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Chief Justice Lamer's Leadership in Feminist Times

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I. INTRODUCTION

Chief Justice Lamer was not a feminist. The idea of writing a feminist assessment of his work on the Supreme Court of Canada was appealing because of the challenge it presented: there was no obvious starting point. In talking about the challenge with feminist colleagues, several suggested that Chief Justice Lamer was possibly an "anti-feminist" if that label can be made meaningful. But I am less convinced that the record supports this assessment, although it is certainly the case that the law has often been anti-feminist, and Lamer was no great dissenter.

I was a law clerk to Chief Justice Lamer at the mid-point of his 10 years as Chief Justice. I was old enough by then to be a feminist, and legal feminism was old enough for this to be commonplace. My references for the job were feminists, as was the Dean of my law school. I first met the Chief Justice when I was six months pregnant with my first child. I was pregnant again during most of my year at the Court. I had worried about being pregnant when applying for a clerkship. Along with foundational principles of the common law, I was learning at law school that the profession was itself quite possibly "anti-feminist". Clerkships were not easy to come by, and pregnancy does not fit well on a résumé. It turned out, however, that Chief Justice Lamer was not at all concerned about my pregnancy. This was really a minor detail that might possibly affect the timing for my start on the job, but not much else. He was a

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* University of British Columbia Faculty of Law. I am grateful to my friends and colleagues for sharing their views with me, and I aologize for any errors in accurately reflecting and conveying these views. My thanks to Janine Benedet, Susan Boyd, Christine Boyle, Kim Brooks, Isabel Grant, Jenni Millbank, Margot Young and Claire Young. I am also grateful to my research assistants Jacqueline Fehr and Michael Hall for timely and unflappable assistance. I must thank Adam Dodek for the invitation to participate in this collection, which has offered considerable intellectual challenge and was simply more fun than I had imagined it could be. I also want to thank Madam Justice C. Lynn Smith, who first taught me about feminism and the law, and whom I have thought of each and every day I have worked on this project.

little more interested in my second pregnancy, because he sometimes sent morning snacks up to the clerk offices for me. I never talked at any time with Chief Justice Lamer about feminism and the law. But I imagine that his attitude to it might have paralleled his attitude to my pregnancy — it was of no particular import to him one way or the other. It would be accommodated, but it did not require comment and it had nothing to do with him. Is such a posture anti-feminist? In sum I do not believe so. Indeed, as one colleague in my informal survey commented, at a given point in time, what feminists wanted from powerful men was simply that they not stand in the way. Antonio Lamer did not stand in the way.

Antonio Lamer was on the Supreme Court of Canada for 20 years, from 1980 to 2000, and was Chief Justice for the second decade of that time. These 20 years were a transformative time for feminist engagement with the law in Canada.[1] Feminist landmarks of the period include: the *Canadian Charter of Rights and Freedoms*[2] coming into force; a series of ground-breaking decisions made on issues ranging from reproductive rights, to tort liability for sexual assault, to rejecting child care expenses as a tax deduction; and Madam Justice Bertha Wilson being appointed as the first woman on the Supreme Court of Canada in 1982. When Chief Justice Lamer retired, he was replaced by the first woman to be Chief Justice in Canada, Beverley McLachlin. While 2009 is probably not far enough removed from this time to draw a firm conclusion, it is at least possible that the middle decade of Antonio Lamer's time on the court represents a high-water mark for feminist legal victories. Between 1985 and 1995, during which time women began to surpass men in law school enrolment and feminist legal studies became a standard part of law school curriculum, there were a number of important feminist victories at the Supreme Court of Canada, and a great number of important feminist arguments put to the Court. Antonio Lamer's time on the Court was a feminist time. He was a leader during that time. It is against this backdrop that a feminist assessment of his work there must be developed.

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[1] Mary Jane Mossman, "Feminism and the Law: Challenges and Choices" (1998) 10 C.J.W.L. 1; Elizabeth A. Sheehy, "Legal Responses to Violence Against Women in Canada" (1999) 19 Canadian Woman Studies 62; Elizabeth Sheehy, ed., *Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dubé* (Toronto: Irwin Law, 2004); Susan B. Boyd & Elizabeth A. Sheehy, "Feminist Perspectives on Law: Canadian Theory and Practice" (1986) 2 C.J.W.L. 1.

[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

In this paper, I construct a feminist retrospective on Lamer's career in three stages. The first is to look at the content of the decisions he penned from a feminist perspective. The second is to look at the position that he took in a number of the key decisions for feminists, and a third is to look — briefly — at the evolution in Chief Justice Lamer's writing about sexual assault during his time on the Court. At each stage, I aim to describe my methodology clearly and to set out the evidence I have relied on, so that readers may make their own decisions about Chief Justice Lamer's engagement with feminist legal argument. The terrain is too vast, and my conclusions are too tentative, for any other approach to be valid. I hope that if you have read this far you will continue on prepared to judge his contributions for yourself, and remain open-minded about what it is to be both feminist and retrospective.

There are so many potential caveats to my methodologies that I hesitate to offer any at all, but one has become so important that I want to introduce it here and follow it through the paper. This is the question of feminism. Feminism has some stable core content, but its parameters are not clear.[3] In 1980, when Justice Lamer was appointed to the Supreme Court of Canada, feminism was possibly more monolithic, or perhaps "coherent", than it is now. While we are now grappling with the consequences of a backlash against feminist advances, in 1980 movement was forward. At that time, undergraduate students (as I recall so clearly) were taught about second-wave feminism. The third wave may have been on the horizon, but was not yet in the classroom. The problem of deciding what would "count" as feminist content in the law quickly became apparent when I talked to colleagues about this work. Given space constraints and the interests of simplicity, in this paper I have not explored the meaning of feminism, and I have taken a broad view of feminist interests. This gives short shrift to important divisions and diverse trajectories within legal feminism, and it comes perilously close to simply equating feminism with "about women". This is not my view. I believe feminism to have an important substantive ideological core, but I have not explored that here in any way.

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[3] See Barbara Crow & Lise Gotell, *Open Boundaries: A Canadian Women's Studies Reader* (Toronto: Prentice Hall Allyn and Bacon Canada, 2005); Sandra Kemp & Judith Squires, eds., *Feminisms* (Oxford: Oxford University Press, 1997).

II. LAMER'S DECISIONS

Chief Justice Lamer wrote an enormous number of decisions while on the Court. I have reviewed 204 of these for the purposes of this analysis.[4] I began the task of a feminist assessment of his contributions by looking at the contributions end to end and asking myself which among all these writings would be of some interest to feminists. My initial list included 66 decisions. But the criterion "of interest to feminists" or even "of interest to feminist scholars" proved problematic. The reach of feminist engagement with the law is so broad that there is scarcely a corner of the law which has not been the object of feminist analysis. Feminists have brought their attention to corporate law, tax law, administrative law, contract law, tort law, international law and constitutional law — indeed, to every imaginable corner of the law, in addition to areas of the law where gendered concerns are present *prima facie* such as family law, sexual assault law, the law of evidence and the law of poverty. It is difficult now to find any area of the law that is not of some interest to some feminist scholars, and impossible to find any area that could not be subject to some degree of feminist analysis.

Surveying Chief Justice Lamer's jurisprudence as a whole does, however, reveal key areas where his interests and what might be called "core elements of feminist concern" overlap. Chief Justice Lamer authored 26 decisions in the area of sexual assault.[5] I discuss these cases

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[4] The list of 204 judgments was compiled by Court staff for the editors of this volume. Chief Justice Lamer stated in his retirement address (December 17, 1999) that he had written 350 decisions on the Court.

