

with each other. From these observations, Gilligan draws broader generalizations about the inherent natures of men and women. While men see moral questions in terms of competing individual rights, women view moral questions in terms of competing obligations. As well, women tend to focus on relationships between individuals and within the community while men focus on the individual in isolation and separation. This distinction between male and female reasoning supports the argument of "separate but equal" psychological development. The writer submits, however, that this categorization of women as natural care-givers and naturally more caring carries with it another set of problems which could limit its usefulness for advancing sexual equality rights. Gilligan is controversial because in many respects, her theories are antithetical to mainstream feminist arguments that demand equality of treatment. Gilligan's theory appears to buy into the gendered assumptions that empowered patriarchal justifications for keeping women in the home and concerned with domestic issues.

Gilligan's theory is based on the supposition that men derive their morality from rules of justice whereas women cite human compassion as their higher moral plane. Women's moral judgments place greater weight on emotional ideas like caring than do men and this difference in perspective, some feminists have argued, will have an impact on the judicial decision-making and the resulting substantive legal principles. According to Gilligan, women are more interested in achieving solutions that benefit everyone as opposed to seeing conflict in terms of winning and losing. This analysis, states Madame

Justice Wilson, has merit.[90] She argues that this tendency toward compassion will enable women judges to get inside the skin of the litigant and make his or her experience part of their own. According to Wilson, if women judges and lawyers can bring a better understanding into the law of what it means to be part of the human community by introducing the experience of women into the deliberation process, then they will make a difference.

Compassionate Authority and the Theory of Otherness

Similarly, Kathleen Jones makes the argument that women formulate conceptions of "authority" differently than do men. In her book about democracy and women's representation, *Compassionate Authority*,[91] she discusses a feminist response to authority and judgment in the political context, but her discussion is equally relevant to the judicial arena. Jones notes that authority, formulated in the hierarchical sense, is supposed to be impartial, neutral, uninterested, and rules are intended to be interpreted so as to apply universally to all members of the society. Those who apply those rules or stand in judgment are individuals who are entitled to judge. What results is a Hobbesian conception of a single will ruling over many diverse wills. Jones contends that in order to judge authoratively within this framework, it is necessary to treat persons as "fungible

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[90]Wilson, *supra* note 87 at 520.

[91]K.B. Jones, *Compassionate Authority: Democracy and the Representation of Women* (New York: Routledge, 1993) 142 - 185.

objects, where their peculiar characteristics, their specific identity, their irreducible distinctiveness, becomes irrelevant to the practice of authority."[92] Accordingly, authority is the ability to "articulate universal and impartial rules, rules that replace disorder with order."[93] This "rational-legal" discourse normalizes authority as impersonal and dispassionate.

On the other hand, Jones argues that "compassionate authority" pulls the actors into a face-to-face encounter with a specific, concrete "other." This conceptualization subverts the modern normalization of authority as a "disciplinary gaze" representing the masculinization of this aspect of being in authority and a form of social ordering which is arguably "masculine." Feminists have criticized the representation of judgment as a standard of fairness dispensed from up above based on the argument that the "impartial" observer is a fiction since all judgments are the judgments of a particular person and all knowledge is situated knowledge. Jones continues this argument as follows:

> "Second, feminists have argued that the Rawlsian concept of deciding moral questions from behind the 'veil of ignorance' is not only incoherent but also incompatible with the notion of fairness implicit in so much of moral theory. If judgment requires moral reciprocity - taking the standpoint of the other - then judgment requires moral imaginativity in the place of the other - then judgment becomes impossible once one assumes the 'veil of ignorance.'"[94]

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[92] *Ibid.* at 143.

[93] *Ibid.*

[94] *Ibid.* at 147.

In other words, the very act of judging requires de-centering the "like us" assumption of impartiality in order to stand in the shoes of the other. Compassionate authority recognizes the dignity of the "other" in a general sense by acknowledging the moral identity of the concrete other. This means seeing the other as he or she sees himself or herself. This is central to a feminist perspective of adjudication. Essentially, this is the act of role-playing and being able to abstract a space created by commonality and uniqueness simultaneously.

Placing a woman on the bench, by extension of the argument, could result in decision-making characterized as possessing the "outsider-within" stance and "have a distinct view of the contradictions between the dominant group's actions and ideologies." For instance, Jones uses the example of Black women as outsiders-within:

> "In terms of power, their marginalized location situates them on the periphery of the dominant culture. Yet at the same time, as the nurturers and caretakers of the children and families of their masters, or as the producers of surplus for the plantation economy, Black women have been located at the core of the dominant culture and are able to affirm themselves by "seeing white power demystified." Outsiders-within can judge from within and without at the same time; their unusual social location provides them with a perspective from which to critique the dominant culture."[95] [emphasis added]

This notion of critical consciousness leads to empowerment and potentially to the struggle against oppressive institutions by introducing norms of judgment implicit in caring for the concrete other, someone seen as a specific person with specific needs and interests.

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[95] *Ibid* at 149.

The theoretical work of Gilligan, Wikler and Jones isn't completely satisfactory, however, in wholly explaining the results obtained by both the American studies summarized in Chapter Two and the Canadian study in Chapter Three. Those studies found that a gender difference does indeed exist on the courts examined but the difference isn't universally applicable across the legal issues contained in the case samples. The gender difference appears to manifest itself with respect to those issues which appear to involve the use of normative analysis as opposed to so-called "objective" principles of fairness and due process. The question then is finding a theoretical explanation for the differences between legal issues, not only between the men and women on the court.

Group Salient Issues and Theories of Gender Difference

The following discussion explores why there is a gender difference with respect to certain issues but not others. The analysis is grounded in a theory developed by an American writer, Phillip Paolino, which he refers to as "Group-Salient Issues."[96] An adaptation of Paolino's theory will help to explain the gap between the women judge's support for equality rights claims versus the apparent lack of difference between male and female voting behaviour with respect to legal rights claims.

The Paolino study merges theories of social-group behaviour and issue salience to

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[96]P. Paolino, "Group-Salient Issues and Group Representation: Support for Women Candidates in the 1992 Senate Elections" (1995) 39 American Journal of Political Science 294-313 [hereinafter referred to as the Paolino study].

introduce the idea of "group-salient issues." He quotes from John Stuart Mill as a useful starting point for understanding the theory of issue salience. Mill writes:

> "We need not suppose that when power resides in an exclusive class, that class will knowingly and deliberately sacrifice the other classes to themselves: it suffices that, in the absence of its natural defenders, the interest of the excluded is always in danger of being overlooked; and, when looked at, is seen with very different eyes from those of the persons whom it directly concerns."[97]

Paolino hypothesizes that certain women's issues in the 1992 Senate election were salient only to women when voting in contests where one of the candidates was a woman. He concludes that women's voting for female Senate candidates in 1992 was related to issues affecting uniquely women's interests where women might be perceived as more competent than men. This notion of descriptive representation assumes that members of certain groups share unique experiences such that only they can adequately represent group interests on certain issues.[98]

In order to understand how group-salient attitudes might influence judicial behaviour, it is necessary to first understand the relevance of the social group for decision-making. Paolino refers to two key requirements for group-based action which are *objective membership* in the group and *political awareness* of the group's position in

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[97]J.S. Mill, *Considerations on Representative Government (1861),* reproduced in *Utilitarianism, On Liberty, and Considerations on Representative Government,* ed. H.B. Acton (London: J.M. Dent and Sons Ltd., 1972).

[98] Paolino *supra* note 96 at 295.

society.[99] Group behaviour, according to Paolino, grows out of experiences to which only members of a particular social group can be directly exposed. Group-specific experiences provide the basis for contrast with "out-groups" necessary for the psychological formation of the group.

Group-based action occurs when individual group members gain in the second requirement, politicization, a "political awareness or ideology regarding the group's relative position in society along with a commitment to collective action aimed at realizing the group's interests."[100] In effect, the individual learns to view political issues through the collective lens of the social group. The occurrence of a salient event that primes the recognition of some shared characteristic, Paolino argues, helps the group become a focus for the members attitudes and behaviour. The group's values can be used to evaluate people and situations although these values may not necessarily be used to evaluate *all* people and *all* situations.

Paolino therefore summarizes his theory of political voting behaviour as follows:

> "In-group members' attitudes on group-salient issues are more likely to be related to direct experiences, such as sexual harassment, racism, and anti-Semitism, to which out-group members cannot be exposed. There are two important consequences of in-group members' unique experiences upon their political behavior. First, while both in-group and out-group members may possess similar attitudes on group-salient issues, in-group members should use these attitudes more

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[99] *Ibid.* at 296.

[100] Paolino, *supra* note 96 at 296 citing A.H. Miller, P. Gurin, G. Gurin & O. Malanchuk, "Group Consciousness and Political Participation" (1981) 25 American Journal of Political Science 494-511.

