

GENDER BIAS ANALYSIS VERSION 2.0: SHIFTING THE FOCUS TO OUTCOMES AND LEGITIMACY

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Twenty-five years ago, the New York State Unified Court System created the New York Task Force on Women in the Courts to study how women fared in the court system, a problem referred to in other contemporaneous reports as “gender bias.” In 1986, the Task Force published their Report (“The Report”).¹ Today, it is important to review the achievements made since that time, and to examine and envision what work remains.

The Report’s authors understood the identification and eradication of gender bias as a process, not a one-time event. Re-reading The Report in preparation for the 25th Anniversary Symposium dedicated to it, which was held at the NYU School of Law in April 2011, it was striking how the section summarizing the Task Force’s goals and conclusions made a straightforward statement that still feels radical today: the gender bias against women in the courts is so pervasive that it undermines the system’s ability to deliver justice to anyone.² This statement is radical not only because it comes from within the establishment, but also because it acknowledges that a system that discriminates against some is unjust for all. In other words, it is not “merely” a problem for women; gender bias in the courts is a problem for *anyone* who expects the courts to render sound, logical, and equitable decisions.

However, The Report’s recommendations fail to sustain the radical edge of this introductory analysis.³ The palpable disconnect between those two parts

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1. UNIFIED CT. SYS. OF THE ST. OF N.Y., REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS (1986), *reprinted in* 15 FORDHAM URB. L.J. 11, 151 (1986-87) [hereinafter THE REPORT].

2. *See* THE REPORT, *supra* note 1, at 18 (“More was found in this examination of gender bias in the courts than bruised feelings resulting from rude or callous behavior. Real hardships are borne by women. An exacting price is ultimately paid by our entire society. The courts are viewed by a substantial group of our citizenry as a male-dominated institution disposed to discriminate against persons who are not part of its traditional constituency.”).

3. *See id.* at 15-18.

may be due to several factors: the historical context of The Report, which framed both the ways in which people considered and discussed gender; the practical challenges of truly revisiting an entire system of justice; and, perhaps, a stepping back from the implications of what it would mean to embark upon the creation of a gender-blind justice system.

Twenty-five years later, as we revisit this important report, we must challenge ourselves not only to complete the project initiated 25 years ago, but also to reimagine it for today. Could we aim as high from today's vantage point? Can any of the promises that were beyond the reach of the original Task Force be fulfilled now?

It is beyond the scope of this article to conduct a new, deeper inquiry into the areas suggested (after all, the last undertaking occupied a team of experts for almost two years); rather, I hope to raise questions worthy of inquiry and identify further avenues worthy of pursuit.

Some of The Report's original questions also deserve continued monitoring, including: are women equitably represented in all parts of the justice system; are women explicitly disrespected (or worse) in the courts; and are mistaken assumptions about women (and men) and their roles and abilities used as factual foundations upon which legal decisions are made? Today's understanding of the ways in which bias can persist has become more nuanced, recognizing the less obvious influence of things like unspoken assumptions. These subtler forms of bias are referenced in The Report and should be formally investigated today. The rich research into how racial bias affects the courts and the systems in which they operate offers two key analytic tools worthy of further application in the area of gender bias. First, whether implicit bias regarding gender affects court decisions, even though made by judges who are explicitly trained to be fair. Second, whether the fact of bias against at least half of the system's litigants undermines the fundamental legitimacy of that system.

The first section of this article briefly reviews the context of the 1986 Report of the New York State Task Force on Women in the Courts. Section II discusses the bravery of the authors' vision. Section III acknowledges that The Report's recommendations fell short of its visionary introduction. Finally, Section IV invites colleagues to use newer analytic tools to investigate gender bias in a more nuanced way.

I.

