

## INTRODUCTION

"Once you see, you cannot not see." Most feminists recognize this aphorism which means, once we, as women, are aware of our position in the world relative to men - once we are aware that sexism disadvantages us - it is difficult to avoid applying that knowledge to the world around us. For feminists, feminism becomes a lens that we view the world through. Instances that may have seemed innocuous at one time now appear to be important illustrations of sexism in our everyday lives. Seeing the world through a feminist lens allows us to better understand the way that gender roles, as they are socially constructed, manifest themselves in, for example, popular culture. The way that MTV portrays women illustrates this. Viewed through the feminist lens, music videos no longer look so harmless. It becomes evident that the subjects of the videos are almost always men and the objects are almost always females, portrayed usually as background dancers or as body parts (literally, legs, buttocks, lips, etc.). The females pictured in the videos have an insatiable appetite for sex and are portrayed to fulfill male fantasies, e.g., young schoolgirls (Britney Spears's *Baby One More Time*) and the mousy teacher who, once she takes her hair down, becomes wild and sexy (Motley Crue's *Hot for Teacher*).

Most non-feminists view the feminist lens as "life" rather than sexism based on patriarchy. Nevertheless, many, if not most women, would acknowledge that they view the world differently because they are women. For instance, a woman is aware that, as long as she is fertile and sexually active, there is a chance that she may become pregnant at some point in

time. The effectiveness of the birth control method she is using, if she is using any at all, may limit her statistical chances of becoming pregnant; however, she is aware of the fact that the risk of pregnancy is endemic to women. Similarly, most women are aware of the very real threat that sexual violence poses to them. "[W]omen live under a constant threat of sex-related violence. . . . [I]t has been estimated that women face a twenty-five percent probability of being raped and a forty-six percent probability of being sexually assaulted during their lifetimes."<sup>1</sup>

The main focus of this paper will be how the unique perspective of women manifests itself in adjudication. I assert that most women are more sympathetic to experiences that are unique to women simply because they are women.<sup>2</sup> I contend that female judges approach particular cases and issues that affect women in ways that are different than male judges due to their societal status as women. Indeed, as Catharine MacKinnon notes, "most if not all women resent women's status on some level of their being."<sup>3</sup> Thus, women tend to view issues, especially issues that are gendered, from a woman's perspective. I will examine the way a woman's unique perspective tends to manifest itself in the law, specifically the way in which this perspective tends to manifest itself when at least one woman is an adjudicator. This paper will analyze specific cases in which the viewpoint of women, or the unique perspective of women, appears to have influenced a particular decision.

Part I reviews the history of women and the judiciary, including the discrimination women have experienced in the historically male legal field and their ascension to judicial posts, positions which remain male dominated. It also sets out reasons why female judges may be more sympathetic to claims of other women that involve gender-specific legal issues. Part II focuses on the impact that Justices O'Connor and Ginsburg have had on the United States

Supreme Court; it analyzes how they may influence Supreme Court opinions, and the way in which their unique perspective as women is evidenced in the opinions that they author. Finally, Part III examines the impact women have had on the state appellate bench, with a special emphasis on the difference that Judge Julia Cooper Mack made on the District of Columbia Court of Appeals. I focus specifically on the District of Columbia which, because of home rule legislation, although not technically a state, has its own court system.

I am aware of the limitations of my proposal concerning female judges. First, although it is easy to assume that women tend to side with the oppressed, this is not always true.<sup>4</sup> Second, it is important to remember that white women may find themselves in the position of the oppressor because of white privilege. Third, even women who are aware of their position as part of an oppressed class can have difficulty both identifying with and supporting other women. Fourth, class standing can hinder a woman's ability to identify with the oppressed rather than the oppressor.<sup>5</sup>

Besides noting that this paper tries to avoid assuming too much, it is also necessary to mention that this paper does not subscribe to the Carol Gilligan<sup>6</sup> school of thought which contends that men and women differ in their moral reasoning techniques and outcomes. Nor does this paper subscribe to Suzanna Sherry's<sup>7</sup> line of reasoning that, "while the masculine vision parallels pluralist liberal theory, the feminine vision is more closely aligned with classical republican theory."<sup>8</sup>

## I.

### FEMALE ASCENSION TO THE JUDICIARY

For most of American history, virtually all adjudicators have been white men. It was not until the late 1970s that this began to change. In fact, conducting meaningful studies to test whether a judge's gender affects decision making were not possible until the female federal judges that joined the bench during Carter's administration generated a sufficient amount of opinions.<sup>9</sup> In 1934, the first woman was appointed the court of appeals under Franklin Roosevelt.<sup>10</sup> Before Carter appointed eleven female judges beginning in 1977 (consisting of about twenty percent of his total circuit appointments), the only other president to appoint a female circuit judge (and he only appointed one) was Lyndon B. Johnson.<sup>11</sup> Similarly, there was a dearth of racial minority federal judicial appointments until the late 1970s.<sup>12</sup> The first minority woman was appointed to the federal bench in 1962.<sup>13</sup>

Most states saw their first female appellate judges in the 1970s, although a few states began earlier, in the 1920s.<sup>14</sup> In 1922, the first woman was elected to a state supreme court.<sup>15</sup> In 1926, Mary Jane Spurlin, was the first woman judge in Oregon appointed to serve in a countywide jurisdiction.<sup>16</sup> It was not until 1988, however, that the first minority female, an African American, was appointed to a state supreme court.<sup>17</sup>

Today, two women serve on the United States Supreme Court, thirty-seven women have been appointed to the Federal Courts of Appeals and 126 women are federal district court judges.<sup>18</sup> On the state court level, the supreme courts are twenty-four percent female and all but four states have at least one woman serving on their court of last resort.<sup>19</sup> State lower courts have about the same percentages.<sup>20</sup>

Now that the numbers of female judges both at the state and federal level are statistically significant, it is possible to analyze whether women bring a unique perspective to the bench. Of

course, female judges do not always support the underprivileged and oppressed. However, when an issue is gendered,

studies of judicial behavior have provided some support for the contention that women will bring a different perspective and decision-making pattern to the bench. For example, an examination of the votes of judges on four state supreme courts found that four of the five women voted on women's issues in a way that placed them at the liberal extreme of their courts.<sup>21</sup>

Additionally, a study analyzing "[t]he votes of all judges on the U.S. court of appeals, including those on senior status, from the District of Columbia Circuit and the 11 numbered circuits from 1981 to 1990",<sup>22</sup> found that, in employment discrimination cases, women, more often than men, supported plaintiffs.<sup>23</sup> The authors of the study provided reasons for differences in male and female voting patterns: "[e]mployment discrimination may be viewed as a problem of exclusion, as members of certain groups are precluded from participating as full members of the community. Thus, women judges' support for plaintiffs may reflect a concern for the right to such membership."<sup>24</sup>

There is a history of employment discrimination against women in the legal profession which makes it likely that female judges either have personally experienced, or know of women who have experienced, barriers to employment. As noted earlier, women and minorities were excluded from the bench before the late 1970s.

The experience of the only two female United States Supreme Court Justices are illustrative of this point. Justice Ruth Bader Ginsburg went to Harvard Law School, finishing her third year at Columbia Law School, tying for first in her class.<sup>25</sup> After graduation in the late 1950s, New York law firms refused to hire her.<sup>26</sup> Similarly, Justice Sandra Day O'Connor graduated from high school at the age of 16 and graduated from Stanford University magna cum laude.<sup>27</sup>

Completing law school in two years, she also managed to serve as editor-in-chief of the Stanford Law Review and graduated Order of the Coif, graduating third in her class of 102 in 1952.<sup>28</sup> Upon graduation, only one law firm offered her a position, not as a lawyer, but as a legal secretary.<sup>29</sup> Justice O'Connor eventually accepted an offer to serve as deputy county attorney in California after she was turned down by the private sector.<sup>30</sup> After having her first child, Justice O'Connor again looked for, and could not find, a position in private practice, so she began her own firm in 1958 with one other partner in an office located in a shopping mall.<sup>31</sup>

The experiences of Justice Ginsburg and Justice O'Connor and the history of discrimination against female lawyers may provide explanations for the study cited previously that examined differences in male and female federal appellate voting patterns. The study tested Gilligan's theories, but acknowledged the possibility that psychological and legal theories of difference are wrong and that a "different voice" by which women solve moral and legal problems does not exist.<sup>32</sup> This paper goes further and argues that Gilligan was, in fact, wrong, and that the reason behind women's support of plaintiffs in cases such as employment discrimination is tied to their personal experience of such discrimination.<sup>33</sup>

## II.

### THE IMPACT OF WOMEN ON THE UNITED STATES SUPREME COURT

It is probably impossible, to find a clear causal link between the appointments of Justice Sandra Day O'Connor and Justice Ruth Bader Ginsburg to the Supreme Court and differences in the Court's decision calculus since their appointments. But I assert that having at least one woman on the Court has mattered in decisions involving abortion, sexual harassment, and gender under an equal protection analysis.<sup>34</sup> This section seeks to analyze ways in which their

perspectives, as women, probably influenced specific Court decisions, or at least influenced the writing techniques employed in the opinions that they, themselves, wrote.

#### A. Justice Sandra Day O'Connor

Justice Brennan acknowledged that Justice O'Connor brought a "unique perspective" to the Court.<sup>35</sup> Brennan noted that, "[e]ven though Justice O'Connor and I did not agree on every case, there were plenty of situations in which we agreed and in which her voice was critical. A classic example may be found in the area of gender discrimination."<sup>36</sup> Citing instances in which the Court had previously relied on gendered stereotypes as justification for its decisions,<sup>37</sup> Brennan states, "The Court, with Justice O'Connor's help, has recognized that the mere fact that some women lead lives that reflect gender stereotypes--that, in fact, those stereotypes may correspond to a level of reality--is no excuse for perpetuating them."<sup>38</sup>

O'Connor tends to view cases from a liberal feminist perspective. Known liberal feminists include Nadine Strossen, former head of the ACLU and Senator Hillary Clinton. Liberal feminism seeks equality under the law and is consistent with tenants formulated in modern political thought such as liberty, equality and happiness. Sources of gender inequality that O'Connor focuses on are: gender stereotyping, devaluation of women, division of work into men's jobs and women's jobs, low pay for women's jobs, and the glass ceiling.