> readily in their political decision making than out-group members. Second, these experiences should activate in-group members' awareness of their differences with out-group members and lead group members to perceive in-group members as better able to represent their interests on group-salient issues. The distinction, then, between group-salient issues and issues that are salient primarily to group members is that exposure to group-specific experiences makes some issues *more strongly related* to group members' political decisions and group members perceive *in-group* candidates as being uniquely qualified to represent group interests on these issues."[101] [emphasis added]

Paolino's research supports his theory of group-salient issues. For example, he discovered that issues related to the Hill-Thomas hearings, sexual harassment and women's representation significantly boosted women's voting for female Senate candidates. In electoral contests that did not highlight issues salient to women, Paolino found that women voters were as likely to vote for male candidates. Paolino suggests that women seek to correct existing imbalances in group representation because of issues uniquely salient to women.[102]

Paolino's theory is useful for interpreting the results of this study because it explains the enormous gender difference discovered with respect to equality rights while no significant difference was detected with respect to legal rights. According to the group-salient issue theory, women judges would be expected to identify more closely with equality rights claimants. This is consistent with their desire to represent the interests of their group. On the other hand, legal rights claims would appear to bear evenly on both

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[101] *Ibid.* at 297-8.

[102] *Ibid.* at 310-11.

sexes, thereby explaining the absence of a gender difference for this policy area. This explanation breaks down, however, in view of the voting record of Madame Justice L'Heureux-Dube who displays the most consistent adherence to a "feminist perspective" even in the legal rights area.

Paolino's theory as described in the previous section of this chapter is perhaps the most satisfying explanation for the differences in voting behaviour where there is gender issue before the court, or an issue which may have particular relevance to women and not so much application to men. Paolino's explanation breaks down, however, in view of the voting record of Madame Justice McLachlin as compared to the voting record of Madame Justice L'Heureux-Dube which is described in more detail in Chapter Three. The statistical evidence confirms what most court-watchers have intuited from observing the two women practice their professional undertakings. L'Heureux-Dube displays the most consistent adherence to a "feminist perspective" by articulating familiar feminist arguments in her written opinions. Similarly, Madame Justice Wilson's written opinions consistently reflect her ability to identify with a woman-centered perspective and have contributed to a body of precedents often cited by feminist litigators.

By contrast, the criminal cases punctuate the differences between Justice L'Heureux-Dube and Justice McLachlin in their respective approaches to the criminal rights area. As the following chapter discusses, McLachlin consistently sides with the rights of the accused even where those rights appear to be in direct conflict with the rights of a female complainant. On the other hand, an analysis of the case law reveals that on

other issues, McLachlin takes a supporting position with L'Heureux-Dube in introducing an alternative perspective which is absent from the written opinions rendered by the men. Chapter Five represents an analysis of the substantive law to determine if the empirical findings in Chapter Three and the theories of difference in Chapter Four are reflected in the written opinions of the Supreme Court Justices.

CHAPTER FIVE: A QUALITATIVE ANALYSIS OF GENDER DIFFERENCE ON THE SUPREME COURT OF CANADA

Identifying a Feminist Theory of Jurisprudence

This chapter critically analyzes selected judgments of the men and the women on the Supreme Court of Canada. The analysis is conducted by first examining a "feminist theory of jurisprudence" in order to identify some of the common theoretical tools used to deconstruct gender bias in legal writing. The judgments are then compared against these themes to see if the women judges are more inclined to refer to, or use these analytical tools in their written decisions.

Bias is deeply embedded within social, political and legal discourse. Common themes within feminist jurisprudence begin with the critique that traditional legal norms were formulated by men to the exclusion of women and therefore reflect and reinforce male attitudes, stereotypes and interests to the detriment of women. Women, according to feminist legal theory, are seen to be the objects of law while men are its authors. The following discussion reviews the radical feminist theories of Catharine MacKinnon to identify common themes in feminist literature. MacKinnon was selected, not because her theories are necessarily representative of feminist legal analysis, but because in many ways her work has established the ground work for other feminists in the legal community. MacKinnon is an often-quoted source in feminist legal discourse, and while her work is controversial because of its radical feminist orientation, it is clearly articulated and readily identifiable with a "feminist legal perspective."

MacKinnon probes the causation of female oppression by the contemporary liberal state in her book, *Toward a Feminist Theory of the State.*[103] MacKinnon's work is a useful starting point for understanding how systemic attitudes and myths about women and female sexuality are formulated and articulated within liberal discourse. These attitudes are reinforced by court systems which embody hierarchical/patriarchal ideology.[104] MacKinnon defines feminism quite simply as "the theory of women's point of view."[105] She writes:

> "Feminism is the first theory to emerge from those whose interest it affirms. Its method recapitulates as theory the reality it seeks to capture. As Marxist method is dialectical materialism, feminist method is consciousness raising; the collective critical reconstitution of the meaning of women's social experience, as women live through it...Consciousness raising...inquires into an intrinsically social situation, into that mixture of thought and materiality which comprises gender in the broadest sense."[106]

MacKinnon's feminism challenges the liberal conception of society as a collection of individuals by importing the notion that society is divided into the distinct classes of male and female. This distinction, according to MacKinnon, cuts across social and economic classes because the tasks women perform and their availability for sexual access and

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[103]C.A. MacKinnon, *supra* note 6.

[104]"Ideology" is used by MacKinnon as a tool of analysis which describes the epistemological relationship between power and knowledge and creates the socio-political classes, male and female. For MacKinnon, ideology is the institutionalized structure of male dominance which systematically shapes social structures to fragment human freedom.

[105]*Ibid.* at 120.

[106]*Ibid.* at 83.

reproductive use are strikingly similar regardless of social position. The law, according to MacKinnon, reflects and bolsters male power by institutionalizing and legitimizing male appropriation of the female body.

Similarly, Janet Radcliffe Richards has argued that feminism is frequently seen as committed to "particular *theories* about what kinds of thing are wrong with women's situation, whose fault it is and what should be done to put matters right...What is *essential* to feminism is simply the belief that women are badly treated and that they suffer from systematic social injustice because of their sex."[107] It should be noted that there is much disagreement among "feminists" as to the best way to address and subsequently redress systemic sexual discrimination in society. There are as many "feminisms," it seems, as there are feminists.

Litigation-driven feminism, such as that identified in the Morton-Allen study discussed in Chapter One, is thus a form of politics directed at changing pre-existent relationships of power between men and women and achieving equality through a calculated use of the courts, seeking equality through legal empowerment. For instance, LEAF describes its three main principles of equality theory as follows:

1. Women as a group, compared with men as a group, experience widespread and pervasive discrimination.

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[107]J.R. Radcliffe, *The Skeptical Feminist: A Philosophical Enquiry* (London: Routledge and Kegan Paul, 1980) cited in J. Grimshaw, ed., *Feminist Philosophers: Women's Perspectives on Philosophical Traditions* (Great Britain: Wheatsheaf Books, 1986) at 19-20.

2. Women who are oppressed on the basis of, for example, their race, class, sexual orientation, religion or disability, experience inequality different in degree and/or kind, in various contexts.

3. Law can be an effective tool for egalitarian social change.[108]

According to MacKinnon, inequality is women's collective condition; however, she theorizes that the law can be used systematically to unravel existing power relationships. "The first task of a movement for social change is to face one's situation and name it."[109] The next step is to move beyond criticism to redefine the law to include women's perspectives, acknowledging the inequities the law has formerly imposed.

In MacKinnon's view, the law not only silences women by failing to include their perceptions and point of view, it deliberately and systematically conceals women's views through "objective" standards of justice constructed out of masculine assumptions articulated, for instance, through the legal fiction of the "reasonable man." MacKinnon also dispels the notion that traditional male-dominated Marxist theory can be used as a tool to dissect and rupture patriarchal discourse as a means to improving women's lived experience. She argues for a woman-centered theory of political change. MacKinnon argues that the law is a particularly potent source for centering gender difference because, as she states, liberal societies are marked by male supremacy, the male standpoint dominates civil discourse by establishing the "objective standard" against which all other standards are measured. The state incorporates notions of hierarchy into social power and

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[108] LEAF, *supra* note 25 at xix.

law, thereby making male dominance both invisible and legitimate by adopting the male point of view in law at the same time as it enforces and reproduces that view in society.[110] Litigation-driven feminism, therefore, seeks to subvert this traditional power structure through the use of the very institutions and principles established by the members of society's legal, social and political elites.

The following section of this chapter reviews three different legal issues: rape, pornography and abortion. Each issue is introduced by a brief summary of MacKinnon's analysis of how the law perpetuates the exploitation and oppression of women on that subject. The discussion then launches into a review of selected decisions of the Supreme Court of Canada to determine whether a MacKinnon-like analysis is applied or given judicial consideration, and more specifically, whether the women judges use this analysis in their reasoning more often than the men.