[5] *R. v. Timm*, [1981] S.C.J. No. 86, [1981] 2 S.C.R. 315 (S.C.C.); *R. v. Mezzo*, [1986] S.C.J. No. 40, [1986] 1 S.C.R. 802 (S.C.C.); *R. v. Carter*, [1986] S.C.J. No. 36, [1986] 1 S.C.R. 981 (S.C.C.); *R. v. Bulmer*, [1987] S.C.J. No. 28, [1987] 1 S.C.R. 782 (S.C.C.); *R. v. Arkell*, [1990] S.C.J. No. 86, [1990] 2 S.C.R. 695 (S.C.C.); *R. v. E. (A.W.)*, [1993] S.C.J. No. 90, [1993] 3 S.C.R. 155 (S.C.C.); *R. v. L. (D.O.)*, [1993] S.C.J. No. 72, [1993] 4 S.C.R. 419 (S.C.C.); *R. v. Osolin*, [1993] S.C.J. No. 135, [1993] 4 S.C.R. 595 (S.C.C.); *R. v. P. (M.B.)*, [1994] S.C.J. No. 27, [1994] 1 S.C.R. 555 (S.C.C.); *R. v. Jones*, [1994] S.C.J. No. 42, [1994] 2 S.C.R. 229 (S.C.C.); *R. v. Tran*, [1994] S.C.J. No. 16, [1994] 2 S.C.R. 951 (S.C.C.); *R. v. Borden*, [1994] S.C.J. No. 82, [1994] 3 S.C.R. 145 (S.C.C.); *R. v. S. (T.)*, [1994] S.C.J. No. 105, [1994] 3 S.C.R. 952 (S.C.C.); *R. v. Park*, [1995] S.C.J. No. 57, [1995] 2 S.C.R. 836 (S.C.C.); *R. v. U. (F.J.)*, [1995] S.C.J. No. 82, [1995] 3 S.C.R. 764 (S.C.C.); *R. v. Brydon*, [1995] S.C.J. No. 75, [1995] 4 S.C.R. 253 (S.C.C.); *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411 (S.C.C.); *A. (L.L.) v. B. (A.)*, [1995] S.C.J. No. 102, [1995] 4 S.C.R. 536 (S.C.C.); *R. v. M. (C.A.)*, [1996] S.C.J. No. 28, [1996] 1 S.C.R. 500 (S.C.C.); *R. v. Currie*, [1997] S.C.J. No. 10, [1997] 2 S.C.R. 260 (S.C.C.); *R. v. F. (W.G.)*, [1999] S.C.J. No. 61, [1999] 3 S.C.R. 569 (S.C.C.); *R. v. W. (G.)*, [1999] S.C.J. No. 37, [1999] 3 S.C.R. 597 (S.C.C.); *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668 (S.C.C.); *R. v. Davis*, [1999] S.C.J. No. 67, [1999] 3 S.C.R. 759 (S.C.C.); *R. v. W. (L.F.)*, [2000] S.C.J. No. 7, [2000] 1 S.C.R. 132 (S.C.C.); *R. v. S. (R.N.)*, [2000] S.C.J. No. 8, [2000] 1 S.C.R. 149 (S.C.C.); *R. v. R. (R.A.)*, [2000] S.C.J. No. 9, [2000]

at more length below. He wrote five family law decisions;[6] three human rights decisions involving equality and family status issues;[7] two decisions involving spousal homicides,[8] one decision regarding prostitution,[9] and five decisions not in any of these categories, but nonetheless involving a particularly vulnerable girl or woman, and therefore of interest because of their portrayal of this individual.[10] In addition to these cases, my list of 66 includes eight decisions on aboriginal rights,[11] ten reference decisions;[12] two decisions regarding subjective fault;[13] and one landmark decision regarding the criminal responsibility of mentally ill accused.[14]

Each of these latter categories has been of particular importance to feminist scholars and lawyers. Aboriginal rights represent a key area of intersectional analysis. In addition, feminist arguments about the nature of these rights, and about potential contests between women's rights and Aboriginal rights, have been vital in the Canadian debate about these rights.[15] The high-profile role of reference decisions means that they are

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1 S.C.R. 163 (S.C.C.). These decisions are discussed below at 369-77. See also Anne-Marie Boisvert, "Le juge Lamer, la faute, le blâme et le châtiment" (2009) 46 S.C.L.R. (2d) 121.

6 *Paquette v. Galipeau*, [1981] S.C.J. No. 4, [1981] 1 S.C.R. 29 (S.C.C.); *Martin v. Chapman*, [1983] S.C.J. No. 29, [1983] 1 S.C.R. 365 (S.C.C.); *Messier v. Delage*, [1983] S.C.J. No. 80, [1983] 2 S.C.R. 401 (S.C.C.); *Beaudoin-Daigneault v. Richard*, [1984] S.C.J. No. 2, [1984] 1 S.C.R. 2 (S.C.C.); *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.).

7 *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.); *Canada (Attorney General) v. Mossop*, [1993] S.C.J. No. 20, [1993] 1 S.C.R. 554 (S.C.C.); *Eaton v. Brant County Board of Education*, [1997] S.C.J. No. 98, [1997] 1 S.C.R. 241 (S.C.C.).

8 *Argentina (Republic) v. Mellino*, [1987] S.C.J. No. 25, [1987] 1 S.C.R. 536 (S.C.C.); *R. v. Ratti*, [1991] S.C.J. No. 5, [1991] 1 S.C.R. 68 (S.C.C.).

9 *R. v. Corbeil*, [1991] S.C.J. No. 29, [1991] 1 S.C.R. 830 (S.C.C.).

10 *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519 (S.C.C.); *R. v. Harper*, [1994] S.C.J. No. 71, [1994] 3 S.C.R. 343 (S.C.C.); *R. v. Hawkins*, [1996] S.C.J. No. 117, [1996] 3 S.C.R. 1043 (S.C.C.); *R. v. Latimer*, [1997] S.C.J. No. 11, [1997] 1 S.C.R. 217 (S.C.C.); *Aubry v. Editions Vice-Versa*, [1998] S.C.J. No. 30, [1998] 1 S.C.R. 591 (S.C.C.).

11 These decisions are discussed in Dwight Newman, "Institutional Roles and Chief Justice Lamer's Aboriginal Rights Jurisprudence" (2009) 46 S.C.L.R. (2d) 77.

12 The list here includes four decisions on judicial independence which are discussed elsewhere in this volume: see Adam Dodek, "Chief Justice Lamer and Policy Design at the Supreme Court of Canada" (2009) 46 S.C.L.R. (2d) 93.

13 *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.); *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

14 *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933 (S.C.C.).

15 For key examples see Marlee Kline, "Child Welfare Law, 'Best Interest of the Child' Ideology, and First Nations" (1992) 30 Osgoode Hall L.J. 375; Marlee Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women" (1993) 18 Queen's L.J. 306; Marlee Kline, "The Colour of Law: Ideological Representations of First Nations in Legal Discourse"

perpetually important to feminists, particularly in key areas of identity politics such as minority language education. The subjective fault decisions were a key point of attention for feminist criminal lawyers.[16] Mental illness also raises important concerns of intersectionality with which feminist scholars have grappled.[17]

Chief Justice Lamer's work on these decisions is neither persistently feminist nor persistently anti-feminist. He wrote a handful of decisions which are considered major feminist victories. For example, he penned the majority decision in *R. v. Sullivan*,[18] a case determining that two midwives could not be convicted of criminal negligence causing death because a fetus is not a person in law. In addressing what was the key legal issue in the case from a feminist perspective, Lamer C.J.C. stated:

> The intervener L.E.A.F. encouraged this Court to find that a foetus is not a "person" within the meaning of s. 203 on the basis that such a result would be inconsistent with the goal of sexual equality in the law which has been recognized by this Court in both *Charter* and non-*Charter* cases: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *R. v. Lavallee*, [1990] 1 S.C.R. 852. Such an approach to statutory interpretation may have arisen if an examination of the legislative history of the criminal negligence provisions had revealed that Parliament had intended that the term "person" would include a foetus, whereas "human being" would not. However, this was not the case. The result reached above is consistent with the "equality approach" taken by L.E.A.F.; but it is unnecessary to consider this point in further detail.[19]

Chief Justice Lamer also wrote the majority decision in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, ruling that in certain child wardship cases provincial governments have an

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(1994) 3 Soc. & Leg. Stud. 451. See also *Speaking Truth to Power: Remembering Marlee Kline* (2004) 16:1 C.J.W.L.