O'Connor's sensitivity to gender discrimination is exemplified in her concurrence in *Johnson v. Transportation Agency*<sup>39</sup> where the Court, in analyzing Santa Clara's affirmative action program for women in jobs where they were underrepresented, upheld the program and rejected a male worker's claim that it violated Title VII.<sup>40</sup> O'Connor's concurrence, importantly, serves as the only time she has upheld an affirmative action program.<sup>41</sup> O'Connor upheld the

plan as valid under Title VII because the sex of applicants was "used as a 'plus' factor."<sup>42</sup>

Additionally, O'Connor held that the program was validly adopted despite the fact that the district court had found "no discrimination against women in fact"<sup>43</sup> because, "at the time the . . . plan was adopted, there were no women in its skilled craft positions."<sup>44</sup> Furthermore, it was conceded "that women constituted approximately 5% of the local labor pool of skilled craft workers . . . . Thus, when compared to the percentage of women in the qualified work force, the statistical disparity would have been sufficient for a prima facie Title VII case . . . ."<sup>45</sup>

In *Harris v. Forklift Systems, Inc.*,<sup>46</sup> O'Connor again demonstrated her ability to identify with the victim of gender discrimination. O'Connor wrote for a unanimous Court, holding that, under Title VII, employees were protected from sexual harassment in a hostile or abusive work environment.<sup>47</sup> She noted that "Title VII comes into play before the harassing conduct leads to a nervous breakdown."<sup>48</sup> The opinion, almost grimly, recounted the lower court decision where the District Court called *Harris* "'a close case,"<sup>49</sup> despite the fact that Harris' boss referred to her as "'a dumb ass woman"<sup>50</sup> and "occasionally asked Harris and other female employees to get coins from his front pants pocket."<sup>51</sup> O'Connor viewed the case very differently from the District Court. "Unlike the five men who reviewed this case previously, the Supreme Court believed that a reasonable person in Harris's position would have viewed [her boss's] words and conduct as not merely annoying or offensive but abusive and therefore sexual harassment."<sup>52</sup>

In *Clark v. Jeter*, O'Connor wrote passionately for a unanimous Court, invalidating a Pennsylvania statute which imposed a six-year statute of limitations on claims filed seeking paternal support of a child under the Equal Protection Clause.<sup>53</sup> O'Connor noted that a mother

may be unwilling to seek paternal support because "the emotional strain of having an illegitimate child, or . . . the desire to avoid community and family disapproval, may continue years after the child is born. The problem may be exacerbated if, as often happens, the mother herself is a minor."<sup>64</sup> O'Connor also noted that "[a] mother might realize only belatedly 'a loss of income attributable to the need to care for the child."<sup>65</sup> Finally, she reasoned that the mother's financial problems "are likely to increase as the child matures and incurs expenses for clothing, school, and medical care. . . . Thus it is questionable whether a State acts reasonably when it requires most paternity and support actions to be brought within six years of an illegitimate child's birth."<sup>66</sup>

In *Mansell v. Mansell*,<sup>57</sup> the Court held that, under the Uniformed Services Former Spouses' Protection Act, state courts do not have the power upon divorce to order division of retirement monies that were "unilaterally waived by a retiree in order to receive veterans' disability benefits."<sup>68</sup> O'Connor writes, dissenting: "The harsh reality of this holding is that former spouses . . . can, without their consent, be denied a fair share of their ex-spouse's military retirement pay simply because he elects to increase his after-tax income by converting a portion of that pay into disability benefits."<sup>69</sup> O'Connor seems to recognize that the realities are particularly and uniquely "harsh" for wives of military servicemen with her use of the phrase "without their consent", the words "fair share" and the use of the word "he", referring to the spouse employed by the military. Her dissent notes that, under the Court's reasoning, the spouse at issue in *Mansell* "will lose nearly 30 percent of the monthly retirement income she would otherwise have received as community property."<sup>60</sup> O'Connor charged that the Court was distorting the statute "beyond recognition"<sup>61</sup> and acting "to thwart the main purpose of the

statute, which is to recognize the sacrifices made by military spouses and to protect their economic security in the face of a divorce.<sup>162</sup> Although O'Connor used the gender neutral term "spouses" in that sentence, she submitted that the Court interpreted the statute as "permitting a military retiree to pocket 30 percent, 50 percent, even 80 percent of gross retirement pay by converting it into disability benefits and thereby to avoid *his* obligations under state community property law . . . ."<sup>163</sup> O'Connor makes her concern for female spouses of military personnel known where she writes: Women generally suffer a decline in their standard of living following a divorce.<sup>164</sup> And, "[m]ilitary wives face special difficulties because 'frequent change-of-station moves and the special pressures placed on the military spouse as a homemaker make it extremely difficult to pursue a career affording economic security, job skills and pension protection."<sup>165</sup> To support this contention, she noted that "[t]he average military couple married for 20 years moves about 12 times, and military wives experience an unemployment rate more than double that of their civilian counterparts."<sup>166</sup> Citing legislative history, O'Connor recognized that the Act was trying to protect against "the dire plight of many military wives after divorce and sought to protect their access to their exhusbands' military retirement pay."<sup>167</sup> She ended her dissenting opinion by stating: "It is now once again up to Congress to address the inequity created by the Court in situations such as this one."<sup>168</sup>

O'Connor examined the issue of abortion and, most significantly for our purposes, spousal notification, in *Planned Parenthood v. Casey*.<sup>69</sup> O'Connor joined Justices Souter and Kennedy in writing a joint opinion, reaffirming the central holding in *Roe v. Wade*<sup>70</sup> regarding the right to abortion, while examining that right under the undue burden standard. Souter, Kennedy and O'Connor found that the spousal notification provision of a Pennsylvania abortion

statute imposed an undue burden on women seeking an abortion and declared that provision unconstitutional.<sup>71</sup>

Although there were a number of issues involved in *Casey*, such as a 24-hour waiting period, recordkeeping requirements and a parental notification provision, most important is the way O'Connor, Kennedy and Souter approached the spousal notification provision.<sup>72</sup> In reviewing the notification requirement, it seems likely that O'Connor's presence, as a woman, must have made a difference in the analysis. O'Connor was able to identify with a woman's hesitancy to receive her husband's permission before going through with an abortion. The sensitivity to the gender-specific burden placed upon women who are faced, not only with the humiliation of being forced to ask their husbands for an abortion, but who may be facing domestic violence as a result of doing so, is articulately communicated. The joint opinion meticulously documented the testimony heard at the lower court level to this effect, citing threats of bodily injury, studies revealing high rates of family violence and battering, and testimony that spousal notification has empirically triggered instances of both physical and psychological domestic abuse.<sup>73</sup>

The joint opinion concluded its analysis of the spousal notification provision by stating:

The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.<sup>74</sup>

In *J.E.B. v. Alabama ex rel. T.B.*,<sup>75</sup> O'Connor tackled the question of gender-based peremptory strikes in jury selection. The Court held that, under the equal protection clause, it is

unconstitutional to intentionally discriminate based on gender in peremptory strikes during jury selection. O'Connor wrote a concurring opinion, expressing her concern that the Court's "important blow against gender discrimination is not costless."<sup>76</sup> She emphasized that peremptory challenges are important to ensure impartiality on the jury as well as to offer some control to advocates; thus, she was hesitant to completely restrict challenges based upon gender.<sup>77</sup> She stressed that the equal protection clause applied only to state actors and that she would thus explicitly limit the restrictions to government attorneys.<sup>78</sup>

O'Connor noted that peremptory challenges based on gender could prove especially important in cases involving gender issues. She pointed out that:

[a] plethora of studies make clear that in rape cases, for example, female jurors are somewhat more likely to vote to convict than male jurors. Moreover, though there have been no similarly definitive studies regarding, for example, sexual harassment, child custody, or spousal or child abuse, one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case. . . . Individuals are not expected to ignore as jurors what they know as men--or women.<sup>79</sup>

She again expressed her hesitancy in restricting such peremptory challenges, not only because an advocate is restricted in certain instances from acting on her intuition about a particular juror, but also because the Court's holding appears to support the notion that "any correlation between a juror's gender and attitudes is irrelevant as a matter of constitutional law." She notes that "to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact."<sup>80</sup> O'Connor emphasized the importance of the Court's holding, analogizing it to *Batson v. Kentucky*<sup>81</sup> where the Court held that peremptory challenges based on racial discrimination are unconstitutional.<sup>82</sup> O'Connor acknowledged the important gains of *Batson* and *J.E.B.* in attempting to eliminate both race and gender-based

discrimination in peremptory challenges, but noted that, in these rulings, we are also losing something: the ability of advocates to "act on sometimes accurate gender-based assumptions about juror attitudes."<sup>83</sup>

At the end of her concurrence, O'Connor restated her contention that the Equal Protection Clause does not restrict peremptory challenges used by defense attorneys and that the restrictions on gender and race-based peremptory challenges should be applied solely to the actions of prosecutors and government attorneys.<sup>84</sup> O'Connor concluded:

This case itself presents no state action dilemma . . . . But what of the next case? Will we, in the name of fighting gender discrimination, hold that the battered wife--on trial for wounding her abusive husband--is a state actor? Will we preclude her from using her peremptory challenges to ensure that the jury of her peers contains as many women members as possible? I assume we will, but I hope we will not.<sup>85</sup>

Justice O'Connor has, through both her physical and intellectual presence, shaped American legal history as the first female on the United States Supreme Court. During her tenure on the Court, she has dealt with a number of issues that disproportionately affect women and she has allowed her unique perspective as a female judge to surface in those cases. She has been sensitive to gender discrimination in the workplace; the financial difficulties faced by single mothers and military wives; the unique hardships faced by women seeking an abortion; and the way that the unique perspective of women influences legal results in *J.E.B.* Her opinion in *J.E.B.* is especially fascinating in the context of this paper. As Justice O'Connor expressed her belief that the unique perspective of women makes a difference in the outcome of a legal matter, she, as a female trier of fact, was making a difference as well.

## B. Justice Ruth Bader Ginsburg

Justice Ruth Bader Ginsburg, like Justice O'Connor, tends to evaluate cases from a liberal feminist perspective. Equality within the law is extremely important to Ginsburg and she seeks remedies such as: more women in politics, legal, accessible and affordable reproductive services, and a gender-neutral workplace free of sex discrimination.