Rape Mythology and the Canadian law

a. MacKinnon's Theory of Rape

MacKinnon devotes a chapter of her book to a discussion of rape and the application of rape mythology by the courts as an extension of male sexual identity and resulting female objectification. She begins with the assertion that "rape is indigenous, not

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[109] MacKinnon, *supra* note 6 at 241.

[110] *Ibid.* at 238.

exceptional, to women's social condition."[111] As a phenomenon, it is symptomatic of male sexual violence and supremacy and is defined in terms of male penetration as opposed to an act which offends the person upon whom it is committed. Even the law to protect women's sexuality from forcible violation and expropriation defines that protection in male genital terms, a loss of exclusive access, a defilement which devalues its victim in the male gaze. She writes:

> "...rape, as legally defined, appears more of a crime against female monogamy (exclusive access by one man) than against women's sexual dignity or intimate integrity. Analysis of rape in terms of concepts of property, often invoked in Marxian analysis to criticize this disparity, fail to encompass the reality of rape. Women's sexuality is, socially, a thing to be stolen, sold, bought, bartered, or exchanged by others. But women never own or possess it, and men never treat it, in law or in life, with the solicitude with which they treat property. To be property would be an improvement....Rape cases finding insufficient evidence of force reveal that acceptable sex, in the legal perspective, can entail a lot of force.[112]

MacKinnon rounds out her discussion of rape by expanding on the mythology surrounding consent which is "supposed to be women's form of control over intercourse, different from but equal to the custom of male initiative."[113] Flowing out of this conceptualization of consent are the distinctions between women, those who are chaste and virginal as distinguished from those who, having acquired sexual experience, are "open season," the whores or prostitutes for whom consent is irrelevant. For these

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[111] *Ibid.* at 172.

[112] *Ibid.*

[113] *Ibid* at 174.

women, consent is inferred, and this, according to MacKinnon, includes married women. Ultimately, she argues, women are socialized to passive receptivity and more importantly, "most women get the message that the law against rape is virtually unenforceable as applied to them."[114] Rape is not prohibited, it is regulated.

The following discussion examines how receptive the women on the Supreme Court have been to the types of arguments summarized above, but more importantly, demonstrates MacKinnon's point of how women's perspectives on the reality of rape frequently collide with established traditional legal principles and theories of justice, and typically lose in those battles. In seeking to preserve the accused's right to use the past sexual history of the complainant to construct a theory of consent, the court, MacKinnon would argue, continues to buy into the stereotypical assumption that if a woman has had sex before with someone else, it is more probable that she consented to have sex with this particular accused.

b. R. v. Seaboyer: A Matter of Procedural Fairness

Frequently, women's issues or claims are seen to clash with due process considerations and the rights of the accused. For MacKinnon, this clash is archetypal of

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[114] *Ibid* at 179. MacKinnon continues, "Women's experience is more often delegitimated by this than the law is. Women, as realists, distinguish between rape and experiences of sexual violation by concluding that they have not "really" been raped if they have ever seen or dated or slept with or been married to the man, if they were fashionably dressed or not provably virgin, if they were prostitutes, if they put up with it or tried to get it over with, if they were force-fucked for years. The implicit social standard becomes: if a woman probably could not prove it in court, it is not rape."

the systemic use of the law, which to outside appearances is based on notions of fairness, to silence women. In Canada, this conflict is particularly evident in the contrasting judicial behaviour of Madame Justice McLachlin and Madame Justice L'Heureux-Dube, the former judge having received her professional legal experience as a criminal defense lawyer. The best demonstration of this difference is found in the analysis of the women's written decisions with respect to rape, an issue where the traditional rules of evidence have been applied in such a way that it has historically been very difficult for female complainants to make their case.

In Chapter Three it was learned that statistically, Madame Justice McLachlin and Madame Justice L'Heureux-Dube agree with each other on legal rights claims only 65% of the time. McLachlin agrees with the legal rights claimant 37.74% of the time as compared to L'Heureux-Dube who agrees with the legal rights claimant 23.28% of the time. L'Heureux-Dube also dissents generally from the rest of the court 21.82% of the time as compared to McLachlin who dissents 18.80% of the time. These empirical findings lend support to the proposition that Madame Justice L'Heureux-Dube is the one member of the Supreme Court who exhibits a tendency to speak to women's experience most consistently. On the other hand, McLachlin demonstrates a committed application of the traditional rules of evidence which have evolved to protect the rights of the accused from the "tyranny of the state." The practical impact of these rules, feminists argue, has been to put female complainants taking the stand to give evidence at disadvantage. It is this disadvantage which Madame L'Heureux-Dube speaks to in her written decisions.

In *R. v. Seaboyer; R. v Gayme,*[115] the Supreme Court of Canada struck down certain of the "rape-shield" provisions of the *Criminal Code,* specifically for violating the accused's *Charter* rights as contained in section 7, the right to a fair trial and full defense, and section 11(d) the right to be presumed innocent. Steven Seaboyer and Nigel Gayme, two men charged with sexual assault in separate cases, sought to admit evidence concerning their victims' past sexual histories, in particular arguing that the women had each had several sexual relationships with other men. Sections 276 and 277 of the *Criminal Code* [116] prohibited introduction of evidence concerning the past sexual history of complainant's with parties other than the accused. The accused argued that the rape-shield law precluded defense-counsel from cross-examining or leading evidence directed at probing the complainant's previous sexual conduct, thereby unfairly preventing counsel's ability to construct a defense.

Madame Justice McLachlin applauds the protection afforded by the legislation, "the myths that unchaste women are more likely to consent to intercourse and in any event are less worthy of belief...are now discredited."[117] Nevertheless, she contends, she is not so much concerned with the purpose of the legislation as its effects on the accused's right to a full and fair defence. In accepting the accused's *Charter* argument, Justice

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[115][1991] 2 S.C.R. 577 [hereinafter *Seaboyer*].

[116] *Criminal Code of Canada,* SC 1980-81-82, c.125.

[117]*Ibid.* at 604.

McLachlin, writing for the majority, couched her judgment in the language of protecting the interests of the accused by preserving the right to call defense evidence:

> "It is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues. This goal is reflected in the basic tenant of relevance that underlies all our rules of evidence...[118]
>
> This Court has affirmed the trial judges' power to exclude Crown evidence the prejudicial effect of which outweighs its probative value in criminal cases...
> The question arises whether the same power to exclude exists with respect to defense evidence...Canadian courts have been extremely cautious in restricting the power of the accused to call evidence in his or her defense..."[119]

McLachlin objects to the law on the ground that it constitutes a blanket exclusion subject to three narrow exceptions and operates to exclude relevant evidence necessary to the accused's defense. She relies on the finding that if evidence has sufficient cogency the witness must endure a degree of embarrassment and perhaps psychological trauma. This harsh reality must be accepted as part of the price to be paid to ensure that only the guilty are convicted.[120] Therefore, the majority held that evidence of the complainant's consensual conduct may be admissible for purposes other than the inference relating to consent or the credibility of the witness provided that there is some probative value on an issue and where the probative value is not outweighed by the danger of unfair prejudice.

The reasons of Justices L'Heureux-Dube and Gonthier, dissenting in part, were

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[118] *Ibid.* at 609.

[119] *Ibid.* at 610.

[120] *Ibid.* at 617-18.

delivered by Justice L'Heureux-Dube. L'Heureux-Dube refers extensively to the political, social and historical context in which the crime of sexual assault is situated in order to make the case that the criminal legal system has erred too far in favour of the rights of the accused to the disadvantage of women.[121] She notes that "sexual assault is not like any other crime" and:

> "Perhaps more than any other crime, the fear and constant reality of sexual assault affects how women conduct their lives and how they define their relationship with the larger society. Sexual assault is not like any other crime.
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> "There are a number of reasons why women may not report their victimization: fear of reprisal, fear of a continuation of their trauma at the hands of the police and the criminal justice system, fear of a perceived loss of status and lack of desire to report due to the typical effects of sexual assault such as depression, self-blame or loss of self-esteem. Although the reasons for failing to report are significant and important, more relevant to the present inquiry are the numbers of victims who choose not to bring their victimization to the attention of the authorities due to their perception that the institutions with which they would have to become involved will view their victimization in a stereotypical and biased fashion....The woman who comes to the attention of the authorities has her victimization measured against the current rape mythologies." [emphasis added] [122]

Justice L'Heureux-Dube enumerates ten of these common rape myths to demonstrate how the police, Crown prosecutors and judges fail to take most rape victims seriously and on the basis of these myths, collect and permit the entry of stereotypical evidence into trial to undermine the credibility of the complainant. L'Heureux-Dube cites several studies illustrating how invariably, whenever the jury is permitted to hear "negative" evidence

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[121] House of Commons Debates: 18 November 1975: 9204 and 92224-25; 8 July 1981: 11300-01 and 11342-44; 4 August 1982: 20041-42.

