A Different Voice: The Feminine Jurisprudence of the Minnesota State Supreme Court

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A DIFFERENT VOICE:  
THE FEMININE JURISPRUDENCE OF  
THE MINNESOTA STATE SUPREME COURT

LINDA S. MAULE*

Introduction

In 1991, the Minnesota State Supreme Court became the first high court in the United States where women achieved majority status—four of the seven justices were female.¹ This was an extraordinary achievement in light of the fact that at that time approximately twenty percent of the state supreme courts did not have any female justices. Nonetheless, this historic first is not only an important accomplishment for those concerned with equal representation on the courts, it also presents researchers with the unprecedented opportunity to test Carol Gilligan’s different voice theory,² and Sue Thomas’s different voice and critical mass theories.³ 

Gender and politics scholarship has cited widely theories of the differences women may make in public life. Gilligan’s theory argues that women tend to approach moral dilemmas in a manner distinct from men. This theory has become increasingly popular in legal scholarship. Nonetheless, public law scholarship has tended


¹ This is no longer the case. None of the women who made up the majority now sit on the bench.

² See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982).

³ See SUE THOMAS, HOW WOMEN LEGISLATE (1994).
to overlook the implications of Thomas's theory. Thomas found that women legislators despite differences in political orientation tend to develop their own distinctive set of priorities and that a critical point may exist where female legislators no longer feel an overriding obligation to represent women as a class.

Because public law scholars have overlooked the implications of Thomas's theories with respect to affect female justices have on state appellate courts, an analysis was conducted to determine whether a state appellate court with a female majority acts in accord with the above theories. This analysis relied upon a unique data set based on the judicial decisions rendered by the Minnesota State Supreme Court from 1985-1994. The fact that this was a longitudinal analysis that tested Thomas's theories distinguishes it from past works that have examined the affect female justices may have on state appellate courts. Public law scholars have yet to test either of Thomas's theories in relation to women on the court.

Literature Review

Political Science and Women's Studies scholars have advanced a variety of theoretical perspectives to justify the need for a more representative bench at both the state and federal level. Proponents of descriptive representation assert that if state and federal courts are to be perceived as legitimate, no segment of the nation's diverse population can be excluded from court membership. No exclusion can be based on arbitrary characteristics such as race or sex. A court system that does not reflect the membership of society breeds increasingly higher levels of disaffection and disillusionment. Thus, as more women are placed on the bench, the democratic regime is strengthened. This perspective of inclusiveness, however, views the placement of women on the bench to be by and large symbolic. While it is concerned with retooling and redefining a democratic process that

4 The liberal and egalitarian underpinnings of descriptive representation necessarily makes this so. This line of reasoning argues for granting women the opportunity to ascend to the state and federal benches because to deny them on the basis of their sex would be unjust.
prevents women from participating and competing on equal terms with white males in the public sphere, it does not hold that women will speak with a uniquely feminine voice once on the bench.  

In contrast, a strand of feminist theory, a strand that decidedly breaks away from the fundamental tenets of liberalism, asserts that the integration of women into the legal system will transform our traditional understanding of the law. Supporters of this perspective encompass a number of different names (maternal feminists, cultural feminists, social feminists, and difference feminists). Nonetheless, they share the view that women can bring to the public sphere a unique style of problem solving and decision-making.

The term "different voice," made popular by Gilligan, describes the differences in the way males and females understand themselves and their environment. Gilligan’s work runs counter to conventional wisdom by positing and then demonstrating that women tend to approach moral dilemmas in a manner that is distinct from men. Gilligan found that women tend to perceive morality more in terms of an interconnected web or an ethic of care. In contrast, men tend to view morality more in hierarchical terms, emphasizing and placing higher premiums on abstractions, rights, rules, autonomy, separation and formality. Accordingly, Gilligan maintains that women tend not to view themselves in opposition to others, seeing themselves, instead, as inextricably linked to society. They are more concerned with obligation and responsibility than rights and rules. Thus, Gilligan’s findings

7 It is important to note that Gilligan’s work has been severely criticized on methodological grounds. See e.g., Sue Davis, Do Women Judges Speak “In A Different Voice?”: Carol Gilligan, Feminist Legal Theory and the Ninth Circuit, WIS. WOMEN’S L.J. 143 (1992-1993).
8 Similarly, Mary Ann Glendon asserts that Americans participate in a type of discourse that is both a symptom of and a contributing factor to disorder in American society. According to Glendon, this discourse, known as “rights talk” is unduly simplistic, legalistic in character, implicitly absolute, hyper-individualistic, insular, and does not speak of either personal or collective
attack the assumption that the masculine style of resolving moral dilemmas is one that all human beings practice. To temper the wholly male-centered view, Gilligan supports the integration of women and women's experiences into all aspects of phallocentric public life.

