BERYL LEVINE: NORTH DAKOTA'S FIRST FEMALE STATE SUPREME COURT JUSTICE

A Thesis
Submitted to the Graduate Faculty
of the
North Dakota State University
of Agriculture and Applied Science

By

Cody Benard Stanley

In Partial Fulfillment of the Requirements
for the Degree of
MASTER OF ARTS

Major Department:
History

May 2009

Fargo, North Dakota

North Dakota State University
Graduate School

Title

Beryl Levine: North Dakota's First Female State Supreme Court Justice

By

Cody Bernard Stanley

The Supervisory Committee certifies that this ***disquisition*** complies with North Dakota State University's regulations and meets the accepted standards for the degree of

MASTER OF ARTS

ABSTRACT

Stanley, Cody Benard, M.A., Department of History, College of Arts, Humanities and Social Sciences, North Dakota State University, May 2009. Beryl Levine: North Dakota's First State Supreme Court Justice. Major Professor: Dr. David Danbom.

The intent of this thesis is to explore the life and perspective of the North Dakota State Supreme Court's first female justice, Beryl J. Levine. The overarching question throughout this thesis is, whether or not, because she was the first, Levine added a new voice to the court. This analysis begins with a biography of Levine. This biography will illustrate how Levine's knowledge and world views were affected by the environment that she grew up and lived in.

The subsequent section deals with Levine's rulings on divorce cases. Levine had a unique perspective on divorce law; specifically in the areas of child custody, alimony and property distribution; she deviated from the court's majority on several occasions. The next part focuses on Levine's work to reduce gender discrimination in North Dakota. Levine worked to eliminate gender discrimination through many different methods. Once these three areas of Levine's life and work are looked at as a whole, it will be demonstrated that Levine added a new perspective to the North Dakota State Supreme Court.

ACKNOWLEDGEMENTS

There are several people I would like to thank, because without their help, this thesis would not have been possible. First, Dr. David Danbom, my advisor during my graduate career at NDSU, offered me his experience, wisdom and time. During my studies he showed, through example, what a true historian is. Next, I would like to thank Dr. Larry Peterson for serving on my committee, and for giving his insight into an early draft of the Marriage and Divorce chapter that proved to be invaluable. Special thanks are given to Dr. Christina Weber and Dr. Jim Norris, for serving on my committee, and for offering their unique insight which only added to the quality of my thesis.

I would also like to give special recognition to the extraordinary help and support that my fiancé, Erika, provided throughout the writing and research process. Without her constant patience and understanding I would not have been able to survive graduate school. Next I would like to thank all of my fellow graduate students for their collective support that helped me throughout my time at NDSU. Lastly I would like to thank my higher power for giving me the continued strength to muscle through life's challenges, and to remember that whatever I am dealing with, that this too shall pass.

TABLE OF CONTENTS

CHAPTER ONE

INTRODUCTION

Justice Beryl Levine was the first woman to be a member of the North Dakota State Supreme Court. Whenever someone is the first in her or his field there are many questions that arise. Some people ask why she got appointed, is it because she is a woman, is she a token, will she add anything to the bench, and the list could be added on tenfold. This work will address some of these questions.

I will be using Patricia Hill Collins' version of Standpoint Theory in order to better understand Levine's perspective. Collins developed four concepts that I have adopted for this analysis of Levine: Situated Knowledge, Subjugated Knowledge, Partial Perspective, and Outsider Within. Ultimately, through the use of Standpoint Theory, it will be illustrated that Beryl Levine was successful within the legal profession in articulating the position of women in North Dakota in a way that had never been done.

The source material for this work was challenging and enjoyable to attain. The core of it is a series of interviews I conducted between August of 2008 and February of 2009. The first was with Levine herself, and without it this project could never have been completed. Also of central importance was my interview with the Chief Justice of the North Dakota State Supreme Court Gerald VandeWalle. My interview with Justice Mary Maring further illuminated Levine's work on gender equality, in a way that without her interview, my work would have not been possible. Former North Dakota Governor George Sinner recounted the story of Levine's selection for the bench. Vogel Law Firm partner Maurice McCormick was willing to answer important questions regarding Levine's work when she was a lawyer with that firm. And finally, Sara Andrew Herman

gave valuable information on Levine's work toward reducing gender inequality in North Dakota, and Levine's involvement with the Commission on Gender Fairness and Equality in the Courts.

This analysis of Levine is broken down into three main chapters. The first one begins with a discussion of the history of female lawyers and judges in America. The next part of this chapter is a biography of Levine. This is done so that the reader can appreciate how rare a woman in Levine's position was, and still is. The next chapter deals with Levine's work in the area of divorce law and her views on marriage. This chapter's foundation is the history of the evolution of divorce and marriage in America. This foundation is needed so that Levine's work can be understood in its proper historical context. The following chapter deals with the many ways in which Levine worked to diminish the extent of gender-based inequality in North Dakota. This is a multi-layered chapter that covers a wide range of areas, and illustrates Levine's high level of influence within the North Dakota legal community and beyond.

In the end, all these areas paint a picture of a woman who had many identities in her life: women, student, mother, lawyer, judge, and citizen, to name a few. Her perspective was a new one on the court, and one that resulted in the court as a whole being improved because of its increased knowledge and appreciation of the diversity of the human experience.

CHAPTER TWO

BIOGRAPHY OF BERYL LEVINE

Women's history is continually growing and expanding as previously ignored topics within it are investigated by scholars. The study of female judges is one such area that has not received sufficient scholarly attention. Beryl Levine was North Dakota's first female State Supreme Court justice and was part of a wave of female firsts in the legal field in the early 1980s. To begin to understand her position within the larger history of female judges requires an understanding of the history of women lawyers and judges. Once this has been accomplished, a biography of Beryl Levine will be provided.

The role of female lawyers and judges in the United States is important to understand if one is to truly appreciate the continuing struggle for equality that women have waged in America. Female lawyers in America occupy a powerful position within society that enables them to speak for and defend women's rights, which have historically been ignored or, worse yet, denied. In conjunction with this elevated social status, they are able to add an important perspective to the legal profession that for most of America's history was absent. With each new perspective added to it, America's legal system moves that much closer to protecting the rights of all people in America.

The journey to a judgeship is a long and tedious process, and even today in the United States there are still only a few female judges. The route to becoming a judge starts when a person has earned the right to practice law. However, for women this right has not always been available. The battle that women have fought to attain this right has been long and arduous. It has only been within the last quarter century that women have finally been allowed to enter this field on a level equal to that of men. An understanding

of the tribulations and struggles women have undergone to enter the legal field is essential to one attempting to grasp the significance of Beryl Levine's role in North Dakota history and in women's history in general.

Two early examples of women who became lawyers, or the practical equivalent, were Margaret Brent and Gertrude James. Margaret Brent often argued her own cases in colonial Maryland's courts. She won several, and in 1647 was named the executrix of Governor Leonard Calvert's estate. In 1650, Gertrude James, in Kent Island, Maryland won a court case protecting her property rights. James went on to act as counsel for herself and others on several occasions. Brent and James are important to acknowledge because they represent the unfulfilled potential of women within the American legal system.[1]

In order for women's legal status to advance, two traditional legal views of women had to change. The first, *fémme couverte,* was a married women's legal status under English common law and it meant that once a woman entered into a marriage she was no longer an independent legal entity. In the eyes of the court, the only position she occupied was as her husband's agent. The second was *fémme sole,* which applied to a single or a widowed woman. *Fémme sole* allowed a woman to own property, make contracts and stand before a court as an individual. However, even under *fémme sole* a woman was still limited as an independent legal entity. These legal views of women were used as the primary justification for keeping women out of the practice of law. If a woman was not an independent legal entity herself, with no legal rights, then she could not be expected to be a legal representative of another person.[2]

These were the prevailing legal doctrines in America until the mid-nineteenth century. The end of *fémme couverte* began with the introduction of married women's property rights acts in the 1830s and 1840s. Married women's property rights acts were not created for feminist purposes. The primary reason was to protect the family wealth from the husband's bad decision-making capacities. Adding to this was the boom and bust nature of the American economy at this time. Married women's property rights were seen as a place where the family property could be invested in a time of economic crisis, so that once the crisis had passed, it could be utilized by the family.[3]

The lines separating the rights delineated in *fémme couverte* and *fémme sole* also began to be attacked by the first wave of feminism. This organized defiance of male dominance and oppression began with the Seneca Falls Convention in 1848, but it was not until after the American Civil War that there were a handful of early successful legal challenges to male domination.[4]

Arabelle A. Mansfield was admitted to the bar in Iowa in 1869 and in the process became the first women to be allowed to practice in any state. Mansfield's success was not replicated elsewhere, because, also in 1869, Myra Bradwell of Illinois was barred by the Illinois State Supreme Court from practicing law in that state. In 1873 the United States Supreme Court upheld the decision. The court ruled that it was a state's right to decide who could practice law within its borders. Furthermore, the court stated that it was not women's natural position to be in the public sphere. In the words of the court:

> The civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man

> is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. [5]

This quote is important not simply for its legal implications, but because it represents the prevailing concept of women's proper role within the separate spheres doctrine. Women have not only had to fight against legal bondage, but they have had to fight against the accepted concept of divine ordinance.[6]

The legal repression of women was not uniform in America due to the federal system, which gives the individual states the power to create their own laws and regulations. In Minnesota in 1877, Martha Dorsett was able, through legislation, to have the law that stated that only men could be a part of the legal profession amended so that the word male was no longer in it. Dorsett used this changed law when she was admitted to the Minnesota bar in 1878. In the 1870s there was also some success at the federal level. By 1874 Alta Hulett and Belva Lockwood had been allowed to practice before two U.S District courts. In 1879 Belva Lockwood also successfully fought for a federal statute that allowed women who had been able to practice before the highest court in their state to argue in front of the United States Supreme Court. She became the first women to do so.[7]

The movement of women into the legal profession had begun; the next step would take women to the position of judgeship. The first known female judge was Esther Morris. Morris was a Justice of the Peace in South Pass Mining Camp in the Wyoming Territory in 1870. Carrie Kilgore became the first female member of a state judiciary in Pennsylvania in 1886. Florence Ellinwood became the first elected female judge in 1921 when she was elected to the Court of Common Pleas in Cuyahoga County, Ohio. She followed this up in 1922 by becoming the first female state Supreme Court justice in Ohio. In 1934 she was appointed to the United States Court of Appeals for the Sixth District. In 1939 there was a movement to have Franklin Roosevelt appoint her to the United States Supreme Court, but he did not think that that nation was ready for that move. By 1950 there were 29 states with female judges. Lorna Lockwood of Arizona was the first female appointed to that state's Supreme Court in 1961. Lockwood was the Chief Justice from 1961 to 1965, and served on the court until 1975.[8]

These few influential women represent the rare times that women were able to break through the gender barrier and achieve notable status before the 1980s. They may have been judges, but they were still viewed as anomalies and the separate spheres doctrine continued to be applied to them in a couple of ways. They were usually placed in charge of divorce courts or small claim courts and juvenile courts, and they were not given the responsibility of trying major cases. Furthermore, the progression up to this point was very erratic and women made few inroads on the east coast or in major centers of political power.[9]

By the 1970s the number of women serving on the bench at any level was still very small. In 1973 fewer than 400 women were judges in the United States. Less than half of these female judges were on a level higher than that of county court. North Dakota lagged behind the rest of the nation because no female lawyers practiced there until Helen Hamilton in 1905 and no judge served there until 1979 when Ann C. Mahoney became a county court judge.[10]

Between 1977 and 1980, there was a forty-five percent increase in the number of women on the bench. This nationwide movement was capped off by the appointment by Ronald Reagan of Sandra Day O'Conner to the United States Supreme Court in 1981. Beryl Levine was a part of this nationwide movement in the late 1970s and early 1980s of women being the firsts at every level of judgeship. With a historical framework of women lawyers and judges established it is now possible to outline Beryl Levine's life up to her appointment to the North Dakota State Supreme Court.[11]

Beryl Levine was born on November 9, 1935 in Winnipeg, Canada. She was the second oldest child with two younger sisters and one older brother. Her father, Maurice Jacob Choslovsky was a Russian Jewish immigrant, and her mother, Bella Gutnik was Canadian. Neither of her parents attended college, but this did not stop them from creating and maintaining a comfortable middle-class home for their family.[12]

Levine's mother was her primary role model in her youth and young adulthood. In interviewing Levine, the important role that her mother played in maintaining the household was obvious due to the affectionate, yet strong, way in which Levine still described her mother's leadership and guidance. Guidance counselor was the essential

role that Levine's mother performed in the lives of all of her children. Levine's mother was what today would be called a traditional stay-at-home housewife. She took care of the children and maintained the home while her husband worked, and any activities in which she engaged still had some connection to the home or the children. Levine's father, Maurice, a small business owner who sold and bought scrap metal, was the other pillar of the Choslovsky household who also motivated the children to succeed.[13]

The desire for and support of education and knowledge in general was stressed a great deal by Levine's parents. Beginning when she was a teenager, Levine knew that she would attend college when she was finished with high school. In 1952 she began to attend the University of Manitoba, while still living at home with her parents, as was the custom of the times.[14]

In early 1955 Beryl meet her future husband Leonard and they married three months later. Soon after this, the realities of being a young married woman in the 1950s forced Beryl to put her education on hold for her husband's career. In his desire to become a doctor Leonard needed to move in order to go to medical school. Compounding this were her responsibilities as a young wife who in 1956 gave birth to her first child. For approximately the next ten years Beryl's primary job was that of caretaker of the Levine household. She was responsible for her children's primary care and she also maintained the house while her husband furthered his career. Beryl did not totally forgo her collegiate aspirations, because she took a few independent study classes now and again. However, unless she moved back to Winnipeg, first from Grand Forks and later Fargo, for a few key classes, she could not earn her bachelor's degree.[15]

In 1963 two events occurred that were fundamentally important in her ultimately becoming a lawyer. First, during that summer, Levine and her young children moved in with a friend in Winnipeg so that she could finally finish her undergraduate degree. All she had left was two philosophy classes that had to be taken at the University of Manitoba. She passed these two classes and by the beginning of 1964 she had earned a Bachelor's degree with a major in Philosophy and a minor in Political Science.[16]

The second major event of 1963 for Levine occurred when she read *The Feminine Mystique*. Written by Betty Friedan and published in early 1963, *The Feminine Mystique* awoke thousands of women's minds to realities and possibilities that they had never contemplated before. Beryl Levine was one of these women.[17]