THE CONTEXT OF THE 1986 REPORT OF THE NEW YORK STATE TASK FORCE ON WOMEN IN THE COURTS

In 1980, the National Organization for Women's ("NOW") Legal Defense and Education Fund invited the National Association of Women Judges ("NAWJ") to join in launching the National Judicial Education Program to

Promote Equality for Men and Women in the Courts (“NJEP”).⁴ The launch of NJEP prompted New Jersey to establish a gender bias task force, which published its report in 1982. On May 31, 1984, Judge Lawrence H. Cooke, then Chief Judge of the State of New York, announced the creation of a New York State Task Force to “examine the courts and identify gender bias and, if found, to make recommendations for its alleviation.”⁵ When Judge Sol Wachtler was appointed Chief Judge in 1985, he communicated to the Task Force his understanding of the urgency of their work, and it was to Judge Wachtler that the Task Force ultimately submitted its final report on April 2, 1986.⁶

The Report was the written culmination of a 22-month investigation undertaken by respected members of the New York Bar.⁷ New York’s Report and NOW’s program shared the same fundamental belief that fairness to women in the courts is an essential ingredient for the fair administration of justice overall. The Report was followed by a series of similar reports that were generated around the country.⁸ At its 1988 annual meeting, the Conference of Chief Justices adopted a resolution urging every chief justice to establish a gender bias task force.⁹ The federal courts were less engaged in this effort, although the Ninth Circuit’s 1993 report was a marked exception.¹⁰

It is useful to remember the 1980s cultural backdrop against which this movement of judicial self-reflection took place. In 1980, the Equal Employment Opportunity Commission, which prohibited sexual harassment, issued new guidelines. In 1981, Sandra Day O’Connor became the first woman named to the Supreme Court. In 1982, the hugely popular movie *E.T.* depicted a single mother raising three children. In 1983, Sally Ride became the first woman to travel into space. In 1984, Geraldine Ferraro was the first woman nominated by a major

4. The Legal Momentum website provides links to various documents created by NJEP. *National Judicial Education Program: Task Forces on Gender Bias in the Courts*, LEGAL MOMENTUM, <http://www.legalmomentum.org/our-work/vaw/njep-task-forces.html> (last visited Oct. 21, 2012). The 2001 implementation guide cites the rich body of literature describing the movement to end gender bias in the courts. Lynn Hecht Schafran & Norma Wikler, *Gender Fairness in the Courts: Action in the New Millennium*, NATIONAL JUDICIAL EDUCATION PROGRAM, 3-4 (2001), <http://womenlaw.stanford.edu/pdf/genderfairness-strategiesproject.pdf>.

5. Hon. Lawrence H. Cooke, Remarks at the Press Conference Announcing the Formation of the New York Task Force on Women in the Courts (May 31, 1984), in *THE REPORT*, *supra* note 1, at 167.

6. *THE REPORT*, *supra* note 1, at 15.

7. *See id.* at 15-25 (explaining the organization of and methods employed by the Task Force).

8. *See, e.g.*, COMMONWEALTH OF MASS., REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT (1989); MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS (1989); R.I. COMM. ON WOMEN IN THE CTS., FINAL REPORT (1987); NEV. SUP. CT. GEND. BIAS TASK FORCE, JUSTICE FOR WOMEN (1989); FLA. SUP. CT. GEND. BIAS STUDY COMM’N, FINAL REPORT (1990).

9. Conference of Chief Justices, Resolution XVIII, “Task Forces on Gender Bias and Minority Concerns” (adopted Aug. 4, 1988).

10. GENDER BIAS TASK FORCE, THE EFFECTS OF GENDER IN THE FEDERAL COURTS: THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE (1993), *reprinted in* 67 S. CAL. L. REV. 745 (1994).

political party to run for Vice President of the United States, and Jesse Jackson was the first black candidate. In 1986, Oprah Winfrey's daytime talk show aired for the first time. In 1988, popular actress Melanie Griffith starred in *Working Girl*. In 1986, this author graduated from college and was educated in the mixed messages most women heard at the time: everything is possible, and everything is required. Madonna was our pop icon, somehow declaring liberation through fishnets and bravado.