A Different Voice: Gayle Binion

Supporting an integration of the feminine perspective, Gayle Binion applies different voice theory to the arena of law. In her work *Toward a Feminist Regrounding of Constitutional Law* (1991), Binion argues that integrating women's experience into constitutional analysis may allow for a different understanding of constitutional rights to emerge. For instance, a different voice perspective, or in Binion's own terminology a "progressive jurisprudence" would "reject such abstract foundations for liberty as social contract," viewing such abstractions as by and large irrelevant to concrete human experiences. Moreover, it would recognize that such abstractions generally are based on what "reasonable" or "rational"(white) men would tend to do and to what conditions of civilization they would tend to consent. In contrast, progressive jurisprudence would find a right to liberty in a concrete understanding of societal experiences where the collective experiences were reinforced by the personal. According to Binion, a progressive jurisprudence would also reject the libertarian proposition that liberty is inversely related to the exercise of government power. It would recognize, instead, that individuals are not always able to prevent "private" others from acquiring power over them. In the case of women, they often experience powerlessness vis-à-vis their everyday environment, requiring the state to step in on their behalf.


9 Different voice feminists argue that such a male-centered bias ignores women's concrete experiences.


11 *Id.* at 213
A Different Voice: Robin West

Robin West, in her work titled *Jurisprudence and Gender*, supports the integration into the law of the theoretical propositions expressed by both different voice theory and radical feminism. According to West, the law is irretrievably masculine because it is founded on the separation thesis. The separation thesis states that the individual exists separate from society. Such a description of human existence does not mirror women’s concrete experiences. As the cultural feminists maintain, women, unlike the sexless— but undoubtedly masculine— individual characterized by liberal legalists and critical legalists, value intimacy and fear separation, while at the same time dread the invasion (or penetration) as the radical feminists claim.

A Different Voice: Sue Thomas

Some political scientists have started to test whether the perspectives articulated by Gilligan, Binion and West play out in the political and judicial arena. Implicit in Thomas’s groundbreaking text, *How Women Legislate*, is the different voice perspective. According to Thomas, “women legislators, despite pursuing the spectrum of political issues and sitting on a range of available committees, have developed their own distinctive set of priorities.” Specifically, women legislators emphasize women’s issues, children and the family. Male legislators historically have tended not to champion these issues. These issues by and large have been associated with the private sphere. Female legislators support bills relating to “women’s issues” by playing a proactive role in their sponsorship. They make every effort to ensure that the issues become public policy. Thus, according to Thomas, the inclusion of women in the legislative arena has altered state legislatures’ traditional agendas.

The critical mass theory is one of Thomas’s most significant contributions to the study of gender and politics.

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12 West, supra note 6.
13 Thomas, supra 3, at 7.
Thomas asserts that in environments where higher proportions of women are present, female legislators are more likely to develop women centered policy priorities. Thomas’s findings confirm that, “reduced conformity pressures and increased support for distinctive behavior were advanced in places where proportions of women were highest.” In contrast, in those legislative environments where women were nearly absent, female representatives tended to repress or abandon dissonant behaviors altogether.

Although the findings support the critical mass theory, Thomas warns that her conclusions should not be seen as definitive. Past research has found that in statehouses where women represented twenty-five percent or more of the legislators, only about forty percent of the women championed so called “women’s issues.” These findings suggest that there may be a critical point where “individual women legislators no longer feel as strong a personal responsibility to represent women.” If this is indeed the case, the advancement of more women to state legislatures, in fact, may mute the different voice currently attributed to women representatives.