Levine can still recall the time and place she first read *The Feminine Mystique*. She was sitting on a beach in Gimli, Manitoba while her children played nearby. As she read the book she realized that Friedan was talking directly to her, explaining exactly what was happening to Levine and countless other middle class women. According to Levine, the problem middle class women faced was that they felt guilty about wanting more out of life. By Levine's own admission she had a good life and a husband who cared for her and gave her whatever she needed. However, mentally her "brain was atrophying," and Friedan gave her feelings the legitimacy she desired. In order to stop this mental atrophy, women needed to find something beyond the confines of the home to satisfy them. This did not mean that housewives did an unimportant job; it just meant that some women felt very unfulfilled intellectually. However, Levine still had responsibilities as a mother and wife that she could not set aside. She continued to be a

housewife, making sure that her children had the same opportunities for education she had engaged, while she waited for the circumstances to allow her to begin her own career.[18]

It should be noted that Levine did not have the practice of law singled out from the start as the field she wanted to pursue. There were no other members of her family who were in the law or politics. Levine always had a general interest in current events and the desire to somehow make the world a better place, which she attributed in larger part to her pragmatic beliefs. What she came to realize over the next few years was that the field of law had a great impact on the everyday lives of many people, and she saw that lawyers had a great opportunity to help people resolve life's problems.[19]

It was at this time that the Levine family decided to not move back to Canada and to stay in the United States permanently. A primary motivator for the move was that Canada had just introduced what is in today's popular culture called "socialized medicine" and there was a great deal of apprehension in the Canadian medical community as to what this meant for the practice of medicine. Leonard wanted to move to California, but this would have been too far away from home for Beryl. North Dakota was settled on as a compromise because of their relative familiarity with the region and its close proximity to Winnipeg.[20]

By 1970 Levine realized that she had done her primary job as a mother and that her children were molded and well on their way to being successful young adults. With this job done, she began, with her husband's full support, looking for the next step in life. Levine realized that if she became a lawyer, she would have an opportunity to satisfy the

feeling of not having a fully complete life as described by Friedan in *The Feminine Mystique* and she would be able to put her pragmatic philosophy of resolving conflicts to use.[21]

Once Levine decided to attend to law school she met with Robert K. Rushing, the dean of the School of Law at the University of North Dakota from 1969 to 1979. In the conversation with Dean Rushing, Beryl did not meet direct opposition to entering the School of Law, but she did not receive any support, either. This conversation must be looked at from both points of view. From the dean's perspective, here was this doctor's wife in her mid-thirties who all of a sudden wanted to go to law school. To him, she may have appeared as just a bored woman that was trying to find an interesting way to fill her time. It was his job to make sure that only serious candidates were admitted. However, from Levine's perspective she was ready for the challenge, and was in a place in her life where she could tackle such a job.[22]

When Levine entered law school in 1971 there were only nine women in her class and this number dwindled to six by the time she graduated in 1974. Levine soon realized the magnitude of her decision and the effect it had on her family. First, in order for the Levine household to continue functioning in her absence, they had to hire a housekeeper. Next, Levine had to accustom herself to the seventy-five mile drive from Fargo to Grand Forks, which she had to make every day. Probably her toughest challenge however, was understanding the language that was used in the legal profession. By her own admission it took her the better part of her first year to fully understand and be comfortable with that language.[23]

When asked if she experienced any gender-based discrimination in law school Levine had an interesting answer. When she entered law school Levine was about ten years older than the other women in her class and, in addition, her hair was prematurely turning white. These two things combined made her appear more like a safe maternal figure to the men in law school, and not as a female who was trying to encroach on a male-dominated field. However, the male students viewed the other female students as competitors and not as equals.[24]

By graduating first in her class in 1974, Levine proved that she was very serious about her studies and that a woman could do just as well if not better than man. After graduation she began working at the Vogel Law firm in Fargo. Her specialization was family law, an area in which many of the first female lawyers practiced. The primary reason that Levine was hired at the Vogel Law Firm was that she graduated so high in her class. Maurice McCormick, a colleague of Levine's at Vogel and a partner who voted in favor of offering her a job, made this abundantly clear in an interview. There were a couple of firm members who had their doubts about her ability to be a lawyer and a mother at the same time. However, this question was rebutted immediately by Senior Partner Mart Vogel, who stated that since she had just finished three years of law school, and had graduated first in her class, and was a mother, being a lawyer would be easy in comparison. This is another example of where Levine's high personal academic standard enabled her to succeed.[25]

While working at the Vogel Law Firm, Levine was not singled out for special treatment because she was a woman. Like many other young lawyers, she took the

second chair in many cases the firm had. This was done so that young attorneys could learn from a more experienced lawyer the skills needed to succeed as a litigator. Levine did not practice solely in the field of family law; she practiced in business and malpractice law as well as several other fields. She even argued a couple of cases before the North Dakota State Supreme Court. All these experiences combined added to her understanding of the law.[26]

Levine further added to her legitimacy as a lawyer by consciously holding herself up to a high academic standard. She realized that as one of the few women in the law her actions would be closely scrutinized, and that if she failed, her failure could be used against other women trying to enter the law. However, there was a positive side to this double standard; because her work was exceptional it meant that she became known not just for being a woman lawyer, but for being a good lawyer.[27]

The ultimate opportunity for her to illustrate that women were capable of working at every level of the law came at the end of 1984 when two openings appeared on the North Dakota State Supreme Court. The first appeared in November with the retirement of Justice Vernon R. Pederson, and the second came in December with the sudden death of Justice Paul M. Sand. These two openings on the court presented an unique opportunity for the newly elected Governor George Sinner, who had just defeated the incumbent Governor Allen Olson, to mold the bench in a way that he deemed appropriate to his judicial vision.[28]

The Judicial Nominating Committee produced a list of eight candidates for Governor Sinner to choose from. Levine had been practicing law for ten years by this

time and she knew that she had the experience necessary to be a judge, so she applied for one of the openings. She desired to be a judge because of the unique opportunities that it presented for her as a woman and as a lawyer. The court up to this point had been composed only of men, and because of this the court viewed the world only from the male perspective. This does not mean that the court was wrong in its observations, just that it was limited in understanding the human experience. Levine, because of her life experiences as a housewife, then as a female law student, and later on a lawyer, knew that women were not represented adequately in the law, and that this was the perfect opportunity to change that.[29]

Governor Sinner thought that same way about Levine's legal expertise, and also wanted to add a female voice to the bench. Sinner wanted to advance women's rights in North Dakota. The 1970s and early 1980s were a time of great advancements for women's rights and Sinner believed that North Dakota needed to stay in step with the rest of the nation in this area. There was some pressure from the Democratic Party to nominate a woman to the court, but the primary impetus came from Sinner himself. The governor was influenced by his Catholic faith and the inequality that he saw within it; the word Sinner used to describe women's position in the church was "shameful." Also, he saw that women in society in general had never experienced equal protection under the law. Sinner was going to nominate a woman even before Levine's name came up.[30]

Why Governor Sinner choose Beryl Levine is important in illustrating that hers was not a token appointment and that she represented the best candidate produced by the North Dakota legal community. The right judicial temperament for a court was the

primary characteristic Sinner looked for in all of his judicial appointments. What this meant was that the candidate did not identify himself or herself with an issue that could cause public controversy, and Levine filled that bill. Sinner believed that when a judge made himself or herself the center of an issue, it took away from his or her ability to serve the people. The second sentence of the Declaration of Independence states "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." Sinner saw Levine as a judge who fully represented the idea of securing the rights of the people due to the fact that she represented a section of the people which historically were silent in the law. Through this increased representation, the court would add to its legitimacy.[31]

Sinner's belief on this point was so strong he went against the pressure that he received from some members of the Democratic Party. Some in the party wanted Sara Vogel, a prominent lawyer in the North Dakota legal community, to be nominated instead of Levine. Sinner did not believe Vogel's judicial temperament was in line with what he saw as being the best for the state, and he went with what he wanted and not what a vocal section of the party wanted. Also, Levine had the ideal personal and political connections to make her known in the circles in which Sinner traveled. Sinner's personal legal councilor was John Kelly, who also worked at Vogel Law Firm, and Vogel Law Firm also represented Merit Care Hospital, where Levine's husband Leonard worked. Because of these personal connections, Sinner had deeper and more complete understanding of Levine's work ethic and intelligence.[32]

Governor Sinner informed all of his judicial appointments through a phone call as soon as he made his decision. The governor called Levine on the morning of January 16, 1985, to ask her to be the next member of the North Dakota State Supreme Court. Her son David answered the phone, realized that it was the Governor, and handed the phone to his mother. The phone call was short and to the point, and culminated in her telling the governor "I thank you governor and I plan to spend the rest of my career proving that you made the right decision."[33]

Just because Beryl Levine was the first female judge on the North Dakota State Supreme Court does not mean that she affected the court any differently from the way any other new member did. What made her have a lasting and profound impact on the court was, first, her ability to show that women had been historically overlooked in the law. And second, that once she did this, she was able to show that adding a new perspective to the court was positive for all of North Dakota.

---

[1] Larry Berkson, "Women on the Bench: A Brief History," *Judiciary* 65:6 (Dec-Jan 1982), 287-288.

[2]Sophie H. Drinker, "Women Attorneys of Colonial Times," *Maryland Historical Magazine* 56:4 (December 1961): 335-6.

[3] Joan Hoff, *Law Gender & Injustice: A Legal History of U.S. Women* (New York: New York University Press, 1991), 120-130.

[4] Ashlyn K. Kuersten, *Women and the Law: Leaders, Cases, and Documents* (Santa Barbara: ABC:CLIO. 2003), 13-16.

[5] *Bradwell v. Illinois*. 83 U.S. 130 1872.

[6] Kuersten, *Women and the Law*, 16-17.

[7] Phyllis J. Reed, Bernard L. Witlieb, *The Book of Women's Firsts* (New York, Random House. 1992), 267-68, 288-89; Berkson, "Women on the Bench" 288-9.

[8] Ibid,.

[9] Ibid,.

[10] Ibid,.

[11] Ibid,.

[12] Beryl Levine interviewed by author, August 21, 2008, Bismarck, North Dakota (recording in the possession of author).

[13] Ibid,.

[14] Ibid,.

[15] Ibid,.

[16] Ibid,.

[17] Ibid,.

[18] Ibid,.

[19] Ibid,.

[20] Ibid,.

[21] Ibid,.

[22] Ibid,; The University of North Dakota, *Deans of the University of North Dakota School of Law*, http://www.law.und.edu/Alumni/deans.php, accessed December 28, 2008.

[23] Beryl Levine interviewed by author, August 21, 2008, Bismarck, North Dakota (recording in the possession of author).

[24] Ibid,.

[25] Ibid,; Maurice McCormick interviewed by author, February 4, 2009, Fargo, North Dakota (recording in the possession of author).

[26] Ibid,.

[27] Beryl Levine interviewed by author, August 21, 2008, Bismarck, North Dakota (recording in the possession of author).

[28] Randy Bradbury, "Fargoan and Minot Man Named ND Justices," *Fargo Forum*, January 18, 1985, A1&A10.

[29] Beryl Levine interviewed by author, August 21, 2008, Bismarck, North Dakota (recording in the possession of author); Randy Bradbury, "Fargoan and Minot Man Named ND Justices," *Fargo Forum*, January 18, 1985, A1&A10.

[30] George Sinner interviewed by author, October 1, 2008, Fargo, North Dakota (recording in the possession of author).

[31] Ibid,; United States of America United States Declaration of Independence

[32] Ibid,.

[33] David K. Levine, "Justice Beryl Joyce Levine: Behind the Scenes," *North Dakota Law Review* 72 (1996): 1053.

CHAPTER THREE

JUSTICE LEVINE'S ROLE IN MARRIAGE AND DIVORCE LAW

During Justice Levine's career as a lawyer, she practiced in several fields of law, but spent a significant amount of time and energy in family law. Levine handled divorce cases, and the many complicated issues that come into play when a marriage ends. On her appointment to the North Dakota State Supreme Court in 1985 by Governor Sinner, she brought knowledge of this field with her to the bench. Previously, there had not been a justice with her distinctive life experiences and views of the world on the court. Patricia Hill Collins' version of Standpoint Theory is a uniquely valuable tool with which to examine Justice Levine's ideas and legal philosophies, and how she was able to shed light on issues for the court in ways that had not been before.

This chapter will place Levine's work in the larger picture of the history of marriage and divorce and show the originality of her perspective on the North Dakota State Supreme Court, when compared with the prevailing court doctrine. This chapter is divided into three main parts. The first section of this chapter will be a history of marriage and divorce leading up to its current status in the United States. This is an important foundation that will allow the effects of Levine's work to be better understood. The next part of this chapter will be an examination of Patricia Hill Collins' Standpoint theory. The concepts of Outsider Within, Subjugated Knowledge, Situated Knowledge and Partial Perspective, drawn from Standpoint Theory, are important tools that will be used to examine Levine's work. Standpoint Theory will be used throughout this examination in order to explain Levine's work, and the new perspective she brought to the bench. The chapter concludes with an examination of Levine's views on marriage

based on an interview with her, and examination of her seminal decisions. In the end, it will be shown that her perspective on marriage and divorce was distinctly new to the North Dakota State Supreme Court.

To begin with, what is marriage? The simple answer is that marriage is whatever the majority of a society's population says it is. Today in America the most common belief is that marriage should be based on the love that two heterosexual individuals have for each other. However, the idea that love is the basis of marriage is a very new concept in the history of marriage. Many scholars consider the love-based marriage idea to be the revolutionary change in marriage of our time. Furthermore, the debate about who can be a part of a marriage is currently in a state of flux. In order for the existing issues to be understood and to place Justice Levine's work in a historical context, a history of this institution must be recounted.[1]

It should be noted that this history of marriage will not cover all social and economic classes of people in the United States. It will be a general examination of the main ideal marriage concepts that a majority of society holds. It has not been uncommon for members of society to be unable or unwilling to conform to the marriage models discussed. However, because they are the dominant models they affect the legal constructs of marriage the most, and are important to understand when examining Levine's work in marriage and divorce law.