It was a decade of many "firsts" for women, yet the "firsts" did not always result in a full opening of doors, and, in fact, often resulted in significant costs as well. The possibility for some women to achieve professional success in no way meant that they, or their non-working counterparts, could relinquish the societal expectation that they also meet high benchmarks for nurturing, homemaking, and physical attractiveness.¹¹ The tension between the availability of some measure of expanded opportunity with the continuation of a simultaneous obligation to accommodate pre-existing expectations created all kinds of friction, including in the courts.

II.

WHY THE 1986 N.Y.S. REPORT STILL RESONATES AS RADICAL

The Task Force concluded that gender bias against women litigants, attorneys, and court employees is a "pervasive problem with grave consequences," as "[w]omen are often denied equal justice, equal treatment, and equal opportunity."¹² The Report further recognized that "[c]onduct influenced by gender bias in an institution with profound power over those who come before it can wreak substantial injustice and can undermine the courts' prestige and authority by eroding public confidence in the justice system."¹³ The Report opened by declaring that our very own justice system regularly denies justice to women, and concluded that, in so doing, it undermines its own authority.¹⁴

Although the next section of this article describes the gap between these profound observations and the far more timid recommendations that followed,

11. An often-used cultural reference that aptly summarizes the overwhelming goals expected of women is the late 70s and early 80s series of advertisement for Enjoli perfume, in which a woman bragged that she could: "bring home the bacon, fry it up in a pan, and never, never, never let you forget you're a man." *Retro Enjoli Commercial*, YOUTUBE (Mar. 6, 2006), <http://www.youtube.com/watch?v=4X4MwbVf5OA>. It should be noted that expectations for women are at a similarly confusing juncture at the writing of this article. For example, in the months leading up to this year's presidential election, the Violence Against Women Act is stalled in Congress; Representative Todd Akin declared that in cases of "legitimate rape" a woman's body shuts down and prevents her from becoming pregnant; and the speech of Ann Romney, the Republican presidential candidate's wife, at the Republican National Convention, suggested that women work harder at work (to be taken seriously) and at home (because there they work alone) and are proud to do so.

12. THE REPORT, *supra* note 1, at 17.

13. *Id.* at 166.

14. *Id.* at 18.

The Report's recognition of structural bias is striking. This powerful statement is the product of a formal and predictable process. By choosing to critique the courts from within the court system, the Task Force members adhered to a fairly traditional method of evaluating the efficacy of a system, taking the following steps: creating an internal Task Force, interviewing stakeholders, holding hearings, and offering suggestions for incremental change. Despite the polite formality of the exercise, the conclusion was dramatic. That fine balancing act between decorum and resistance is apparent in the determination, methodology, and scope of the project.

A. Dedication of Substantial Resources

The Unified Court System called for the investigation of gender bias in the courts. To successfully conduct this investigation, the System devoted substantial resources to the project. The investigation lasted 22 months and several fact-finding methods were used. The bulk of the work consisted of compiling anecdotes from a variety of individuals regarding their experiences with and impressions of the court system. Four public hearings were held in New York City, Albany, and Rochester and the Task Force received testimony from over 85 witnesses.¹⁵ Judges and attorneys were invited to informal discussions with the Task Force, informal meetings were held with residents in urban and rural areas, and questions were raised about the judicial nominating process. The Task Force used other statistical and systematic methods as well: surveys were distributed among attorneys, and the Center for Women in Government at SUNY Albany produced data analyses included in The Report, as well as interviews and a textual analysis of court rules.¹⁶ In all, more than 2,000 judges, lawyers, and laypersons were heard from during this process.

The project charted a course that demanded a full system's analysis, asking how women fared in every part of the court system. The conclusions outlined at the outset of The Report question the legitimacy of the system itself. Specifically, The Report found that discrimination against women affects the delivery of justice, both generally, and in particular, by contributing to women's perception that the justice system is not just, as applied to them.

B. Dimension and Credibility

It is no small task to conduct a public, in-depth self-analysis and then publish the unflattering results for all to see. Yet in 1986, through the Task Force, that is exactly what the courts did.

Associate Judge Judith S. Kaye, who later became the state's first female Chief Judge, provided the introduction to The Report.¹⁷ In the first of two key

15. *See id.* at 20 (describing the public hearing process conducted by the Task Force).