Public Law Scholarship and A Different Voice

Although political scientists have placed a greater emphasis upon finding a different voice in the legislative arena than in the legal realm, public law scholars have begun to investigate whether gender matters on both the federal and state bench. At best, recent studies have produced mixed results. Suzanna Sherry, in her article titled Civic Virtue and the Feminine Voice in Constitutional Adjudication, analyzed the decision making of Supreme Court Justice Sandra Day O'Connor to determine whether she evinced a different voice. Sherry concluded that the lone female justice (at that time) tended to emphasize connection, context, and

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14 Id. at 122
15 Id. at 154. See also Lyn Kathlene, Power and Influence in State Legislative Policy Making: The Interaction of Gender and Positions in Committee Hearing Debates, 88 AM. POL. SCI. REV. (1994). Kathlene’s findings indicate that as the proportion of women increases in legislative bodies, men will become more verbally aggressive and controlling of committee hearings.
responsibility, over rights.\textsuperscript{16} Sherry's analysis also suggested that O'Connor was less willing than other conservative justices to permit the violations of the right to full membership in the community. However, in \textit{The Voice of Sandra Day O'Connor}, Sue Davis critiques Sherry's conclusion's maintaining that O'Connor may simply be less conservative than Rehnquist.\textsuperscript{17} Davis suggests that O'Connor possibly diverges from Rehnquist on civil rights issues because as a victim of past discrimination herself O'Connor is sensitive to the claims of traditionally disadvantaged groups.

In another study, \textit{Voting Behavior and Gender on the United States Courts of Appeal}, Sue Davis, Susan B. Haire, and Donald R. Songer\textsuperscript{18} examined the voting behavior of women on United States Courts of Appeal in three specific policy areas: employment discrimination, search and seizure, and obscenity. The analysis initially demonstrated significant differences between male and female Court of Appeals judges in two of three areas—employment discrimination and search and seizure cases. However, when appointing President's party was controlled for in search and seizure cases,\textsuperscript{19} the difference between male and female voting patterns disappeared. Thus, in only employment discrimination cases did the authors find support for the thesis that women judges bring a different perspective to the bench. Nonetheless, they warned that against drawing broad conclusions. Women judges might support plaintiffs in employment discrimination cases solely because they identify with the members of the subordinate group, not because they are expressing a distinctly feminine voice.

\begin{flushright}
\textsuperscript{17} Sue Davis, \textit{The Voice of Sandra Day O'Connor}, \textit{77 JUDICATURE} 134, 137 (1993). Davis's findings that O'Connor's voting behavior in criminal procedure cases was significantly more liberal than Rehnquist's support this contention.
\textsuperscript{19} The appointing president is used as a surrogate for the justice's political ideology. Justices appointed by Democratic presidents tend to be more liberal and justices appointed by Republican presidents tend to be more conservative.
\end{flushright}
David W. Allen and Diane E. Wall, in their article *Role Orientation of Women State Supreme Court Justices*, hypothesized that female judges would adopt one of four distinctive role orientations while on the bench. These roles included the representative, the token, the outsider or the different voice role.\(^{20}\)

They found that female justices were more likely to take on the representative role when confronted with women's issues and less likely to exhibit a different voice orientation altogether.

Building upon past work, Donald R. Songer and Kelley A. Crews-Meyer, *Does Judge Gender Matter? Decision Making in State Supreme Courts*, examined the voting behavior of State Supreme Court judges from 1970-1993 in four substantive areas of law: gender discrimination, obscenity, death penalty sentencing, and environmental policy. This research concluded that when party, region, and selection system are controlled for, women judges tend to vote more liberally than their male colleagues.\(^{21}\)

This cursory look at past attempts to determine the effects of gender on judicial decision-making demonstrates the difficulty of proving women jurists exhibit a different voice. Nonetheless, public law scholars seem unwilling to dismiss the notion of a different voice entirely. Perhaps, in line with Thomas's work, they recognize that the number of women holding appellate judgeships remains small and that a manifestation of a different voice may only occur when the number of women on appellate courts reaches a critical mass.

\(^{20}\) David W. Allen & Diane E. Wall, *Role Orientations and Women State Supreme Court Justices*, 77 JUDICATURE 3 (1993). Female judges taking on a representative orientation would demonstrate a "pro women" record when it came to cases centering on women's issues. Female judges who adopted the token role would "modify their behavior to conform to the dominant majority." In contrast, outsiders would exhibit extreme behavior. An extension of the outsider role would be the different voice orientation where female judges exhibit extremism and isolation in voting behavior.