To understand marriage and why it is a basis of societal organization, one needs to start with an explanation of the legitimacy and power of marriage as an institution. Marriage was, for most of history in the western world, the principle construct that

organized society and established norms and customs by which people lived. The actual ceremony that represented the union between a man and a woman has changed radically in the past 1,000 years, as has the source of that legitimacy. However, in the United States the individual states have had and still do have the authority to set the terms and conditions of who can and cannot get married.[2]

To comprehend where many of the ideas about marriage that exist today began, one should start by looking at the state of marriage in the late seventeenth and early eighteenth century. In English Common Law, which is the basis of American law, natural law and the theory of contract were two concepts that played a significant role in the development of the modern idea of marriage. These two ideas of how legal systems should be based dominated the legal debate on marriage and divorce and effected many other areas of law as well. It was at this time that the idea of marriage as a contract began to emerge. However, unlike today where a contract's only basis is temporal law, at that time the contract was based on a higher law. This higher law was natural law, which also stated that there were specific roles men and women should play in a marriage. This idea of natural law reinforced the idea of *coverture* and also the division of roles along gender lines.[3]

In the west, marriage before the late nineteenth century was usually designed to create a union between two sets of unrelated families, in order to produce a new kinship-network. Love was not a reason for this union. Usually either economics, politics or some combination of the two was the rationale for a marriage. Even for the lower class,

marriage had an important financial impact on the long term economic trajectory of the family.[4]

Ideas, such as natural law and the theory of contracts, were not the only reason for marriage's existence; people desired, and still desire, to marry and be a part of this institution as a way of showing their feelings for one another. The personal desire to be a part of marriage is an important concept to understand because, as mentioned before, it is the one area of marriage that has undergone the most change in the last century.

The personal goals of the marriage varied depending on the social class of the families. The upper class used marriage as a tool for creating political alliances between powerful families. Marriage helped keep the peace among the powerful families. Often a woman would be given as a peace offering that would physically cement the bond between the two families. The children of this union would represent this desired peace, but would also be the vessels of a family's union.[5]

As a tool for maintaining power, marriage played a fundamental role in deciding who did and did not have power. The offspring of a couple were the means of making sure that the family's legacy and position would last. However, if a child was conceived out of wedlock, then that child would not be recognized by the law as legitimate. This illegitimate child would not be a part of the kinship that was created in the socially accepted marriage. This was why a person's status as legitimate or illegitimate had such a profound impact on his or her life. Children were one of the many ways in which marriage created and controlled power in society and vice versa how society was able to control children.[6]

The upper classes were not the only ones that used marriage as a means of establishing the roles and expectations that women and men were to play in society. The lower classes viewed marriage as the economic tool for maintaining what wealth they had. Often a marriage was decided on the basis of whether or not the union would create a compatible economic situation that would have a positive effect for both families.[7]

The main vessel of this economic exchange was the dowry given to the groom by the bride's family. The dowry was often the largest economic infusion of goods that the women would bring to the marriage. This was one of the main deciding factors that a husband and his family had to weigh when looking for an acceptable woman to add to their family.[8]

The economic union of the man and the woman produced and reinforced the gendered division of labor. Before the nineteenth century the economic dynamics of the husband and wife were not as off balanced. They both worked in different areas of the family economy in order to produce the necessary goods and services that would allow for their continued existence. Before the Industrial Revolution everything within the domestic economy was divided along either gender or age guidelines. This was true whether or not the family engaged in farming, textile work, or another craft. Each person knew his or her role to play and there was little to no opportunity to change the position that one was dealt.[9]

To describe how marriage functioned until the mid nineteenth century, Ernest Burgess, a sociologist from the early twentieth century, developed the idea of the Institutional Marriage. An Institutional Marriage was one based in unyielding formal

statutes and religious ideas bound together to encourage it to fulfill its role as the basic unit of social organization. However, by the end of the nineteenth and beginning of the twentieth century marriage began to transform into the Companionate Marriage model. This was where marriage, ideally, became based on egalitarian ideals, and started to allow a level of self expression. This shift in the idea of marriage was not a clean and definitive transformation; companionate marriage still had a strong overlay of institutional marriage, resulting in a slow evolution.[10]

Divorce at this time was allowed only under extraordinary circumstances. In the United States, divorce was predominantly a secular affair with religious overtones. The most common ground for divorce was the couple's inability to produce children. Once again, the larger role that marriage played in producing children within the dominant social system, more often than not, trumped any personal feelings the couple had. Abandonment was the other acceptable grounds for divorce. This typically occurred when a man would abandon his wife. The wife needed to be considered divorced from the husband after a certain length of time because she had her role as a mother to play and without her husband she could not fulfill it. In addition to this, without the husband the wife needed to be legally independent again, so that she could control the family property or remarry.[11]

The ideas that constructed marriage began to change with a combination of events that would fundamentally change not just marriage but the whole western world. The first event that shifted the ideas of marriage was the industrial revolution, which radically changed the way people earned a living. Now it was possible for a much larger number of

people than ever before to leave the family setting and earn an income in an urban locale. This did not mark the end of marriage as primarily an economic and political institution, but it did give people the mobility they needed in order to start down the road to the love-based marriage model, which developed in the late-nineteenth and early-twentieth century.[12]

Marriage changed to better conform to this new economic and social situation. Even though a majority of Americans still lived in rural settings, these changes had a much deeper impact in the twentieth century once a majority of the population began to live in urban areas. The children of the marriage were often put to work in the factory to earn a wage that was collectively added to whatever the rest of the family earned. The wife in the family took care of the house and raised the children who were not old enough to take care of themselves. This family structure usually applied to the working classes, and is the main focus of this work for two reasons. First, working class Americans were the statistical majority until World War One. And second, due to their numerical majority, any changes within their social class tended to have a ripple effect on the rest of society.[13]

The new family arrangement, combined with the idea of natural law, led to the creation of a new conceptualization of the separate spheres doctrine in relation to men and women. Women were seen as sexually pure individuals who were to be the regulators of their husbands' morality. This was known as the cult of female purity. It came to be a deeply engrained idea in society about how women should act, and did not

change until the mid-twentieth century with the sexual revolution of the 1960s, and the introduction of liberal divorce laws.[14]

It was also during this time that the view of women as the natural caretakers of small children rose to a higher level of acceptance in society. The reason that women gained control over the younger children was that they were not of economic use to their father any more. Before the industrial revolution, when the economics of the family were based on the home, young children performed important tasks that contributed to the creation of wealth for the family. Now with the increase in importance of factory work, the children had to reach a certain age before they became economically important. They only became economically connected to their father once they got older. This was why it was thought that older children were naturally meant to be with their father. Out of these ideas grew the Tender Years Doctrine in divorce law, which stated that young children, usually under the age of nine or seven, were naturally supposed to be placed with their mother because of the mother's natural ability to better handle small children. Then when the children got older it was the fathers' right to have the children. This doctrine was prevalent well into the middle-too late-twentieth century.[15]

The idea of separate spheres was also designed to keep in check the radical concept of individualism, which was strongly elevated in society by the American and French revolutions. These events were the culmination of enlightenment ideas of individual freedom and the right to achieve happiness in one's life. Nevertheless, the social construct of marriage was able to avoid any radical change because the economics of the time did not allow women to exist outside of the established spheres to which they

were confined. The separate spheres doctrine also asserted that men could, and should, work for success in their lives but women, due to their nurturing and weaker abilities, were to stay in the home.[16]

Throughout the nineteenth century, marriage and divorce rates in the United States leveled out, no longer continuing upward as they had; along with this was a decline at the fertility rate. However, with the commencement of the women's rights movement in the Seneca Falls Convention, and the devastating social results of the American Civil War, marriage and divorce went through a dramatic shift in American thought and action.[17]

The legal reasons for divorce began to be expanded in the nineteenth century. Divorce came to be justified for adultery, desertion, failure to provide for one's wife, imprisonment, extreme cruelty, a wife's denial of conjugal rights to her husband, and drunkenness. Even these were often difficult to prove, and their introduction was not for the benefit of the partners, but to protect the economic situation of the family. If one member of the marriage did not perform his or her specific role, then the marriage could be ended in order to save the partner who did perform his or her role, as well as any children that the marriage produced.[18]

Between 1900 and 1920 the women's rights movement and the ideas of personal happiness and liberty combined to create the socially constructed idea of a love-based marriage. Loved-based marriage would be the fuel of the divorce revolution in the later part of the twentieth century. However, between 1900 and 1920, for the first time, American women in large numbers had the economic ability to pursue their own desires

outside of their parents' home and without a husband. Along with this came the deterioration of clear cut gender lines. Women and men were still supposed to conform to certain ways of acting and thinking, but there were more and more examples of women not acting in traditional ways and following their own will. This was aided in large part by the liberalization of sexual mores and increased use of birth control that gave women freedom they had not had before. This was a time period were the changing perception of marriage combined with greater economic prospects to allow women new opportunities in their lives.[19]

Global events did not allow for this revolution to continue. The crash of the United States Stock Market in 1929 and the ensuing Great Depression often kept people married out of economic necessity when before they would have divorced. However, World War Two and the economic windfall that it produced for the Untied States created what is today in popular culture commonly called "the golden age of marriage."[20]

Divorce and marriage in the 1950s was out of step with the overall historical trend of divorce and marriage in the United States. The rate of divorce, on average, since the Civil War rose at about three percent a year; during the early 1950s it leveled off. The age at which people married decreased, and the size of the average American family increased. Also, during the 1950s television use expanded dramatically across America. Televisions showed millions of Americans what the "ideal" family was through such shows as "I love Lucy" and "Leave it to Beaver." These shows at their core reinforced the ideal image of a stable heterosexual family that was meant to stay together forever;

the reality was starting to prove this wrong. Starting in the late 1950s divorce rates began to increase once again. However, divorce still had to be based on fault.[21]

Fault-based divorce was all that was available in the 1950s and 1960s. It should be noted that it varied a great deal from state to state and this analysis is a general overview of legal trends. Fault-based divorce had a profound impact on the settlements that came out of divorce cases. The innocent party was, in reality, usually no more innocent than the guilty party. However, the innocent party had more negotiating power because the law would rule in his or her favor. Most of the time the wife was the innocent party and the husband was the guilty party. In this situation the wife had less freedom to get a divorce when she wanted to, but when it did happen she was usually left in a better economic position. Because of the legal difficulty of getting a divorce and the social stigma still attached to it, this time period is often regarded as the most stable time in the history of marriage in the United States.[22]

There are a couple of events that occurred between 1964 and 1970 that fundamentally shifted the nature of divorce and in so doing shifted marriage as well. The first was the Civil Rights Act of 1964, which listed sex as one of the grounds on which employers could not discriminate. The second event was the overall economic downturn of the 1970s which forced women to enter the work force in ever increasing numbers and in previously male only fields. The one-income household was no longer a valid reality in America for people in the middle and lower economic classes; it now took two incomes to get what one used to. Combined with this was an increase in what people expected materially out of life.[23]

The increase in women's participation in the work force continued from 1980 to 2000. In 1980 women under the age of 55 had an employment rate of 64 percent; in 2000 it was 76 percent. The number of working mothers increased as well. In 1980, 45 percent of women with children under six worked; this number rose continually until 2000 when it was 63 percent. The continued trend in women's participation in the work force since the 1950s illustrates that women were becoming less and less dependent on men for their financial well being.[24]

The other event that fundamentally shifted divorce and marriage was the introduction of no-fault divorce laws. No-fault divorce was developed in response to the discontent in the legal community with the way fault-based divorce was used. Fault-divorce was no longer being held to a standard that the legal community had faith in. In case after case, the parties involved would use the same script to prove that just enough fault had occurred on the part of one party to legally justify granting a divorce. In fact, the American Bar Association had been calling for a change in the law to reflect the reality of American society since 1948.[25]

In the late 1960s the Uniform Law Commission and the California Governor's Commission on the Family began working together to create the legal grounds for eliminating fault-based divorce in California. They succeeded in 1969 with the passage of the California Family Law Act, which allowed a couple to divorce for no other reason than irreconcilable differences. The popularity of no-fault divorce was such that, by 1985, when South Dakota enacted the functional equivalent of no-fault divorce, every state had a law comparable to no-fault divorce.[26]

Soon after no-fault divorce became the accepted legal doctrine in a majority of the states, it came apparent that even though women were legally equal to men in divorce, women now had new forms of inequality pressed on them. These inequalities existed because society itself did not yet treat women as equals to men. So, when a law that treats men and women as equal is applied to an unequal society, those who are unequal often come out on the bottom. The three areas of divorce that are often cited as adversely affecting women the most are child custody, spousal support, and marital asset division.[27]

By looking at child custody, spousal support and marital asset division in the opinions that Justice Levine authored, it will be possible to illistrate the new perspective that she brought to the court as its first female member. To properly understand Levine's opinions and beliefs on the court, this thesis will be using Patricia Hill Collins' framework in Standpoint Theory. Collins originally developed this framework to examine African-American women's position in society but it is of equal utility when applied to women's position in North Dakota.

The work of Collins that this framework is drawn from is a selected reading of hers taken out of her book *Black Feminist Thought.* The four concepts of Collins pulled from this reading that will frame the discussion of Levine's opinions are: Outsider Within, Situated Knowledge, Subjugated Knowledge, and Partial Perspective. Collins' recognized that a person often has more then one characteristic that defines who they are. This intersectionality of traits comes out in her work because she views African-American women as having a double minority status. This is an important concept that

one can see in Levine's life and had a strong influence on how she viewed and understood the law.[28]

In Collins' framework, an Outsider Within is an African American woman who has achieved a high enough standing in an institution, such as academia, and is accepted and understood by that institution, but also knows what it is like to not be a member of that institution. Often these individuals are faced with the daunting task of deciding whether or not they are going to be one or the other, the member of the group or the outsider. However, there are a few individuals who have the capacity to belong to the institution and also maintain their own identity; Beryl Levin was one of those individuals.[29]

When Levine entered law school, she was one of only nine women. She was able to use her male fellow students' bias in favor of maternal figures, combined with her high level of skill, to gain a level of acceptance from them, thereby becoming an Outsider Within. On entering the practice of law she worked at the Vogel Law Firm in Fargo, one of the most prestigious law firms in the state of North Dakota but with only one other female member. She was in a position that few women had and she earned the trust and respect of many prominent male lawyers in the region, once again becoming an Outsider Within. Then, finally, when she joined the State Supreme Court, she was the first woman on the bench and often the only one who expressed the views that she had. In interviews with Levine and with Chief Justice Gerald W. VandeWalle, it was apparent that the other members of the court welcomed her and there was an open and responsive relationship between them. All of these events combine to illustrate that Levine was able to maintain

her own identity and yet achieve a position of influence in institutions that had previously been dominated by men.