16. *Id.* at 22-23.

17. *See id.* at 1-2.

points, she suggested the import not only of The Report's actual findings, but also of its very existence. She wrote: "[T]he Report has given credibility and dimension to the problem of gender bias in the courts."¹⁸ The court system chose to dedicate significant resources for over two years to investigating bias against women. The courts rarely conduct this kind of administrative soul-searching, and to do so for so long, so thoroughly, and with such a public conclusion was a strong and significant statement. As Judge Kaye observed, individual complaints were routinely brushed aside: a systemic analysis revealed the problems to be beyond anecdotal, recognized them, and gave them value, weight, and dimension. And, of course, as a woman who had herself broken through many glass ceilings, Judge Kaye knew personally what stories had been ignored, and, indeed, may have had some herself.¹⁹

Judge Kaye's pointed use of the word "credibility" is significant. As she suggests, the anecdotal reports of women about bias in the system had not been taken seriously, nor deemed credible. The Report dedicated an entire section to the credibility of women litigants, recognizing that giving the claims and testimony of women litigants less credibility, solely because proffered by women, is: "perhaps the most insidious manifestation of gender bias against women."²⁰ Female litigants and witnesses are often dismissed as not credible.²¹ In the legal system, the determination of credibility is essential to evaluating witness testimony. Just as women were not credible witnesses to the bias levied against them—their experiences had to be corroborated by external and substantiating research—so too had many women as witnesses in court

18. *Id.*

19. In 1983, Judge Kaye was the first woman appointed to serve on the New York Court of Appeals, and she was the first female Chief Judge for the state of New York. When hired by Sullivan & Cromwell LLP, she was the sole female litigator at the firm. She later became the first female partner at Olwine, Connelly, Chase, O'Donnell & Weyher. *See Professionals – Judith Kaye*, SKADDEN, <http://www.skadden.com/professionals/judith-kaye> (last visited Nov. 24, 2012); *Faculty Profile – Judith Kaye*, PRACTICING LAW INSTITUTE, http://www.pli.edu/Content/Faculty/Hon_Judith_S_Kaye/_/N-4oZ1z139oI?ID=PE508016 (last visited Nov. 24, 2012).

20. THE REPORT, *supra* note 1, at 114.

21. This unfortunate reality has been amply documented. *See, e.g.*, Karen Czapanskiy, *Gender Bias in the Courts: Social Change Strategies*, 4 GEO. J. LEGAL ETHICS 1, 3-4 (1990 – 1991) (postulating that some judges are unable to find women's testimony credible because it does not match their own life experience); Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform*, 37 ARIZ. ST. L. J. 709, 738-44 (2005) (reviewing literature, including gender bias reports, that indicates that women's credibility is often questioned in court proceedings, as support for the same impression expressed by the individual litigants interviewed for the article); Lynn Hecht Schafran, *Overwhelming Evidence: Gender and Race Bias in the Courts*, in THE CRIMINAL JUSTICE SYSTEM AND WOMEN: OFFENDERS, PRISONERS, VICTIMS, & WORKERS, 457, 459 (Barbara Raffel Price & Natalie J. Sokoloff eds., 3d ed. 2004) (summarizing the work of gender bias task forces in multiple states, including research methodologies used and consistent findings of bias, including negative effects for women's credibility, throughout); Elizabeth Sheehy, *Evidence Law and 'Credibility Testing' of Women: A Comment on the E Case*, 2 QUEENSLAND U. TECH. L. & JUST. J. 157, 159 (2002) (discussing the use of a "scientific" theory – "false memory discourse" – to undermine the credibility of a female witness in a Canadian rape trial).

proceedings also been deemed not credible, unless other evidence supported their testimony. As a woman who went on to work to improve the court system's recognition of violence against women in particular, Judge Kaye surely chose her words with care.