[16] Elizabeth Sheehy & Christine Boyle, "Justice L'Heureux-Dubé and Canadian Sexual Assault Law: Resisting the Privatization of Rape" [hereinafter "Sheehy & Boyle"] in Elizabeth Sheehy, ed., *Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dubé*, *supra*, note 1, 247.

[17] Judith Mosoff, "Motherhood, Madness, and Law" (1995) 45 U.T.L.J. 107; Janine Benedet & Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief" (2007) 52 McGill L.J. 243; Janine Benedet & Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues" (2007) 52 McGill L.J. 515.

[18] [1991] S.C.J. No. 20, [1991] 1 S.C.R. 489 (S.C.C.).

[19] *Id.*, at 503.

obligation to provide state-funded legal counsel.[20] In this case, Lamer C.J.C. decided the matter as a question of fundamental justice under section 7 of the Charter. In finding that the interests at stake were a matter of security of the person, he wrote:

> I have little doubt that state removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent. The parental interest in raising and caring for a child is, as La Forest J. held in *B. (R.)* ... "an individual interest of fundamental importance in our society". Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as "unfit" when relieved of custody. As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.[21]

This reasoning with regard to section 7 draws directly on the decision in *R. v. Morgentaler*,[22] a key feminist landmark discussed below.[23] In his reasons, Lamer C.J.C. declined to address the matter as a question of equality rights, which L'Heureux-Dubé J. did in her separate opinion, noting that "women, and especially single mothers, are disproportionately and particularly affected by child protection".[24] In each of these cases, therefore, Lamer C.J.C. penned majority reasons leading to outcomes applauded by feminists without directly engaging in the core of the feminist argumentation put to the Court.

On the other hand, Chief Justice Lamer also authored a handful of opinions that can be labelled anti-feminist. In 1983 he authored a dissent in *Martin v. Chapman*, which argued that the so- called "illegitimate" son of a man registered under the *Indian Act* should not be eligible to be so registered because his parents were not married.[25] For the majority, Wilson J. asserted that Lamer J.'s interpretation amounted to adding the

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20 *Supra*, note 6.

21 *Id.*, at 53.

22 [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.).

23 See discussion at 365-66.

24 *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, *supra*, note 6, at 88. Justices Gonthier and McLachlin signed on to L'Heureux-Dubé J.'s reasons.

25 *Supra*, note 6.

criterion of legitimacy to the relevant provision.[26] In 1993, Lamer C.J.C. wrote for the majority in *Canada (Attorney General) v. Mossop*, ruling that denial of bereavement leave to a same-sex spouse was not discrimination on the basis of "family status".[27]

The best-known of Chief Justice Lamer's decisions which fall in the anti-feminist category are the rulings on disclosure and production of complainants' therapeutic counselling records in sexual assault cases. In the 1995 case of *O'Connor*, Lamer C.J.C. and Sopinka J. jointly authored reasons holding that such records would frequently be relevant, and thus the threshold for their exclusion would be low. On the two key issues in the case, they held, first, that a sexual assault complainant has no privacy interest in therapeutic counselling records once they are in the hands of the Crown;[28] and, second, that there were many foreseeable reasons why such records might be relevant evidence and hence subject to production for the defence even when in third party hands. This reasoning was in stark contrast to L'Heureux-Dubé J.'s view that counselling records would rarely be relevant. Their reasoning was sharply at odds with feminist argument in the case, as this excerpt demonstrates:

> By way of illustration only, we are of the view that there are a number of ways in which information contained in third party records may be relevant, for example, in sexual assault cases:
>
> (1) they may contain information concerning the unfolding of events underlying the criminal complaint ... .
>
> (2) they may reveal the use of a therapy which influenced the complainant's memory of the alleged events. For example, in

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[26] *Id.*, at 366.

[27] *Supra*, note 7. Justices L'Heureux-Dubé, Cory and McLachlin dissented.

[28] *Supra*, note 5, at 428-33. See, for example, 429-30:

> In our view, it would be difficult to argue that the complainant enjoys an expectation of privacy in records that are held by the Crown. In discussing the nature of a complainant's privacy interest in therapeutic records, L'Heureux-Dubé J. points out that such records often relate to "intensely private aspects" of the complainant's personal life, and describe thoughts and feelings "which have never even been shared with the closest of friends or family" (para. 112). With respect, we agree that important privacy interests attach to counselling records in the situation described by our colleague. However, where the documents in question have been shared with an agent of the state (namely, the Crown), it is apparent that the complainant's privacy interest in those records has disappeared. Clearly, where the records are in the possession of the Crown, they have become "the property of the public to be used to ensure that justice is done" (*Stinchcombe*, *supra*, at p. 333). As a form of "public property", records in the possession of the Crown are simply incapable of supporting any expectation of privacy. As a result, there is no "privacy interest" to be balanced against the right of the accused to make full answer and defence.

> *R. v. L. (D.O.)*, L'Heureux-Dubé J. recognized the problem of contamination when she stated, in the context of the sexual abuse of children, that "the fear of contaminating required testimony has forced the delay of needed therapy and counselling". ...
>
> (3) they may contain information that bears on the complainant's "credibility, including testimonial factors such as the quality of their perception of events at the time of the offence, and their memory since". ...[29]

Because the direct issue in *O'Connor* was whether the trial judge ought to have stayed the charges to discipline the Crown, Lamer and Sopinka JJ. are technically dissentients in this ruling. However, because Cory and Iacobucci JJ. agreed with them substantively, their ruling carried the day. On the matter of the stay, L'Heureux-Dubé J. prevailed. In the companion case of *A. (L.L.) v. B. (A.)*, Lamer C.J.C. again co-authored with Sopinka J., this time in a straightforward majority ruling that the accused was not entitled to sexual assault counselling records in this case because he had not followed proper procedures to obtain them.[30]

Following the decision in *O'Connor*, Parliament legislated to address the issue of medical records in third party hands. The legislation was tested and found constitutional by the Court in the *R. v. Mills* ruling in 1999.[31] Chief Justice Lamer, however, could not agree and penned a strongly worded dissent arguing that that the procedure for an accused to obtain records in the possession of the Crown placed too high an onus on the accused to withstand constitutional scrutiny. In his reasons, we hear the voice of a judge whose strongest contributions to jurisprudence are quite likely in protecting the rights of the accused:

> McLachlin and Iacobucci JJ. emphasize in their reasons that the Crown's duty of disclosure is not absolute. The *Charter* entrenches the right to a fair trial, they maintain, not the best trial. The principles of fundamental justice do not guarantee the most favourable procedures conceivable. All of this is true. However, in my respectful view my colleagues understate the importance of Crown disclosure to trial fairness. Disclosure of records in the Crown's hands furthers the search for truth as it enables the defence to challenge the accuracy and cogency of the prosecution's case. The accused's ability to access

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29 *Id.*, at 440-41 (citations omitted).
30 *Supra*, note 5.
31 *Supra*, note 5.