*Harris v. Forklift Systems, Inc.* was the first case involving gender that came before Justice Ginsburg in her capacity as a Supreme Court Justice.<sup>86</sup> This was significant because Ginsburg was well-known as a feminist before her appointment to the Court. Ginsburg concurred in the *Harris* opinion,<sup>87</sup> noting that: "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."<sup>88</sup> Ginsburg further submitted that it is not necessary for a plaintiff to prove a tangible decline in productivity "as a result of the harassment. It suffices . . . that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'ma[k]e it more difficult to do the job."<sup>89</sup> Ginsburg's analysis in *Harris* was important because it made it easier for plaintiffs to prove sex-based discrimination and legitimized plaintiffs' sex discrimination actions overall. Ginsburg reasoned that, as long as the discrimination is based on sex, a requirement that there be a psychological, or even sexual, injury is not necessary for plaintiffs to show a violation of Title VII. If a workplace is permeated with discrimination, intimidation, ridicule and insults such that the conditions of employment are altered, the plaintiff has proven a violation of Title VII.

In *United States v. Virginia*<sup>90</sup> (known as "the V.M.I. case"), Ginsburg wrote the opinion for the majority of the Court (which O'Connor joined), holding that the Virginia Military Institute's

policy of excluding women violated the Equal Protection Clause of the Fourteenth Amendment.<sup>91</sup> Ginsburg began the Court's legal analysis of the case by recounting the United States' "long and unfortunate history of sex discrimination".<sup>92</sup> Her opinion recounted that women did not gain the right to vote until 1920 and that, "for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any 'basis in reason' could be conceived for the discrimination."<sup>93</sup>

Ginsburg also described Virginia's history of discrimination against women in its public institutions of higher education<sup>94</sup> and compared VMI's arguments to those advanced by advocates of same-sex higher education.<sup>95</sup> She wrote: "The notion that admission of women would downgrade VMI's statute, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other 'self-fulfilling prophecies,' once routinely used to deny rights or opportunities."<sup>96</sup> Ginsburg noted that these same arguments were made when women "first sought admission to the bar and access to legal education."<sup>97</sup> Notably, perhaps due to her experience as one of eleven female graduates out of a class of Columbia Law School<sup>98</sup> and as the first female Columbia Law School professor,<sup>99</sup> she explains that fear motivated Columbia Law School's reluctance to admit women.<sup>100</sup>

Ginsburg quotes a pertinent article from *The Nation* regarding Columbia Law School's policy on admitting female students:

[T]he faculty . . . never maintained that women could not master legal learning. . . . No, its argument has been . . . more practical. If women were admitted . . . [the faculty] said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!<sup>101</sup>

Ginsburg also details the extent to which Virginia Military Institute (VMI) and the alternative institution for women set up by VMI, Virginia Women's Institute for Leadership (VWIL) are unequal facilities: "In myriad respects other than military training, VWIL does not qualify as VMI's equal. VWIL's student body, faculty, course offerings, and facilities hardly match VMI's. Nor can any VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network."<sup>102</sup> Perhaps the difference in prestige was important to Ginsburg not only to explain why women at VWIL would receive a substandard education in comparison with VMI, but also due to the fact that Ginsburg herself "in her second year . . . applied pursuant to Harvard's administrative rules for permission to receive a Harvard degree by spending her last year of law school at an institution approved by Harvard."<sup>103</sup> The Dean denied her request on the basis that she could not show "exigent personal circumstances required for such permission."<sup>104</sup> Her desire that she and her young daughter move to be in close physical proximity to her husband "proved to be an insufficient ground, even though . . . applications by males for similar permissions were quite frequently granted. Consequently, Ruth Ginsburg was awarded [a] . . . degree by Columbia, with Columbia giving her credit for her first two years at Harvard."<sup>105</sup> After Ginsburg became prominent, "Harvard offered to give her a degree, on condition that she give up her Columbia degree. She declined to do so."<sup>106</sup>

Ginsburg ended the Court's opinion by noting that

[a] prime part of the history of our Constitution, historian Richard Morris recounted, is the story of the extension of constitutional rights and protections to people once ignored or excluded. VMI's story continued as our comprehension of 'We the People' expanded. There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the 'more perfect Union.'<sup>107</sup>

In Supreme Court cases that deal with issues of gender, it is clear that Justices O'Connor and Ginsburg have made a difference with their voices and their presence on the Court. Their opinions addressing gender are written sensitively and eloquently, and they seem to be able to appreciate hardships that women face. From sexual harassment to abortion to educational exclusion, these cases are analyzed from a woman's perspective and with obstacles that are unique to women in mind. Justices O'Connor and Ginsburg have made a difference on the Court that not only has intrinsic value (in that it is important that brilliant female judges have access to seats on the Supreme Court) but their presence has made a difference in that it has influenced the way the Court evaluates cases involving issues of gender.

### III.

#### THE IMPACT OF WOMEN ON THE STATE APPELLATE BENCH: THE DISTRICT OF COLUMBIA COURT OF APPEALS

##### A. Background

The District of Columbia Court of Appeals is unique in that it has the largest number of black women both serving on an appellate court and as chief judges since the founding of our country.<sup>108</sup> Five African American women have been appointed to the court, some serving simultaneously.<sup>109</sup>

In this section I focus on the two African American women who most likely had a strong impact on the court's opinion in the *en banc* proceeding of the fetal rights case *In re A.C.*<sup>110</sup>, then-Chief Judge Judith Rogers and Judge Julia Cooper Mack. My focus on Judges Rogers and Mack centers mostly on the voice of Judge Mack simply because she produced quite a few more opinions that center on issues affecting women than did Chief Judge Rogers. I do,

however, provide background information on both judges, detailing their experiences in the legal profession. Both women made history because they entered the legal profession at a time where African American female lawyers were unheard of. I argue that Judge Mack's position as an African American woman uniquely influenced the opinions that she wrote. I also argue that both Chief Judge Rogers and Judge Mack influenced the final outcome of *In re A.C.* because of their status as women on an otherwise all-male court.

### 1. Chief Judge Judith Rogers

Judith Rogers was appointed by President Reagan to the nine member D.C. Court of Appeals in 1983.<sup>111</sup> She is the first African American woman to serve on a non-federal appellate court as chief judge in the history of the United States.<sup>112</sup> After becoming chief judge of the D.C. Court of Appeals in 1988,<sup>113</sup> she was appointed to the U.S. Court of Appeals for the D.C. Circuit in 1993 by President Clinton,<sup>114</sup> making her the second African American woman appointed to a U.S. Court of Appeals.<sup>115</sup>

Judge Rogers was born in 1939, graduated from Radcliffe College in 1961 and became the first African American woman to graduate from Harvard Law School in 1964.<sup>116</sup> In 1988 she received a Master of Laws from the University of Virginia School of Law.<sup>117</sup> She was the first African American female assistant U.S. attorney and, in 1979, after Marion Barry was elected mayor, he appointed her D.C. corporation counsel and she became the first female city government's chief lawyer.<sup>118</sup>

### 2. Judge Julia Cooper Mack

Much of what I discuss in this section regarding Judge Julia Cooper Mack is also discussed in Howard Law Journal's symposium tribute to Judge Mack. One of the symposium authors,

Derrick Bell, says of Judge Mack, "[s]he has been the conscience of her court."<sup>119</sup> Appointed by President Ford,<sup>120</sup> Judge Julia Cooper Mack became the first African American woman appointed to the District of Columbia appellate bench in 1975<sup>121</sup> and one of the very first women of any race to serve on an appellate court.<sup>122</sup> She retired from the D.C. Court of Appeals in 1989.<sup>123</sup>

Judge Mack was born in 1920.<sup>124</sup> In 1940 she earned a B.S. from the Hampton Institute and graduated from law school at Howard University in 1951.<sup>125</sup> Upon graduation from law school, she worked in the legal department of the postwar federal government's Office of Price Stabilization; and subsequently joined the General Services Administration as both their first woman and their first African American lawyer.<sup>126</sup> In 1961 Judge Mack, while working for the Justice Department, became the second African American female to argue before the Supreme Court (the first African American female argued before the Court only six weeks earlier).<sup>127</sup>

Before her appointment to the D.C. Court of Appeals, Judge Mack served as general counsel of the Equal Employment Opportunity Commission (EEOC).<sup>128</sup> During her period of employment for the EEOC, she started the practice of the EEOC's filing of amicus curiae briefs in employment discrimination cases.<sup>129</sup> Serving as one of the EEOC's top attorneys, Judge Mack helped shape early feminist jurisprudence via her work in employment law.<sup>130</sup> Judge Mack also served as the EEOC's chief appellate counsel, training civil rights lawyers during the EEOC's most active enforcement period of antidiscrimination law.<sup>131</sup>

Judge Mack tends to evaluate cases from a black feminist or multiracial feminist perspective. Known multiracial feminists include Angela Davis, bell hooks and Audre Lorde. Multiracial feminism identifies sources of gender inequality within the intersection of racial, ethnic, class and

gender discrimination. Judge Mack's viewpoint focuses on the experiences of women of minority groups. She recognizes that there are many forms of discrimination that exist and that those who are not white, male and middle class can end up with double and triple doses of discrimination.

Judge Mack's commitment to justice is clear in the opinions that she wrote while serving on the D.C. Court of Appeals. *Edwards v. Edwards*<sup>132</sup> was Judge Mack's first family law opinion.<sup>133</sup> The issue before the court was whether Bertha Edwards could legally divorce her husband of thirteen years, Jesse Edwards, on the grounds of constructive desertion. Throughout their marriage, Jesse had physically abused Bertha. When he threatened Bertha and their children with a shotgun, he was arrested, pled guilty, and was placed on probation upon the condition that he avoid all contact with Bertha. The trial court found that Bertha was not entitled to a divorce on the grounds of constructive desertion because she had not left the marital home.