C. Treating the Stories of Individuals as "Legitimate" Information

The Task Force used many qualitative research techniques: focus groups, interviews, public hearings, and court observation. In today's era of outcome measures and data-mapping, the reliance on primarily qualitative information from samples of convenience may seem unusual. However, this emphasis on stories was as much political as practical. In 1985, systems were not in place to conduct the level of data analysis available to us today.²² But the goal was to validate the lived experiences of women, to turn those experiences into statistically significant findings, and to acknowledge that numbers were insufficient to describe the inequality experienced by women in the courts.²³ The Task Force made use of feminist tactics to turn women's words and voices into legitimate evidence. As scholars have recognized, "[t]he plural of anecdote is data. They add up."²⁴ As The Report makes clear, that reality was not always acknowledged in the courtrooms themselves.

III.

THE N.Y.S. REPORT COULD NOT LIVE UP TO ITS ASPIRATIONS

For all its ambition and sweeping conclusions, the 1985 Report was ultimately unable to deliver fully on its potential. The Report reads as internally conflicted,²⁵ as though the authors recognized that they could not fulfill the full scope of their own ambitions. To be sure, some of the problems identified hinted at further research beyond the Task Force's capacity, but the Task Force could have called for an extension of their investigation to be taken up by academics or others. Feeling bound by the scope of a Task Force, The Report saw the horizon, but was not equipped to reach it.

Two stark examples show that while The Report's goals are stated in broad, sweeping terms, the supporting analysis and final recommendations are far less ambitious. First, The Report is intended as a review of "all aspects of the [court] system, both substantive and procedural to ascertain whether there are statutes,

22. See Schafran & Wilker, *supra* note 4, at 14 (describing obstacles faced in the absence of strong data collection).

23. See Deborah R. Hensler, *Studying Gender Bias in the Courts: Stories and Statistics*, 45 STAN. L. REV. 2187, 2187-193 (1993) (discussing what research techniques the 9th Circuit Gender Bias Task Force used given that statistics are a necessary but insufficient technique for measuring bias).

24. Schafran & Wilker, *supra* note 4, at 56 (quoting Jill Laurie Goodman, Counsel for the New York State Judicial Committee on Women in the Courts).

25. As its members may well have been.

rules, practices, or conduct that work unfairness or undue hardship on women in our courts.”²⁶ But not all aspects of the court system were analyzed, and substantive law was not significantly assessed. Perhaps, The Report’s authors recognized that the tools needed to achieve its goals were unavailable or would have required the courts or others to take steps they were not yet prepared to take. Or, perhaps, the authors determined that carefully documenting the bias women experienced was sufficient. The harm that came from such bias should have been self-evident.

The Task Force explicitly referenced the effect gender bias might have on substantive law as both goal and observation: “cultural stereotypes of women’s role in marriage and in society daily distort courts’ *application* of substantive law.”²⁷ As mentioned above, the Task Force did cite concerns about judicial determinations of credibility, but it did not conduct an actual evaluation of substantive decisions premised on bias-ridden trial-level determinations.²⁸ Instead, the recommended solution for this profound conclusion was limited to education and consciousness-raising to improve future decisions. There was no proposed remedy for the shaky precedential history upon which all future decisions would be based.

Second, The Report notes that a system perceived as unjust or illegitimate by a substantial group could deter individual litigants. Yet the implications to the overall legitimacy of the court system, when fully half of the population might have concerns about its fairness to them, are not adequately addressed in its recommendations.²⁹ The Report reads as though the authors retreated from the potential implications of their findings by choice or necessity, and favored more palatable remedies by the end of The Report.

A pulling back from the power of the original questions began once the Task Force decided what actions to take. Throughout The Report’s introduction, the Task Force suggested that judicial decisions had been based on biased assumptions, and that women litigants may have been right not to trust the courts—the place ostensibly reserved for adjudication of a wide range of life-altering critical questions, including those regarding the custody of children and the innocence or guilt of people accused of rape. A system of decisions built more upon assumptions about a certain class of litigants than upon facts, as well as the message that bias sends to those litigants, put both the procedural and substantive justice of the law into question. Yet the Task Force circumscribed its own project, listing only limited tasks:

26. THE REPORT, *supra* note 1, at 16 (emphasis added) (internal quotations omitted).

27. *Id.* at 17.