> relevant information that may ultimately deprive him of his liberty strikes at the very core of the principles of fundamental justice.[32]

The counselling records decisions come quickly to mind in any feminist appraisal of Chief Justice Lamer's record. His influence here was significant, even though, as I discuss below, his overall record on matters of sexual assault is more nuanced.

In sum, examining the whole gamut of Chief Justice Lamer's decisions demonstrates that feminist concerns were not a central focus of his writings, even when the result he reached was applauded by feminists. His strong and well-recognized commitment to the rights of the accused offers a more logical account of these decisions — both feminist and anti-feminist — than any factor related to feminist argumentation, or to women. This is one of the reasons that I have concluded that Chief Justice Lamer may well have found feminist argumentation to be largely irrelevant as an ideological whole. It was probably important to him when it fit well with his other concerns — as in *Sullivan* or *G. (J.)* — but clearly not able to persuade him on other points, as is evident in the counselling records decisions. This conclusion does, however, show that Chief Justice Lamer was a skilful judge and a consummate common lawyer, able to deploy all possible tools of analysis and persuasion.

It is also notable that only one of the decisions that Chief Justice Lamer wrote in what I have broadly termed the "core" areas of feminist engagement with the law made the various lists of his most important decisions that were published shortly after his death.[33] This too is indicative that while he was a judicial leader at a vitally important time for feminist engagement with the law, he did not take a leadership role in that engagement. For that reason, it is instructive to turn to considering how Chief Justice Lamer positioned himself in relation to the key decisions — from a feminist point of view — of his time.

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[32] *Id.*, at 683.

[33] An article in *The Globe and Mail* listed the following decisions: *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.); *R. v. Swain*, *supra*, note 14; *R. v. Smith*, [1987] S.C.J. No. 36, [1987] 1 S.C.R. 1045 (S.C.C.); *Reference re Motor Vehicle Act (British Columbia) S. 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.); *R. v. Vaillancourt*, *supra*, note 13; *R. v. Bartle*, [1994] S.C.J. No. 74, [1994] 3 S.C.R. 173 (S.C.C.); *R. v. O'Connor*, *supra*, note 5; *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 (S.C.C.). See Kirk Makin, "Judge breathed creative life into the Charter", *The Globe and Mail* (November 26, 2007), online: <http://www.theglobeandmail.com>.

III. FEMINIST LANDMARKS

Compiling this list of decisions was almost as complex as considering what might be of interest to feminists. I used two methods here. First, I considered cases where the Women's Legal Education and Action Fund ("LEAF") had acted as an intervenor.[34] This is a useful indicator because it demonstrates both that LEAF itself took an interest in the case, and that the Supreme Court granted intervenor status in response to LEAF's request. This second criterion is important because LEAF's argument for intervenor status is typically at least partially based on its experience in articulating substantive equality arguments from a feminist perspective. While the Court does not issue reasons for granting intervenor status, it is logical to assume that granting such status to LEAF reflects the Court's view that there is an important feminist viewpoint to be articulated in the case. I supplemented the list of LEAF cases before the Supreme Court with an informal survey of feminist colleagues who specialize in a range of substantive areas of the law. This was useful because it highlighted which cases from the lengthy LEAF list particularly stand out as landmarks, and it also added a handful of decisions that were vitally important but where LEAF either did not seek or was not granted intervenor status.

From 1985 to the end of 1999, LEAF intervened in 32 Supreme Court of Canada cases.[35] In the ensuing judgments, Chief Justice Lamer authored or co-authored the majority reasons in 7 cases;[36] concurred with majority reasons in 12 cases;[37] signed onto to one dissent;[38] authored

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[34] The Women's Legal Education and Action Fund ("LEAF") is a national charitable organization which was established in 1985 when the Charter's equality provisions came into force with the primary objective of promoting substantive equality interpretations of those provisions. LEAF quickly became the key Canadian organization for feminist litigation strategies. See the LEAF website at <http://www.leaf.ca>. See also Sherene H. Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund* (Toronto: Second Story Press, 1991); Christopher P. Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver: University of British Columbia Press, 2004).

[35] This count is based on the case records available on the LEAF website, *id.*

[36] *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] S.C.J. No. 67, [1988] 2 S.C.R. 122 (S.C.C.); *R. v. Sullivan*, *supra*, note 18; *Schachter v. Canada*, *supra*, note 7; *R. v. Whitley*, [1994] S.C.J. No. 102, [1994] 3 S.C.R. 830 (S.C.C.); *R. v. O'Connor*, *supra*, note 5; *A. (L.L.) v. B. (A.)*, *supra*, note 5; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, *supra*, note 6. In the *O'Connor* judgment, the Chief Justice and Sopinka J. are the true dissentients because of their ruling on the question of a stay: see above at 360-61. I have included this judgment in this list, however, as their reasoning on the more enduring issues was the majority position.

[37] *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.); *Borowski v. Canada (Attorney General)*, [1989] S.C.J. No. 14, [1989] 1 S.C.R. 342

dissenting reasons in one case;[39] and did not sit in 10 cases.[40] In one case, the opinion of the Court is not attributed to a named author.[41] At this broad level, the most notable trend here is that Chief Justice Lamer was either absent or a quiet majoritarian. This accounts for 29 of the 32 cases. It is tempting to make something of the 10 cases that the Chief Justice did not sit on; however, without doing a systematic analysis of the patterns of other judges, I cannot draw any conclusions here.

This dominant posture fits with my conclusion based on reviewing Chief Justice Lamer's rulings: he was in the main an observer of feminism's engagement with the law, mostly supportive, silent or not standing in the way. This group of cases represents some of the key achievements of feminist engagement with legal argument. Justice Lamer (as he then was) concurred with McIntyre J.'s oft-cited reasons outlining a substantive equality approach for section 15 Charter rights in *Andrews v. Law Society of British Columbia*;[42] and as Chief Justice he participated in the Court's judgment in the important equality sequel in *Eldridge v. British Columbia (Attorney General)*.[43] Chief Justice Lamer

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(S.C.C.); *R. v. Seaboyer; R. v. Gayme*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577 (S.C.C.); *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452 (S.C.C.); *R. v. M. (M.L.)*, [1994] S.C.J. No. 34, [1994] 2 S.C.R. 3 (S.C.C.); *Gordon v. Goertz*, [1996] S.C.J. No. 52, [1996] 2 S.C.R. 27 (S.C.C.); *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.); *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] S.C.J. No. 96, [1997] 3 S.C.R. 925 (S.C.C.); *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 (S.C.C.); *R. v. Ewanchuk*, [1999] S.C.J. No. 10, [1999] 1 S.C.R. 330 (S.C.C.); *M. v. H.*, [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3 (S.C.C.); *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (Meiorin Grievance)*, [1999] S.C.J. No. 46, [1999] 3 S.C.R. 3 (S.C.C.). In the *Andrews* judgment, Lamer J. concurred with McIntyre J. in the oft-cited judgment on s. 15; however, he did join with McIntyre J. in dissenting in regard to the application of s. 1.

[38] *R. v. S. (R.D.)*, [1997] S.C.J. No. 84, [1997] 3 S.C.R. 484 (S.C.C.).

[39] *R. v. Mills*, *supra*, note 5. *R. v. O'Connor*, *supra*, note 5, is a partial dissent: see comments at note 36.