The next frame of analysis is Situated Knowledge. The basic premise of Situated Knowledge is that a person's knowledge is based on the group in which he or she grew up and lived and developed his or her world view. Justice Levine had several unique points from which to draw her Situated Knowledge. First, she was not born in the United States; she grew up in Canada and therefore had a different set of ideas about what society should be and how it should function. Next, she was a homemaker, who put her career on hold for many years in order to make sure that her family prospered and that her husband's career developed fully. Furthermore, Levine is Jewish and because of this she experienced a second layering of a minority status. These concepts will come out more clearly once we begin to look at her cases and the way she wrote her opinions.[30]

From Situated Knowledge comes the idea of Subjugated Knowledge. The ideas and beliefs that Levine had were due to the fact that she was not a part of the majority. Because none of her perspectives represented the dominant position in society, people who held them previously did not have the power to set the agenda and in fact they were often silenced and their views were considered wrong. Because of this historic lack of voice in public policy, Levine's knowledge was subjugated and not in a position of influence in society.[31]

However, the knowledge that Levine had was not without limitations. Because no one group can see or understand everything that occurs, each has a Partial Perspective. Levine, just like everyone else, had a limited view of the facts and realities of the cases

that were before her due to her personal biases. However, this does not mean that the other perspectives were any more legitimate. They were all different, with each adding a fresh perspective to the ideological vision of the court.[32]

These four concepts combined will help bring out the perspective Justice Levine brought to the bench. Also, these ideas will allow for the limitations and advantages of her perspective to be examined and understood. Then once this is done, it will be possible to see what her view of marriage was, further reinforcing the idea that she offered a new perspective to the court.

Furthermore, throughout this examination of marriage and Standpoint Theory, it will be illustrated how Justice Beryl Levine's work fit into the larger debate on the nature of marriage and divorce and how women's perspective is necessary. Also, because she represented a voice that had been silent for so very long, her point of view was valuable for the North Dakota State Supreme Court. In addition to this, she embodied a new way of examining legal doctrines that helped pave the way for future feminists. It should be noted that Levine could not speak for all women, but she was able to allow women the opportunity to have their voices heard.

The appropriate place to begin examining Justice Levine's standpoint is with her dissenting opinion in the case of *Gravning v. Gravning,* decided in 1986. This dissenting opinion was unmistakably Justice Levine's clearest articulation of the Primary Caretaker Doctrine. Furthermore, it was from this case that Levine built her future attempts to get the court to adopt the Primary Caretaker Doctrine.

The Primary Caretaker Doctrine, if a court adopted it, would automatically grant physical custody of a child to the parent who was the primary caretaker of the child. In *Gravning v. Gravning*, Levine articulated a general statement to which the court would conform, if it used the Primary Caretaker Doctrine; "the primary caretaker is the parent that provides the child with daily nurturance, care and support." [33]

Now, this was a very general statement, which could be interpreted in as many different ways as there are judges. However, this was followed up by a much more specific and detailed list of factors a judge would go by when using the Primary Caretaker Doctrine. The primary caretaker is the parent who is in charge of preparing meals, grooming the child, taking care of the child's clothing, creating situations for the child to have social interactions with his or her peers, dispensing discipline to the child when need be, educating the child in normal manners and helping the child in other ways that produce the social and emotional education for the child. Levine did not create the Primary Caretaker Doctrine; it was first put into law in other states before this case. In Minnesota the doctrine was adopted in 1985 in the case of *Pikula v. Pikula*. Minnesota law was an important reference point for Levine because of Minnesota's proximity to North Dakota.[34]

The facts of this case are as follows; Nancy and Greg Gravning were married in 1982 and they divorced in 1985. During their marriage they had two children, Gabriel, born in 1982, and Amanda, born in 1983. The trial court awarded custody of Amanda to Nancy, contingent on Amanda's continuing work toward an education and/or her acquiring gainful employment. Greg was awarded Gabriel, with his custody contingent

on his maintaining employment, not using alcohol and continued living with his parents. Also, each month there were to be two consecutive days of joint visitation alternating each month between Greg's and Nancy's residence, so that the children would have contact with each other.[35]

Both Greg and Nancy believed the trial court to have been in error in that they both thought that they should have sole physical custody of the children. Also, Nancy believed that the financial settlement was inequitable and that it should be redressed. Greg as well believed that the financial settlement was excessive but that it should be redressed in his favor.[36]

The first issue that the majority addressed was the custody question. The court stated immediately that the Tender Years Doctrine was no longer the standard that guided them. The case of *Odegard v. Odegard*, in 1977, eliminated the Tender Years Doctrine in North Dakota. Now the standard that was to be used was "determined by the court's consideration and evaluation of all factors affecting the best interests and welfare of the child." This was the test that the majority used to come to their conclusion that the split custody arrangement was the correct route to take. The final justification for their decision was a section of the North Dakota Century Code 14-09-06 that states that parents "have equal rights" in the "care, custody, education and control" of minor children. In the eyes of the majority the only way that the law could have been satisfied was by the current arrangement as articulated by the trial court.[37]

Justice Levine viewed the facts in a much different manner than the three male justices who made up the majority. Justice Levine began her dissent by stating that the

trial court did not make its justification for split custody obvious and that it left her with more questions than answers about their decision. However, she made it well known that she was aware of the difficult task a trial court has in deciding who should receive custody.[38]

It was at this point that she began her argument for the Primary Caretaker Doctrine. Since both Nancy and Greg were equally fit to be the parents, then, the court needed to establish which one was the primary caretaker. In this case Levine saw Nancy as the primary caretaker.[39]

Next, Levine gave four reasons why the benefits of Primary Caretaker Doctrine outweighed the negative side effects in this case. First, she believed that "the intimate interaction of the primary caretaker with the child creates a vital bonding between parent and child." The second factor was that it adds a level of certainty to custody actions. Levine saw this as the only real way a judge can knowingly and directly affect the child's life in a positive way. Third, the negotiating process of the primary caretaker is aided in the financial settlements that are created when a marriage ends. The primary caretaker will not be able to be threatened with financial ruin by the non-primary caretaker and therefore will get a more equitable arrangement. Fourth, the Primary Caretaker Doctrine at its implementation is gender neutral because it is possible for a man to be the primary caretaker.[40]

Several of Justice Levine's four points in support of the Primary Caretaker Doctrine connect to the historical changes in marriage. In addition to this, it is possible to see why she ruled the way that she did by using Standpoint Theory. The main connection

between this case and the changing history of marriage has to do with the third point in support of the Primary Caretaker Doctrine that the primary caretaker is in a more secure position in the bargaining process. Before no-fault was introduced, if a marriage ended, the husband was required to support his now ex-wife. Also, as mentioned earlier, in fault divorce there was a guilty party who often had to pay, with the amount often influenced by the level of fault on her or his part. With the introduction of no-fault divorce, these protections were eliminated. Now the woman, or man if the circumstances warranted it, had to fight for an equitable economic settlement. What Levine wanted was to add a level of protection for the person who was responsible for taking care of the children. This was not to protect the parent who had custody, but to protect the child's interests.

Why Justice Levine ruled the way she did can be drawn out and better understood through an examination of her standpoint. As a former housewife and homemaker, combined with her experience as a lawyer working with women going through the divorce process, her Situated Knowledge was such that she understood the difficulties women faced when a marriage ended. However, she was still a judge and had to follow the law. This was where the predictability of the Primary Caretaker in her eyes came into play; it added a level of protection to the child to save her or him from the ugliness of the custody battle.

Precedent plays an important role in how judges rule. Legal precedent establishes how judges should look at the issue in question and how the law should be applied. However, precedent does not establish the entirety of a judge's decision-making process. This is where the Partial Perspective of Levine, as well as that of her fellow justices, is

important to understand, because taken individually each justice only had the ability to look at the case from his or her point of view. Because of this imperfect perspective, how each justice saw the legitimacy of the judicial precedent was different. The male justices probably saw the case from a very analytical perspective; two parents and two children, give the man the boy and the woman the girl. There was also a tainting of gender bias in that decision because of the court automatically putting the boy with the father and the girl with the mother. Justice Levine's perspective was such that she understood how delicate children are when they are young and believed that the parent who nurtured the children the most should continue to do so, not for the parent's sake, but once again for the child.

In interpreting the law, Justice Levine always sided with what she thought was the best interest of the child, with the effects it had on the parents always coming in second. When interviewed, Levine stated that one of her main goals with the Primary Caretaker Doctrine was to add a level of stability and civility to the divorce proceedings. When talking about divorce and what it did to the former couple, Levine made sure to point out that divorce is an ugly process and that the Primary Caretaker Doctrine would shield the child from some of the battles that were bound to ensue between his or her parents.

The damage that divorce did to a child was made clear to her during her time as a lawyer, when she was the counsel to many women who were in such a precarious position. This was where the idea of Subjugated Knowledge is applicable to Levine's point of view. She realized the connection that existed between the child and the parent to whom she or he was closest. However, women at the time did not have the ability to get

this knowledge into the legal discourse. Levine was able to be the voice for this Subjugated Knowledge.

The Primary Caretaker Doctrine was not without its detractors. The fundamental critique of the Primary Caretaker Doctrine was that it was gender biased in favor of women. This was due to the fact that women still were generally the primary caregivers and that men almost always earned more money than women did. Levine addressed this in her interview by stating that in its origins the doctrine was not gender biased. It was possible for a man to decide to stay at home and raise the child and let the woman enter the work force. This did not happen very often, so in its impact it was gender biased. However, according to Levine this bias was the choice that the couple made in their marriage partnership and it was neither the court's nor the law's fault that it came out biased.[41]

Levine did not stop trying to implement the Primary Caretaker Doctrine she enunciated in Gravning. In the case of *Kaloupek v. Burfening*, decided three years later in 1989, she wrote her strongest denunciation of split custody and her most passionate support for the Primary Caretaker Doctrine. In *Kaloupek v. Burfening* Chris Kaloupek and Michael Bufening began a non-marital relationship in 1981, which ended in 1987. During this time they had one child, Robert. Chris, the mother, was appealing the trial court's ruling of split custody between herself and Michael, alternating every six months, until Robert started school. The majority of the court affirmed the decision of the trial court.[42]

Justice Levine's dissenting opinion began by proclaiming "Poor Robert! In order to assure that his relationship with his father survive[s] and grow[s], he has been placed in a state of custodial schizophrenia." This quote clearly shows the level of passion that Levine displayed in the interest of making sure that the child in question had a stable home and that the parent's desires came second. Furthermore, because this was a case where the parents were not married, the Primary Caretaker Doctrine was shown to be useful for more than traditional families. It was in the 1980s that the percentage of children being born outside of wedlock began to increase dramatically. This was an important aspect to the Primary Caretaker Doctrine because it added to its utility.[43]

In her dissent Justice Levine cited several psychologists' opinions that split custody was not healthy for the well-being of the child. Levine was trying to add to the idea that the best interests of the child were met only through the Primary Caretaker Doctrine. Justice VandeWalle wrote a special concurring opinion in which he addressed Levine's use of psychological experts, but came to a different conclusion. He saw their work as preliminary and argued that it lacked the high standard the court called for when it had to find a fact erroneous. This difference in opinion between these two judges further illustrated the idea of Partial Perspective; each judge looked at the same item and yet came to a different conclusion. The reason was that there was ambiguity in what they read and within that ambiguity the justices are forced to use their own life experiences or Situated Knowledge.[44]

Now it is important to see if Levine's work on the Primary Caretaker Doctrine had any effect beyond her time on the bench. Current North Dakota State Supreme Court

Justice Mary Maring stated in an interview that the Primary Caretaker Doctrine was not in the law in North Dakota specifically, but that the concepts were there. She pointed out that North Dakota Century Code 14-09-06.2 lists the factors a trial court is to use when determining who gets custody of the child. It starts with factor A that states that the court is to take into consideration "the love, affection and other emotional ties existing between the parents and the child." Factor A resembles the Primary Caretaker Doctrine the most. When Chief Justice VandeWalle was asked what effect the Primary Caretaker currently has, he stated that it is a consideration, but not the predominant factor. It is clear that the Primary Caretaker Doctrine did not become the standard of the court, but it did gain in legal weight.[45]

The next area of divorce law on which Levine had a great deal of impact was spousal support. With the elimination of fault-based divorce and the adoption of no-fault divorce, the dependent partner lost the legal grounds to achieve a level of financial security after a marriage ended. A vast majority of the time the woman was the one who was at risk of entering poverty or approaching it after a marriage ended.

In several cases Levine voiced what she saw as spousal support issues in the changing landscape of divorce. Now that the nature of marriage had changed to a more egalitarian model, so did the way that judges viewed alimony. Levine saw marriage as a partnership in which economics played a very important role in regard to who worked and who did not and also what type of work each partner did. Often, her differing perspective came out in the battle between when to use rehabilitative support or permanent support. Rehabilitative support lasts only until the spouse who was

disadvantaged by the divorce is able to achieve a level of financial self sufficiency. Permanent support is awarded to a individual that was so financially damaged by the divorce that she or he will never be able to achieve an equitable financial situation on her or his own.[46]

In 1987, in the case of *Dick v. Dick*, Levine wrote a lone dissenting opinion that clearly articulated her Situated Knowledge on the issue of alimony. It also showed how her perspective on the matter was clearly different from what the court used and was in the custom of using.

The facts of the case were that Maxine Dick married Keith Dick in 1969. They did not have any children in the course of the marriage, and during the marriage Maxine had intermediate employment, usually a part-time job with no advancement opportunity. Usually her employment was a secondary source of income used to augment Keith's. Maxine appealed the trial courts' distribution of marital property and also the lack of alimony awarded to her. Maxine was awarded approximately one half of the marital assets value after all debts were paid, which equaled around $85,000, and $1,000 per month for the last four months of 1986. Keith received the other half of the marital assets and also his Pioneer seed business, which was deemed to have no tangible assets beyond the client list. Also, Keith was awarded the assets he brought into the marriage.[47]

The four-member majority viewed this ruling by the trial court as adequate for both parties and that there were no glaring errors. Justice Levine wrote a dissenting opinion that disagreed with the majority on almost every point. Levine did not see Maxine's periodic employment as having the necessary weight to support her. Also,

Levine argued that Maxine did not have the opportunity to pursue a career that fulfilled her needs and inner desires. Furthermore, Levine blasted both the majority and the trial court for not giving Maxine's desire to pursue an education the importance that it deserved. By not doing this, Levine believed that Maxine was being denied the opportunities that the marriage had given Keith and that the court had a duty to give her the same chance at life.[48]

In *Dick v. Dick* it is easy to see how Levine's Situated Knowledge, Partial Perspective, and Subjugated Knowledge combined, leading to her dissenting opinion. Until she went to Law School, Levine was in a similar situation to that of Maxine in her marriage. Levine understood that a minimum wage job combined with the lack of a formal education would not allow for a person to advance herself. Also, Levine realized that the court did not understand this and thus she tried to change their opinion of spousal support.