Research Design

Because it was the first state appellate court where a majority of women sat on the bench, the Minnesota State Supreme Court was selected as the sole subject of this study. Data were collected over a ten-year period (1985-1994). Approximately 1250 unanimous and non-unanimous cases were examined. The ten-year period encompassed seven natural courts. Each of which consisted of seven members. A total of thirteen justices sat on the bench during the period of analysis—four of which were women. The women justices included Rosalie Wahl, M. Jeanne Coyne, Esther Tomljanovich, and Sandra S. Gardebring. The Minnesota citizenry selects its State Supreme Court justices through nonpartisan elections; however, all but two of the justices, Peterson and Page, were appointed. A Democratic governor appointed Justices Yetka, Scott, Wahl, Popovich, Keith and Tomljanovich; whereas, a Republican governor placed on the bench Justices Simonett, Amdahl, Kelley, Coyne, and Gardebring.

There are three central objectives of this analysis. The first objective is to apply and test Thomas’s different voice and critical mass theory in the judicial arena. Thomas asserts that in environments where higher proportions of women are present, female legislators are more likely to develop women-centered policy priorities. This paper seeks to determine (1) do women justices tend to emphasize women’s issues and (2) are female justices more likely to demonstrate dissonant behavior as more women come onto the bench.

The second objective of this paper is to explore whether female judges may exhibit a different voice without dissenting. For the most part, past research has focused exclusively on majority opinions or dissents to determine if women judges exhibit

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22 It is recognized that there are methodological difficulties associated with studying a single court. However, the purpose of this paper is to explore the utility of Sue Thomas’s critical mass theory with respect to the judicial arena.

23 Natural courts are identified by the membership on the court. Each time the membership changes, there is a new natural court.
a different voice.\textsuperscript{24} In contrast, this paper maintains that a uniquely feminine voice is as likely to come in the form of a concurrence, as it is to come in the form of a dissent. Judges draft concurring opinions when they agree with the outcome the majority has reached, but not necessarily with the majority's legal reasoning. Since different voice theory looks at how women approach moral and legal dilemmas and what rationale they use to resolve those dilemmas, to disregard concurrences when testing a different voice theory is to ignore the fact that male and female judges can reach the same decisional outcomes but for different reasons.

The third objective of this paper is to assess whether female justices on the Minnesota State Supreme Court tend to use a different style of reasoning as Gilligan, Binion, and West suggest. The question simply stated is: do women justices, especially in areas of the law that could be considered to be women-centered, tend to focus on the concrete realities and experiences of the plaintiffs over legal abstractions and rules?

Below are the specific hypotheses that were developed for measuring these objectives:

Hypothesis #1: Female justices will demonstrate unity across all types of cases, but female justices should demonstrate more unity in legal matters directly affecting women as a category.

Hypothesis #2: As the number of women increased on the court, the number of women-centered cases should increase.

Hypothesis #3: As the number of women increased on the court, the willingness of female jurist to express dissonance should increase.

\textsuperscript{24} As an example, in the 1993 Allen & Wall study, "a different voice" role was operationalized as when female justices exhibited "extremism and isolation in dissenting behavior." Allen & Wall, supra note 20, at 159. \textit{Contra} Davis, supra note 17 (where she examines both concurring and dissenting opinions in her analysis of Justice O'Connor's voting behavior).
Hypothesis #4: Female justices are as likely to use a concurrence as a vehicle for expressing a different voice as a dissent.

Hypothesis #5: Female justices will tend to reject legal abstractions and focus on concrete human experiences. Moreover female justices will focus on responsibility, obligations, and duty over rights and rules.

Findings

First the degree to which female judges were unified across all types of cases was determined. Then the number of times a female judge sided with a member of her sex in non-unanimous criminal law and family law cases was assessed. It was hypothesized that for Thomas’s different voice theory to hold that the female justices would tend to agree with one another in family law cases, despite differences in political orientation. However, when it came to criminal law cases the level of agreement between female justices would tend to depend more upon their political orientation than their sex.