[40] *Brooks v. Canada Safeway Ltd.*, [1989] S.C.J. No. 42, [1989] 1 S.C.R. 1219 (S.C.C.); *Janzen v. Platy Enterprises Ltd.*, [1989] S.C.J. No. 41, [1989] 1 S.C.R. 1252 (S.C.C.); *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.); *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] S.C.J. No. 5, [1992] 1 S.C.R. 236 (S.C.C.); *Norberg v. Wynrib*, [1992] S.C.J. No. 60, [1992] 2 S.C.R. 226 (S.C.C.); *M. (K.) v. M. (H.)*, [1992] S.C.J. No. 85, [1992] 3 S.C.R. 6 (S.C.C.); *Moge v. Moge*, [1992] S.C.J. No. 107, [1992] 3 S.C.R. 813 (S.C.C.); *Weatherall v. Canada (Attorney General)*, [1993] S.C.J. No. 81, [1993] 2 S.C.R. 872 (S.C.C.); *Thibaudeau v. Canada*, [1995] S.C.J. No. 42, [1995] 2 S.C.R. 627 (S.C.C.) [hereinafter "*Thibaudeau*"]; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.) [hereinafter "*Baker*"].

[41] *Tremblay v. Daigle*, [1989] S.C.J. No. 79, [1989] 2 S.C.R. 530 (S.C.C.).

[42] *Supra*, note 37. It is also notable that Lamer J. was the only judge on the panel to also concur with McIntyre J. that the impugned provision barring non-citizens from legal practice was saved by s. 1.

[43] *Supra*, note 37. The judgment of the Court was delivered by La Forest J.

concurred with Sopinka J.'s majority reasons in *R. v. Butler*,[44] with Major J.'s majority reasons in *R. v. Ewanchuk*,[45] and with the majority reasons of Cory and Iacobucci JJ. in *M. v. H.*[46] and in *Vriend v. Alberta*.[47] Chief Justice Lamer concurred with McLachlin J. for the majority in *Gordon v. Goertz*,[48] in *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*,[49] and in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (Meiorin Grievance)*.[50] Each of these cases is regarded by LEAF as a victory, and Chief Justice Lamer formed part of the majority panel.

Of course, LEAF did not always prevail. Again concurring with McLachlin J., in *R. v. Seaboyer*, Chief Justice Lamer joined the majority in finding part of the *Criminal Code*[51] provisions limiting the use of a sexual assault complainant's sexual history as evidence unconstitutional, against the LEAF arguments.[52] In the *R. v. S. (R.D.)* decision where LEAF intervened in support of the Youth Court judge accused of bias because of her comments regarding racism, Chief Justice Lamer concurred in Major J.'s dissent, while the majority of the Court found no apprehension of bias.[53]

There have also been a number of feminist landmark cases where LEAF did not have intervenor status and in these cases as well, Justice Lamer most often concurred with the majority. The decision in *Morgentaler*[54] leads this list, and here Lamer J. signed onto the reasons of Dickson C.J.C., rather than those of Wilson J. While the latter are more often cited by feminist legal scholars, Dickson C.J.C.'s reasons did not shirk feminist analysis. The then Chief Justice wrote of women's interests in reproductive rights in strong terms:

> At the most basic, physical and emotional level, every pregnant woman is told by the section [s. 251 of the *Criminal Code*] that she cannot submit to a generally safe medical procedure that might be of clear

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44 *Supra*, note 37.
45 *Supra*, note 37.
46 *Supra*, note 37.
47 *Supra*, note 37.
48 *Supra*, note 37.
49 *Supra*, note 37.
50 *Supra*, note 37.
51 R.S.C. 1985, c. C-46.
52 *Supra*, note 37.
53 *Supra*, note 38.
54 *Supra*, note 22.

> benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person. Section 251, therefore, is required by the *Charter* to comport with the principles of fundamental justice.[55]

Chief Justice Lamer also signed onto Wilson J.'s majority in *R. v. Lavallee*.[56] Writing in support of allowing expert evidence in regard to the psychological state of a woman in an abusive relationship, Wilson J. wrote:

> The gravity, indeed, the tragedy of domestic violence can hardly be overstated. Greater media attention to this phenomenon in recent years has revealed both its prevalence and its horrific impact on women from all walks of life. Far from protecting women from it the law historically sanctioned the abuse of women within marriage as an aspect of the husband's ownership of his wife and his "right" to chastise her. One need only recall the centuries old law that a man is entitled to beat his wife with a stick "no thicker than his thumb".[57]

In the *Symes v. Canada*[58] ruling, Chief Justice Lamer participated in the majority which rejected the feminist arguments put to the Court, signing on to Iacobucci J.'s reasons for rejecting the inclusion of child care expenses as acceptable deductions from business income for income tax purposes.

There are a considerable number of landmark cases — using either of my methods — where Justice or Chief Justice Lamer simply did not sit. This list includes *Brooks v. Canada Safeway Ltd.*,[59] *Janzen v. Platy Enterprises Ltd.*,[60] *R. v. Keegstra*,[61] *Norberg v. Wynrib*,[62] *M. (K.) v.*

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55 *Id.*, at 56-57.
56 [1990] S.C.J. No. 36, [1990] 1 S.C.R. 852 (S.C.C.).
57 *Id.*, at 872.
58 [1993] S.C.J. No. 131, [1993] 4 S.C.R. 695 (S.C.C).
59 *Supra*, note 40.
60 *Supra*, note 40.
61 *Supra*, note 40.
62 *Supra*, note 40.

M. (H.),[63] *Moge v. Moge*,[64] *Thibaudeau*[65] and *Baker*.[66] Without conducting a parallel analysis for the other judges on the Court at the time, it is impossible to draw any conclusions from this. As Chief Justice, the administrative and representative functions of his role would certainly have created more time demands than his colleagues encountered. Whether he participated in more or less of these landmark rulings than other judges is not something I have analyzed, in part because of how difficult it would be to adequately calculate the effect of the Chief Justice role. I have listed these cases simply to complete the record, in order to assist readers in drawing their own conclusions about Chief Justice Lamer's engagement with feminist legal analysis.

While surveying the landmarks, it is illuminating to look at the eight decisions where Chief Justice Lamer wrote reasons. Each of these is a case where LEAF successfully sought intervenor status.

Considering majority reasons, the first of these was the 1988 *Canadian Newspapers* decision, where Lamer J. wrote a comparatively brief decision on behalf of the whole Court, upholding the *Criminal Code* provisions allowing for a publication ban on the name of a complainant in a sexual assault case; in this case, the accused was the complainant's spouse.[67] Moving chronologically, the next reasons he wrote were in the *Sullivan* decision discussed in the previous section of this paper.[68] In 1992, Lamer C.J.C. wrote the majority reasons in *Schachter v. Canada*[69] in favour of a father seeking access to what were at that time solely "maternity" benefits under Canada's unemployment insurance scheme. At the Supreme Court of Canada level, the government conceded a section 15 breach and did not offer a section 1 argument, and thus the reasons focused solely on the appropriate remedy.[70] In 1994, the Chief Justice gave the Court's oral reasons in the

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63 *Supra*, note 40.

64 *Supra*, note 40.

65 *Supra*, note 40.

66 *Supra*, note 40.

67 *Supra*, note 36.

68 *Supra*, note 18.

69 *Supra*, note 7.

70 Chief Justice Lamer opened his analysis by expressing the Court's frustration with this position:

> I find it appropriate at the outset to register the Court's dissatisfaction with the state in which this case came to us. Despite the fact that *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, was handed down in between the trial and appeal of this matter, the appellants chose to concede a s. 15 violation and to appeal only on the issue of remedy. This precludes this Court from examining the s. 15 issue on its merits, whatever doubts might or might not exist about the finding below. Further, the appellants' choice

case of *R. v. Whitley*,[71] ruling that any potential error in the jury charge related to the defence of honest but mistaken belief in consent did not lead to a miscarriage of justice. The co-authored decisions in *O'Connor* and *A. (L.L.)* come next chronologically.[72] The final majority reasons in a LEAF case were those the Chief Justice wrote in *G. (J.)*, discussed earlier.