Dick v. Dick was by no means the last time Levine voiced her position on spousal support. In *Weige v. Weige* Levine wrote a concurring opinion that was meant to get the court to reevaluate its stance on its awarding of permanent versus temporary rehabilitative spousal support. Larry Weige was appealing the trial court's ruling that gave his ex-wife Dianne both temporary support until she received a college degree and then permanent support at a reduced amount until her death. The majority affirmed the ruling because of Dianne's disadvantaged position due to the duration of the marriage and her total lack of skills necessary to archive financial independence.[49]

Levine agreed with the court's decision but she felt it necessary to write a concurrence because she did not believe the court truly understood the effects that inadequate spousal support had on the person receiving it. Also, she wanted to address the fact that the court had a strong bias in favor of temporary support and that it did not give permanent support the weight it should have. In addition to this, Levine thought that the court needed to reexamine its precedent that held that as soon as a person remarried that support should end. Her justification for this was that marriage was a contract two people decided to enter into, the results of which will impact a person for the rest of her of his life. Just because a person makes the choice to enter into a new marriage, there is no reason that this new contract should affect the previous contract. They were two separate entities in Levine's eyes.[50]

In her decisions, Levine was ever aware of the fact that the nature of marriage in American society had changed a great deal and that alimony, in her opinion, should evolve accordingly. In her concurrence one can see her view of marriage as partially an economic arrangement in which the partners early on make decisions that will affect them economically. Usually the woman gave up her career in order to help the man with his. Because they made this agreement, it was the court's job to make sure that the long-lasting effects of this contract were upheld. Just because one party enters into a new contract with a different partner does not mean that the first one is negated. *Dick v. Dick* was an excellent example of Levine's unique Situated Knowledge. When she was a lawyer Levine's primary field was family law, but she also practiced contract law and business law. Her view of marriage as a contract, first and foremost before anything else, and the affect that it has on the partners was a clear combination of these experiences.[51]

The area of property distribution was another field in which Levine was able to illustrate her unique perspective on marriage. In the case of *Erickson v. Erickson* Levine wrote a special concurrence that helps further illustrate her standpoint. In *Erickson* the court was faced with a couple that had been married for 36 years and had acquired substantial financial assets. Furthermore, the wife was not in the best of health, which added to her award settlement. To further complicate the situation there had been adultery on the part of the husband.[52]

This case was full of details that are not relevant to this discussion of Levine however, there are two components of her concurrence that illustrate once again the changing nature of fault in award settlements, and her view of marriage as a partnership. In her concurrence Levine explicitly stated that the infidelity of one partner plays no part in the award settlement. This is a clear shift from the fault divorce era. However, Levine was careful to point out the aid that the wife gave to the husband by taking care of the home, and that this was why she deserved the award that she got.[53]

In this opinion, Levine's idea that marriage in America had changed significantly was reinforced. By using the ideas of Paul R. Amato, Alan Booth, David R. Johnson and Stacey J. Rogers, in *Alone Together: How Marriage in America is Changing*, one can strongly suggest what Levine's view of modern marriage was. This was done by building off of sociologist Ernest Burgess' theory on the construct of marriage. Ernest stated that marriage was once based on institutional model, and then it changed and became based on a companionate model, to now being an individualist model. An individualist marriage is a marriage that pairs two individuals who decide to form a partnership, with the goal of

advancing their lives together. Because of this new pattern the law has been forced to accept legal doctrines that represent the increased partnership model of marriage. This was something that Levine realized, and she worked to address any inequalities in the law to make the partnerships more equitable.[54]

Levine's perspective on marriage and her opinions are relevant to the current debate on the nature of marriage. There are two primary sides to the marriage debate. The first is the Marital-Decline Perspective as framed in *Alone Together*. Those who accept the Marital-Decline Perspective of marriage carry with them four beliefs about the current state of marriage. One, that marriage is weaker than it has ever been; two, that extreme individualism in America is the primary reason for this change; three, as marriage deteriorates it will hurt the average family in America; and four, actions should be taken to stop this decline and the institution of marriage should be safe-guarded.[55]

Those who subscribe to the Marital-Decline Perspective want America to undo many of the changes that occurred in marriage and divorce laws in the 1960s and the 1970s. However, there is another side to this debate and that is the Marital-Resilience Perspective, which also has four main parts. First, marriage is changing, but it is not in a state of decline; second, America's individualism has not become uncontrolled in the last half century; third, the latest changes in family law have not resulted in negative effects for society as a whole; and fourth, all types of families should be encouraged to prosper.[56]

After interviewing Justice Levine and upon close examination of her most influential case opinions through the lens of Standpoint theory, it is possible to argue that Justice Levine shared the Marital-Resilience Perspective. Levine understood that

marriage had changed and that the individuals in the marriage now had most of the power in the creation of the marriage. But more importantly, in her desire to civilize the marriage process, Levine attempted to stabilize marriage.

Justice Levine added an important perspective and voice to the bench that had not been there before her tenure. Through the examination of the history of marriage, her opinions can be set in a historical context and the roots of the circumstances of each case can be illustrated in way that allows the history of marriage to be better understood. Ultimately, through Standpoint theory it was possible to see the influence that her perspective had on the way she ruled and how the rulings added to the knowledge of the court as a whole.

---

[1] Carl N. Degler, *At Odds: Women and the Family in America from the Revolution to the Present* (Oxford: Oxford University Press, 1980), 9-10.

[2] Stephanie Coontz, *Marriage a History: From Obedience to Intimacy or How Love Conquered Marriage* (New York: Viking Press, 2005), 136-37.

[3]Phillips, *Putting Asunder*, 210-20.

[4] Coontz, *Marriage a History*, 4-6; Phillips, *Putting Asunder*, 9.

[5] Coontz, *Marriage a History*, 31-32.

[6] Coontz, *Marriage a History*, 29-30

[7] Coontz, *Marriage a History*, 64-66.

[8] Coontz, *Marriage a History*, 5-7.

[9] Phillips, *Putting Asunder*, 364-70.

[10] Paul R. Amato, Alan Booth, David R. Johnson, Stacey J Rogers, *Alone Together: How Marriage in America is Changing* (Cambridge: Harvard University Press, 2007), 11-27.

[11] Phillips, *Putting Asunder*, 214; Coontz, *Marriage a History*, 152-53.

[12] Phillips, *Putting Asunder*, 376-80.

[13] Steven Mintz & Susan Kellogg, *Domestic Revolutions: A Social History of American Family Life* (New York: The Free Press, 1988), 84, 90-91.

[14] Coontz, *Marriage a History*, 175-76; Mintz & Kellogg, *Domestic Revolutions*, 90-91.

[15] Michael Grossberg, "Who Gets the Child? Custody, Guardianship, and the Rise of Judicial Patriarchy in Nineteenth-Century America." *Feminist Studies* 9:2 (Summer 1983): 235-60.

[16] Stephanie Coontz, "The Origins of Modern Divorce," *Family Process* 46:1 (2006): 7-16; Grossberg, "Who Gets the Child?" 250.

[17] Steven Mintz & Susan Kellogg, *Domestic Revolutions*, 50-51.

[18] Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, Harvard University Press: 2000), 105-6.

[19] Coontz, *Marriage a History*, 196-215.

[20] Coontz, *Marriage a History*, 216-28.

[21] Mintz & Kellogg, *Domestice Revolutions*, 179-201.

[22] Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York, Collier Macmillan Publishers: 1985), 1-14.

[23]Cott, *Public Vows*, 205

[24] Amato et al, *Alone Together*, 23-25.

[25] Marx Ann Glendon, *The Transformation of Family Law: State, Law and Family and the United States and Western Europe* (Chicago: University of Chicago Press, 1989).

[26] Glendon, *The Transformation of Family Law*.

[27] Cott, *Public Vows*, 206.

[28] Patricia Hill Collins, "Black Feminist Thought," in *Feminist Theory: A Reader*, ed Wendy Kolmar and Frances Bartkowski (2000; repr., New York: McGraw-Hill, 2005), 505-8; Standpoint theory is a subject of much debate and study within sociology. It has been a tool of academic study for over thirty years, and has gone through many stages of acceptance and usage. It would be beyond the scope of this thesis to give an examination of all of Standpoint Theory a proper evaluation. That is why only one part of Collins' work on Standpoint Theory is discussed here. If a person wants to know more about Standpoint Theory two other important scholars that have worked on it are Nancy Hartsock and Sandra Harding.

[29] Collins, "Black Feminist Thought" 505-8.

[30] Collins, "Black Feminist Thought" 505-8.

[31] Collins, "Black Feminist Thought" 505-8.

[32] Collins, "Black Feminist Thought" 505-8.

[33]*Gravning v. Gravning* 389 N.W.2d 621(N.D. 1986); William A. Neumann and Vigness Kolb, "A Woman's Touch," *North Dakota Law Review* 72 (1996): 961-65.

[34] *Gravning v. Gravning* 389 N.W.2d 621(N.D. 1986); Neumann and Kolb, "A Woman's Touch" 961-65.

[35] *Gravning v. Gravning* 389 N.W.2d 621(N.D. 1986); Neumann and Kolb, "A Woman's Touch" 961-65.

[36] *Gravning v. Gravning* 389 N.W.2d 621(N.D. 1986).

[37] *Gravning v. Gravning* 389 N.W.2d 621(N.D. 1986).

[38] *Gravning v. Gravning* 389 N.W.2d 621(N.D. 1986).

[39] *Gravning v. Gravning* 389 N.W.2d 621(N.D. 1986).

[40] *Gravning v. Gravning* 389 N.W.2d 621(N.D. 1986).

[41] Beryl Levine interviewed by author, August 21, 2008, Bismarck, North Dakota (recording in the possession of author).

[42]*Kaloupek v. Burfening*, 440 N.W.2d 496 (ND 1989).

[43]*Kaloupek v. Burfening*, 440 N.W.2d 496 (ND 1989); Amato, et al, *Alone Together*, 22-3.

[44] *Kaloupek v. Burfening*, 440 N.W.2d 496 (ND 1989).

[45]Justice Mary Maring interviewed by author, October 31, 2008, Bismarck, North Dakota (recording in the possession of author); The cases used in this thesis are by no means all of the cases that Justice Levine argued for the Primary Caretaker Doctrine. Some of the cases that furthered her position on its adoptioin are *Schmidkunz v. Schmidkunz*, 529 N.W. 2d 857 (ND 1995), *Weber v. Weber*, 512 N.W. 2d 729 (ND 1994) and *Dinius v. Dinius*, 448 N.W. 2d 210 (ND 1989).

[46] Beryl Levine interviewed by author, August 21, 2008, Bismarck, North Dakota (recording in the possession of author).

[47]*Dick v. Dick*, 414 N.W.2d 288 (N.D.1987).

[48] *Dick v. Dick*, 414 N.W.2d 288 (N.D.1987).

[49] *Dick v. Dick*, 414 N.W.2d 288 (N.D.1987).

[50] *Dick v. Dick*, 414 N.W.2d 288 (N.D.1987).

[51] *Dick v. Dick*, 414 N.W.2d 288 (N.D.1987).

[52] *Erickson v. Erickson*, 384 N.W.2d 659 (N.D. 1986).

[53] *Erickson v. Erickson*, 384 N.W.2d 659 (N.D. 1986).

[54]Amato, et al, *Alone Together*, 15-17.

[55]Amato, et al, *Alone Together*, 4.

[56]Amato, et al, *Alone Together*, 6.

CHAPTER FOUR

JUSTICE LEVINE'S WORK AGAINST GENDER DISCRIMINATION

Justice Beryl Levine worked diligently to correct gender inequality in North Dakota. Because of Justice Levine's powerful position as a State Supreme Court Justice, she had the ability to develop policy, and the means to articulate legal thinking to directly combat gender inequality. This chapter will examine the most direct ways in which Justice Levine attacked gender discrimination during her career, and will also bring out her perspective on gender discrimination.

This chapter was also designed to place Levine's work to combat gender inequality in North Dakota within the larger national struggle. Once this historical background has been established, the rest of the chapter will be divided into several parts. The first part of the chapter deals with the Commission on Gender Fairness and Equality in the Courts. Justice Levine was the co-chair of this commission. The second section will be an examination of the North Dakota State Supreme Court case of *Swenson v. Northern Crop Insurance Inc, and John Krabseth*. This case will illustrate Levine's personal and legal perspective on workplace discrimination. The third section will deal with gender-based peremptory challenges in the jury selection process. This section will focus on the case of *Mandan v. Fern*. *Mandan v. Fern* was important not only for what it did for North Dakota, but also because it foreshadowed a change in legal doctrine in America as a whole. The fourth section will look at the United States Supreme Court case of *United States v. Virginia*. This case involved the opening up of the Virginia Military Institute to women candidates. Justice Levine was cited by United States Supreme Court Justice Ruth Bader Ginsberg in her majority decision. And the fifth section will discuss

the Cass County Bar Association's position toward the Elk Club's male-only membership policy. Furthermore, this chapter will reinforce the idea that by including those groups that historically have not been heard before, American society as a whole benefits, and grows ever closer to realizing America's promise of equality for all.