[122] *Seaboyer, supra* note 115 at 648-50.

about the complainant's past sexual history, the rate of conviction drops significantly.

Common law principles of admissibility of evidence in sexual assault cases are based, she asserts, on moral judgments made about the virtue and credibility of a particular type of woman. Armed with this type of evidence, defense counsel are apt to turn a sexual assault trial into a dirt-throwing exercise. Subsequent legislative intervention must be viewed in this larger legal context. The early rape shield provisions were designed to rid trials of sexual offences of certain discriminatory rules and practices; however, the courts failed both to take cognizance of and implement the objectives of Parliament in this regard. A second package of rape shield provisions was rolled out by Parliament in 1982 to acknowledge and correct the inequality of the common law which places an unfair burden on female victims of sexual assault. According to L'Heureux-Dube, these larger reform purposes must inform the court's analysis of the impugned legislation.[123] These legislative reforms represented significant steps toward protecting the integrity of the person and the elimination of sexual discrimination.

L'Heureux-Dube turns her analysis to the rules of relevance and admissibility at common law to demonstrate that these concepts are also imbued with stereotypical notions of female complainants and sexual assault. The determination of what is "relevant" is often represented as involving a neutral standard applied objectively through the "test for judicial truth," although history and the magnitude of harm done to the complainant

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[123] *Ibid.* at 670-75.

suggest otherwise.[124]

L'Heureux-Dube concludes that the effects of this area of the law provide "significant evidence" of discrimination against female complainants. Moreover, the impugned rape shield provisions do not operate so broadly as to exclude all evidence of past sexual conduct since past history with the accused is admissible subject to certain exceptions. The evidence which is inadmissible under the legislation is sexually discriminatory, stereotypical, mythical evidence. Such evidence is irrelevant, according to L'Heureux-Dube, and furthermore, has a prejudicial effect which distorts the question of guilt or innocence of the accused. She therefore holds that the impugned legislation is not unconstitutional because the accused does not have a constitutional right to adduce irrelevant or prejudicial evidence. Notions of a "fair trial" or the right to "full answer and defence" do not recognize a right in the accused to adduce any evidence that may lead to an acquittal.[125] Section 7 of the *Charter* should be interpreted not only in light of the rights of the accused but also in the broader context of protecting societal interests. This interpretation is reinforced by Section 28 of the *Charter* which mandates a constitutional inquiry that recognizes and accounts for the impact upon women of the narrow construction of sections 7 and 11(d) advocated by the appellants.

Although the majority of the Supreme Court failed to protect Parliament's

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[124] *Ibid.* at 680-81.

[125] *Ibid.* at 696.

objectives under the rape shield provisions, the value of Madame Justice L'Heureux-Dube's judgment lies in creating a judicial record acknowledging important arguments made by women's groups. For instance, LEAF intervened in *Seaboyer* to represent rape crisis centres and treatment centres who supported the legislative purpose and intent of sections 276 and 277. LEAF begins its written argument as follows:

> "The law of sexual assault has played a unique role in the history of women's inequality. Historically as a matter of common law, women, the victims of rape, were not legal persons. Rape was treated by the law more like a property offence than like an offence against the person: a property offence committed by one man against another man's property. Women were also disenfranchised. Therefore laws relating to sexual assault were developed, promulgated, and administered by men, the perpetrator group, without regard to the experience and perspective of women, the victim group, and without regard to sexual equality values or law."[126]

With her written judgment, L'Heureux-Dube expands this argument and incorporates it into Supreme Court jurisprudence representing an important landmark in Canadian legal history.

The Pornography Debate

a. MacKinnon's Views on Pornography

MacKinnon has argued that the law surrounding pornography has traditionally been framed in terms of male perceptions of "obscenity" as opposed to the harm it inflicts

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[126] Factum of the Women's Legal Education and Action Fund (LEAF) cited in *Equality and the Charter, supra* note 25 at 176-7.

on women as a class.[127] Pornography, according to MacKinnon, is a form of "hate speech" which is not a legitimate form of speech that should be protected under the laws of free expression. According to MacKinnon, debates surrounding pornography have been couched too much in the language of either morality or the language of rights - freedom of expression and freedom of ideas. The effect of this debate has been, she argues, to obfuscate the real issue which is that pornography is not about sex, sexuality or morality; rather, pornography is about power, or more specifically, male power over women.

MacKinnon explains that pornography exploits women's sexual and economic social inequality for commercial gain. The law has failed to address the political overtones of the pornography industry. Pornography defines what women in society are allowed to be, reaffirming male power and domination, and the obscenity laws seeking to limit this political form can be seen to treat morals from the male point of view.[128] The law governing pornography, according to MacKinnon, is really a liberal attempt at balancing male interests and defining allowable limits of sex and violence for prurient arousal. The law of obscenity reflects male perceptions of what exceeds acceptable exploitation to enter the realm of unacceptable exploitation. It is not the exploitation *per se* which is regulated, it is the degree of exploitation which is determined by current social and moral attitudes constructed out of the male perspective. The law fails to identify and

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[127] C.A. MacKinnon, *Only Words* (Cambridge Mass.: Harvard University Press, 1993) [hereinafter *Only Words*].

[128]MacKinnon, *supra* note 6 at 197.

redress the real social harm that is suffered by women as a group. "Men's obscenity is not women's pornography."

Rather than criminalize pornography, the law seeks to regulate it in the interests of male power, "robed in gender-neutral good and evil."[129] MacKinnon argues that the existing laws which define what is and isn't obscene are not about women at all. Essentially, these laws are about defining the limits of what one group of men, legislators, can tell another group of men to do or not do. The experience of women and the harm they suffer as a result of the universal proliferation of pornography, within the "legitimate" media and in advertising, is completely ignored within the debate. Pornography is political because is maintains male dominance.

MacKinnon's feminist critique of pornography echoes the writing of radical feminist, Andrea Dworkin, who contends that the laws are enacted specifically to regulate intercourse, or more to the point, to regulate women and their sexuality. According to Dworkin:

> "Laws create male dominance, and maintain it, as a social environment. Male dominance is the environment we know, in which we must live. It is our air, our water, earth. Laws shape our perceptions and knowledge of what male dominance is, of how it works, of what it means to us. ...[Laws] keep some people on top and some people on the bottom....The purpose of laws on intercourse in a world of male dominance is to promote the power of men over women and to keep women sexually subjugated (accessible) to men."[130]

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[129]*Ibid.* at 199.

[130]A. Dworkin, *Intercourse* (New York: The Free Press, 1987) at 150.

By situating these laws within the context of what is supposed to be "natural" in a man and "natural" in a woman, the guaranteed outcome is that women will be relegated to inferior status. The laws regulating intercourse are intended to protect these "authentic" natures by proscribing how men and women are supposed to use (and be used by) each other. Moreover, Dworkin charges, many sexual laws are not overt because they serve first and foremost, to uphold male supremacy by keeping peace among men while defining women as property. She points to the laws governing adultery, rape, incest which are crimes against woman but are treated, she argues, as thought damaging male access and exclusivity in respect of the women who have been violated.[131]

MacKinnon makes a similar argument that liberal definitions of pornography as something sexual rather than an act of violence against women trivialize the political implications of pornography. "To reject forced sex [pornography or rape] in the name of women's point of view requires an account of women's experience of being violated by the same acts both sexes have learned as natural and fulfilling and erotic when no critique, no alternatives, and few transgressions have been permitted."[132] The cumulative effect of pornography is to depersonalize the act and introduce a double standard of personhood. These liberal critiques themselves indicate that women can be "persons" by interpretation as though sexuality were not something that is socially constructed by men. Liberal

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[131]*Ibid.* at 161.

[132]MacKinnon, *supra* note 6 at 212.

critiques of pornography therefore fail to take into account that the power of pornography is to create women in the image of their use by men. MacKinnon and Dworkin that gender bias not only exists within the judicial system, but is also manufactured and fortified by the very laws which, on the surface, appear to protect women from violation.

b. Justice Wilson's Impact on Pornography Laws in Canada

The debate in Canada on the right to produce and consume pornography versus feminist arguments against the dissemination of these materials has been affected significantly by the willingness of Madame Justice Wilson to entertain the alternative theories espoused by MacKinnon and Dworkin in order to challenge conventional thinking about censorship. Unlike the rape shield provisions, however, the positive impact that Madame Justice Wilson has had on Canadian jurisprudence in the area of censorship has resulted in a substantive change in public policy. Her written decision relies upon the theory developed by MacKinnon that the law should protect the dignity of women and seek to obstruct the trafficking of the female body rather than impose notions of morality which have been devised by men.