28. *Id.* at 113 (summarizing the 1980s body of literature discussing the research that showed that women were often found to be less credible than men).

29. THE REPORT, *supra* note 1, at 18.

1. Identify the perceptions of women and men (judges, lawyers, and laypersons) of the treatment of women in the courts;
2. Review the treatment women actually receive in court; and
3. Ask whether women are treated differently from men.

All three focus on how women are treated in courtrooms that are intended to be impartial forums. So although the original mission of the task force was, bluntly put, to see if there was systemic discrimination against women as a whole, the practical questions and tasks undertaken by the Task Force investigated only whether *individual* women were treated equitably.

To use the language of evaluation, the research looked at “outputs,” but did not assess for “outcomes.”³⁰ This distinction is the difference between recognizing that some judges think differently about men and women versus recognizing that there are fundamental and structural forces that serve to multiply the individual biases of specific actors. Since the goal of the court system is to deliver justice to all, the less-than-equitable treatment of a large percentage of litigants should count as an initial finding, not a conclusion.

The Task Force documented substantial evidence of bias, but it did not ask how the fact that women were treated differently changed determinations of witness credibility, case outcomes, or even whether certain cases reached the court system at all. In 1986, the reality obvious to women – that they were treated differently from men, to their detriment – was something that still needed to be proven to be believed. This documentation itself became the goal.

A. Gendered Jurisdictional Choices

First, the authors of The Report acknowledged that, although they would have liked to assess this problem throughout the court system, that scope was impossible, even with fairly generous resources. The court system was already big in 1985, and resources required that choices be made. The Task Force reasonably decided to focus on “those matters that appeared to have the most profound effect on the welfare of the greatest number of women,” while recognizing that other areas deserved further scrutiny in the future.³¹

The choices made about what areas were most likely to be relevant to

30. The exact definition of an “output” versus an “outcome” is dependent upon the context in which it is used. Referring to program evaluation, the U.S. General Accounting Office defines “outputs” as “the direct products and services delivered by a program,” while “outcomes” are defined as “the results of those products and services.” U.S. Gen. Accounting Office, GAO-11-646SP: *Performance Measurement and Evaluation: Definitions and Relationships* (2011), <http://www.gao.gov/new.items/d11646sp.pdf>.

31. *Id.* at 26.

female litigants were based not on data regarding women's involvement in the court system, but on the Task Force's assumptions about what kinds of courts and cases were most meaningful for women or where they would most likely find female litigants. The danger of such an approach is that it may have served to reinforce the very biases The Report was aiming to uncover.

The Task Force decided to focus its civil court analysis on family and matrimonial cases. While there is no doubt that women were, and are, predictably present as litigants in family and matrimonial matters, they may as frequently be litigants in housing court, for instance. In New York City, few legal outcomes have a greater impact on the litigant than the outcome of an eviction case, yet the presence of gender bias in housing court was not considered.

Similarly, while criminal cases of rape and domestic violence were analyzed, the Task Force did not consider the many other criminal cases involving women as defendants, victims, or witnesses. Since custody, divorce, rape, and domestic violence cases involve topics generally considered "women's issues," it is conceivable that they were most likely to reveal any stereotypes or biases at play in the court system.³² But, by limiting the analysis to those "women's" topics, the Task Force was unable to determine if the bias extended into areas not traditionally considered "women's issues," even though such cases could have as great an effect on the lives of the women involved.³³

The Task Force was also ill-equipped to assess the broad system of judicial appointments of women to counsel in lucrative and complex cases. As a result, it chose to conduct a limited study of the Surrogate's Court in New York. The Task Force does not explain how it chose Surrogate's Court of all of the civil and criminal courts and matters in which counsel can be assigned. However, given the criteria used earlier, it appears that the Task Force selected a site presumed to be the most relevant for female litigants.