The legal position of women in American society before the twentieth century was often contingent on their marital status and when they were denied a right they had very little recourse. The case of *Bradwell v. Illinois*, which was examined in the first chapter when the history of women lawyers was discussed, also played a role in setting up women's legal status in general. *Bradwell* ruled that the Fourteenth Amendment's equal protection clause did not apply to women due to their nature. This idea was little changed until 1908. That year, in the case of *Muller v. Oregon*, the United States Supreme Court declared that the state of Oregon was within its legal rights to prohibit women from working in "mechanical establishments," those jobs which today are called manufacturing jobs. The court said that, the constitution did indeed apply to women, but that it applied to them in a different way. Women were a class that was dependent on men, and the government saw it as well within the state's rights to protect them from jobs that were dangerous to their weaker nature.[1]

This was the status quo until World War II when many of the accepted ideas about women's proper place in society had to be discarded due to the demands of the wartime economy. Women had to enter the workforce and take manufacturing jobs. However, once the war was over, and the soldiers came home, women began to leave their jobs so that the men could have them back. Women at the time rarely fought the

idea that manufacturing and managerial jobs were a man's domain. This prevailing idea can best be summed up by a statement produced by the National Manpower Council, established by President Eisenhower to explore ways to expand the American work force, on the role of men and women's work in society: "Both man and women generally take it for granted that the male is the family breadwinner and that he has a superior claim to available work, particularly over the woman who does not have to support herself." This idea was the prevailing thought among men in power. There were no women on the National Manpower Council, and as such what they really wanted was not heard. However, the ideas that they were suppose to live up to were propagated.[2]

Society had not yet changed in its approach to gender discrimination. However, in the area of racial discrimination society was changing. African-Americans had fought for equal rights since the end of the Civil War. However, after World War II many African-American veterans fought the idea that they were meant only for certain jobs due to their race. Many veterans went on to help form the civil rights movement of the 1960s. If African-Americans could argue that they should not be judged on the basis of their skin color, then why should women be judged on the basis of their sex. In addition to this, the American economy began to shift in such a way that women began to enter the workforce in ever-increasing numbers. This was due to two reasons. First, the expanding economy needed as many workers as possible to maintain American prosperity in the Cold War. And second, it became less feasible for many families to only have one person earn an income and still maintain an attractive standard of living.[3]

The 1960s was a time of radical change for women and what society perceived as their accepted position in it. The changes in gender roles were a part of the larger shifts that were occurring in how society viewed minority groups. However, there were steps taken independent of the African-American civil rights movement that positively affected women's legal position. One such step occurred when President Kennedy established the Presidents Commission on the Status of Women in 1961. It was created in order to appease those who wanted the federal government to take a larger role in promoting women's rights. The Commission on the Status of Women laid the groundwork for the Equal Pay Act of 1963, which amended Fair Labor Standards Act of 1938 when it described equal work as that which involved "equal skill, effort, and responsibility . . . performed under similar working condition." This act became one of the main pillars which women rights activists used in the following decades to construct a framework on which to build the legal remedies for gender discrimination.[4]

The Civil Rights Act of 1964 was another main foundation for women's future legal gains. Title VII of the act included sex as one of the grounds that employers cannot use to discriminate in their hiring practices. Democratic Representative from Virginia Howard Smith added it to the legislation while it was in the House of Representatives. Whether or not he really supported women's rights or he wanted to kill the bill is still under debate; either way the bill succeed in getting through congress and was signed into law by President Johnson. The Equal Employment Opportunity Commission was formed by the Civil Rights Act, with the goal of making sure that the act's policies on economic discrimination were carried out. Even on this commission women still did not have

immediate access, as it took until 1969 before it would consider gender discrimination as one of the grounds for a claim.[5]

In 1969 the Fifth Circuit Court of Appeals became the first court to declare a law unconstitutional under the Civil Rights Act of 1964 in the case of *Weeks v. Southern Bell Telephone.* In this case the court struck down a Georgia law that stated that a woman could not be forced to lift more than thirty pounds at her job. The plaintiff, Lorena Weeks, had applied for a switchman's job at the Southern Bell Telephone and the company's reason for denying her the job was this state law, even though she was physically capable of doing the work the job required. The court saw this as a clear violation of the Title VII of the Civil Rights Act of 1964 when it stated "Title VII rejects this type of romantic paternalism as unduly Victorian and instead vests the individual woman with the powers to decide whether or not to take on unromantic tasks...The promise of title VII is that women are now to be on an equal footing." This reasoning would come to be echoed in many future gender discrimination cases.[6]

The United States Supreme Court began to establish the standard by which gender was to be viewed by the courts in 1971, with the case of *Reed v. Reed.* This case declared unconstitutional an Idaho law that automatically made the man the administrator of the estate of a minor child who died. The court saw this as "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment." However, the court at that time did not establish whether or not gender was a suspect classification for discrimination.[7]

To understand why it is important whether or not a group is given the suspect classification standard by the Supreme Court an understanding of the tests used by the court is needed. The United States Supreme Court has established three tests in regards to the constitutionality of a law. What tests the court applies to a classification of people has a significant impact on whether they are allotted a higher level of protection by the law. The lowest test, and the one that when used usually results in a law being declared constitutional, is the Reasonableness Test. All the state has to do is prove a reasonable excuse for having the law, which is often easy to prove. Next is the Intermediate Scrutiny Test. With this test the law's unconstitutionality is not predetermined beforehand because it is a middle ground test. The Intermediate Scrutiny test is applied to gender issues and there is still debate as to the exact standard the court applies when using this test. The last test, and the one that is applied to racial discrimination, is Strict Scrutiny. When this test is used the law is almost always seen as unconstitutional, because of the high standard the court places on the state to prove the need for the law.[8]

In 1973, in *Frontiero v. Richardson*, the United States Supreme Court was finally forced to decide if gender discrimination was a suspect classification. In *Frontiero*, the court came close to declaring that sex was a suspect classification. This declaration would have made it equal to race. However, in the end the court did not. The facts of the case were these: Sharron Frontiero, a lieutenant in the United States Air Force, wanted to get a dependent's allowance for her husband. Federal law provided that the wives of members of the armed services automatically became dependents. Husbands of female members of the armed services however, were not accepted as dependents unless their wives gave

them over one-half of their financial support. Frontiero's request for her husband's dependent status was subsequently denied.[9]

Eight of the nine justices on the court ruled the law unconstitutional. However, only four of them ruled that gender was a suspect classification, which would have made it equal to racial discrimination. Justice Lewis F. Powell's concurring opinion stated that gender discrimination did not require the use of the Strict Scrutiny Test, but that the Reasonableness Test was not enough. The result was that a new test, the Intermediate Scrutiny Test, was officially established for gender discrimination cases. The court cemented the use of this test for sexual discrimination cases in 1976, with the case of *Craig v. Boren*.[10]

This is by no means a complete history of all the advances in women's legal rights in the last half century. However, the importance of which comes out even when these legal actions are connected with Levine's biography, these connections, in all likelihood; map out places in her life where larger events influenced her legal philosophy on gender discrimination. Even if at the time of their occurrence they did not directly affect Levine, they would have an impact on her once she began to work in the legal profession to address gender discrimination.

Levine earned her bachelor's degree in 1964, within a year of the Equal Pay Act and the Civil Rights Act being signed into law. As an educated woman who, by her own admission, was aware of and interested in current events, it is safe to assume that she was knowledgeable of the importance of these acts. In addition to this, if one looks at the cold reception she received from the dean of the Law School at the University of North

Dakota, it is possible to understand that Levine knew firsthand what negative effects gender discrimination had on a person. Occurring shortly after this and just as Levine was actually starting law school, the case of *Reed v. Reed* was decided. With this being the first case before the Supreme Court declaring a law unconstitutional on the grounds of gender discrimination, she could have not only known about it but more than likely studied it. Shortly after this, in 1973, the decision in *Frontiero v. Richardson* came out. Levine would have just started her third year of law school, and by this time she would have been more knowledgeable in the world of legal doctrine, making the case all the more meaningful. Finally, in 1976 when *Craig v. Boren* came out Levine was in her second year of being a lawyer, and she would have been aware of what the legal tests were for gender discrimination. The next part of this chapter will show the many ways in which Levine met head-on gender discrimination in North Dakota and, when confronted, how she worked to eliminate it.

When Levine was a practicing lawyer in Fargo there were only a handful of women practicing in the area. In the entire Seventh District, across the Red River in Minnesota, for a time in the late 1970s there were only two practicing female attorneys in. Current North Dakota State Supreme Court Justice Mary Maring was one of them. The few female attorneys at this time relied on each other for support in a this very demanding field. This tied in with the isolation that these female lawyers faced within the legal community. The reason that isolation was such a problem was that a large part of being an attorney in private practice was, and still is, the ability to acquire clients, and to make the personal connections within the legal community. A person who has the ability to do this is often called a rainmaker.[11]

To create a sense of community, the female attorneys in the Fargo Moorhead area met regularly, usually on Saturday mornings, to discuss the issues they were confronting. In the process they created a support network. Levine was an active participant in these meetings, working with the women who regularly showed up. Simply talking about the problems they faced and knowing that there was in fact a support system for them helped them ride through the early years of female involvement in the area's legal community.[12]

Once Levine was appointed to the North Dakota State Supreme Court, she continued her work toward reducing gender inequality. In 1985 Levine joined the National Association of Women Judges (NAWJ). In that same year Levine attended her first NAWJ meeting in Minneapolis, Minnesota. The NAWJ was still very small at that time, due to the few female judges in the country. However, it did not stop them from asking the question; "What did it mean to be a woman within the legal system, either as a lawyer or as a citizen using the system?" To answer this question the NAWJ members were forming state commissions in their respective states.[13]

After learning about these state commissions on gender bias, Levine wanted to form a similar commission in North Dakota. From the very beginning Levine, according to Chief Justice VandeWalle, had the support of all the members of the North Dakota State Supreme Court, and was poised to go ahead with the creation of the commission. The State Bar Association of North Dakota also supported the creation of the commission. However, due to a tax referral in 1989, there was no funding to start a commission until 1994. During the interim, Justice Levine was the driving force keeping the commission idea alive in North Dakota. She was able to do this because of her

powerful position as a state Supreme Court Justice and her personal connections within the legal community.[14]

Levine was able to recruit Fargo attorney Sara Andrews Herman to co-chair the commission, and in Levine's words Andrews became "the real driving force" behind the work of the commission once it started. This commission was the first of two commissions. The goal of the first was to be a fact finding enterprise. The members were not charged to prove any point specifically, but to ask questions and do research that would allow for the current situation of North Dakota's legal system and how it treated women to be documented. The first commission was called the North Dakota Commission on Gender Fairness in the Courts.[15]

The importance and work of the North Dakota Commission on Gender Fairness in the Courts can best be understood by using the same framework of analysis of Patricia Hill Collins' Standpoint Theory that was used to analyze Levine's perspective on marriage and divorce in the previous chapter.

The commission was a perfect example of how the concepts of Situated Knowledge, Subjugated Knowledge and Partial Perspective can all be seen in one work. An overriding theme one can see in the commission's work is the importance that labels have. First, an examination of the title of the final report of the commission, published in the *North Dakota Law Review* in 1996, speaks volumes to the very nature of the information contained in it. It was entitled "A Difference in Perceptions: The Final Report of the North Dakota Commission on Gender Fairness in the Courts." If a person looks at the beginning of the title, "A Difference in Perception," she or he begins to

understand that at the very core of the report was the idea that women and men saw the North Dakota legal system and how it affected women in a very different way. By labeling the report in this manner, the authors wanted its readers it to realize that how things are viewed in the legal system was not standardized.[16]

One key element that the first commission articulated and that Levine herself worked very hard to eliminate, was the use of terms of endearment by either male judges or lawyers for women in court rooms. An example of a term of endearment would be, if a judge called a female council in a case "honey" or "dear." Now, from the judge's partial perspective this might be perfectly okay or even a good thing. However, from the woman's perspective, it degraded her in the eyes of those in the court and possible how she saw herself. In an interview, Sara Andrews Herman commented on how Levine in meetings of the commission would get agitated with male commission members who saw nothing wrong with those terms of endearment and did not understand a woman's perspective on the issue.[17]

Another finding of the first commission was that rural women in North Dakota often lacked the means to acquire representation in the court. Compounding this was the practice, once again often in rural communities, of judges not allowing women to represent themselves when they could not get a lawyer. This lack of representation in the legal system for women in rural areas of North Dakota illustrates the fact that women were not given equitability of the law. In the eyes of the commission, in order for women, or anyone else, to receive justice there must be equitability in the law.

The concept of Partial Perspective was an important theme running throughout the commission's findings. Women and men perceived the activities in the courtroom differently due to their unique experiences. The commission's final report frequently made special note of how men and women both need to view things from each other's point of view in order for justice to be carried out. This conclusion reflected a sentiment that Levine expressed in many of her legal writings and also in her interview.[18]

Once the North Dakota Commission on Gender Fairness in the Courts finished its fact finding mission, a second commission was formed. Administrative Order 7, issued by Chief Justice Gerald VandeWalle, created the Gender Fairness Implementation Committee. This committee was headed by Levine's successor on the court, Justice Mary Maring. Justice Maring had many of the same experiences as a female lawyer in North Dakota and Minnesota as Levine. The Gender Fairness Implementation Committee's goal is to take active steps to reduce gender discrimination within the North Dakota legal community. Also, the Gender Fairness Implementation Committee is to make sure that the inequalities within the law that North Dakota Commission on Gender Fairness in the Courts discovered are corrected.[19]

Justice Levine also wrote several case opinions that had an effect on women's position in North Dakota. *Swenson v. Northern Crop Insurance., and John Krabseth,* was a case in which Levine was able to articulate a woman's perspective on gender discrimination. It was also important for the state as a whole in addressing the continued existence of sexual discrimination.