Madame Justice Wilson held in *Towne Cinema Theatres Ltd v. The Queen* that the line of "undueness" is drawn between the mere portrayal of sex and the dehumanization of people:

> "As I see it, the essential difficulty with the definition of obscenity is that "undueness" must presumably be assessed in relation to consequences. It is implicit in the definition that at some point the exploitation of sex becomes

> harmful to the public or at least the public believes that to be so. It is therefore necessary for the protection of the public to put limits on the degree of exploitation and, through the application of the community standard test, the public is made the arbiter of what is harmful to it and what is not. The problem is that we know so little of the consequences we are seeking to avoid. Do obscene movies spawn immoral conduct? Do they degrade women? Do they promote violence? The most that can be said, I think, is that the public has concluded that exposure to material which degrades the human dimensions of life to a subhuman or merely physical dimension and thereby contributes to a process of moral desensitization must be harmful in some way. It must therefore be controlled when it gets out of hand, when it becomes "undue."[133]

Justice Wilson is cited with approval by the majority of the Supreme Court in the subsequent decision of *R. v Butler.*[134]

Justice Sopinka has since expanded on Wilson's judgment in *Towne Cinema* to acknowledge that a disproportionate amount of the harm caused by pornography is suffered by women:

> "Among other things, degrading of dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings...This type of material would, apparently, fail the community standards test not because it offends against morals but because it is perceived by public opinion to be harmful to society, particularly to women. While the accuracy of this perception is not susceptible to exact proof, there is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women and therefore to society as a whole."[135] [emphasis added]

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[133][1985] 1 S.C.R. 494 at 524.

[134][1992] 1 S.C.R. 452.

[135]*Ibid.*

By categorizing pornography as a thing which harms women, the Supreme Court has ventured into otherwise unchartered judicial territory. Political scientists A. Allen and F.L. Morton have commented that by upholding Canada's censorship law, the Supreme Court has followed the recommendations of the feminist organization, LEAF, in rejecting traditional justifications for legislating in the area of pornography, i.e. the defense of public morality. Rather, Allen and Morton argue, the Court has adopted a "feminist" interpretation of pornography as a form of "hate speech" directed at women,[136] an interpretation made possible by Wilson's judgment.

For this reason, the precedent set by Madame Justice Wilson in *Towne Cinema* and subsequently followed by the Supreme Court of Canada in *R. v. Butler* appears to be a judicial attempt at recognizing the female perspective by introducing this notion of harm and dehumanization. This change to the substantive law may provide the necessary evidence supporting increased appointments of women to the bench. Wilson's judgment, insofar as it incorporates a feminist perspective through abandoning the traditional "community standards" approach derived out of notions of male morality, is an expression of the feminist jurisprudence advocated by MacKinnon in the final chapter of her book. Wilson's judgment is not gender neutral which, in itself, overtly acknowledges that the law has never been gender neutral. The difference, according to writers like MacKinnon, is that while the law has traditionally been formulated to ensure male dominance, feminist

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[136]Allen and Morton, *supra* note 27 at 9.

theory has enabled the judicial decision-maker to expose the invisible imbalance in men's favour and counterbalance the traditional norm with an alternative viewpoint. The *Towne Cinema* decision therefore is a useful example of how a women judge has made a difference in bringing about legal recognition of women's real, lived experience.

The Law that Wasn't: The Right to Access to Abortion

a. MacKinnon's Views on Reproductive Rights

For MacKinnon, the abortion issue cannot be seen apart from the reality that sexual intercourse, "the most common cause of pregnancy," cannot be presumed coequally determined because women feel compelled to "preserve the appearance of male direction of sexual expression." Women often do not use birth control, she argues, because of its social meaning i.e. the implied suggestion that women are not entitled to plan when they will have sexual intercourse because women's sexual availability has traditionally been determined by men.[137] Access to abortion as an attempt to mitigate the reality that women do not have choices around intercourse is therefore necessary according to MacKinnon although the state, even in granting this right, has intervened to control even this aspect of women's lives. Essentially, MacKinnon contends that women have no privacy, a fact made all the more apparent by either the criminalization of abortion or alternatively, the refusal of the state to fund it. To cite Dworkin, more simply put, "her body is not her

[137] MacKinnon, *supra* note 6 at 185.

own."[138]

MacKinnon states that "in private, consent tends to be presumed." It is almost impossible to get anything private to be perceived as coercive when the privacy in question is male privacy and their assumed right to sexual intercourse within the domestic setting. Men have been permitted to appropriate the female body for sexual purposes even when the woman does not consent to intimacy or her consent is granted by virtue of the oppressive economic and social conditions under which she lives. This is MacKinnon's controversial "all sex is rape" theory which has more than any of her other arguments engendered anger from her opponents. On the other hand, there is no privacy for women. The right to abortion in the United States, she states, was granted as a private privilege, not a public right, and in practical application, control over reproduction continues to reside in the male hands of doctors, husbands and regulators who determine whether or not the privilege will be publicly funded. Despite de-criminalization, she maintains, the right to access has not been guaranteed.

b. The Canadian Courts Recognize a Woman's Right to Control her Body

In Canada, the debate about public funding of abortions has not gained the notoriety that it has in the United States. Nevertheless, a good early examples of a gender difference in Canadian judicial reasoning is seen between the written judgments of Justice

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[138] Dworkin, *supra* note 130 at 73.

Bertha Wilson and Chief Justice Brian Dickson in *Morgantaler, Smoling and Scott v. The Queen.*[139] The gender difference is seen in Wilson's willingness to rely upon theories advanced in favour of a woman's unfettered right to an abortion and to control her own body. As a result of her political reasoning, the credibility of Wilson's judgment has been challenged by detractors who allege it has no basis in law.[140] Dickson, on the other hand, avoids the political argument altogether in his written reasons and uses an argument based on procedural legal reasoning to achieve the same result as Wilson in striking down the provisions of the *Criminal Code* which made abortion a punishable offence. As Wilson notes:

> "With all due respect, I think that the Court must tackle the primary issue first. A consideration as to whether or not the procedural requirements for obtaining or performing an abortion comport with fundamental justice is purely academic if such requirements cannot as a constitutional matter be imposed at all...a review of the procedural requirements...seems pointless."[141]

The case involved a constitutional challenge by three physicians charged under the abortion provisions of the *Canadian Criminal Code.* Section 251 of the *Code* was intended to "liberalize" access to abortions in Canada by creating two categories of abortion: legal therapeutic abortions requiring approval by therapeutic abortion committees and non-therapeutic abortions which were subject to criminal prosecution.

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[139][1988] 1 S.C.R. 30 [hereinafter *Morgantaler*].

[140] See F.L. Morton, *Morgentaler v. Borowski: Abortion, The Charter and the Courts* (Toronto: McClelland Stewart, 1992).

[141] *Morgantaler, supra* note 139 at 161-62.

Failure to comply with the committee and other requirements under section 251 constituted an indictable offense with a maximum sentence of life imprisonment for individuals other than the woman who performed the procedure, and a maximum sentence of two years for the woman undergoing the procedure. Counsel for the physicians argued that section 251 of the *Code* violated the guarantee of "liberty" under section 7 of the *Charter*. Their argument rested on a broad interpretation of section 7 which encompassed "a wide-ranging right to control one's own life and to promote one's individual autonomy." This included a "right to privacy and a right to make unfettered decisions about one's own life," including a woman's right to terminate her own pregnancy.[142]

Professor Christopher P. Manfredi makes several important and correct observations about the differences between the written judgments provided by Justice Wilson and Chief Justice Dickson.[143] He points out that only Justice Wilson adopts the purposive interpretation of "liberty" as argued by defense counsel to include a guarantee of personal autonomy over important decisions intimately affecting the private lives of every individual. The right to liberty, Wilson reasoned, also included a right to make fundamental personal decisions without state interference.[144] Manifredi uses the *Morgantaler* decision to illustrate differences in the judicial philosophies of activism

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[142]*Ibid.*

[143]C. P. Manfredi, *Canada and the Paradox of Liberal Constitutionalism: Judicial Power and the Charter* (Toronto: McClelland & Stewart Inc., 1993) 114-19.