With the exception of the counselling records rulings, this set of majority reasons in LEAF cases are all in support of the result sought by LEAF. The content of these reasons, however, means that Chief Justice Lamer's work here is not as strongly influenced by feminist analysis as this conclusion would suggest. In both *Sullivan* and *G. (J.)*, Lamer C.J.C. reaches his conclusions largely without engaging the feminist arguments put to the Court. The ruling in *Schachter* makes a key equality contribution without an equality argument, in this case because of how the argument reached the Court. The ruling in *Whitley* amounts to a paragraph. The ruling in *A. (L.L.)* supports the LEAF position on narrow grounds, while the substance of the Chief Justice's ruling is antithetical to much of LEAF's argument. It is only in the first of these rulings, *Canadian Newspapers*, that Lamer J. (as he then was) pens a ruling that resonates with feminist perspective in its substance. In explaining why the Court found the mandatory publication ban on the identity of sexual assault victims to withstand scrutiny under section 1 of the Charter, he writes:

> When considering all of the evidence adduced by appellant, it appears that, of the most serious crimes, sexual assault is one of the most unreported. The main reasons stated by those who do not report this offence are fear of treatment by police or prosecutors, fear of trial procedures and fear of publicity or embarrassment. Section 442(3) is one of the measures adopted by Parliament to remedy this situation, the rationale being that a victim who fears publicity is assured, when deciding whether to report the crime or not, that the judge must prohibit upon request the publication of the complainant's identity or any information that could disclose it. Obviously, since fear of publication is one of the factors that influences the reporting of sexual assault, certainty with respect to non-publication *at the time of deciding whether to report* plays a vital role in that decision. Therefore, a

not to attempt a justification under s. 1 at trial deprives the Court of access to the kind of evidence that a s. 1 analysis would have brought to light. (*Id.*, at 695)

71 *Supra*, note 36.

72 *Supra*, note 5. See earlier discussion at 360-62.

> discretionary provision under which the judge retains the power to decide whether to grant or refuse the ban on publication would be counterproductive, since it would deprive the victim of that certainty. Assuming that there would be a lesser impairment of freedom of the press if the impugned provision were limited to a discretionary power, it is clear, in my view, that such a measure would not, however, achieve Parliament's objective, but rather defeats it.[73]

While Lamer C.J.C. wrote in support of LEAF more often than not, his rulings do not as a whole take up the arguments that LEAF put before the Court. The privilege and price of judging is that while one must give legally coherent reasons for judgment, explanations of personal motivations do not count as "reasons" for this purpose. It is tempting to speculate why this pattern appears in Chief Justice Lamer's majority judgments, but to do so is not fruitful.

Chief Justice Lamer also penned one dissenting opinion in a LEAF case, *R. v. Mills*, discussed above.[74] In this dissent, he was opposed to the position LEAF had advocated and with which the majority had agreed. At the intersection of two of his areas of passion — protections for accused persons and principles of evidence — Chief Justice Lamer was unwilling to occupy the quiet majoritarian position that marked much of his response to feminist argument before the Court.

This conclusion might suggest some intransigence in his views regarding the areas of the law closest to his heart, but a closer look at his work in the area of sexual assault shows that a simplistic explanation is inappropriate.

IV. LAMER'S WRITING ON SEXUAL ASSAULT

Chief Justice Lamer did more writing in the area of sexual assault law than in any other area of "core" feminist engagement with the law. This is undoubtedly because criminal law was the subject of the largest group of his decisions, and was a passion that began long before he came to the Supreme Court. This body of work therefore deserves some comment as part of any feminist assessment. In this section, I look briefly at the discursive content of a selection of Chief Justice Lamer's

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73 *Supra*, note 36, at 131-32 (emphasis in original).

74 *Supra*, note 5.

sexual assault decisions.[75] I have taken a broad approach to this analysis, considering sexual assault as a subject matter rather than a *Criminal Code* provision. Accordingly, I have included (and counted for the purposes of the tally above) all cases which have sexual assault as a central aspect of the factual background. As a result, many of the cases I considered in developing this section focused on legal issues of evidence or sentencing, or on related offences such as indecent assault rather than sexual assault itself.[76]

Justice Lamer's first reasons in a sexual assault case were written in 1981 in *R. v. Timm*.[77] This was a different era in terms of the evolution of sexual assault law. In 1981, Canada still had a marital rape exemption, and two major episodes of statutory reform of the relevant *Criminal Code* provisions separate that time from the present.[78] It was also prior to the introduction of the Charter. There was not, and never had been, a woman on the Court. It was at this time, against this legal backdrop, that Mr. Timm was acquitted at his trial for rape. The Crown appealed, arguing that the trial judge ought to have let evidence of the complainant's sister, which may have corroborated her early complaint evidence, go to the jury. The Court of Appeal unanimously overturned the acquittal and the Supreme Court of Canada granted leave to hear the appeal. Justice Lamer wrote for the Court. His appetite for reforming and for rationalizing the law of evidence was apparent:

> The case law as regards early complaint evidence ... amply shows that there exists in this area of the law great uncertainty, at least as to some aspects of that evidence. There is disagreement as to the nature of the complaint that may be put to the jury and by whose testimony; also as to the proper function of a judge holding a *voir dire* to determine the admissibility of early complaint evidence. Much of this disagreement and uncertainty is, in my opinion, the result of our considering the admissibility of such evidence as an exception to a general exclusionary rule, whilst what is in fact exceptional is the granting of special probative value to the silence of an alleged victim of a sexual offence. Most scholars and many a judge have in the past explained the

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[75] For a doctrinal analysis of these decisions see Sheehy & Boyle, *supra*, note 16; Julian V. Roberts & Renate M. Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) [hereinafter "Roberts & Mohr"].

[76] *Supra*, note 5.

[77] *Supra*, note 5.

[78] Christine Boyle, *Sexual Assault* (Toronto: Carswell, 1984) [hereinafter "*Sexual Assault*"]; Roberts & Mohr, *supra*, note 75; Elizabeth A. Sheehy, "Canadian Judges and the Law of Rape: Should the *Charter* Insulate Bias?" (1989) 21 Ottawa L. Rev. 741.

> historical origins of the rule and attempted, with relative success as far as I am concerned, to rationalize the singling out of that group of victims' complaints as being exceptionally admissible. There are today suggestions ... that the need for the rule is doubtful and should be reconsidered. We have not been invited by the parties to do so, but I should like to add here that, given the proper opportunity, we should seriously reconsider the soundness of some of the assumptions that are made in order to justify the rule; furthermore, some of those assumptions are even more difficult to accept since the extension of the rule to victims of both sexes and to all sexual offences, including those where consent is not in issue ...[79]

His description of the rationale for this type of evidence is revealing:

> In my view, any statement made by the alleged victim, which is of some probative value in negating the adverse conclusions the jury might be invited to make and could draw as regards her credibility had she remained silent, is to be considered a complaint. It will have the effect of negating that adverse conclusion if it is in some way supportive of the victim's credibility by showing consistency between the victim's conduct after the alleged ravishment and the victim's narration of same as a witness.[80]

There is much to critique in this language and reasoning from a feminist perspective, especially a 21st-century one. But it is also important not to lose sight of results. With this reasoning Lamer J. required that Timm face trial again, with additional evidence against him, and he also widened the space for evidence in support of other complainants.

