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Feminist Activism in the Supreme Court: Legal Mobilization
and the Women's Legal Education and Action Fund (review)

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Christopher P. Manfredi

Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund. Vancouver: University of British Columbia Press, 2004.

Manfredi's *Feminist Activism in the Supreme Court* offers a very detailed study of LEAF's positions as intervener in Supreme Court cases from the 1980s to the early 2000s. The purpose of the study is to examine the process by which legal doctrine changes and the impact of those changes on politics and society where there has been feminist mobilization. He aims to measure the influence of LEAF's interventions in two ways: legal influence in the Supreme Court's decision and social influence in four policy areas, family policy, sexual assault, sexual orientation, and pornography. The key determining factor for measuring legal influence was whether the Court either in a majority or minority decision referred to the LEAF factum in a specific case and whether the decision represented a legal win for LEAF. The indicators he uses for measuring social influence include the change in numbers of abortions performed, the number of sexual assaults reported and deemed (un)founded, legislative change recognizing same-sex marriage, and the number of criminal charges for pornography. While Manfredi provides a valuable presentation of the chronology of LEAF's interventions in Supreme Court cases and changed legal doctrine, his analysis of the impact of those interventions on the Supreme Court's decisions in subsequent policy changes and social change within the context of the study does not address questions concerning variables he raises in Chapter 1 such as the change in judges occupying the Supreme Court bench, general social support, an account of LEAF's active litigation outside of the Supreme Court, not to mention the activism of feminist organizations and their allies and a chronology of change in the policy areas he addresses. A disconnect arises between the decisions and Manfredi's analysis of their consequences for related policy and social change because his selection of social indicators for change are partial and he does not provide his reader with a broad enough policy and social analysis in the areas selected.

Chapter One "Legal Doctrine, Legal Mobilization, and LEAF" shows promise for a study that will take into consideration different variables in policy and social change in part flowing from LEAF's interventions. Manfredi outlines the different variables that explain the Supreme Court's outcomes in decision making. First judges' own personal background and beliefs play a role. These are also influenced by the gender composition of the Court, which began to rise since 1982, and political and environmental factors of the day. Manfredi notes the increase in the number of women on the Court and particularly Justice L'Heureux-Dubé's presence and agreement with LEAF positions as factors that made LEAF's interventions more effective. At the end of the chapter he positively evaluates LEAF's success in its intervener role in Supreme Court cases. "LEAF has enjoyed broad judicial support, and this support has translated into high rates of

success in terms of both outcome and doctrine (p. 33). There are a series of tables that clearly document LEAF's sources of funding, outline chronologically the Supreme Court cases in which LEAF was an intervener, the origin and outcome of LEAF cases, individual judicial support for LEAF, Court voting on LEAF issues from 1988-2000, dissent behavior of Supreme Court justices in LEAF cases, government participants in LEAF cases, and other non-government interveners in LEAF cases. These tables provide a concise and easily accessible history of LEAF's interventions. In Chapter 2, "The Path to Substantive Equality," Manfredi outlines clearly the arguments made by organizations of Canadian women's movements in pressing for substantive equality through interpretation of s.15 of the Charter. Chapter 3 "Gaining Ground" provides a very clear chronicle of the Supreme Court's adoption of LEAF's positions in the areas of fetal rights, expression and pornography. In Chapter 4, "Family Matters," Manfredi outlines the arguments pursued by LEAF in its interventions in family law. In Chapter 5, "A Difficult Dialogue," he traces the development of consent in sexual assault cases.

Difficulties in Manfredi's analysis arise in Chapter 6, "Making a Difference," where he attempts to trace the consequences of LEAF's intervention in Supreme Court cases involving abortion, sexual assault, family law, and sexual orientation. This review examines how he relates his research to the areas of abortion and sexual assault. The policy impact that Manfredi focuses on is the increase in the number of abortions post-1988 and he attributes this increase to feminist legal mobilization. The year 1988 is significant for Manfredi; in that year the Supreme Court removed national level rules governing access to abortions. Manfredi notes that this was done without LEAF's participation. What LEAF did do was preserve the 1988 legal framework by intervening in *Borowski* that blocked the establishment of a constitutionally entrenched right to fetal life, in *Daigle* that opposed civil and common law rules giving fathers input into the abortion decision, in *Winnipeg Child and Family Services* that blocked interference with maternal liberty in the name of fetal interests, and in *Sullivan* that preempted the extension of personhood to fetuses. Manfredi acknowledges that feminist legal mobilization "was not directly responsible for changing the legal framework governing abortion policy" (p. 179). Even though he acknowledges there is not a direct causal link between LEAF's interventions and changes in the legal framework governing abortion, the policy measurement he selects, the increase in the number of abortions, implicitly creates such a linkage. A reader may be drawn into thinking that because feminists have supported a woman's right to choose, there are now a greater number of abortions because women want them "on demand." The absence of discussion on why women seek abortion has the effect of making invisible the profound reasons why abortion should be the women's decision. Significantly, issues surrounding the pro-choice position on abortion include a woman's sovereignty over her own body and the economic and social circumstances under which pregnancy occurs. To