The court consisted of two women, Judge Mack and a white woman, Judge Catherine Kelly; and one white male, Judge Pair. Interestingly, Judge Pair dissented, reasoning that, for constructive desertion to exist, one spouse must be compelled by the cruelty of the other to leave the marital home and, because Bertha had not left that home, she was not entitled to a divorce. Judge Pair seemed to question the domestic violence in the relationship and whether such violence warranted a divorce.<sup>134</sup>

Mack, writing for the majority, found it significant that domestic violence effectively forced an end to the marriage. She recognized the choices that Bertha was confronted with - Bertha could either take her children and physically leave the home or call for law enforcement assistance each time she was threatened by Jesse. There was evidence that she had actually left

the house several times but that her husband followed her each time and continued to physically assault her. Distinguishing *Edwards* from previous decisions, Judge Mack would not deny Bertha a divorce simply because she decided to handle her husband's abuse via alternative means.<sup>135</sup>

In 1976, when *Edwards* was decided, there was not a battered women's shelter in the District of Columbia and there were only two shelters in the entire United States.<sup>136</sup> Six years would pass before D.C. law even allowed an abused woman to personally petition the court for a protective order.<sup>137</sup> Judge Mack was extremely bold in recognizing the impact of domestic violence for women and her decision, as well as the compassion with which she writes her opinion, is commendable.

In *Arnold v. United States*,<sup>138</sup> Judge Mack was able to express herself uniquely as an African American female. In *Arnold*, Eugenia Dickerson was raped by the appellant while she was on her way to work the graveyard shift at the post office. She was standing at the bus stop when appellant noticed her at the bus stop and inquired of her presence. She stated that she had missed the bus and was afraid she would be late to work. Appellant offered to drive her to work and she accepted. Instead of driving her to work, appellant threatened to kill her and told her that she couldn't run away and that if she screamed no one would hear her. He ordered her into the back of the car and raped her.

Not long after the rape of Dickerson, appellant raped Portia Mills, who worked with him. She invited him to her home, but he insisted that they talk in his car. He stopped his car at a park near Portia's home and began to tell Portia that he desired her sexually. She asked him to

take her home and he refused, telling her that he was going to beat her and kill her. He then proceeded to rape her.

Appellant was convicted at the trial court level on a two-count rape indictment. The D.C. Court of Appeals majority held that the trial court did not abuse its discretion when it denied severance of the rape counts and upheld the denial of the motion for a judgment of acquittal. Appellant further argued that the trial court erred in refusing to instruct the jury that corroboration of the complainants' testimony must be found before returning a guilty verdict. Appellant also claimed that the evidence was insufficient to support a guilty verdict. The majority held that corroboration of a rape victim's testimony is not required and but emphasized that "insofar as mature females may be involved, we caution that crucial in the trial of any such case is the issue of credibility particularly when there is a claim of provoked or consentaneous participation."<sup>139</sup> The majority further affirmed the ruling of the trial court in finding the evidence sufficient to support a guilty verdict.

Judge Mack, concurring in part and dissenting in part, emphasized her rejection of "any notion that a victim of rape or other sex related offenses is presumptively lacking in credence."<sup>140</sup> However, she would not have abolished the corroboration rule. Although she sees rape victims as presumptively credible, she expressed her concern with false accusations in a race-based context where the defendant is a racial minority. Here, she brings to light the experiences of black women and implicitly rejects the white feminist interpretation of the corroboration rule<sup>141</sup> that ignores the fact that, as she notes, "nationwide, 89% of the 455 men executed for rape between 1930 and 1969 were black men."<sup>142</sup> Judge Mack uses her voice to speak about the African American woman's phenomenological understanding of rape.<sup>143</sup> Judge

Mack contextualized the corroboration rule and emphasized that it was conceived to "safeguard against unjust conviction . . . which cannot be divorced from the practical realities . . . and that factual circumstances of rape . . . lend themselves to . . . different interpretations depending upon one's station or experiences in life, including age, sex, race and environment."<sup>144</sup> Implicit racism manifested in the trier of fact, the judge or the jury, is clearly a concern for Judge Mack and her experiences as an African American woman inform her analysis. Throughout her opinion she takes a unique approach, empathizing not only with the female rape victim, but with the accused, as criminal defendants are, all too frequently, African American males.

Judge Mack again strikes a balanced perspective as an African American woman when she discusses the trauma that rape victims almost always experience during trial and the way that the corroboration rule might play into that "during which a female victim may be exposed to searching and embarrassing inquiry from law enforcement officers or reluctant or insensitive treatment from medical personnel."<sup>145</sup> However, she questioned whether elimination of the corroboration rule alone "would subject a victim to even closer scrutiny during the investigatory stages and even harsher cross-examination by defense counsel at trial. One of the more degrading experiences for a victim, for example, is that of being cross-examined as to prior sexual conduct."<sup>146</sup>

Judge Mack concludes: "[A]s long as there remains racial hostility-I feel . . . that the liberally applied corroborative rule of this jurisdiction is the best protection against attitudinal judgments which operate in derogation of the protection of the innocent-whether that innocent be a victimized female or a falsely accused male."<sup>147</sup> Thus, Judge Mack would have retained the rule in future rape cases and reversed because the trial judge did not give the required instruction.

The D.C. Court of Appeals had occasion to address the way women are economically disadvantaged by divorce in *Neuman v. Neuman*.<sup>148</sup> Emily Neuman appealed both from an order granting a divorce to her husband, Robert Neuman, on grounds of desertion and an order awarding him sole possession of the marital property. In an earlier proceeding initiated by Emily for a divorce on cruelty grounds, custody of the children, exclusive use of the home and an order restraining Emily from the home (except for picking up the children for visitation) were granted to Robert. Robert was subsequently granted divorce on grounds of desertion, awarded the marital property, custody, and visitation. Emily appealed the decision, arguing that that legal desertion was not possible since there was an order in place restraining her from the home. She further appealed the award of the home and property to Robert.<sup>149</sup> Emily moved to appeal and her motion was denied. She then filed for reconsideration and then withdrew her motion for reconsideration because she had obtained employment. She then asked the clerk to file her notice of appeal by a separate letter. Robert's attorneys were not served in a timely fashion by Emily's attorneys and he was never served with the letter to the clerk. Robert's attorney had received an order for the court stating that Emily's appeal was withdrawn and therefore assumed that the divorce was final and that Robert could remarry - and he did. Emily's appeal was dismissed on grounds of equitable estoppel. The court seemed extremely concerned for Robert's second wife and called her an "innocent third party." The court held that Robert had reasonably believed that the divorce was final and therefore decided that the divorce could not be challenged.

Judge Mack wrote an opinion, concurring and dissenting in part, criticizing the majority for its lack of thoroughness in examining the facts of the case. She identified as valid legal issues

that the trial court and the majority glossed over. She considered relevant the question of whether the ground of desertion could exist when the wife, due to a prior consent order dismissing her suit for divorce due to cruelty, was restrained from the marital home. She also questioned whether the trial court's method was correct in computing the property award and exercising its discretion where the wife certainly was not alone in engaging in misconduct and had contributed to the acquiring of the marital property.

Additionally, finding it significant that Robert was a lawyer she wrote, "with all due respect to counsel, I find it hard to believe that appellee, himself a lawyer, having strongly contested the status of his wife to proceed in forma pauperis, could have reasonably concluded, in these bitterly fought proceedings, that his wife was abandoning an appeal altogether."<sup>150</sup>

Judge Mack balanced equities in *Neuman* and formulated a compassionate and just decision. Because she recognized Emily's desire to achieve a divorce while avoiding becoming impoverished in the process, she joined the majority with respect to the granting of the divorce decree. Regarding the property award, she refused to side with the majority's refusal to hear the merits of an issue "that might cast a shadow over Mr. Neuman's financial status where there is an issue as to whether appellant had contributed significantly to that status. Estoppel by its very nature must be equitable. I believe the first Mrs. Neuman has been denied inequitably a right of appeal."<sup>151</sup>

In *Thompson v. Thompson*,<sup>152</sup> Mack again dissented in a family law case, this time involving domestic abuse. When Gerald Thompson violated a protection order, Teresa Thompson filed a motion for contempt and alleged that he choked her by the neck and threw a rock through her bedroom window. Gerald appeared at the hearing unrepresented and the trial

court judge, a female, appointed an attorney to represent him. Gerald's attorney then moved for a continuance which was denied. Both Gerald and Teresa testified and the judge found that Gerald had assaulted Teresa in contempt of court and sentenced him to fifteen days in jail.

Gerald appealed and a majority on the D.C. Court of Appeals reversed and found that the trial court abused its discretion when it refused to grant a continuance. Judge Mack dissented, once again paying attention to facts that had been ignored, in this case, omitted, by the majority. The majority reasoned that Gerald was not aware that imprisonment could follow violation of the protection order.<sup>153</sup> Mack referred to this as "farfetched" since the protection order contained bold print and capital letters explaining that violation of the order could result in imprisonment and since Gerald testified that understood that he could be imprisoned for violating the order.<sup>154</sup>

Regarding the issue of abuse of discretion, Judge Mack decided that, given "the . . . appellant's history of violent conduct towards his wife, the narrowness of the issue, and the simplicity of the facts, the trial court properly considered advance notice in its denial of the continuance."<sup>155</sup> Mack also recognized Teresa's unique situation and the danger that she was in: "The trial court weighed the asserted need for a continuance against the possibility of physical danger to appellant's wife."<sup>156</sup> In a footnote, Mack concluded:

The trial court's concern that there be no further delays in this case appears well-founded. Almost a month had passed after the appellant had allegedly tried to choke his wife before a contempt hearing was held. Moreover, the appellant, as noted, had a history of violent conduct against his wife. As one commentator has concluded, in cases involving domestic violence, "the timing of orders is critical. Studies of wife beating hypothesize a 'cycle of violence.' In order to prevent further beatings which are part of the cycle, immediate help may be necessary."<sup>157</sup>

In another family law case, *In re T.M.*, Judge Mack wrote passionately about mothering and parental rights.<sup>158</sup> *In re T.M.*, was heard before Judge Mack, Judge Schwelb and Judge Farrell. In *In re T.M.*, the biological, drug-addicted mother of three-year-old T.M. was appealing from a trial court order terminating her parental rights. T.M.'s mother stipulated that T.M. was a neglected child, but there was no evidence in the record that she had actually harmed T.M. In a *per curiam* opinion, the majority affirmed the termination of parental rights and applauded the trial court judge, Judge Stephen G. Milliken, for conscientiously deciding such a difficult case. In his trial court opinion, Milliken reasoned that while T.M.'s mother had "made progress in the drug treatment programs undertaken, as often she has relapsed. Because of her addiction she has been unable to take care of T.M.'s physical, mental and emotional needs. The court finds no evidence she will permanently overcome her addiction. Thus the evidence is against reunification."<sup>159</sup>