[144]*Morgentaler, supra* note 139.

versus standards of traditional judicial restraint normally associated with procedural arguments as opposed to substantive arguments.[145]

Justice Wilson gave an equally liberal interpretation to the notion of "security of the person," which she determined had been violated by section 251. The "essence" of section 251 according to Wilson was to mandate,

> "...that the woman's capacity to reproduce is not to be subject to her own control. It is to be subject to the control of the state. She may not choose whether to exercise her existing capacity or not to exercise it. This is...a direct interference with her physical "person."...She is truly being treated as a means--a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with human dignity and self-respect? How can a woman in this position have any sense of security with respect to her person?"[146]

As F.L. Morton and Rainer Knopff comment, "Justice Wilson in effect reads almost the entire pro-choice perspective on abortion into five words of section 7."[147]

Wilson's judgment provides strong support for the proposition that women perceive the world differently than men, particularly when she describes the dilemma a woman confronted with an unwanted pregnancy must experience in making her decision about whether to continue the pregnancy to term. She writes:

> "It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience

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[145]See F.L. Morton, *supra* note 140.

[146]Manfredi, *supra* note 128 at 173-74.

[147]F.L. Morton & R. Knopff, *Charter Politics* (Scarborough, Ontario: Nelson Canada, 1992) at 266.

> (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma."[148]

By contrast, Chief Justice Brian Dickson arrived at the same result by declaring the provisions of section 251 of the *Code* unconstitutional but for very different reasons. Dickson avoided the issue of reproductive rights entirely and focused instead on the scope of section 7 as it relates to the protection offered to individuals through "security of the person" and the application of the principles of fundamental justice. Chief Justice Dickson was unwilling to recognize an expansive interpretation of section 7 that would prohibit the state from interfering with what individuals choose to do to themselves. Instead, he opted for a more restrictive interpretation of section 7 as limiting what governments can do to individuals. He extended the definition of security of the person to include protection against "state-imposed psychological stress."[149]

The focus for Dickson was not a woman's reproductive right, but rather on the ways in which section 251 imposed significant delays through the therapeutic approval process which ultimately compromised the woman's physical and psychological security. Dickson pursued a second line of reasoning designed to express his "dissatisfaction" with the impugned legislation while not actually addressing the substantive policy implications of the provision. This second line examined the impact of the administrative and procedural aspects of the law on the availability of a defence to criminal charges brought

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[148] *Morgantaler, supra* note 139 at 171.

[149] Manfredi, *supra* note 143 at 116.

under section 251. Dickson held that as a result of several administrative deficiencies, the exculpatory provisions of section 251 were "practically unavailable to women who would *prima facie* qualify for...a defence that is held out as generally unavailable."[150] *Morgentaler* therefore embodies an important distinction in the respective approaches to women's issues of Justice Wilson and Chief Justice Dickson.

Economic Rights and the Income Tax Act

A final policy area worthy of examining is with respect to taxation and the pair of fairly recent cases which address equality rights and the right to deductions under the *Income Tax Act* (ITA). These cases are especially significant because both Justice McLachlin and Justice L'Heureux-Dube took dissenting positions for reasons, it is submitted, that are uniquely related to their experience as women and as professionals with responsibilities in both the workplace and in the household.

The first of these cases, *Symes v The Queen*[151] involved a challenge to the Act because it precludes a woman from deducting child care expenses as a business expense. The female appellant was a self-employed lawyer who required the services of a nanny to care for her children while she was at the office. Accordingly, she deducted the wages she paid to the nanny as a business expense incurred "for the purpose of gaining or producing

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[150]*Morgentaler, supra* note 139.

[151][1993] 4 S.C.R. 695 [hereinafter *Symes*].

income from business" pursuant to the *Income Tax Act.*[152] Revenue Canada disallowed the business deduction under s. 9 and substituted the deduction as a child care deduction under s. 63 of the ITA. The child care deduction was significantly less than the expenses actually incurred by Symes. She appealed on the basis that s. 63 infringed her equality rights under s. 15(1) by preventing her to deduct child care expenses in computing profit from her business under s. 9 of the ITA.

The judgment of the all-male majority was delivered by Justice Iacobucci in a decision that relied on traditional notions of what constitutes a "business-expense." The thrust of the Iacobucci's opinion adopted the "well accepted principles of business practice" encompassed by the ITA. These principles would generally operate to prohibit the deduction of expenses which lack an income-earning purpose, or which are personal expenses. The majority maintained that the need for child care expenses exists regardless of the appellant's business activity. Accordingly, it could not be demonstrated to the majority that a violation of s.15(1) had occurred since the appellant could not prove that the impugned legislation drew a distinction based on the personal characteristics of sex. The appellant and her husband had made a "family decision" to the effect that the appellant alone bears the financial burden of child care. While it is clear that women disproportionately bear the burden of child care in society, it was not clear to the majority

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[152] R.S.C. 1952, c.148, as am. by S.C. 1970-71-72, c. 63, ss 9, 18(1)(a) [hereinafter referred to as the ITA].

that women disproportionately incur child care expenses. Moreover, while Iacobucci declined to find that the expense in question arose out of personal circumstances rather than business expenses (and in his judgment he is sensitive to traditional classifications of childcare versus the acknowledgment that the increased participation of women in the workplace has altered this characterization), however, he could not conclude either that the expense was business-related.[153] His opinion is based, primarily, on a straightforward reading of the statutory provisions themselves. Moreover, he concludes that to reexamine this particular provision would necessitate a revamping of the entire range of government responses to family and child care issues.[154]

On the other hand, Justice L'Heureux-Dube writing on behalf of herself and Justice McLachlin, takes the "contextual approach" to express the view that to disallow child care as a business expense clearly has a differential impact on women. She writes that "though ostensibly about the proper statutory interpretation of the Act, this case reflects a far more complex struggle over fundamental issues, the meaning of equality and the extent to which these values require the women's experience be considered when the interpretation of legal concepts is at issue."[155] Iacobucci's definition of "business expense" is derived from the experiences of those persons who have traditionally held positions in the commercial sphere--primarily men. This, she submits, is very much a "gendered" analysis which fails

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[153] *Symes, supra* note 151 at 731.

[154] *Ibid.* at 774.

[155] *Ibid.* at 786.

to take into account the dramatic and fundamental changes in both the labour market and the family structure. A majority of women are now in the work force. The interpretation of the law must change, according to L'Heureux-Dube, to coincide with altered and ever-changing societal contexts.

While for most men the responsibility for child care does not impact on the number of hours they work or their ability to work, a woman's ability to work at all may be completely contingent on her ability to acquire child care.

> "The ability to deduct a legitimate business expense that one incurs in order to gain or produce income from a business should not be based on one's sex. Any business person would be entitled to a deduction if he or she can prove that such expenses have been incurred for a business purpose. The reality, however, is that generally women, rather than men, fulfil the role of sole caregiver to children, and as such, it is they alone who incur and pay for such expenses....In many traditional family situations child care issues were not concrete business expenses for men in business, as most often their wives stayed home to care for their children."[156]

These real costs incurred by business women with children are no less real, no less worthy of consideration and no less incurred in order to gain or produce income from business. Moreover, she debunks the argument made by Iacobucci to the effect that "employed" persons and business people will not be treated in the same manner by pointing out that this is the very rationale of the Act itself. Business people get deductions such as office, transportation or meal and entertainment expenses, while employees do not get these deductions.[157] Because Justice L'Heureux-Dube was of the

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[156] *Ibid.* at 791.

[157] *Ibid.* at 803.

view that Symes should succeed on the basis of statutory interpretation, she applied section 15 only insofar as the values of equality it implies shape the determination of the issues in the interpretation of the Act. This interpretation, she suggests, should strive to break the "glass box" of female entrepreneurship which currently prevents business women from realizing their full potential.

With respect to the interplay of section 9(1) of the ITA and section 63 permitting child care deductions from a source, L'Heureux-Dube argues that the two sections should co-exist as opposed to one being used as a bar to the use of the other. In this case, the appellant wanted to deduct childcare expenses as a source deduction independent of section 63. Moreover, she objects to the outdated classification of section 63 as a "special tax allowance to working mothers." These provisions, she argues, were instated at a time when the legislature probably did not anticipate that women would enter the workforce in their present numbers. The current tax regime, she submits, is by its very nature both overtly and systemically discriminatory an perpetuates many inequalities, not just between men and women, but also between classes of taxpayers. As a matter of constitutional interpretation, therefore, sections 15 and 28 of the *Charter* should be used by the courts to ensure equality of treatment between the sexes

> "To disallow child care as a business expense clearly has a differential impact on women and we cannot simply pay lip service to equality and leave intact an interpretation which continues to deny the business needs of business women with children."[158]

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[158] *Ibid.* at 819.

Justice Iacobucci, on the other hand, concludes that there is no infraction of the appellant's equality rights because section 63 operates to permit the appellant to gain a tax exemption of some sort, even though it cannot be said to be a business expense. In a sense, therefore, the dispute between the all-male majority and the all-female minority is the use of language and characterization of what is and is not a "business purpose" per se.