The facts of this case are as follows; Catherine Swenson started working for Northern Crop Insurance Inc., (NCI) in February of 1986, as a secretary. Her only co-worker at that time was office manager Rick Wallace, who resigned in December of 1986. Wallace recommended that Swenson take his position as office manager. Swenson went to John Krabseth, who was NCI's general manager, and asked to be considered for the job. Krabseth response was that he wanted a man "fresh out of college" for that job and that he did not want a woman. However, NCI's Board of Directors thought differently and they gave the job to Swenson.[20]

Swenson's salary was increased from $7.50 to $10.00 per hour. Shortly after her promotion, Krabseth reorganized the office structure and in the process eliminated Swenson's new position. Swenson was demoted to a secretary and her pay was decreased to $6.00 per hour. Two new office positions of program specialist and computer operator were created. For each one a man was hired, each being paid a higher wage than Swenson was when she was the office manager, even though each one did work that was comparable to the former office manager position. Also, Swenson was never offered either job before her demotion. Once these events transpired, Krabseth began avoiding Swenson, refusing to discuss the issue with her.[21]

Swenson terminated her employment with NCI and brought suit against NCI and Krabseth in the District Court for Williams County, North Dakota. She sued them on three grounds. First, she claimed that NCI and Krabseth were guilty of gender discrimination in violation of chapter 14-02.4, of the North Dakota Century Code, (N.D.C.C). Second, Swenson believed that they had violated North Dakota's Equal Pay

act. Third, that the actions of NCI and Krabseth constituted intentional infliction of emotional distress. The trial court ruled against Swenson on all three grounds and simply dismissed the suit. Swenson appealed to the North Dakota State Supreme Court.[22]

The North Dakota State Supreme Court's opinion of the case was written by former Chief Justice Ralph J. Erickstad. The court ruled that on the first issue Swenson lacked the grounds for a suit. Under North Dakota law in order an company to be classified as an employer, and subject to anti-discrimination laws, they must have ten or more employees, but NCI did not. Swenson then tried to argue that the law was unconstitutional, but because she did not bring that issue up enough when the case was heard at the district court level the court had no legal right to rule on its constitutionality. Had Swenson made the unconstitutionality of the law a major issue in the district court brief it would have been able to be ruled on.[23]

On the second issue, the court ruled that NCI and Krabseth violated North Dakota's Equal Pay Act. The main fact that proved this for the court was the disparity in Swenson's pay versus that of male employees. Also taken into account were the discriminatory statements made by Krabseth in regards to what women should be paid. Krabseth repeatedly stated that a woman should not be paid as much as a man and that he wanted men to be employed by NCI instead of women.[24]

The third issue, of emotional distress, was the only one of the three areas on which the justices varied in their rulings. The majority ruled that NCI and Krabseth had caused intentional emotional distress. The two pieces of evidence that caused them to come to this conclusion were Krabseth's sexist comments and the power relations

between Swenson and Krabseth. Krabseth was in a position at NCI that gave him a great deal of power over Swenson's job and through that her very livelihood. This power gave any actions that he took which were derogatory toward Swenson a greater weight. However, Chief Justice VandeWalle did not believe that NCI and Krabseth's actions were of a high enough caliber to be judged as intentional emotional distress. It must be noted that the Chief Justice was not condoning Krabseth's actions. The Chief Justice simply did not think Krabseth's actions rose to the level needed to prove intentional emotional distress, and that the law's integrity forced him to rule against Swenson on that issue. What the chief justice meant was that just because an action was viewed as bad did not mean that the law should be bent by a judge to address it.[25]

Justice Levine agreed with the majority on every point accept one area that she saw that should be modified. Levine was not willing to agree that the case should have been put to a jury. Instead Levine believed that the case should have been granted summary judgment. Summary judgment is rendered when the facts of an issue are so clear and undisputed that there is no need for a trial. All that is needed for justice is for a judge to rule on how the law should be applied to the facts at hand. Levine's position here illustrated that, from her perspective, the facts at hand were of such clarity in their illegality that a trial was not needed.[26]

Levine's Situated Knowledge and Subjugated Knowledge can both be illustrated in her reasoning. First, Levine's Situated Knowledge can be seen in how she framed her argument for summary judgments. Levine began with the case of *Bradwell v. Illinois*. She used this case to show how much the position of women and society's perception of their

natural place had changed over time. However, the crux of her argument against a jury decision rested on the thought that old ideas, such as those in Bradwell, do not just disappear but that they fade away and parts of them linger. Levine contended that for Swenson to get a fair trial she would have needed to eliminate all the jurors who still held antiquated beliefs about women. Levine saw this as an injustice because it placed an undo burden on Swenson. Therefore, the only way that Swenson could have received justice would have been through a summary judgment.[27]

When Levine's opinion is compared to Chief Justice VandeWalle's, her Situated Knowledge and Subjugated Knowledge comes out more clearly. The Chief Justice represented a common line of reasoning. It must be stated that he did not support Krabseth's action but that he was less willing to allow the law to grow in the uncertain areas that exist around it. Levine's Subjugated Knowledge on the effects of gender discrimination allowed her to let the law expand in order for justice to be carried out.

Swenson was not the only case in which Levine wrote an opinion in which she tried to extend the rights of women in ways they had not been extended before. The case of the *City of Mandan v. Fern,* decided in 1993, was another example. The result of this case was that in North Dakota gender-based peremptory challenges were declared unconstitutional.

The facts of the case are these, Scott Fern was convicted of drunk driving by a jury composed of four women and two men. The prosecutor used his peremptory challenges to remove three men from the jury. Fern believed that these gender-based

peremptory challenges violated his Fourteenth Amendment right to equal protection under the law.[28]

Fern's justification was based on the principle established in the United States Supreme Court case of *Batson v. Kentucky*, which stated that race-based peremptory challenges were in violation of the equal protection clause of the fourteenth amendment. The Supreme Court went on to say that the use of race in the jury selection process "harms the excluded jurors, undermines public confidence in the judicial system and stimulates community prejudice."[29]

When *Mandan v. Fern* was before the North Dakota State Supreme, the United States Supreme Court had not yet ruled as to whether gender-based peremptory challenges were in violation of the Fourteenth Amendment. So Levine's justification would have to come from other jurisdictions. She noted this in the opinion and in doing so it can be assumed that she wanted to add the North Dakota court's opinion to the side in favor of doing so.[30]

The belief that gender-based peremptory challenges were unconstitutional was agreed to by all the members of the North Dakota State Supreme Court. However, the test that should be used was not agreed to by all the justices. Justice Levine and Justice Herbert L. Meschke wanted the Baston Test to be used. The Baston Test had three parts to it. First the party that claimed a bias in jury selection had to show that the preemptory challenges were used to exclude a group that was protected by the equal protection clause. Second, the proponent of the challenge had to show a nondiscriminatory reason for the challenge. Third, the court must determine whether or not the reason given for the

preemptory challenge was a pretext for discrimination. Chief Justice VandeWalle and Justices Dale V. Sandstrom and Justice William A. Neumann did not think that gender-based peremptory challenges should use the Baston test. In the Chief Justice's words, "I have no hesitation in concluding that gender discrimination in jury selection violates constitutional principles. I am not convinced that the Batson procedure is the only or the appropriate procedure to be applied to remedy that discrimination."[31]

Mandan v. Fern was an example of how Justice Levine was able to use her Outsider-Within status to directly affect the way in which the court ruled on gender based matter. This change was important because in using the Baston Test, Levine attempted to raise the level of protection that women as a group were given by the courts. She made note of this by pointing out the historical progress of rights that women have attained, tracing her reasoning back to *Craig v. Boren* in 1976. Adding to her justification for this, Levine used the reports that other state's commissions on gender fairness in the courts to reinforce her opinion that women, as a group, need extra protection. Levine's reasoning and the test she believed applicable to gender-based peremptory was echoed by the United States Supreme Court one year later in the case of *J.E.B. v. Alabama.*[32]

Justice Levine's writings, outside of her court opinions, had an impact beyond the borders of North Dakota. Levine was cited in the United States Supreme Court case of the *United States v. Virginia* by Justice Ruth Bader Ginsburg, who was the author of the majority opinion. Ginsburg's career before becoming a justice was deeply intertwined with the history of the women's rights movement. She was lead council for *Reed v. Reed* in 1971, and latter on for *Craig v. Boren* in 1976.[33]

To recognize where Levine's work fits into the VMI case, an understanding of how the Virginia Military Institute structured its case in favor of continued male only enrollment is needed. The Clinton administration in 1995 sued VMI because it refused to allow women to enroll. VMI stated that an integrate part of their training program was that it was all male, and to allow a woman into that environment would destroy the uniqueness of the institution. They went on to state that the unique program at VMI produced men who had a special skill set from which society benefited, thereby showing that they were fulfilling an important state interest.[34]

Justice Ginsberg strongly disagreed with the idea that VMI's program required a male student population. As part of her rebuttal of this idea, she cited the closing comments of Justice Levine at the Eighth Circuit Judicial Conference in Colorado Springs on July 17, 1987. In her comments Levine discussed Plato's Republic and how for women to be guardians in that society they would have to cloth themselves in order to take part in the wrestling and physical tasks required to be good citizens. Levine pointed out that the "virtue" of Greek society would clothe them. Ginsburg took this idea of a society accommodating to include those not allowed in before and applied it to the VMI. Ginsburg reasoned that VMI had the means and the knowledge to adjust its program to include women and yet still hold it to the same high standard. The VMI case reinforced Levine's faith in the idea that including women did not weaken society, it strengthened it.[35]

Levine worked for gender equality at all levels of society. A good example of this occurred when she was the President of the Cass County Bar Association. The

association had been meeting at the Elks Club in Fargo. The Elks Club would not allow women to be full members. Women could be Elkets, but this was not the same as a membership. It was literally a second class status. Levine wanted the association to tell the Elks Club that it would no longer meet there unless they opened membership to women. There was a great deal of discussion among members of the association as to whether or not this action should be taken. An interesting event occurred during this discussion when Judge Myron Bright recalled how the association in the past had refused to meet at the Elks club when they refused to serve African-Americans. Levine was quick to point out that the club was willing to do this for African-Americans but not women. The irony of this event was that when the association told the Elks club to open its doors to African-Americans, they had no African-American members, but when Levine wanted to make them open up to women, they had several female members.[36]

There are two main lessons that should be drawn from this episode. First, that Levine through her Outsider-Within status in the Elks Club was eventually able to have the Elks club open up to women. Second, the episode at the Elks Club reflected American society's unwillingness to put women's rights on the same level as those of African-Americans. This undercurrent in American thought in part fueled Levine in her work.

When one looks at the totality of Levine's work on gender equality it is possible to come to a couple of conclusions. First, many of her beliefs on the legal remedies for gender inequality were formed by the times though which she lived. Second, that she worked throughout her career to eliminate gender-based discrimination, wherever she

confronted it. Third, that she had a lasting impact on women's legal rights in North Dakota, and also American society as a whole.

---

[1] Craig R. Ducat, *Constitutional Interpretation: Rights of the Individual, Vol II (repr., Belmont, California, Thomson West, 2004), 1274-94* ; M.Margaret Cowning, David W. Ahern, *Women and Public Policy: A Revolution in Progress* (1995; repr., Washington D.C: CQ Press, 1999), 4-6; Jo Freeman, "From Protection to Equal Opportunity: The revolution in Women's Legal Status," in *Women, Politics, and Change*, ed Louise A. Tilly and Patricia Gurin (New York: Russel Sage Foundation, 1990), 458-59.

[2] Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in the 20th Century* (Oxford: Oxford University Press, 2001); Debran Rowland, *The Boundaries of Her Body: The Troubling History of Women's Rights in America* (Naperville, Illinois: Sourcebooks, 2004), 78-9.

[3] Kessler-Harris, *In Pursuit of Equity*, 203-6.

[4] Kessler-Harris, *In Pursuit of Equity*, 233-41; Marcia Canavan, *Women's Law* (Littleton Colorado: Fred B. Rothman Publications, 2000), 379.

[5] Kessler-Harris, *In Pursuit of Equity*, 238-41; Cowning, *Women and Public Policy*, 1-8.

[6] Freeman, "Protection to Equal Opportunity," 468-69; Flora Davis, *Moving Mountains: The Women's Movement in America Since 1960* (1991 repr., New York: Simon and Schuster, 1999), 62-5.

[7] The Oyez Project, *Reed v. Reed*, 404 U.S. 71 (1971), available at: http://www.oyez.org/cases/1970-1979/1971/1971_70_4/ (Wednesday, March 4, 2009); Ducat, *Constitutional Interpretation*, 1276-83.

[8] The Oyez Project, *Reed v. Reed*, 404 U.S. 71 (1971), available at: http://www.oyez.org/cases/1970-1979/1971/1971_70_4/ (Wednesday, March 4, 2009); Ducat, *Constitutional Interpretation*, 1276-83.

[9] Ducat, *Constitutional Interpretation*, 1276-83.

[10] Ducat, *Constitutional Interpretation*, 1276-83.

[11] Justice Mary Maring interviewed by author, October 31, 2008, Bismarck, North Dakota (recording in the possession of author); Justice Mary Maring, email to the author, 18 February 2009; Justice Mary Maring, email to the author, 18 February 2009; Oxford English Dictionary Online, http://dictionary.oed.com.proxy.library.ndsu.edu/cgi/entry/50196600? "rainmaker.";

[12] Justice Mary Maring interviewed by author, October 31, 2008, Bismarck, North Dakota (recording in the possession of author); Justice Mary Maring, email to the author, 18 February 2009.

[13] Beryl Levine interviewed by author, August 21, 2008, Bismarck, North Dakota (recording in the possession of author).

[14] Ibid.; Sarah Andrews Herman interviewed by author, February 11, 2009, Fargo, North Dakota (recording in the possession of author); Janell Cole, "N.D. intends to weed out sexism in legal community," *The Bismarck Tribune*, 13 March, 1994, A1,A12.

[15] Sarah Andrews Herman interviewed by author, February 11, 2009, Fargo, North Dakota (recording in the possession of author).

[16] "A Difference in Perception: The Final Report of the North Dakota Commission on Gender Fairness in the Courts," *North Dakota Law Review* 72 (1996).

[17] Sarah Andrews Herman interviewed by author, February 11, 2009, Fargo, North Dakota (recording in the possession of author).

[18] "A Difference in Perception: The Final Report of the North Dakota Commission on Gender Fairness in the Courts," *North Dakota Law Review* 72 (1996), 1140,1142,1150.

[19]North Dakota State Supreme Court, *Gender Fairness in North Dakota's Courts: A Ten Year Assessment*, 2006, www.ndcourts.gov/court/committees/gender/gficreport.html.

[20] *Swenson v. Northern Crop Insurance, Inc., and John Krabseth,* 498 N.W.2d 174 (N.D. 1993).

[21] *Swenson v. Northern Crop Insurance, Inc., and John Krabseth,* 498 N.W.2d 174 (N.D. 1993).

[22] *Swenson v. Northern Crop Insurance, Inc., and John Krabseth,* 498 N.W.2d 174 (N.D. 1993).

[23] *Swenson v. Northern Crop Insurance, Inc., and John Krabseth,* 498 N.W.2d 174 (N.D. 1993).

[24] *Swenson v. Northern Crop Insurance, Inc., and John Krabseth,* 498 N.W.2d 174 (N.D. 1993).

[25]*Swenson v. Northern Crop Insurance, Inc., and John Krabseth,* 498 N.W.2d 174 (N.D. 1993).

[26] *Swenson v. Northern Crop Insurance, Inc., and John Krabseth,* 498 N.W.2d 174 (N.D. 1993); ABA Family Legal Guide, *How the Legal System Works: The Civil Trial Step by Step,* http://public.findlaw.com/abaflg/flg-2-3a-10.html accessed March 9th, 2009; Ralph J. Erickstad, Michael J. Hagburg, "In Justice Beryl Levine's View: Her Most Significant Opinions," *North Dakota Law Review* 72 (1996): 944-50.

[27] *Swenson v. Northern Crop Insurance, Inc., and John Krabseth,* 498 N.W.2d 174 (N.D. 1993); Erickstad and Hagburg, "In Justice Beryl Levine's View," 944-50.

[28] *City of Mandan v. Fern*, 501 N.W. 2d 739 (N.D. 1993); Erickstad and Hagburg, "In Justice Beryl Levine's View," 934-38.