Dissenting, Judge Mack wrote, "[t]he court-imposed termination of the parent/child relationship is an extreme remedy that obviously has a significant lifelong impact upon all parties."<sup>160</sup> She also expressed her frustration with the lack of true assistance offered by family services and compassion for mothers like T.M.'s who are struggling with an addiction and have few financial resources: "[i]n short, the actions or inactions of DHS [family services] prevented a mother, with few material resources who was anxious to reunify with her daughter and willing to take the necessary steps for reunification, from achieving this goal."<sup>161</sup>

Judge Mack continues:

[A]ppellant's actions indicate that she was anxious to reunify with her child and that she was willing to take the steps necessary to achieve this goal. Moreover, it is clear that appellant was a loving mother with few material and human resources who was doing what she thought was best for her child. It is also

clear that DHS failed to provide appellant with the necessary guidance and resources for her to realistically "recover strongly enough to offer herself as a viable parent."<sup>162</sup>

Concerning the mother's financial status and her obvious struggle with her addiction, Judge Mack found it significant, not only that family services almost intentionally refused to help her develop a relationship with her own child, but also that the trial court did not consider this evidence to be relevant when it declared T.M.'s mother to be unfit.<sup>163</sup> Judge Mack also found it disturbing that the trial court judge relied so heavily upon the uncertainty surrounding the mother's ability to continue in her treatment program and find housing and employment.<sup>164</sup> She wrote: "[g]iven the existence of fully functional drug addicts, simply stating that appellant is unable to adequately care for her child because she is a drug addict is not enough. . . . There was no expert testimony or other medical evidence presented on this issue."<sup>165</sup>

Judge Mack refused to affirm the trial court's order of termination of parental rights and stated that she would have remanded the case to allow the trial court to engage in a more thorough examination of the facts of the case "consistent with the child's overall best interest."<sup>166</sup> It seems clear that Judge Mack was combating the image of T.M.'s mother painted by the trial court and relied upon by her colleagues on the D.C. Court of Appeals as a bad mother due to the fact that she was poor and addicted to drugs.<sup>167</sup>

#### B. *In re A.C.*

*In re A.C.* is a case consisting of three significant proceedings.<sup>168</sup> The first proceeding occurred at the trial court level in the D.C. Superior Court, in front of Judge Emmet Sullivan. The second proceeding took place at the D.C. Appellate level, in front of a three-judge, all-male panel consisting of Judges James A. Belson, John A. Terry and Frank Nebeker, who

wrote the opinion. The case was heard again in front of the D.C. Court of Appeals, this time in an *en banc* proceeding that included the court's female judges. The *en banc* court consisted of: Chief Judge Judith Rogers, Theodore Newman, John M. Ferren, James A. Belson, John A. Terry, John Steadman, Frank E. Schwelb, and Julia Cooper Mack.<sup>169</sup>

The third *In re A.C.* proceeding, the proceeding in front of the court's female judges, produced a significantly different opinion than did the first two proceedings. The third opinion was not only different because it reversed the previous two findings, but it was written compassionately and, although Judge Terry, a male, authored the opinion, the opinion seemed to take on the perspective of the woman at issue in the case. Interestingly, Judge Terry had been a member of the three-judge panel in the first D.C. Court of Appeals proceeding which issued a starkly different opinion in outcome and tone. Most likely, it was significant that the women on the *en banc* court, Chief Judge Rogers and Judge Mack, were able to hear the arguments and were present at the court's conference. The difference between the two court of appeals opinions is so striking, it is difficult to conceive of a persuasive alternative explanation.

### 1. The Superior Court

*In re A.C.* was a case about a twenty-eight-year-old secretary named Angela Carder (known as Angie).<sup>170</sup> One of the first children ever to survive Ewing's sarcoma, Carder had been struggling with bone cancer since she was a young child.<sup>171</sup> As a result of this struggle, Carder's leg had been amputated. At twenty-six weeks pregnant, she was diagnosed with terminal cancer.<sup>172</sup> She had been wrongly diagnosed as terminal twice before, but doctors at George Washington University Hospital in Washington, D.C. gave her only days to live this time and refused to prescribe chemotherapy - treatment that Carder wanted, and treatment that

her long-time oncologist (who did not consider her to be terminal) had suggested - because they were afraid that it would endanger the fetus.<sup>173</sup>

Carder's cancer had been in remission for several years when her obstetrician told her that she should do as wished and become pregnant.<sup>174</sup> Halfway through her pregnancy, she discovered the inoperable lung tumor.<sup>175</sup> The doctors, concluding that a baby delivered at twenty-six weeks probably would not survive, attempted to prolong Carder's life instead of saving it.<sup>176</sup> As Carder fought, saying "No, no, no. Don't do that to me,"<sup>177</sup> a tube was inserted into her throat and sedatives were used to silence her.<sup>178</sup> Instead of waiting for the sedatives to wear off so that Carder's permission could be obtained, and without seeking her family's consent, the hospital administration brought in Superior Court judge Emmet Sullivan, who conducted the hearing in a conference room at the hospital.<sup>179</sup>

The lawyers involved in the lower court case included the hospital's attorneys, two attorneys representing the city and the fetus's lawyer.<sup>180</sup> One court-appointed attorney, appointed thirty minutes before the hearing, represented Carder.<sup>181</sup> During the hearing in the hospital, neither the judge nor any of the attorneys visited Carder in her hospital room.<sup>182</sup>

At the conclusion of the hearing, Judge Sullivan announced:

"There's been some testimony that the performance of a cesarean section may well hasten the death of Angela. . . . There's also been testimony that delay in performing the cesarean section greatly increases the risk to the fetus. . . . Given the choices, the court is of the view the fetus should be given an opportunity to live. . . . I have ruled"<sup>183</sup>

Judge Sullivan then told the doctors to begin the operation immediately.<sup>184</sup>

An obstetrician went to Carder's room to inform her of Judge Sullivan's decision when she was just beginning to come off of her sedatives.<sup>185</sup> He asked her if she would consent to the

procedure and she mouthed "yes."<sup>186</sup> Thirty minutes later, when the doctor returned, she told him "I don't want it done, I don't want it done."<sup>187</sup>

When the doctor told those still assembled in the hospital conference room, one of the city's lawyers argued that Carder's opinion was irrelevant because the court's decision was made under the assumption that her consent would not be obtained.<sup>188</sup> Judge Sullivan concurred and again told the doctors to begin the procedure.<sup>189</sup>

## 2. The D.C. Court of Appeals, First Proceeding

Carder's court-appointed attorney then commenced the second *In re A.C.* proceeding, filing an emergency appeal for a stay.<sup>190</sup> Less than an hour later, the case was heard via teleconference before a D.C. Court of Appeals three-judge panel.<sup>191</sup> The judges were told that the operation had to begin immediately and they agreed to hear the case and rule in "sixteen minutes."<sup>192</sup>

The court raised doubts regarding Carder's decision-making abilities.<sup>193</sup> The judges asked about her "mental frame of mind" and whether she seemed "to be ambivalent".<sup>194</sup> Judge Nebeker, who eventually wrote the opinion, noted that Carder "[c]hanged her mind at least twice, is that correct?"<sup>195</sup>

The attorneys arguing the case in front of the court of appeals had only just been assembled and had not yet conducted any legal research.<sup>196</sup> The only attorney attending the teleconference who was well-versed in fetal rights law was interrupted by Judge Nebeker when she attempted to explain precedent: "With the time constraints, we don't have time to start reading."<sup>197</sup> When the sixteen minutes were over, the court ruled that the hospital should begin the procedure.<sup>198</sup>

A few hours after the procedure, Carder awoke, crying and grieving. The hospital staff told Carder that her baby had lived only briefly.<sup>199</sup> Two days later, Carder died and an autopsy report noted the operation as a contributing factor in her death.<sup>200</sup>

Five months later, the D.C. Court of Appeals panel delivered its written opinion.<sup>201</sup> Susan Faludi calls this opinion "unapologetic"<sup>202</sup> and, indeed, that word describes the way the court relegates Carder to almost sub-human status. Unsympathetically, the court almost chastises Carder for wanting to be on sedatives and other medications after her cancer diagnosis: "A.C. was aware that a number of medications she was taking might harm the fetus. Nevertheless, she expressed a desire to her physicians to be kept as comfortable as possible throughout her pregnancy and to maintain the quality of her life."<sup>203</sup> The court writes as if it believed it had a moral imperative to decide how the rest of Carder's life was to be lived. Carder's health and quality of life are viewed as irrelevant and subordinate to the possible interests of the fetus, despite testimony that "this particular fetus, because of the mother's medical history, had only a fifty to sixty percent chance of survival."<sup>204</sup>

The court admits that "[t]here was no time to have the transcript read or to do effective research."<sup>205</sup> It justified its decision to deny a stay "on the medical judgment that A.C. would not survive for a significant time after surgery and that the fetus had a better, though slim, chance if taken before A.C.'s imminent death."<sup>206</sup> The court also admitted that "we may have shortened A.C.'s life span."<sup>207</sup> And that, "the surgery might have hastened her death. The ordinary question of likelihood of ultimate success on the merits was deemed subsumed in the immediate necessity to balance the delicate interests of fetus survival with the mother's condition and options on her behalf."<sup>208</sup> Also, because the denial of a stay would bring almost certain

death to Carder, the court concedes: "[w]e decided the entire matter when we denied the stay."<sup>209</sup>

The court argued that this case was "not about abortion"<sup>210</sup> and cited *Roe v. Wade* for the proposition that "when the fetus is 'potentially able to live outside the mother's womb albeit with artificial aid,' the state has a compelling interest in protecting the 'potentiality of human life,' *as well as the life and health of the mother.*"<sup>211</sup> Clearly, two lives are at issue here. However, the court seems to, both in its opinion, and, quite literally, erase the only living person in this case: that of Angela Carder. The court continued, "[t]hus, as a matter of law, the right of a woman to an abortion is different and distinct from her obligations to the fetus once she has decided not to timely terminate her pregnancy."<sup>212</sup> The court, assuming that Carder's fetus was viable, reasoned that "a balancing of interests must replace the single interest of the mother."<sup>213</sup> Here, the court concedes the right to abortion, but concludes nevertheless that Carder owed an obligation to her fetus. The words "timely terminate her pregnancy" demonstrate the court's inability to have any empathy or to think about the reality of Carder's life as a pregnant woman recently diagnosed with terminal cancer. What the court *really* seems to be saying here is: "She got herself pregnant and didn't have an abortion." Of course, what the court ignores is the fact that Carder had no reason to have a "timely" abortion. When she discovered that she had only days to live, she was too far along in her pregnancy to legally proceed with an abortion.