Similarly, Justice McLachlin writes the dissent on behalf of herself and Justice L'Heureux-Dube in *Thibaudeau v. Canada*[159] which, whether correct in law or not, underscores the increased willingness of these women to provide a decision which recognizes the reality of women's lives. At issue was whether a provision of the ITA requiring a divorced wife to include maintenance payments in her annual income infringes section 15 of the *Charter*. The all-male majority determined that the impugned provisions did not impose a burden or withhold a benefit so as to attract the application of section 15(1). The fact that one member of the marital unit might a derive a greater benefit from the legislation does not, by itself, trigger a s. 15(1) violation. Of particular significance to the majority was the argument that the amount of taxable income is determined by the family law system and includes "grossing-up calculations" to account for tax liabilities incurred by the recipient. The amount of income tax payable therefore continues to be calculated on the basis of the couple.

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[159][1995] 2 S.C.R. 627 [hereinafter *Thibaudeau*].

Justice McLachlin, on the other hand, was not impressed by this argument because, she points out, the family law system does not work flawlessly to ensure, in every instance, that the appropriate grossing up takes place to compensate the custodial parent. She writes:

> "I conclude that the argument that the question of equality must be viewed from the perspective of the couple rather than the individual overlooks the individual inequalities which s.15 of the *Charter* is designed to redress; and that even if the matter is viewed from the standpoint of the couple, the unequal treatment is demonstrated."[160]

The custodial parent, usually the woman, is forced to include child support payments from which she gains no personal benefit. The non-custodial parent is then taxed only on his actual income less this deduction. The increased tax burden results from the artificial inflation of the custodial parent's taxable income.[161] The tax provisions in dispute overlooked the contribution of the custodial parent's income and financial contribution to the care of the children.

Inequality between the custodial and non-custodial parent, moreover, is exacerbated by the fact that the latter enjoys an automatic and absolute right of deduction of support payments while the former's ability to offset the increase in her taxes by obtaining an adjustment in support is unpredictable. The family law regime, in practice, does not apply the gross-up principle evenly, she notes. Furthermore, she argues that

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[160] *Ibid.* at 718.

[161] *Ibid.* at 711.

custodial parents, usually women, are generally subject to a lower tax rate than non-custodial parents which is less in accord with present reality and undermines the importance our society places on women attaining financial self-sufficiency. McLachlin also points to statistical evidence demonstrating that in the first year after a divorce, the standard of living of women and children falls by 73% while that of men increases by 42%. "Any attempt to break out of this cycle of poverty," she writes, "is discouraged by the fact that the higher the custodial parent's income, the greater the disadvantage suffered as a result of the inclusion in her income of child support."[162]

McLachlin concedes, at the end of her judgment, that the deduction/inclusion scheme was designed to improve the situation of the family upon divorce or separation and in many cases succeeds in meeting this objective; however, it does so at the expense of custodial mothers like Thibaudeau who suffers an unfair tax burden as a result of the statute's operation. For this reason, McLachlin proposes "reading down" the provision so that the deleterious effects suffered by this particular appellant are remedied. She therefore refers the matter of the constitutionality of the provision itself back to Parliament to deal with the practical implementation of the necessary modifications to the legislation. In fact, despite Thibaudeau's court loss, Parliament responded to her appeal by initiating the requested changes to the legislation.

The positions taken by both McLachlin and L'Heureux-Dube on both *Symes* and

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[162]*Ibid.*

Thibaudeau in opposition to the all-male majority appears to suggest that there is a dichotomy of "two solitudes" relating to gender differences in legal interpretation.[163] In *Symes,* Justice Iacobucci referred to the majority's "straightforward approach to statutory interpretation" basing his reasoning on what he believed to be Parliament's intention that s. 63 of the ITA comprehensively addressed the issue of child care expenses for both employees and self-employed people...therefore the provision was not discriminatory. His reasons, however, fail to address the issues raised by L'Heureux-Dube. The point, according to L'Heureux-Dube, is not that women are permitted to deduct child care expenses under an alternative provision of the ITA, the point is that the courts and Parliament need to see the legislation is objectionable because of the gendered categories it creates. Many Canadians have difficulty with *Symes* because the claimant was a wealthy business person who wanted access to a benefit not available to women employees. However, as L'Heureux-Dube pointed out, discrimination cannot be justified by pointing out other discrimination. The Court's role, according to this view, should have been to remedy the disadvantage suffered by businesswomen as compared to businessmen.

With respect to Thibaudeau's arguments, the women on the Supreme Court approached the issue of support payments, not from the legalistic perspective that the ITA discriminates in all instances, but from the more case-specific perspective that the provisions of the ITA were discriminating against this particular appellant in these

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[163] D. McAllister, "The Supreme Court in *Symes*: Two Solitudes" (1994) 2 N.J.C.L 248.

particular circumstances. This decision, therefore, highlights the women's improved ability to step outside of the objective paradigms of legal rules and principles to look specifically into the life circumstances of the individual before them.

Other Examples of Gender Differences on the Supreme Court

Another criminal case punctuating the differences between Justice L'Heureux-Dube and Justice McLachlin in their respective approaches to the concept of "sexual equality" itself is the decision of *R. v Hess; R. v Nguyen.*[164] The majority decision was written by Justice Wilson and included, *inter alia*, Justice L'Heureux-Dube. Justice McLachlin writes the dissenting opinion to take a more individualistic approach to equality whereas Justices L'Heureux-Dube and Wilson favour the "contextual approach." The case involved section 7 and section 15 *Charter* challenges to section 146(1) of the *Criminal Code* which made it an indictable offence punishable by a maximum of life imprisonment for a man to have sexual intercourse with a female under the age of 14 who is not his wife. The provision expressly removed the defence the accused had a *bona fide* belief that the female was 14 years or older.

The majority found that the impugned provision did in fact violate section 7 of the *Charter* because it deemed *mens rea* even where the accused may have taken all reasonable steps and therefore could not be justified under section 1 as a reasonable limit

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[164][1990] 2 S.C.R. 906.

on an accused's section 7 rights. Justice Wilson for the majority writes:

> "Our commitment to the principle that those who did not intend to commit harm and who took all reasonable precautions to ensure that they did not commit an offence should not be imprisoned stems from the acute awareness that to imprison a "mentally innocent" person is to inflict a grave injury on that person's dignity and self-worth. Where that person's beliefs and his actions leading up to the commission of the prohibited act are treated as completely irrelevant in the face of the state's pronouncement that he must automatically be incarcerated for having done the prohibited act, that person is *treated as little more than a means to an end.* That person is in essence told that because of an overriding social or moral objective he must lose his freedom even though he took all reasonable precautions to ensure that no offence was committed." [emphasis added][165]

Justice Wilson's adherence to the dignity of the accused echoes her reasoning in *Morgentaler, supra.* Her judgment with respect to the accuseds' section 15 argument, morever, is consistent with her written decisions in *Andrews v The Law Society of British Columbia* and *R. v. Turpin*[166] in which she advocated a contextual approach to equality. To illustrate, Hess and Nguyen submitted that section 146(1) of the *Criminal Code* also violated section 15 because it distinguished between potential accused on the basis that only men could be charged under the provision, envisaging that only females may be complainants. Wilson applied her argument from *Andrews, supra* as follows:

> "...we must not assume that simply because a provision addresses a group that is defined by reference to a characteristic that is enumerated in s.15(1) of the *Charter* we are automatically faced with an infringement of s. 15(1). There must also be a denial of an equality right that results in discrimination.
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> ...if the impugned provision creates an offence that involves acts which, as a matter

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[165]*Ibid.*

[166][1989] 1 S.C.R. 143; [1989] 1 S.C.R. 1296.

> of fact, can only be committed by one sex, then it is not obvious that s.15(1) of the *Charter* is infringed. In such a case there may well be a reason related to sex for creating an offence that can only be committed by one sex. I am of course fully aware of the dangers inherent in arguments that seek to justify particular distinctions on the basis of alleged sex-related factors. All too often arguements of this kind have been used to justify subtle and sometimes not so subtle forms of discrimination. They are tied up with popular yet ill-conceived notions about a given sex's strengths and weaknesses or abilities and disabilities. [emphasis added]

Implicit in the majority's reasoning is a desire to avoid trivializing the problem that the impugned legislation was designed to address, that is the reality that females are the typical victims of sexual exploitation. This brand of jurisprudence, therefore, recognizes the overall cultural and social position of women and seeks to redress the historic imbalance of power between the sexes.

Madame Justice McLachlin, on the other hand, approaches the equality rights question very differently. First, she and Justice Gonthier agreed with the majority of the Court finding that the impugned legislation violated section 7 of the *Charter.* They disagreed with the majority, however, on the equality rights issue on the basis of the definition of discrimination laid out in *Andrews, supra* as follows:

> "...discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."[167]

[167] *Andrews, supra* note 166 at 174-75.