[29] *City of Mandan v. Fern*, 501 N.W. 2d 739 (N.D. 1993).

[30] *City of Mandan v. Fern*, 501 N.W. 2d 739 (N.D. 1993).

[31] *City of Mandan v. Fern*, 501 N.W. 2d 739 (N.D. 1993); Randolph N. Jonakait, *The American Jury System* (Yale University Press, 2003) 143-45.

[32] *City of Mandan v. Fern*, 501 N.W. 2d 739 (N.D. 1993).

[33] Elizabeth Frost-Knappman, *Women's Rights on Trial: 101 Historic American Trials From Anne Hutchinson to the Virginia Military Cadets* (Detroit: New England Publishing Associates, Inc, 1997) 143-47.

[34] Frost-Knappman, *Women's Rights on Trial*, 143-47.

[35] *United States v. Virginia et al.* 518 U.S. 515 (1996).

[36] Sarah Andrews Herman interviewed by author, February 11, 2009, Fargo, North Dakota (recording in the possession of author).

CHAPTER FIVE

CONCLUSION

Beryl Levine retired from the North Dakota State Supreme Court on March 1, 1996. She served on the court for eleven years and one month. During her time on the court she allowed women to have a voice in a way they never had before. Levine could not speak for all women, but she was able to allow for women in general to speak with a much louder voice. In addition to this, Levine was able to allow minorities in North Dakota to believe that anyone can become a part of the institutions that shape people's legal rights. Ultimately, Levine made it seem normal and natural for women to be on the North Dakota State Supreme Court. This could be her most important contribution.

Not only did Levine do all of these things, but she also reinforced the idea that by letting previously silenced members of society into the institutions of power in America, society as a whole is strengthened. This idea reaches in to the very core of the idea that, out of its diversity, America draws its strength.

A person does not have to like or agree with all of Levine's beliefs that were examined in this work. She was a human just like anyone else with strengths and weaknesses. However her work was scholarly in its nature and had a solid reasoning. Furthermore, her work deserves study because of what it contributed to American legal thought.

An examination of Levine's life illustrates how she embodied the idea of how the right person at the right time is able to create new opportunities for formerly oppressed

groups. Levine represented a member of generation of pioneering women that helped further advance women's rights.

Levine's biography further illustrated how hard she had to work to achieve the accomplishments in life that she did. Her father, Maurice Jacob Choslovsky, was a Russian-Jewish immigrant to Canada. There he married Bella Gutnik, and together they created a home that fostered an environment that instilled in their daughter Beryl the personal drive to do better in her life. Beryl met her husband Leonard, and together they moved to the United States, and began their life together. The life they made together in America was successful. By the time their last child, David, entered grade school, Levine was ready for the next challenge. For Levine being a lawyer, and eventually a state Supreme Court justice, proved to be her calling. She excelled at it and demonstrated that she was more than capable of handling the stress and rigors of the position.

Levine presided over the many different types of cases that came before the court during her tenure. However, in the area of family law, and in particular divorce cases, Levine demonstrated a new perspective that had not been heard on the North Dakota State Supreme Court before. Levine had a deep and personal understanding of the toll that the adversarial nature of divorce had on everyone involved. Her belief in, and support for the Primary Caretaker Doctrine was important because it represented an attempt at add stability to the divorce process. In addition to this, it added a layer of protection to the children of the couple getting a divorce. Levine also worked to help challenge the growing poverty problem that divorced women face by addressing the way in which property was divided after divorce. All of these concepts combined were an

attempt to level the playing field for women. After looking at her work in its totality it is safe to say that Levine was able to affect the court's thinking by forcing it to take into greater consideration the needs and challenges women faced in the divorce process.

The one area in which Levine showed the most passion was addressing gender inequality in American Society. Throughout American history women have not been allowed the full protection of, and access to, the rights delineated in the United States Constitution. It has only been since the early 1970s that the United States Supreme Court has started to see women as a suspect classification for discrimination and, even there, debate continues as to how far women have been able to advance themselves.

Levine's life coincided with many of the important firsts in the women's rights movement. She was in law school when the United States Supreme Court produced some of the first landmark cases for women's rights. As a practicing lawyer in the Fargo-Moorhead area she saw and experienced the struggles that women had to go through in their professional careers. When Levine became a member of the court, she carried her life experiences with her, and began to address gender discrimination in the legal field. The North Dakota Commission on Gender Fairness in the Courts brought to public attention the problems and challenges women faced in the law, and without Levine it very likely would not have been formed. It was the first major step in making the law more equitable in North Dakota. Over all, Justice Beryl J. Levine was successful in adding a new perspective to the court, and helped pioneer a path for women to achieve a higher level of equality in American society.

BIBLIOGRAPHY

PRIMARY SOURCES

A. COURT CASES

City of Mandan v. Fern, 501 N.W. 2d 739 (N.D. 1993).

Dick v. Dick, 414 N.W.2d 288 (N.D.1987).

Erickson v. Erickson, 384 N.W.2d 659 (N.D. 1986).

Gravning v. Gravning 389 N.W.2d 621(N.D. 1986).

Kaloupek v. Burfening, 440 N.W.2d 496 (ND 1989).

Swenson v. Northern Crop Insurance, Inc., and John Krabseth, 498 N.W.2d 174 (N.D. 1993).

United States v. Virginia et al. 518 U.S. 515 (1996).

B. INTERVIEWS

Herman, Sarah Andrews. Interviewed by author, February 11, 2009, Fargo, North Dakota (recording in the possession of author).

Levine, Beryl. Interviewed by author, August 21, 2008, Bismarck, North Dakota (recording in the possession of author).

Maring, Mary. Interviewed by author, October 31, 2008, Bismarck, North Dakota (recording in the possession of author).

McCormick, Maurice. Interviewed by author, February 4, 2009, Fargo, North Dakota (recording in the possession of author).

Sinner, George. Interviewed by author, October 1, 2008, Fargo, North Dakota (recording in the possession of author).

VandeWalle, Gerald. Interviewed by author, November 13, 2008, Bismarck North Dakota (recording in the possession of author).

C. GOVERNMENT DOCUMENTS

"A Difference in Perception: The Final Report of the North Dakota Commission on Gender Fairness in the Courts," *North Dakota Law Review* 72 (1996).

D. NEWSPAPERS

Bismarck Tribune (Bismarck North Dakota).

The Forum (Fargo North Dakota).

SECONDARY SOURCES

A. ARTICLES

Allen, David W. and Diane E. Wall. "The Behavior of Women State Supreme Court Justices: Are They Token or Outsiders?" *The Justice System Journal* 12 (Fall 1987): 232-244.

----------. "Role Orientation and Women State Supreme Court Justices." *Judicature* 65:6 (December-January 1982): 156-65.

Berkson, Larry. "Women on the Bench: A Brief History." *Judicature* 65:6 (December-January 1982): 286-93.

Binion, Gayle. "The Nature of Feminist Jurisprudence." *Judicature* 77:3 (November-December 1993): 140-44.

Canon, Bradley C. "Defining the Dimensions of Judicial Activism." *Judicature* 66:6 (December-January 1983): 236-47.

Carbon, Susan and Pauline Houlden and Larry Berkson. "Women on the State Bench: Their Characteristics and Attitudes About Judicial Selections." *Judicature* 65:6 (December-January 1982): 294-305.

Collins, Patricia Hill. "Black Feminist Thought," in *Feminist Theory: A Reader*, ed Wendy Kolmar and Frances Bartkowski (2000; repr., New York: McGraw-Hill, 2005), 505-8.

Cook, Beverly B. "Women as Supreme Court Candidates: From Florence Allen to Sandra O'Connor." *Judicature* 65:6 (December-January 1982): 314-26.

----------. "Moral Authority and Gender Difference: Georgia Bullock and the Los Angeles Women's Court." *Judicature* 65:6 (December-January 1982): 144-55.

Davis, W. Jeremy. "Dedication." *North Dakota Law Review* 72:4 (1996): 909-910.

Davis, Sue. "Do Women Judges Speak in a Different Voice?" *Wisconsin Women's Law Journal* 1:8 (1993): 143-168.

D.H. Van Doren. "Rights of Illegitimate Children under Modern Statutes." Columbia Law Review 16:8 (December 1917): 698-701.

Drinker, Sophie H. "Women Attorneys of Colonial Times." *Maryland Historical Magazine* 56:4 (December 1961): 335-6.

Erickstad, Ralph J. and Michael J. Hagburg. "In Justice Beryl Levine's View: Her Most Significant Opinions." *North Dakota Law Review* 72:4 (1996): 915-951.

Furstenberg, Frank F. "History and Current Status of Divorce in the United States." *The Future of Children* 4:1 (Spring 1994): 29-43.

Grossberg, Michael. "Who Gets the Child? Custody, Guardianship, and the Rise of Judicial Patriarchy in Ninteenth-Century America." *Feminist Studies* 9:2 (Summer 1983): 235-60.

Gruhl, John and Cassia Spohn and Susan Welch. "Women as Policy Makers: The Case of Trial Judges." *American Journal of Political Science* 25:2 (May 1981): 308-322.

Jelsing, Catherine. "The Woman Behind the Robe" *Open* (2008): 33-36.

Levine, David K. "Justice Beryl Joyce Levine: Behind The Scenes." *North Dakota Law Review* 72:4 (1996): 1049-1067.

Lockney, Thomas M. "Justice Beryl Levine: Taking Her Title Seriously in North Dakota Criminal Cases." *North Dakota Law Review* 72:4 (1996): 967-1010.

Martin, Elaine. "Women on the Bench: A Different Voice?" *Judicature* 77:3 (November-December 1993): 126-128.

----------. "The Representative Role of Women Judges." *Judicature* 65:6 (December-January 1982): 166-73.

Martin, Patricia Yancey and John R. Reynolds and Shelley Keith. "Gender Bias and Feminist Consciousness Among Judges and Attorneys: A Standpoint Theory Analysis." *Signs* 27:3 (Spring 2002): 665-701.

Myszkowski, Pete. Ed "Former Justice Beryl Levine." *Matters of Law* 4 (Fall 2005): 8-9.

Neumann, William A. and Tracy Vigness Kolb. "A Woman's Touch." *North Dakota Law Review* 72:4 (1996): 953-965.

Rand, Kathryn R.L. "Making a Real Difference: The Dominance Approach in the Opinions of Justice Beryl J. Levine." *North Dakota Law Review* 72:4 (1996): 1031-1047.

Schafran, Lynn Hecht. "Focus." *Judicature* 77:2 (September-October): 110-114.

Tolchin, Susan. "The Exclusion of Women from the Judicial Process." *Signs* 2:4 (Summer 1977): 877-887.

B. BOOKS

Amato, Paul R. et al. *Alone Together: How Marriage in America is Changing.* Cambridge: Harvard University Press, 2007.

Berkowitz, Edward D. *Something Happened: A Political and Cultural Overview of the Seventies.* New York: Columbia University Press, 2006.

Canavan, Marcia. *Women's Law*. Littleton Colorado: Fred B. Rothman Publications, 2000s.

Cott, Nancy F. *No Small Courage: A History of Women in the United States*. Oxford University Press, 2000.

----------. *Public Vows: A History of Marriage and the Nation*. Cambridge: Harvard University Press, 2000.

Cowning, M.Margaret, David W. Ahern. *Women and Public Policy: A Revolution in Progress*. 1995; repr., Washington D.C: CQ Press, 1999.

Davis, Flora. *Moving Mountains: The Women's Movement in America Since 1960*. 1991 repr., New York: Simon and Schuster, 1999.

Degler, Carl N. *At Odds: Women and the Family in America from the Revolution to the Present*, Oxford: Oxford University Press, 1980.

Ducat, Craig R. *Constitutional Interpretation: Rights of the Individual, Vol II. repr., Belmont, California, Thomson West, 2004.*

Frost-Knappman, Elizabeth. *Women's Rights on Trial: 101 Historic American Trials From Anne Hutchinson to the Virginia Military Cadets*. Detroit: New England Publishing Associates, Inc, 1997.

Gilligan, Carol. *In A Different Voice: Psychological Theory and Women's Development*. Harvard University Press, 1982.

Glendon, Mary Ann. *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe*. Chicago: The University of Chicago Press, 1989.

Griffie, Delores Jackson. *Weaving a Thread of Continuity: Impact of Female Judges Serving on the United States Court of Appeals*. Claremont Graduate University, 1998.

Hoff, Joan. *Law Gender & Injustice: A Legal History of U.S. Women* New York: New York University Press. 1991.

Jonakait, Randolph N. *The American Jury System* Yale University Press. 2003.

Kessler-Harris, Alice. *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in the 20th Century*. Oxford: Oxford University Press, 2001.

Kuersten, Ashlyn K. *Women and the Law: Leaders, Cases, and Documents*. Santa Barbara: ABC:CLIO. 2003.

Mintz, Steven and Susan Kellogg. *Domestic Revolutions: A Social History of American Family Life* New York: The Free Press, 1988.

Molette-Ogden, Carla E. *Female Jurists: The Impact of Their Increased Presence of the Minnesota Supreme Court*. Saint Louis: Washington University, 1998.

Phillips, Roderick. *Putting Asunder: A History of Divorce in Western Society*. Cambridge: Cambridge University Press, 1988.

Reed, Phyllis J. and Bernard L. Witlieb, *The Book of Women's Firsts*, New York: Random House, 1992.

Rosen, Ruth. *The World Split Open: How the Modern Women's Movement Changed America*. New York: Viking Press, 2000.

Rowland, Debran. *The Boundaries of Her Body: The Troubling History of Women's Rights in America*. Naperville, Illinois: Sourcebooks, 2004.

Thistle, Susan. *From Marriage to Market: The Transformation of Women's Lives and Work*. Berkley: University of California Press, 2006.

Tilly, Louise A. and Patricia Gurin, ed. *Women, Politics, and Change*. New York: Russel Sage Foundation, 1990.

Weitzman, Lenore J. *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*. New York, Collier Macmillan Publishers, 1985.

C. INTERNET SOURCES

ABA Family Legal Guide, *How the Legal System Works: The Civil Trial Step by Step*, http://public.findlaw.com/abaflg/flg-2-3a-10.html accessed March 9th, 2009.

The Oyez Project, *Reed v. Reed*, 404 U.S. 71 (1971), available at: http://www.oyez.org/cases/1970-1979/1971/1971_70_4/ (Wednesday, March 4, 2009).

The University of North Dakota, *Deans of the University of North Dakota School of Law*, http://www.law.und.edu/Alumni/deans.php, accessed December 28, 2008