The court next addressed the right of bodily integrity in the context of "the right of an adult to refuse medical treatment and the right of a parent to refuse medical treatment on behalf of offspring."<sup>214</sup> The court conceded that "in most circumstances, an adult's right to bodily integrity precludes the state from intervening in the adult's decision to refuse medical treatment."<sup>215</sup> It

also admitted that very serious consequences may arise from caesarean sections, including "infection, hemorrhage, gastric aspiration of the stomach contents . . . postoperative embolism . . . considerable discomfort . . . [and] death."<sup>216</sup> The court concludes that, "[e]ven though we recognize these considerations, we think they should not have been dispositive here."<sup>217</sup> The court found the considerations to be irrelevant because A.C. "had, at best, two days left of sedated life"<sup>218</sup> and saw the fetus, or as the court calls it, "[t]he child",<sup>219</sup> as having "a chance of surviving delivery . . . ."<sup>220</sup>

### 3. The D.C. Court of Appeals, Second Proceeding, *En Banc*

Three years later, and "three years too late to matter to Angela Carder,"<sup>221</sup> the D.C. Court of Appeals, this time sitting *en banc*, with its two female members present, reversed its initial appellate court ruling.<sup>222</sup> The second opinion is written with compassion and with genuine concern for Carder. The court noted at the outset of its opinion that it was holding:

that in virtually all cases the question of what is to be done is to be decided by the patient - the pregnant woman - on behalf of herself and her fetus.<sup>223</sup> If the patient is incompetent or otherwise unable to give informed consent to the proposed course of medical treatment, then her decision must be ascertained through the procedure known as substituted judgment.<sup>224</sup>

Substituted judgment is where the judge tries to put himself or herself truly subjectively in the position of the person at issue. In cases analyzed under substituted judgment, what the judge thinks is right is irrelevant; it is what the person at issue would have chosen that is determinative.

The *en banc* court, went through a much more thorough, detailed analysis of the facts than did the three-judge panel. It cited lengthy testimony from the record, noting that "[t]here was no evidence before the court showing that A.C. consented to, or even contemplated, a caesarean section before her twenty-eighth week of pregnancy."<sup>225</sup>

The court begins its legal analysis by reciting "the tenet common to all medical treatment cases: that any person has the right to make an informed choice, if competent to do so, to accept or forego medical treatment. The doctrine of informed consent, based on this principle . . . is ingrained in or common law."<sup>226</sup> The court noted, significantly, that "[s]urely . . . a fetus cannot have rights . . . superior to those of a person who has already been born."<sup>227</sup> After analyzing relevant cases, the court concluded "that every person has the right, under the common law and the Constitution, to accept or refuse medical treatment. This right of bodily integrity belongs equally to persons who are competent and persons who are not."<sup>228</sup> The opinion continues:

[I]t matters not what the quality of a patient's life may be; the right of bodily integrity is not extinguished simply because someone is ill, or even at death's door. To protect that right against intrusion by others - family members, doctors, hospitals, or anyone else, however well-intentioned - we hold that a court must determine the patient's wishes by any means available, and must abide by those wishes unless there are truly extraordinary or compelling reasons to override them. When the patient is incompetent, or when the court is unable to determine competency, the substituted judgment procedure must be followed.<sup>229</sup>

In context of the case at hand, the court notes that it cannot decipher whether a sedated A.C. was ever competent enough to make an informed decision regarding a caesarean section.<sup>230</sup> The court noted that it is incumbent that the judge, at the trial court level, "ascertain whether a patient is competent to make her own medical decisions. Whenever possible, the judge should personally attempt to speak with the patient and ascertain her wishes directly, rather than relying exclusively on hearsay evidence, even from doctors."<sup>231</sup> The opinion points out that "[i]t is improper to presume that a patient is incompetent."<sup>232</sup> The court held that, because A.C. did not

competently refuse to proceed with the caesarian, "and without a finding through substituted judgment that A.C. would not have consented to the surgery, it was error for the trial court to proceed to a balancing analysis, weighing the rights of A.C. against the interests of the state."<sup>233</sup>

In addressing the time constraints present in *In re A.C.*, the court found it significant that "A.C.'s court-appointed attorney was unable even to meet with his client before the hearing."<sup>234</sup> Further, "[t]he factual record . . . was significantly flawed because A.C.'s medical records were not before the court and because . . . the physician who had been treating A.C. for many years, was not even contacted and hence did not testify."<sup>235</sup>

Unfortunately, as the court recognized,

the time for legal preparation was so minimal that neither the court nor counsel mentioned the doctrine of substituted judgment which - with benefit of briefs, oral arguments, and above all, time - we now deem critical to the outcome of this case. We cannot be at all certain that the trial judge would have reached the same decision if the testimony of [A.C.'s long-time doctor] and the abundant legal scholarship filed in this court had been meaningfully available to him, and if there had been enough time for him to consider and reflect on these matters as a judge optimally should do.<sup>236</sup>

Regarding the substituted judgment rule, the court recognizes that the trial court did not follow the substituted judgment rule and it did not attempt to decide based on what A.C. would do if she were competent.<sup>237</sup> The court concludes:

in virtually all cases the decision of the patient, albeit discerned through the mechanism of substituted judgment, will control. We do not quite foreclose the possibility that a conflicting state interest may be so compelling that the patient's wishes must yield, but we anticipate that such cases will be extremely rare and truly exceptional. This is not such a case.<sup>238</sup>

The *en banc In re A.C.* opinion seems to be written from a standpoint that combines relational, or cultural feminism with liberal feminism.<sup>239</sup> Cultural feminism has its roots in Carol

Gilligan's work and it emphasizes women's connection and relationship to one another. The opinion seems to be a combination of both because it focuses on the rights of Carder and deemphasize possible rights of the unborn fetus, which is consistent with liberal feminism's value of reproductive autonomy without state interference and individual rights. However, the opinion also seems to emphasize mutual responsibility in its focus on Carder's existence as a as a pregnant, terminally ill woman who deserves compassion, respect and consideration.

Unfortunately, the compassion evident in the *en banc In re A.C.* opinion is missing from most judicial opinions concerning women and mothers. Marie Ashe writes: "the major attributes of legal discourse concerning women and mothers are these: it originates in men; it defines women with certainty; it attempts to mask the operations of power; it silences other discourse. I take as given: Law that silences any discourse is without warrant."<sup>240</sup> Clearly, the three-judge appellate court opinion silenced the discourse of Angela Carder. Ashe criticizes opinions such as the first *In re A.C.* appellate decision: "[H]ateful legal constructs that impose 'love' and 'self-sacrifice' upon women as our duties - are perverse."<sup>241</sup> I submit that perhaps such constructs were imposed upon Angela Carder because three men wrote the first *In re A.C.* appellate opinion. Further, it seems probable that the reason the second *In re A.C.* appellate opinion, the *en banc* opinion, would not have forced Angela Carder to choose the slight possibility of her fetus surviving over her own life is because there were two women sitting on the court who could identify with Angela Carder. These two female appellate judges may not have been pregnant and they certainly were not dying of cancer, but they had the ability to empathize with a woman's need for bodily integrity during her pregnancy.

Judge Mack and Chief Judge Rogers are examples of the way that the makeup of the judiciary is slowly changing. As African American women who sat on the bench of the D.C. Court of Appeals at the same time, they not only changed the face of the court, they influenced the way that decisions, specifically in *In re A.C.*, were both decided and reasoned. Clearly, Judge Mack has been the more vocal of the two regarding women's issues and, more specifically, African American women's issues. Although most of Judge Mack's most passionate opinions were written as dissents, it is significant that her voice is present and that, even if she could not always persuade the court, she courageously let her position be known. Chief Judge Rogers and Judge Mack's voices have been preserved in judicial opinions as evidence of the way that female judges have begun to change the voice of a once all-male judiciary. And, as *A.C.* demonstrates, sometimes women don't have to write the opinions in order for the female voice to be heard.<sup>242</sup>

#### CONCLUSION

Female judges tend to approach cases involving issues that uniquely affect women in ways that differ from that of their male colleagues. They tend to be more sympathetic to cases involving issues that uniquely affect women. The perspective of female judges manifests itself not only in a historical change in the makeup of the judicial system, but in a way that is evidenced in their opinions and the opinions that they have influenced, perhaps through court conferences or informal discussions with colleagues. With the slow changes in the makeup of the judiciary, it is my hope that more women will have the ability to evaluate cases through a feminist lens.

One explanation for the difference between male and female adjudication could lie in female judges' experience with gender discrimination. For example, many female judges have encountered discrimination in the workplace. Justices Ginsburg and O'Connor clearly faced obstacles in their careers due to gendered stereotypes and efforts to keep women out of the legal profession. Judge Mack and Judge Rogers most likely, as not only women but as African Americans, encountered many forms of workplace discrimination as well.

The women profiled in this paper are true legal pioneers. Despite all of the difficulties they have faced (and probably continue to face) throughout their careers, they have been able to not only ascend to the judiciary, but to find their voice and express it through judicial opinions. They have helped change the sexist nature of the law and have worked to ensure that women begin to have a meaningful place in legal analysis.

#### ENDNOTES

<sup>1</sup> Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER & L. 195, 215-16 (2001).

<sup>2</sup> It is *not* my contention of this paper that women inherently share a unique perspective simply because of their biological makeup.

<sup>3</sup> CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 85-86 (1989).