McLachlin rejects the Crown's contention that although the impugned legislation distinguishes between men and women, this is not an "irrelevant distinction;" because men are not a "discrete and insular minority" which the *Charter* intended to benefit. According to McLachlin, this argument would take the provisions of section 15, and the judicial interpretation outlined in *R. v Turpin*[168] farther than is justified. Therefore, because section 146(1) burdens men in a way that does not burden women while also offering protection to young females which it does not offer to young males, McLachlin found that the provision was discriminatory.

Nevertheless, in applying the section 1 analysis to the legislation, McLachlin concluded that the purpose of the legislation, to protect female children from the harms which may result from premature sexual intercourse and pregnancy, was sufficiently important to justify it. She also saw the provision as important to combatting the problem of juvenile prostitution. Accordingly, there was a rational connection between the legislation and the harm it was designed to address as well as the imposition of strict liability. Moreover, she concluded, the objectives of section 146(1) could not be achieved with a lesser infringement of the accuseds' section 1 and section 15 rights.

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[168]*Turpin, supra* note 166 at 1331-33. Justice Wilson established that "...it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will in most but not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged."

Of the cases examined, the best examples of decisions which advance the argument that women will make a substantive difference in jurisprudence are the two economic rights cases. In *Symes* and *Thibeadeau*, there is a glaring difference in the approaches taken by the all-male majority and the all-female minority to the question of whether the ITA operates unfairly between men and women. The majority of the court, in failing to accept the argument of *Symes*, in particular, reveals that the business of judges has always been the business of men. This business, it is argued, suffers from men's stereotypical views of women and what women are supposed to do with their days. In this instance, the bias in question is that a woman is like any other businessman who is not enencumbered by concerns of child-care. The most interesting part of that case, however, is that the men on the court assumed that childcare concerns are spread between both parents when any working woman knows that this is typically not the case. *Symes* is the perfect example of the male majority not understanding the reality of women's lives to see how a piece of legislation, inoffensive at first glance, imposes an additional burden on half of the population.

CONCLUSION

The empirical research conducted in this paper demonstrates that there is a gender difference on the Supreme Court of Canada. This finding is consistent with similar studies conducted in the United States with respect to three different levels of American courts. The American studies, however, are primarily descriptive in their analysis and by and large, fail to provide an adequate theoretical explanation for the gender differences they located in their research. To compensate for this failing, this paper examined not only the commonly cited difference theory originated by Carol Gilligan, but also explored the group salience issues theory to explain why the gender difference became apparent with respect to issues with an equality component to them. This theory in addition to the theories of representation discussed in the first chapter, support the assertion that women judges will make a difference in the adjudication of legal questions. This difference is best explained by the fact that women approach equality issues differently because of their lived experience as women.

In theory, as well as in practice, there appears to be support for the proposition that women judges will make a difference in the adjudication of legal questions. Their representative function exceeds, apparently, a symbolic role insofar as they increase the potential of the court to appreciate arguments directed from a perspective other than that of the white, economically privileged male of European descent which represents the traditional demographic of the courts. This assertion that individual characteristics influence voting behaviour is not unique and is borne out by previous social sciences

studies unrelated to the question of gender. Therefore, this paper assumes that it is possible to extrapolate that finding into the context of whether a woman, by virtue of being a woman, would approach legal questions differently than men. While the empirical study provides evidence that there is a difference between men and women judges, the more difficult argument to make is what that difference looks like and whether it will work to the advantage of women's interests. The assumption that women judges will better represent women's issues is implicit in the writing of Sheilah Martin and others who advance the argument that the court system now suffers from gender bias because of the historical exclusion of women from decision-making functions. In other words, the court system will operate in a more balanced and gender-neutral fashion if women are better-represented on the bench.

Therefore, to test whether women judges will actually make a substantive difference in the law, a qualitative analysis was conducted. This analysis looked at the case law of the Supreme Court of Canada and compared it to the feminist legal theory of Catharine MacKinnon to determine whether the courts, in particular the women judges, were incorporating these theoretical tools into their reasoning. It was discovered that in some instances, the women judges were using feminist theoretical tools to look at the issues which especially affected women. The possible exception to this finding, however, were the judgments of Justice McLachlin when deciding legal rights questions. Justice McLachlin consistently examined legal rights claims from the perspective of due process and protecting the rights of the accused even where the rights of the accused were in

direct conflict with the claims being made by female complainants. This tendency distinguishes Justice McLachlin from Justice L"Heureux-Dube who displays more consistency in analyzing the law using theoretical tools most commonly associated with feminist theory and practice.

On the other hand, Justices McLachlin and L'Heureux-Dube displayed a particular solidarity with respect to the economic rights cases brought before the Supreme Court by women challenging the unfair operation of income tax legislation. In responding to the arguments of Thibaudeau and Symes, Justices McLachlin and L'Heureux-Dube demonstrated by the points they raised in their written decisions that they "got it," they understood what the two women claimants meant when they alleged that the ITA wasn't according them equal treatment within the established income tax regime. The arguments presented by Thibaudeau and Symes required the court to step outside the dominant paradigm of "fairness" to understand the substantive impact of the tax laws on individuals whose interests the legislature didn't contemplate at the time the legislation was drafted.

Presumably, Madame Justices McLachlin and L'Heureux-Dube approached the issues presented to them by Thibaudeau and Symes because of their unique ability to understand or sympathize with what it means to be caught in the bind of wanting to exercise ones intellectual skills and capacity in a work environment even while dealing with the responsibilities of looking after a household. This is a recognition of the practical reality that women are still burdened with more than their fair share of work in

the home environment. L'Heureux-Dube and McLachlin also understood and articulated that in a discretionary regime, family court judges do not always exercise their discretion fairly when applying common law rules, like grossing up support payments. The women appeared to understand these issues when the "guys" didn't appreciate the arguments being advanced by the women appellants. In other words, the all-male majority of the court was unable to escape the paradigm of maleness to view the arguments from the appellants position.

The other literature canvassed by this paper generally observes that women judges bring a different life experience to the way they decide questions which are directly related to the lived experiences of women claimants. This difference, it is submitted, has the potential to introduce greater balance into the decision-making of the court. This assertion is supported both by the quantitative and qualitative evidence presented in this paper. Women judges, it appears, do make a difference in the legal system if for no other reason than the fact that their prior absence resulted in one-dimensional approaches to legal questions.

The late Chief Justice of Canada, Brian Dickson, remarked about his former colleague, Madame Justice Wilson, that:

> ...she has succeeded brilliantly in shattering the myth that the law is not a domain for women. Through her contribution we have all come to see how much weaker our legal culture has been for the dearth of women lawyers and judges. That the quality of her contribution has made our previous failings in this respect so obvious is the ultimate measure of her success.[169]

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[169]B. Dickson, "Madame Justice Wilson: Trailblazer for Justice" (1992) 15 Dalhousie

Madame Justice Wilson specifically addresses the issue of the potential impact that women on the bench could have in her 1990 Betcherman lecture, "Will Women Judges Really Make a Difference?"[170] The answer to this question, she concludes, is that appointing women judges alone will not solve the problem of gender bias. The presence of women on the bench, however, will serve as part of educating the judiciary and increase the sense of representativeness as well as contribute to tearing down the difference between men and women by introducing a comfort level for women lawyers and litigants.

Wilson points to the feminist literature in Canada which she characterizes as:

> "...premised, at least as far as judicial decision-making is concerned, on two basic propositions: one, that women view the world and what goes on in it from a different perspective from men; and two, that women judges, by bringing that perspective to bear on the cases they hear, can play a major role in introducing judicial neutrality and impartiality into the justice system.[171]

The statistical study summarized in Chapter Three supports Wilson's contention that women will make a difference on the bench. This is especially true when the question being examined relates to the lived experiences of women.

In spite of the arguments made in this paper, however, the fact remains that there are several men on the Supreme Court of Canada who have written decisions which may

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[170]B. Wilson, *supra* note 78.

[171]*Ibid at* 514.

be viewed as "progressive" in the sense that they recognize the historically disadvantaged status of women in Canadian society. In fact, in certain instances, male members of the Supreme Court have sided with legal arguments constructed out of the theories articulated by Catharine MacKinnon and LEAF even where Madame Justice McLachlin has sided with the legal rights of the accused. Similarly, there is the argument that women judges, who live and work in a biased society, are subject to the same biased attitudes and therefore should not be relied upon to produce substantial change. Nevertheless, increased representation of women in official institutions in numbers proportionate to their numbers in society equates with principles of fairness and at least provides the potential to speak to women's issues in a more balanced fashion. As more women enter officially into these institutions they will continue to create a supportive network of ideas and beliefs that in combination with the symbolic value of their presence may result in a more equitable distribution of power and laws that reflect notions of equality.

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