25 Family law cases were used as a surrogate for women-centered issues.
### Table 1

**DEGREE OF AGREEMENT BETWEEN FEMALE JUSTICE**

<table>
<thead>
<tr>
<th>Year</th>
<th>50% (2 of 4)</th>
<th>66% (2 of 3)</th>
<th>75% (3 of 4)</th>
<th>100% (ALL)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1985</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>62.5</td>
</tr>
<tr>
<td>2 female justices</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1986</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>58.1</td>
</tr>
<tr>
<td>2 female justices</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1987</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>75.0</td>
</tr>
<tr>
<td>2 female justices</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1988</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>43.5</td>
</tr>
<tr>
<td>2 female justices</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1989</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>50.0</td>
</tr>
<tr>
<td>2 female justices</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1990</td>
<td>NA</td>
<td>13.5</td>
<td>NA</td>
<td>43.2</td>
</tr>
<tr>
<td>3 female justices</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1991</td>
<td>17.6</td>
<td>17.6</td>
<td>35.3</td>
<td>29.4</td>
</tr>
<tr>
<td>3 &amp; 4 female justices</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1992</td>
<td>36.8</td>
<td>NA</td>
<td>52.6</td>
<td>10.5</td>
</tr>
<tr>
<td>4 female justices</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1993</td>
<td>25.0</td>
<td>NA</td>
<td>58.3</td>
<td>16.7</td>
</tr>
<tr>
<td>4 female justices</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1994</td>
<td>25.0</td>
<td>NA</td>
<td>25.0</td>
<td>50.0</td>
</tr>
<tr>
<td>4 female justices</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 1, above, indicates the degree to which female justice agreed with one another across all non-unanimous cases. Not surprisingly, the level of agreement between the female justices was at its highest when only two women were on the bench. From 1985 to 1989, the number of cases where Wahl and Coyne agreed
with one another never fell below 50 percent. In 1987, Wahl and Coyne were in agreement with one another in 75 percent of the cases. This is somewhat noteworthy in light of the fact that a Democratic governor appointed Wahl and a Republican governor selected Coyne. However, in 1993, with the appointment of Gardebrin and Tomljanovich the degree of unanimity between the female justices fell sharply hitting a low of 16.7 percent. Interestingly enough, the level of unanimous agreement between the four female justices nearly tripled a year later, peaking at 50 percent.26 Despite the fact that the degree of unanimity decreased as more women came on the court, Table 1 demonstrates that three of four female justices agreed with one another as much as 58 percent of the time.

Criminal and family law cases were selected to determine the level of agreement between female justices across particular issue areas. The data indicate that over a ten-year period that a higher degree of consensus was evidenced among the members of the court (both male and female) when it came to criminal law and family law cases. The court was unanimous a little over 83 percent of the time in criminal law cases and about 81 percent of the time in family law cases.

As indicated above, past research has suggested that the type of issues that come before a court may affect the level of agreement between female justices. The difference between the unity rates in non-unanimous family law and criminal law for the Minnesota justices further strengthens these past findings. The female justices were most unified when it came to non-unanimous family law cases. They agreed with one another nearly 90 percent of the time. This is even higher than the unanimity rate of 81 percent for the entire court. In contrast, the female justices were in agreement with one another only 25 percent of the time in non-unanimous criminal cases. The female justices, despite differences in their political affiliations, seem to exhibit a uniquely feminine voice in matters concerning family law. They lack the same unified voice when dealing with criminal law cases.

26 The explanation for this significant increase should be explored at a later date.
Analyzing how supportive each of the female justices were toward the State's case in criminal cases over a ten year period, further helps to explain the dissonance between the female justices in criminal cases as compared to family law cases. In 92 percent of the non-unanimous criminal law cases that Coyne presided over she sided with the state; Gardebring supported the state in just a little over 50 percent; and both Wahl and Tomljanovich deferred to the state in just over 40 percent of the cases.

The opinions rendered by Wahl and Tomljanovich invariably supported the individual defendant. Since Wahl served as Assistant State Public Defender before becoming a justice, her willingness to protect the rights of the individual over the power of the state is not altogether surprising. The same Democratic governor appointed Tomljanovich. Republican governors, however, appointed both Coyne and Gardebring. Together the above findings lend support to Hypothesis #1 that while female justices will not be in agreement with one another all of the time or across all categories of cases, in areas of law affecting women as a category we can expect higher levels of agreement between the female justices.

To determine if the increase in the number of women justices on the court influenced the likelihood that the Court would hear cases involving women-centered issues, data provided by the Research and Planning Unit of the Minnesota Judicial Center were examined.