measure the impact of feminist legal mobilization through Supreme Court decisions on abortion in terms of the increase in the number of abortions elides the issues researchers, both feminist and non-feminist, would ask relating to the increase: why do unwanted pregnancies occur? Why do women choose to abort their pregnancies? Manfredi would discover and need to delve into issues of pregnancy resulting from sexual assault (including date rape, acquaintance rape, husband rape), incest, improper use of birth control on the shared part of men and women, age and life circumstances, and a woman's health at time of pregnancy in order to make better sense of the rise in numbers of abortion. The changes in access to abortion resulting from feminist activism are only one facet of the multiple variables for social change.

To measure the policy and social impact of LEAF's interventions in sexual assault cases, Manfredi presents statistics such as the number of cases reported, the decrease in the number of unfounded cases by police, the percentage of cases resulting in prison terms for more than two years, and the increase in conviction rates. Overall, he concludes that the police and courts are taking sexual assault seriously. Manfredi might be interpreted as making the assumption that a court decision itself has the power to make women feel safer to report when they have been sexually assaulted, to make police take sexual assault seriously, to make lower courts render prison sentence terms of more than two years. The causal connection that Supreme Court decisions have policy and social consequences moves too quickly. Manfredi notes that "whether because or in spite of the various rule changes throughout the 1990s, by the end of the decade sexual assault remained an infrequently reported crime" (p. 186). Yet, Manfredi does not explore why sexual assault remains frequently unreported. His analysis would be strengthened if he included a discussion on the humiliation involved in reporting sexual assault, the fear of further violence when a report is made, the risk of not being taken seriously, and also the kinds of changes adopted in police behavior that would lead to his observation of police taking a "pro-feminist" position, a position he does not define (p. 186). He does not discuss systemic issues surrounding sexual assault from tacit acceptance of misogyny and sexism in society to problems faced by women living with the men who assault them, women who have children living in a situation where they do not feel safe to report sexual assault, or women in positions where if they report sexual assault risk economic and social consequences they feel are too great to bear. The list of reasons for unreported sexual assaults can continue. Instead, he focuses on the relative stability in the incidence of sexual assault over time and the statistically insignificant changes in the reported rate of sexual assaults according to Statistics Canada. The effect is to diminish the gravity of sexual assault against women and to cast the illusion that not only sexual assault is decreasing but that violence against women is also decreasing. The assumption of his partial focus on his selected indicators is that the reach of Supreme Court decisions on consent extends quickly and deeply into policy and social change related to sexual

assault, yet Manfredi does not explain how this occurs. His analysis would strengthen if he broadened his study to include an account of feminist activism and further research at specific sites of sexual assault and its redress: the location of sexual assaults; police policy on handling incidents of sexual assault; and lower court decisions, for example.

Manfredi would have served his study well, if he had made clear the assumptions of his own methodology and analysis. This way he could be more thorough in explaining his own judgments concerning issues that are not related to the empirical research. For example, Manfredi does not favor the practice of the Court's reference to social science evidence presented in third party factums. Manfredi describes as "problematic" L'Heureux-Dubé's reliance on research findings presented in LEAF's factum. He also said that the social science evidence had not been introduced or developed in the trial proceeding. Thus, he concludes, "to draw a firm conclusion from such material is to stretch the utility of social science in the courtroom" (Manfredi 2004, p. 129). Manfredi's reasons appear to be based in a neutral perspective, but the assumptions that underlie his preferred exclusion of social science research from the courtroom dovetails with a traditional view that conserves the power of a judiciary imagined to be independent of society to make decisions. Yet, feminist legal perspectives and critical legal theory perspectives have clearly argued that this kind of conserving power favors patriarchal, homophobic, able-bodied, and racist attitudes. The reader will wonder why Manfredi himself disagrees with the social science upon which L'Heureux-Dubé drew in her decision and whether he agreed or disagreed with the information in that evidence and why. Ideological assumptions would appear to play a role, here.

Manfredi's work provides an example of fine empirical research and how such fine research can be used to demonstrate policy and social impacts in areas that would need another or further study and different methodology to answer more thoroughly. Manfredi's overarching assumption throughout the work is that Supreme Court decisions have a direct and measurable effect on social change without broader consideration of social attitudes of specific policy, the opinions of the effect of feminist legal mobilization from the mobilizers themselves, the judges, and a broader policy analysis framework that could measure the change in question.

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