The 1986 ruling in *R. v. Mezzo*[81] and the 1987 ruling in *R. v. Bulmer*[82] form a matched set from Justice Lamer's point of view, and are still among the earliest of his sexual assault decisions. At Mr. Mezzo's rape trial, the only issue was the identity of the assailant. The trial judge granted a motion for a directed verdict because the sole evidence of identity was that of the complainant, and it was open to a number of challenges. The facts of the case conform to the stereotypical stranger in a dark alley formula. Justice Lamer wrote dissenting reasons, and was joined by La Forest J. Justices Wilson and McIntyre each wrote majority rulings. Justice Lamer concluded his dissent by stating:

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79 *Supra*, note 5, at 320-21 (citations omitted).

80 *Id.*, at 322-23.

81 *Supra*, note 5.

82 *Supra*, note 5.

> It appears to me, when reading all of Wright J.'s reasons, that he applied the proper test, found the quality of the evidence such that it would be unsafe to rest a conviction upon it, and directed a verdict of acquittal. The manner in which he referred to "the fleeting glance" and "difficult conditions" situations offers some footing for the conclusion that he turned the examples into a test. But the context in which these references were made was one where he specifically referred in general terms to the "quality" of the identification as being the purpose of the scrutiny. Added to that is the fact that it is obviously the "quality test" that was on his mind when he addressed the question whether the improper police procedure had "partially or wholly destroyed" the "value of the evidence". The majority of the Court of Appeal found that it would not have been unsafe to convict, while Matas J.A. shared the trial judge's view that it would. This did not in my view raise a question of law alone in the Court of Appeal, and the Crown's appeal should have been dismissed.[83]

The *Bulmer* case was one of several grappling with the vexed issue of the honest but mistaken belief in consent defence and the evidentiary standards that ought to accompany it. In this instance, the complainant worked as a prostitute and there were three accused facing a range of charges. For the majority, McIntyre J. held that on the facts it was permissible to put the defence of honest but mistaken belief in consent to the jury, but that the charge was wrong in this case. Justice Lamer penned a separate concurrence, asserting that the accused's own evidence regarding his honest beliefs is always some evidence. Taking direct aim at McIntyre J., he opined:

> The combined effect of McIntyre J.'s test in this case for withdrawing a defence from the jury and the majority's test in *Mezzo* for withdrawing the case would lead to incongruous results. Where the only evidence on the questions of consent and belief in consent is the testimony of the complainant and that of the accused, the complainant's allegation of no consent must go to the jury (*Mezzo*) but the accused's defence of honest belief in consent may be withdrawn from the jury unless it is supported by other evidence or circumstances (this case). The old common law rule in sexual assault cases that the trial judge must instruct the jury that it is unsafe to convict in the absence of corroboration of the complainant's testimony (which was abolished by s. 246.4 of the *Criminal Code*) would in effect be replaced by a rule requiring corroboration of the accused's testimony. Such a requirement will often work an injustice to the accused. Clearly the best, and quite often the

[83] *Supra*, note 5, at 861-62.

> only, evidence of the accused's subjective belief will be his or her testimony, and there is no basis in law or in principle for requiring corroboration. In addition, this Court decided in *Pappajohn* that the accused's belief must be honest but need not be reasonable. As a result, there clearly cannot be a requirement that the accused's belief be supported by the circumstances before it can be submitted to the jury.[84]

In this ruling, what Justice Lamer appears to be resisting is a gendered account of sexual assault. This view is surely the antithesis of much feminist legal analysis. His commitment to this view is confirmed by his concluding statement in *Bulmer*:

> Finally, I wish to add that I do not believe that this view of the "air of reality" test will open the floodgates to claims of honest mistake as to consent in sexual assault cases. An accused who wishes to raise the defence in the absence of any other evidence supporting an honest mistake will be required to take the stand and will run the risks of cross-examination. In addition, I do not think that the jury will be fooled by false claims of the defence. Juries are constantly assessing and then discarding defences because they lack an air of reality and do not raise a reasonable doubt. *Sexual offence cases are no different.*[85]

The assertion that sexual offence cases are no different would have flown in the face of a body of feminist scholarship which, by 1987, was flourishing.[86] Perhaps this distinction from the majority of the Court helps explain why Lamer J. penned a solitary concurrence in *Bulmer*.

Several of the feminist landmark cases discussed above involved evidentiary provisions in sexual assault cases. Chief Justice Lamer was part of the majority striking down evidentiary protections for complainants in *Seaboyer*, and his view of requirements for therapeutic counselling records were consistent in *O'Connor*, and in dissent in *Mills*.[87] However, he also authored a number of decisions that eased evidentiary restrictions from the Crown's point of view. In the 1993 *R. v.*

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[84] *Supra*, note 5, at 798-99.

[85] *Id.*, at 799 (emphasis added).

[86] Christine Boyle's important text, *Sexual Assault*, *supra*, note 78, was published in 1984. She notes that her work draws on feminist antecedents such as Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon & Schuster, 1975); Lorenne M.G. Clark & Debra J. Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: The Women's Press, 1977); Susan S.M. Edwards, *Female Sexuality and the Law: A Study of Constructs of Female Sexuality as They Inform Statute and Legal Procedure* (Oxford: M. Robertson, 1981); Elizabeth A. Sheehy, Book Review of *Sexual Assault* by Christine Boyle (1985) 17 Ottawa L. Rev. 671; Kathleen A. Lahey, *Implications of Feminist Theory for the Direction of Reform of the Criminal Code* (Windsor: University of Windsor, Faculty of Law, 1984).

[87] *Supra*, notes 5, 39.

L. (D.O.) ruling, Lamer C.J.C. wrote for the majority upholding provisions allowing for use of videotaped evidence by children. He opened his reasons stating:

> I have read the reasons of Madame Justice L'Heureux-Dubé and concur in her result. It is my view that s. 715.1 of the *Criminal Code* ... is a response to the dominance and power which adults, by virtue of their age, have over children. Accordingly, s. 715.1 is designed to accommodate the needs and to safeguard the interests of young victims of various forms of sexual abuse, irrespective of their sex. By allowing for the videotaping of evidence under certain express conditions, s. 715.1 not only makes participation in the criminal justice system less stressful and traumatic for child and adolescent complainants, but also aids in the preservation of evidence and the discovery of truth.[88]

This reasoning explicitly departs from an understanding of the power imbalance that is often embedded in facially neutral legal provisions. His 1995 ruling in *R. v. U. (F.J.)*[89] also eases evidentiary restrictions in a child sexual assault case, elaborating the reworking of hearsay exceptions that was launched by the Court in the 1990 *R. v. Khan* ruling.[90] The *Khan* ruling focuses closely on difficulties faced by children giving evidence. The Chief Justice's discussion in *U. (F.J.)* spends more time on hearsay doctrine than the circumstances of children, but reaches the same result. In contrast, in his dissent in *R. v. F. (W.J.)* the Chief Justice would have agreed that the Crown had not met its burden to demonstrate why a child had stopped testifying before requesting the introduction of hearsay evidence.[91]

Like the early decision in *Timm*, the Chief Justice had occasion to pen the views of the Court in later career sexual assault decisions as well. In the 1997 ruling in *R. v. Currie*,[92] the issue was whether the particular predicate offences at the time that the Crown sought a dangerous offender designation against Mr. Currie were sufficiently serious. The Chief Justice expressed the Court's repudiation of the defence's proposition:

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[88] *Supra*, note 5, at 428-29. Justices La Forest, Sopinka, Cory, McLachlin and Iacobucci signed on to Lamer C.J.C.'s reasons.

[89] *Supra*, note 5.

[90] [1990] S.C.J. No. 81, [1990] 2 S.C.R. 531 (S.C.C.). In this decision, McLachlin J. wrote for the Court, which included Lamer C.J.C.

[91] *Supra*, note 5.

[92] *Supra*, note 5.