The data in Table 2, below, indicates that although the number of family law case filings increased each year (except in 1992 where the number of case filings fell from 76 to 49), the court did not subsequently dispose of a greater percentage of family law cases. In fact as more women came onto the court, the number of family law cases accepted for appeal and resolved begins to decrease.
The rate of concurrences and dissents authored by the female were examined to test whether the female justices were more willing to contest the opinions of their male colleagues as more women were appointed to the court. To do this analysis a longitudinal study was conducted using data from 1985 to 1994. As of 1985, Wahl already had sat on the court for eight years. Coyne had been on the court for over two years. In 1990, Tomljanovich joined the court and was quickly followed by Gardebring who joined the court in 1991.
The data from the longitudinal analysis suggest that the Minnesota State Supreme Court, like most collegial bodies, tends towards unanimity. From 1985 to 1994, the percent of non-unanimous opinions never surpassed 22.1 percent. In fact, 1994 has the lowest percentage of non-unanimous decisions (8.9 percent). However, beginning in 1992 one year after the fourth female justice was appointed to the bench, the percent of non-unanimous decisions begins to drop dramatically, falling from 20 percent in 1991 to 15.6 percent in 1992 to 10.1 percent in 1993. Interestingly, as women reached a majority on the bench the over-all level of dissonance of the court decreased.
Table 4
Percentage of Dissenting Opinions Authored by Justice by Year

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
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</thead>
<tbody>
<tr>
<td>Wahl</td>
<td>4</td>
<td>2</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>Coyne</td>
<td>6</td>
<td>3</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Gardebring</td>
<td>0</td>
<td>4</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Tomljanovich</td>
<td>6</td>
<td>5</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>Page</td>
<td>NA</td>
<td>0</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Yetka</td>
<td>4</td>
<td>3</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>Keith</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Simonett</td>
<td>5</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

The data in Table 4, above, suggest, however, that after 1991 when females comprised a majority on the court the greatest percentage of dissents (per year) were written by females. In 1991, Justices Tomljanovich, Coyne, and Wahl ranked first, second and fourth in terms of the highest percentage of dissents. In 1992, Tomljanovich, Gardebring, and Coyne were the top three dissenters respectively. In 1993, Tomljanovich, Gardebring, and Wahl ranked first, second, and third. In 1994, Wahl and Tomljanovich held the first and second rankings. Thus, although the overall dissonance rate of the court decreased as more women came on the court, the individual dissonance rate of each of the female justices increased.

The rate of concurrence for each individual justice was computed to ascertain whether the female justices used concurrences as a vehicle for a different voice and whether they were more likely to concur when one of their male colleagues drafted the majority opinion.
In Table 5, above, the total number and the percentage of concurring and dissenting opinions that each judge drafted from 1985-1994 are listed. Only three judges, two females (Wahl and Coyne) and one male (Simonette), sat on the bench for the entire ten-year period. The aggregate data renders the hypothesis that women judges may express their uniquely feminine voice by authoring concurring opinions somewhat moot. In the ten-year period studied only two of the women, Justice Wahl and Justice Coyne, authored concurring opinions. Coyne authored four (.03%) and Wahl drafted 7 (.05%) concurring opinions. It appears that the female justices on the Minnesota State Supreme Court were more likely to express dissonance through dissenting opinions. In fact, two female judges, Wahl and Tomljanovich, wrote a greater percentage of dissenting opinions (4%) than all but one of their male counterparts (6%).

Lastly, a textual analysis of selected non-unanimous family law cases was conducted to assess whether the female justices exhibited a different voice. The Court heard 63 family law cases between 1985 and 1994. Only ten of the cases were non-
unanimous. The female justices agreed with one another in all but one of the cases. In these ten cases, the female justices authored two majority and three dissenting opinions. Coyne authored two of the dissenting opinions. Wahl signed onto both of these opinions. The other dissenting opinion was a lone dissent authored by Wahl. Not a single male colleague agreed with any one of these dissenting opinions. An analysis of the two cases where the female justices disagreed with their male counterparts was conducted looking for language that indicated the female justices were emphasizing concrete human experience over abstract rules.

The language used in these opinions suggests that in the area of family law Wahl and Coyne may have approached the legal dilemmas arising from family law cases differently than their male counterparts. In the cases *Karon v. Karon*\(^2\) and *Erickson v. Erickson*\(^2\), both Coyne and Wahl were concerned with the impact of the decision on the losing party. In each of these cases the majority opinion—authored by men—tended to focus on rules, processes and regulations. In contrast, the dissenting opinions focused either on the responsibility of a husband to a wife even after the marriage had been dissolved or on an obligation of a father to abide by the original intent of a child support contract even after his wife's circumstances had changed.