<sup>4</sup> This is especially true regarding issues of racial injustice. I limit my focus in this paper to the way female judges, especially white women, approach issues of gender because many females, while identifying with the oppression of women, have difficulty identifying with those subject to other forms of oppression. For instance, Justice Sandra Day O'Connor wrote the majority opinion in *Richmond v. J.A. Croson Co. (Croson)*, 488 US 469 (1989), holding that amorphous claims of past discrimination in an industry do not justify racial quotas implemented by the city. *Id.* at 499. In *Croson*, a city council enacted a monetary set-aside program for minority-owned businesses. The program was challenged by a white contractor on the basis that it denied him equal protection. Despite the strong anecdotal evidence of racial discrimination in the Richmond area, the Court invalidated the plan. There was evidence before

the Court that, although African Americans made up more than half of the overall population, only 0.67 percent of the prime construction contracts had been issued to African Americans. Justice O'Connor's majority opinion submitted that a reason for this difference may not lie solely in discrimination, but in "both black and white career and entrepreneurial choices." *Id.* at 503. The Court noted that if the evidence of discrimination is a product of "societal discrimination," *Id.* at 505, reflects societal racism, the city may not remedy that discrimination. O'Connor's opinion "announced that the Court would henceforth apply a 'strict scrutiny' test when reviewing programs that discriminate on the basis of race, regardless of whether they confer benefits or burdens on racial minorities." DAVID M. O'BRIEN, *STORM CENTER* 305 (2000).

<sup>5</sup> For instance, studies produced by social scientists that were conducted after it was apparent that there were enough women on the bench to actually conduct accurate studies, "produced mixed results." Sue Davis et al., *Voting Behavior and Gender on the U.S. Court of Appeals*, 77 *JUDICATURE* 129, 130 (1993). In examining "interest group ratings of members of Congress," *Id.* the studies found that "women were more liberal than men, particularly in the areas of social welfare and defense spending. In contrast, studies of the views of political party elites . . . failed to reveal significant differences based on the sex of the decision maker." *Id.*

<sup>6</sup> Gilligan, now a law professor at New York University, did uncover groundbreaking psychological research in her book, *A DIFFERENT VOICE*, regarding women and moral reasoning. She submits that men's moral values tend towards justice and individualism and women's tend towards care and connection. She is known as the founder of "cultural feminism," an academic feminist theory which focuses on women's ways of knowing and contends that women's ways of knowing and reasoning should be valued in their own right.

<sup>7</sup> Professor of Law, Vanderbilt University.

<sup>8</sup> Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 *VA. L. REV.* 543, 543 (1986).

<sup>9</sup> Tracey E. George, *Court Fixing*, 43 *ARIZ. L. REV.* 9, 19 (2001).

<sup>10</sup> *Id.* at 18.

<sup>11</sup> *Id.* at 18-19.

<sup>12</sup> *Id.* at 19.

<sup>13</sup> J. Clay Smith, Jr., *Black Women Lawyers: 125 Years at the Bar; 100 Years in the Legal Academy*, 40 *HOW. L.J.* 365, 393 (1997) [hereinafter Smith, *Black Women Lawyers*]. "In 1962, a landmark appointment to the Juvenile Court of the District of Columbia was marked with the confirmation of Marjorie McKenzie Lawson, at age 50, to the newly organized Juvenile Court of the District of Columbia Municipal Court." *Id.*

<sup>14</sup> Karen L. Valihura, *Breaking Through the Barriers: A Reflection on the Participation of Women in the American Legal Profession*, 12 DEL. LAW. 5, 7 (1994).

<sup>15</sup> Florence Ellinwood Allen of the Ohio Supreme Court was the first women state supreme court justice and was also the first woman appointed to the federal appellate bench. Judge Phyllis A. Kravitch, *Women in the Legal Profession: The Past 100 Years*, 69 MISS. L.J. 57, 64 (1999).

<sup>16</sup> Fred Leeson, *The Appointment*, 56 OR. ST. B. BULL. 43, 43 (1996).

<sup>17</sup> Smith, Jr., *supra* note 13 at 394. Juanita Kidd Stout, appointed by the Governor of Pennsylvania to the Pennsylvania Supreme Court, was the first woman appointed to a state supreme court. *Id.*

<sup>18</sup> Kravitch, *supra* note 15 at 70.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Davis, et al., *supra* note 5 (citing Allen and Wall, *The Behavior of Women State Supreme Court Justices: An Update*. Unpublished manuscript, 1990; *The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders?*, 12 JUST. SYS. J. 232-44 (1987)).

<sup>22</sup> *Id.* at 131. This study was conducted by Sue Davis, Susan Haire and Donald R. Songer. The authors write:

[s]ince there were more than 3,000 published opinions for both search and seizure and employment discrimination cases, samples of each of these case types were drawn. The samples contained 1,283 votes in search and seizure cases and 519 votes from the employment discrimination cases. . . . The samples included . . . 15 females and 237 males in search and seizure cases, and 16 females and 188 males in employment discrimination cases. No judge cast more than 2.4 percent of the votes in any one area.

*Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 132.

<sup>25</sup> O'BRIEN, *supra* note 4 at 83.

<sup>26</sup> *Id.* See also Malvina Halberstam, *Ruth Bader Ginsburg: The First Jewish Woman on the United States Supreme Court*, 19 CARDOZO L. REV. 1441, 1445 (1998).

<sup>27</sup> *Hon. Sandra Day O'Connor Associate Justice, U.S. Supreme Court*, 48 FED. LAW. 18, 19 (2001)

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Davis, et al., *supra* note 5 at 133.

<sup>33</sup> *Id.* See also, Carl Tobias, *Closing the Gender Gap on the Federal Courts*, 61 U.CIN. L. REV. 1237, 1243 (1993). "Most [women] jurists will more readily apprehend particular problems, such as securing employment and encountering discrimination, that many American women experience." *Id.*

<sup>34</sup> See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (declaring restrictions on abortion unlawful); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) (holding that severe psychological injury is be enough to meet the hostile environment standard in employment discrimination and reversing the district court's dismissal of plaintiff's case); *United States v. Virginia*, 518 U.S. 515 (1996) (declaring VMI's men-only admittance policy unconstitutional and in violation of equal protection); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding that intentional discrimination on the basis of gender in peremptory strikes during voir dire violates the equal protection clause).

<sup>35</sup> Justice William J. Brennan, Jr., *A Tribute to Justice Sandra Day O'Connor*, 1996 ANN. SURV. AM. L. xvi, xvi (1996).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at xvii-xviii (citing, e.g., *Hoyt v. Florida*, 368 U.S. 57, 61 (1961) (upholding the exemption of women from jury duty, noting that "woman is still regarded as the center of home and family life);

<sup>38</sup> *Id.* at xviii.

<sup>39</sup> 480 U.S. 616 (1987).

<sup>40</sup> *Id.* at 640-42. *See also* Stephen J. Wermiel, *O'Connor: A Dual Role - An Introduction*, 13 WOMEN'S RTS. L. REP. 129, 134-35.

<sup>41</sup> Wermiel, *supra* note 40 at 134.

<sup>42</sup> *Johnson v. Transportation Agency*, 480 U.S. at 656.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 510 U.S. 17 (1993).

<sup>47</sup> *Id.* at 20.

<sup>48</sup> *Id.* at 22.

<sup>49</sup> *Id.* at 18.

<sup>50</sup> *Id.* at 19.

<sup>51</sup> *Id.*

<sup>52</sup> CAROLINE A. FORELL & DONNA M. MATTHEWS, *A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN* 68 (2000).

<sup>53</sup> 486 U.S. 456 (1988). *See also* Wermiel, *supra* note 40 at 135.

<sup>54</sup> *Clark v. Jeter*, 486 U.S. at 463 (quoting *Mills v. Habluetzel*, 456 U.S. 91, 105, n.4 (O'Connor, J., concurring)).

<sup>55</sup> *Id.* at 463-64 (quoting *Pickett v. Brown*, 462 U.S. 1, 12 (1983)).

<sup>56</sup> *Id.* at 464.

<sup>57</sup> 490 U.S. 581 (1989).

<sup>58</sup> *Id.* at 595 (O'Connor, J., dissenting). *See also* Wermiel, *supra* note 40 at 135.

<sup>59</sup> *Mansell v. Mansell*, 490 U.S. at 595 (O'Connor, J., dissenting).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 601-02.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* (emphasis added).

<sup>64</sup> *Id.* at 602

<sup>65</sup> *Id.* (quoting S. Rep. No. 97-502, at 6).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 604.

<sup>69</sup> 505 U.S. 833 (1992).

<sup>70</sup> 410 U.S. 113 (1973).

<sup>71</sup> 505 U.S. at 893-94.

<sup>72</sup> *See, e.g.,* Judith Olans Brown et al., *The Rugged Feminism of Sandra Day O'Connor*, 32 Ind. L. Rev. 1219, 1226 (1999).

<sup>73</sup> 505 U.S. at 888-91.

<sup>74</sup> *Id.* at 893-94.

<sup>75</sup> 511 U.S. 127 (1994).

<sup>76</sup> *Id.* at 147 (O'Connor, J., concurring).

<sup>77</sup> *Id.* at 148. *See also* Beth A. Deverman, *Supreme Court Review: Fourteenth Amendment - Equal Protection: The Supreme Court's Prohibition of Gender-Based Peremptory Challenges J.E.B. v. Alabama*, 114 S.Ct. 1419 (1994), 85 J. CRIM. L. & CRIMINOLOGY 1028 (1995).

<sup>78</sup> *Id.* at 147-48, 150.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 149.

<sup>81</sup> 476 U.S. 79 (1986).

<sup>82</sup> *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994) (O'Connor, J., concurring).

<sup>83</sup> *Id.* at 149-50.

<sup>84</sup> *Id.* at 150.

<sup>85</sup> *Id.* at 151.

<sup>86</sup> Toni J. Ellington, *Ruth Bader Ginsburg and John Marshall Harlan: A Justice and Her Hero*, 20 U. HAW. L. REV. 797 (1998); 510 U.S. 17 (1993).

<sup>88</sup> 510 U.S. at 25 (Ginsburg, J., concurring).

<sup>89</sup> *Id.*

<sup>90</sup> 518 U.S. 515 (1996).

<sup>91</sup> For further explanation of Ginsburg's perspective illustrated by her opinion in *United States v. Virginia*, see Halberstam, *supra* note 26 at 1449. It is interesting that O'Connor was willing to join Ginsburg's opinion, which explicitly analyzed the case from a female point of view when the case was, in fact, about a man. O'Connor could have simply concurred in the outcome, but she joined the opinion, making an unusual departure from Thomas and Scalia. Cases such as *VMI* may illustrate the reason O'Connor is known as the Court's "swing vote." More importantly, one wonders if her perspective as a female who had been discriminated against in the legal profession influenced her decision to join Ginsburg's opinion.