> Parliament has said that there are certain types of offences, which are inherently serious, that can trigger a dangerous offender application. As this Court observed in *R. v. McCraw*, [1991] 3 S.C.R. 72, at p. 83, sexual assault, whatever form it may take, is one of them. Other offences, presumably less threatening to the personal safety of others, do not trigger s. 753.
>
> As such, I would find it contradictory, as well as callous, to categorize the impugned predicate assaults as "nuisance-type offences". These sexual assaults, while not as violent or grave as some of the respondent's earlier offences, were nevertheless within the category of violent and grave. The predicate offences involved repeated sexual touching of young girls in public and at least two of the victims of the assaults have experienced serious psychological trauma and other side effects. If these sexual assaults were not serious, sexual assault would not be enumerated as a s. 752 offence. Nor would Parliament have ever seen fit to eliminate the distinction between rape and indecent assault — indeed it would have ensured that such a distinction endured.[93]

The Chief Justice also wrote for the Court in *R. v. Davis* in 1999, holding that sex could be the subject of an extortion offence. This argument prevailed despite the history of the offence and the "property" subheading in the *Criminal Code*. The Chief Justice reasoned that "extortion criminalizes intimidation and interference with freedom of choice",[94] an assessment of the nature of consent that would fit well with much feminist analysis. He continued:

> Given this purpose, I find it difficult to accept the appellant's contention that "anything" should be limited to things of a proprietary or pecuniary nature. If the appellant's argument is accepted, it would be criminal to threaten exposure of nude photographs when coupled with a demand for money, but it would not be criminal to make that same threat when coupled with a demand for sex. This strikes me as unreasonable, and at odds with the purpose of the provision. The threat is equally intimidating in both cases, as the consequences of non-compliance are identical. With respect to interference with freedom of choice, in both cases the victim is asked to do something he or she may not want to do. It is likely that the victim would much sooner accede to the monetary demand than the sexual demand. Freedom of choice in sexual matters is at least as highly valued as freedom of choice in

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93 *Id.*, at 274.

94 *Supra*, note 5, at 780.

> matters concerning property. Accordingly, there is no reason to think that extortion of sexual favours is not also a criminal offence.[95]

This analysis, similar to those seen earlier, is an ungendered view of sexual exploitation, but it does reflect the evolving view of consent that has been anchored in the *Criminal Code* since the early 1990s. In *Davis*, the Chief Justice also explicitly endorsed the majority view that he had opposed in *Bulmer*, as he was, of course, required to do.[96]

I had thought that it might be possible to construct an analysis of Chief Justice Lamer's writings on sexual assault which showed a linear trajectory through his career. Alas, this is the stuff of academic hubris. A series of sentencing decisions released following his resignation demonstrate that Chief Justice Lamer provoked the ire of some of his colleagues in matters relating to sexual assault right up to his final decisions. These decisions were all sentencing appeals following the introduction of the conditional sentencing regime. The lead decision was *R. v. Proulx*, a case involving a sentence for dangerous driving causing death, and Lamer C.J.C. wrote for the Court.[97] This consensus, however, broke down in the accompanying cases that concerned sexual assault matters. In *R. v. R. (R.A.)*, the Chief Justice dissented and would have upheld the conditional sentence imposed by the Court of Appeal.[98] In *R. v. W. (L.F.)*,[99] the Chief Justice wrote upholding a 21-month conditional sentence for an indecency and gross indecency conviction. He was joined by Iacobucci, Binnie and Major JJ. and they prevailed on equal division of the Court. This ruling drew strong criticism from some of his colleagues which appears in the reasons in *R. v. S. (R.N.)*.[100] In this latter ruling, the Chief Justice wrote for the majority, restoring the original and harsher sentence.[101] Justices L'Heureux-Dubé, Gonthier, McLachlin and

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[95] *Id.*, at 780-81.

[96] *Id.*, at 795.

[97] [2000] S.C.J. No. 6, [2000] 1 S.C.R. 61, 2000 SCC 5, 182 D.L.R. (4th) 1 (S.C.C.).

[98] *Supra*, note 5. The Chief Justice was joined by Iacobucci J. Justice L'Heureux-Dubé wrote for the majority, restoring the carceral sentence imposed at trial.

[99] *Supra*, note 5.

[100] *Supra*, note 5.

[101] The Chief Justice summarized his reasons for departing from his position in the other cases as follows:

> With respect, I do not think that a nine-month conditional sentence was a fit sentence, in light of the relevant sentencing considerations, including the gravity of the offences committed and the high moral blameworthiness of the respondent. The impugned acts occurred repeatedly over a period of approximately five years. The respondent abused the trust of a very young child, despite clear indications from the complainant that she did not like what he was doing. He remained unrepentant and continued to deny that the offences took place. The amount of denunciation provided by a nine-month conditional sentence

Bastarache each wrote individual concurrences for the sole purpose of distancing themselves from the Chief Justice's reference to his views in *W. (L.F.)*.

In Chief Justice Lamer's writings on sexual assault issues, he appears to be very little influenced by the feminist scholarship and legal argumentation that surrounded these matters throughout his Supreme Court of Canada career. His analysis is almost utterly ungendered, fitting squarely with the transition to an ungendered *Criminal Code* provision in the form of sexual assault in 1982. While the earlier era of rape law was certainly heavily criticized by feminist scholars, feminists have also been concerned that an understanding of power and coercion is lost in an ungendered approach. This is not to say that Chief Justice Lamer's conclusions in sexual assault matters can be easily bundled as anti-feminist. Indeed, his passion for reforming the rules of evidence did lead him to some significant evidentiary conclusions that support the Crown in sexual assault matters, as well as those that reflected his equally strong views about the rights of the accused. He penned more dissents in this area than in the selection of landmark cases discussed in the previous section, but nonetheless was more often than not among the majority of the Court.

V. CONCLUSION

Chief Justice Lamer was probably a man of his times in terms of his views of feminist causes and what are more broadly termed "women's issues". As a leader of the nation's judicial system, however, he does not have the luxury of being judged by this standard. We expect, even demand, more of leaders in this role. And we are entitled to do so. It is evident from looking at Chief Justice Lamer's own decisions, as well as the positions that he took in leading cases of concern to feminists, that he was not especially interested in or influenced by the arguments that feminists brought to the Court during the two transformative decades of his tenure there. His leadership on the Court did not include leadership in responding to the challenge of legal feminism. But if an alternative measure may be whether he met feminist argument with protracted

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was clearly insufficient in the circumstances to signify society's abhorrence for the acts the respondent committed, despite the fact that his liberty was restricted by the conditions imposed. It must be remembered that, even though the respondent experienced some marital difficulties, he still benefited from the support of his family, while the victim and her mother were ostracized by the rest of the family. (at 158)

resistence, this is also not borne out by the record. His record is primarily one of quiet majoritarianism: a man who did not stand in the way.

It was an honour to clerk in the Chief Justice's chambers, one that was made possible for me by the support of strong feminist scholars, teachers and advocates. With each passing year, I am more aware of how rare and precious that experience was, and how much it has informed my choices since that time. The Chief Justice certainly knew I was a feminist when he hired me. I doubt this fell on the plus side when he weighed my file against the many other candidates, but it did not weigh against me. There were stories afloat, even in those halcyon days of legal feminism, of women clerking at the Court, and in the profession more broadly, whose careers were disadvantaged by having children. This did not happen to me because the Chief Justice did not let it happen to me. Perhaps this was more than not standing in the way. Indeed, having clerked in his chambers probably protected me from scrutiny later. Six years after leaving the Court, I had my third child. While I was working as a law professor, no one sent me mid-morning fruit out of concern that the pregnancy might leave me hungry. One could have seen this gesture as paternalistic, but I always saw it as a kindness, and it is — besides — a key tenet of feminist ideology that equality requires that pregnancy be accommodated as difference.