In *Karon v. Karon*, Coyne and Wahl took umbrage with her brethren's contention that once marital maintenance had been waived it could not be reinstated, stating:

Consider that not unlikely event that a woman entering into a stipulation identical to that presented, shortly thereafter suffers a totally disabling illness that threatens to exhaust all of her available resources and that, during the same period, her former husband enjoys a substantial increase in income.\(^2\)

\(^2\)435 N.W.2d 501 (Minn. 1989).
\(^2\)449 N.W.2d 173 (Minn. 1989).
\(^2\)435 N.W.2d 501.
Thus, Justices Coyne and Wahl were more interested in how waiving modification of maintenance order would affect the individual litigants than they were in the procedural grounds that such a waiver rests upon.

Similarly, in Erickson, Justices Coyne and Wahl dissented when the majority upheld the termination of maintenance upon remarriage of the wife and the amendment of child support in light of the wife’s increased prosperity. Justice Coyne wrote:

In light of the majority’s recognition of the actual purpose of the agreement, I am utterly confounded by its disposition of this matter: remanding for termination of maintenance rather than effectuating the actual intent of the parties . . . Neither can I agree with the majority’s apparent acceptance of the appellant’s contention that amendment of the decree constitutes a change of circumstances which relieves him of his contractual obligations.30

The dissenting opinions from the above cases seemingly exemplify Gilligan, Binion, and West’s contention women (and in this case women justices) tend resolve moral dilemmas differently than their male counterparts. In these cases, the female justices appeared to be more concerned with responsibility, obligation, and the concrete reality of the parties involved in the litigation. In contrast, their male counterparts appear to rely more upon rule and procedural based justifications.

Discussion

A central objective of this research was to test Thomas’s different voice and critical mass theories in the judicial arena. The findings of this research suggest that the level of cohesiveness between female justices was directly affected by issue area. Female justices demonstrated a greater degree of agreement in family law cases and a lesser degree of cohesion in criminal law cases. The

30 449 N.W.2d 173.
female justices were not only remarkably unified when it came to family law cases, they also were more likely to take the lead by either drafting a majority or a dissenting opinion in these types of cases. Moreover, initial support is given for the hypothesis that women justices will tend to be more unified and exhibit a different voice in legal matters directly affecting women as a category or in issues relating to the private sphere.

There was little evidence to support our hypothesis that the court was more willing to hear family law cases, as more women justices were appointed to the bench. However, our interest was piqued by the fact that as more women were appointed, more family law cases were filed. Thus, before we discount this particular operationalization of Thomas's theory, we need to explore if the mere presence of a majority of women on the court influenced petitioners' willingness to file. We also need to determine whether the court was more willing to hear other types of women-centered cases (such as cases relating to sexual violence and sexual discrimination), as more women advanced to the bench.31

We also found that as the number of women increased on the court, so to did their willingness to express themselves. Although the level of consensus for the court as a whole increased as more women were placed on the bench, the female justices also began to dissent more frequently. Thus, increasing the number of women on the court apparently helped to make the court both more collegial and a safer place for women justices to express dissonance.

Another central theme of our analysis was to determine if female justices might express a different voice without dissenting. Concurrences were rarely used as a vehicle by the female justices on the Minnesota State Supreme Court to express any voice, let alone a different voice. Female justices, on the whole, either agreed with both the outcome of and the legal reasoning behind a decision or they disagreed with the decision altogether. Despite this finding, future research in this area should not ignore concurrences.

31 Furthermore, we suggest that because women were only the majority for such a brief period, that they may not have had the time to influence the court docket
As more women are either appointed or elected to State Appellate Courts, public law scholars interested in assessing whether female jurists evidence a different voice will need to continue to examine female justices concurrences as well as their dissents.

Conclusion

Using a distinct data set, different voice theories were tested within a legal context. Given the fact that the data were drawn from a single State Supreme Court, any conclusions are necessarily tentative. However, several findings support the need to further test Thomas's theories with respect to the judicial arena and female jurists. In the case of the Minnesota State Supreme Court, it appears that the female justices were more willing to dissent once more females were appointed. Furthermore, the female justices, despite holding different political orientations, evidenced a higher level of agreement (even more so than the court generally) when deciding family law cases. Together these findings suggest the need to further explore whether the increase in number of women justices on state appellate courts will affect these courts, the members of these courts, and the law in much the same way that state legislatures were influenced by the growing presence of female legislators.