<sup>92</sup> *United States v. Virginia*, 518 at 531 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 537.

<sup>95</sup> *Id.* at 538.

<sup>96</sup> *Id.* at 542-43.

<sup>97</sup> *Id.* at 543.

<sup>98</sup> Carol Pressman, *The House That Ruth Built: Justice Ruth Bader Ginsburg, Gender and Justice*, 14 N.Y.L. SCH. J. HUM. RTS. 311, 311 (1997).

<sup>99</sup> O'BRIEN, *supra* note 4 at 83.

<sup>100</sup> United States v. Virginia, 518 U.S. 515, 543 (1996).

<sup>101</sup> *Id.* at 543-44 (quoting THE NATION, Feb. 18, 1925 at 173).

<sup>102</sup> *Id.* at 551.

<sup>103</sup> Gerald Gunther, *Ruth Bader Ginsburg: A Personal, Very Fond Tribute*, 20 U. HAW. L. REV. 583, 583 (1998).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 583-84.

<sup>106</sup> Halberstam, *supra* note 26 at 1445 n.15.

<sup>107</sup> United States v. Virginia, 518 U.S. 515, 557-58 (1996).

<sup>108</sup> Smith, *Black Women Lawyers*, *supra* note 13 at 394.

<sup>109</sup> *Id.*

<sup>110</sup> 573 A.2d 1235 (D.C. App. 1990) (*en banc*).

<sup>111</sup> Smith, *Black Women Lawyers*, *supra* note 13 at 394; Martin Weil, *Chief D.C. Judge Named to U.S. Appeals Court*, WASH. POST, Nov. 18, 1993, at C03.

<sup>112</sup> Smith, *Black Women Lawyers*, *supra* note 13 at 394.

<sup>113</sup> Barton Gellman, *Woman Named to Head D.C. Appeals Court*, WASH. POST, Oct. 18, 1988, at B01.

<sup>114</sup> *President Clinton Names Rogers to Circuit Court for D.C.; Vanaskie to U.S. District Court for Pennsylvania*, U.S. Newswire, Nov. 17, 1993, available in 1993 WL 7132468.

<sup>115</sup> Weil, *supra* note 111.

<sup>116</sup> *Id.*; *Clinton Changes 'Face' of Nation's Judges Fifty Percent of the Administration's Nominees are Women and Minorities*, SALT LAKE TRIB, Jan. 11, 1994, at A4.

- <sup>117</sup> *Biographies: Judith W. Rogers*, 63 GEO. WASH. L. REV. 917, 917 (1995).
- <sup>118</sup> Weil, *supra* note 111.
- <sup>119</sup> Derrick Bell, *A Gift of Unrequited Justice*, 40 HOW. L. J. 305, 305 (1997).
- <sup>120</sup> *Court of Appeals Judge Mack to Retire*, WASH. POST, June 27, 1989, at D08.
- <sup>121</sup> Smith, *Black Women Lawyers*, *supra* note 13 at 394.
- <sup>122</sup> Walter J. Walsh, *Speaking Truth to Power: The Jurisprudence of Julia Cooper Mack*, 40 HOW. L. J. 291, 296 (1997).
- <sup>123</sup> Barton Gellman, *3 Names Sent to Bush for D.C. Appeals Court*, WASH. POST, Oct. 11, 1989, at D05.
- <sup>124</sup> Walsh, *supra* note 122 at 300.
- <sup>125</sup> *Id.*
- <sup>126</sup> *Id.*
- <sup>127</sup> *Id.* Constance Baker Motley was the first African American woman to argue in front of the United States Supreme Court. Motley argued for the NAACP in *Hamilton v. Alabama*, 368 U.S. 52 (1961).
- <sup>128</sup> *Court of Appeals Judge Mack to Retire*, *supra* note 120. Judge Mack was an attorney for the EEOC from 1968 until her appointment to the bench in 1975. Walsh, *supra* note 122 at 301. Because Thomas began his tenure at the EEOC in 1989, Judge Mack and Justice Thomas's service at the EEOC did not overlap. However, Judge Rogers did take Justice Thomas's seat on the federal appellate bench when he was appointed to the Supreme Court.
- <sup>129</sup> Walsh, *supra* note 122 at 300.
- <sup>130</sup> *Id.*
- <sup>131</sup> *Id.*
- <sup>132</sup> 356 A.2d 633 (D.C. 1976).
- <sup>133</sup> Nancy D. Polikoff, *Context and Common Sense: The Family Law Jurisprudence of Julia Cooper Mack*, 40 HOW. L.J. 443, 444 (1997).
- <sup>134</sup> *Edwards v. Edwards*, 356 A.2d at 639 (D.C. 1976) (Pair, J., dissenting).
- <sup>135</sup> *Id.* at 635.

<sup>136</sup> Polikoff, *supra* note 133 at 445.

<sup>137</sup> *Id.*

<sup>138</sup> 358 A.2d 335 (1976).

<sup>139</sup> *Id.* at 344.

<sup>140</sup> *Id.* at 348 (Mack, J., concurring and dissenting).

<sup>141</sup> See Lisa A. Crooms, *Speaking Partial Truths and Preserving Power: Deconstructing White Supremacy, Patriarchy, and the Rape Corroboration Rule in the Interest of Black Liberation*, 40 HOW. L. J. 459, 460-61 (1997).

<sup>142</sup> 358 A.2d at 350 (Mack, J., concurring and dissenting).

<sup>143</sup> Crooms, *supra* note 141 at 461.

<sup>144</sup> 358 A.2d 335, 349 (1976) (Mack, J., concurring and dissenting).

<sup>145</sup> *Id.* at 351 (Mack, J., concurring and dissenting).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 352 (Mack, J., concurring and dissenting).

<sup>148</sup> 377 A.2d 393 (D.C. 1977). See also Polikoff, *supra* note 133 at 445.

<sup>149</sup> *Id.* at 395.

<sup>150</sup> *Id.* at 400 (Mack, J., concurring and dissenting).

<sup>151</sup> *Id.* (Mack, J., concurring and dissenting)

<sup>152</sup> 559 A.2d 311 (D.C. 1989); See also Polikoff, *supra* note 133 at 448.

<sup>153</sup> 559 A.2d at 316 (Mack, J., dissenting).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 316-17 (Mack, J., dissenting).

<sup>157</sup> *Id.* at 317 n.2 (Mack, J., dissenting) (quoting *Restraining Order Legislation for Battered Women: A Reassessment*, 16 U.S.F. L. REV. 703, 728 (1982)).

<sup>158</sup> 665 A.2d 950 (D.C. 1995). *See also* Kate Nace Day, *Judicial Voice: Judge Julia Cooper Mack and Images of the Child*, 40 HOW. L.J. 331 (1997).

<sup>159</sup> *In re T.M.*, 665 A.2d at 955.

<sup>160</sup> *Id.* at 957 (Mack, J., dissenting).

<sup>161</sup> *Id.* at 959 (Mack, J., dissenting).

<sup>162</sup> *Id.* at 961-62 (Mack, J., dissenting).

<sup>163</sup> *Id.* at 962 (Mack, J., dissenting).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 962 n.21 (Mack, J., dissenting).

<sup>166</sup> *Id.* at 956 (Mack, J., dissenting).

<sup>167</sup> *See Day, supra* note 158 at 350.

<sup>168</sup> The two proceedings most significant for our purposes are *In re A.C.*, 533 A.2d 611 (D.C. App. 1987) [hereinafter A.C. I] and *In re A.C.*, 573 A.2d 1235 (D.C. App. 1990) (*en banc*) [hereinafter A.C. II].

<sup>169</sup> Judge Nebeker, who wrote the first Court of Appeals opinion, had retired by this point.

<sup>170</sup> SUSAN FALUDI, *BACKLASH* 432 (1991).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 432-33.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 432.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 433.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 434.

<sup>183</sup> *Id.* at 434-45.

<sup>184</sup> *Id.* at 435.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 435-36.

<sup>198</sup> *Id.* at 436.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*; 533 A.2d 611 (D.C. App. 1987).

<sup>202</sup> FALUDI, *supra* note 170, at 436.

<sup>203</sup> A.C. I, 533 A.2d 611, 613 (D.C. App. 1987).

<sup>204</sup> A.C. II, 573 A.2d 1235, 1239 (D.C. App. 1990).

<sup>205</sup> A.C. I, 533 A.2d at 613.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 613-14.

<sup>208</sup> *Id.* at 613.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 614.

<sup>211</sup> *Id.* (citing *Roe v. Wade*, 410 U.S. 113, 160, 162, (1973)) (emphasis added).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 614-15.

<sup>214</sup> *Id.* at 615.

<sup>215</sup> *Id.* at 616.

<sup>216</sup> *Id.* at 617.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> FALUDI, *supra* note 170, at 436.

<sup>222</sup> A.C. II, 573 A.2d 1235, 1239 (D.C. App. 1990).

<sup>223</sup> The first A.C. court never used the words the words “her fetus.”

<sup>224</sup> *Id.* at 1237.

<sup>225</sup> *Id.* at 1239.

<sup>226</sup> *Id.* at 1243.

<sup>227</sup> *Id.* at 1244.

<sup>228</sup> *Id.* at 1247.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 1248.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 1252. I do not know why A.C.’s longtime physician was not contacted. In my research, it seems that the academics writing about Angie Carder who note this fact are unaware of the reasons behind it also.

<sup>238</sup> *Id.*

<sup>239</sup> See Joyce E. McConnell, *Relational and Liberal Feminism: “The Ethic of Care,” Fetal Personhood and Autonomy*, 99 W. VA. L. REV. 291, 303 (1996).

<sup>240</sup> Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on “Reproduction” and the Law*, 13 NOVA L. REV. 355, 358-59 (1989).

<sup>241</sup> *Id.* at 382.

<sup>242</sup> See also *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (declaring restrictions on abortion unlawful); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (holding that a manifest gender imbalance justified an affirmative action policy that encouraged the hiring of women); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (recognizing sexual harassment as a form of sex discrimination).