These jurisdictional selections are based on what Judith Resnick might call "essentializing assumptions."³⁴ Just as traditional "women's issues" are seen to be the domain of the state courts, "women's issues" are further circumscribed into the family, matrimonial, and surrogate's parts. The very premise upon which the analysis was conducted was limited by a gendered notion of where the courts were most likely to affect women's welfare. Statistics show these assumptions to be misguided. Even in 1991, when women were surely less

32. Most gender bias task force reports have identified cases involving domestic violence as those most susceptible to bias. *See, e.g.*, GENDER BIAS STUDY COMMITTEE, MASS. SUPREME JUDICIAL COURT., GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS, *as reprinted in* 24 NEW ENG. L. REV. 745, 774 (1990).

33. *See generally* Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195 (1993) (discussing how gender bias is a relevant concern for women in all areas of legal practice and academics).

34. Judith Resnik, *Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J.L. & FEMINISM 393, 399 (2002).

represented in the court system as a whole than we are today,³⁵ lawyers in the Ninth Circuit reported that 20 percent of the criminal defendants they saw were women,³⁶ and a 1989 study showed that in 75 percent of consumer bankruptcies studied a woman was the debtor.³⁷

B. *Gender Assessed in a Vacuum*

Like most analytic theories, feminist analysis strives to assess the role of gender in order to provide a new lens through which to see the world. By conducting a systems analysis that only divided the players into binary male and female categories, the Task Force failed to enrich its analysis with more complete information regarding race, class, and sexual orientation. These missing perspectives are integral to the scope of a gender bias analysis. It is not pure happenstance that Family Court is the court deciding cases likely to have the most profound effect both on the greatest number of women and on the lives of the poor and of people of color. The outcomes for female litigants in Family Court are absolutely a result of their gender, but cannot be disassociated from their class. Similarly, female litigants of color have to contend with multiple biases based on their ethnicity, as well as their gender. Finally, lesbian litigants – although present in few of the analyzed cases given that, in 1985, they would not have had standing to pursue most of the cases analyzed—must surely have encountered a level of bias different in measure and kind than that of their heterosexual counterparts. While The Report’s introduction acknowledges these distinctions and cross-currents, it fails to address them in its actual analysis and recommendations.³⁸

C. *Radical Implications Go Unaddressed*

The Task Force directed their analysis to overt bias, and there was much to

35. The American Bar Association’s most recent statistics indicate that approximately 31% of the legal profession is female, representing 45.5% of law firm associates, 19.45% of law firm partners, and almost half of all J.D.’s awarded. *A Current Glance at Women in the Law 2011*, ABA: COMMISSION ON WOMEN IN THE PROFESSION, http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_2011.authcheckdam.pdf.

36. GENDER BIAS TASK FORCE, *supra* note 10, at 920.

37. THERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 150 (1989). It should be noted that the gender gap in bankruptcies seems to have narrowed, with the Institute for Financial Literacy reporting that, in 2010, women represented 52.26% of all personal bankruptcy filings; however, there has also been an increase in the number of married couples filing jointly for bankruptcy (34.5% of all filings), so the picture may be more complicated. INSTITUTE FOR FINANCIAL LITERACY, 2010 ANNUAL CONSUMER BANKRUPTCY DEMOGRAPHICS REPORT: A FIVE YEAR PERSPECTIVE OF THE AMERICAN DEBTOR (2011). For a broader discussion of how certain issues become labeled “women’s issues,” see generally, Elizabeth Warren, *What Is A Women’s Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN’S L.J. 18 (2002).

38. THE REPORT, *supra* note 1, at 18.

find. Observations of explicitly sexist comments were identified in every area of the court system. The Task Force offered remedies to address that bias, such as training and consciousness-raising, as well as working to support women's professional advancement to important positions of judicial responsibility.³⁹ Judge Kaye's promotion to the position of Chief Judge serves as an example. In addition, establishing an arm of the court system to carry out The Report's recommendations represented the system's long-term commitment to ensuring the integration of these recommendations over time.⁴⁰

The Task Force members deserve to be commended for their determination to document the lived reality of women in the courts in the mid-1980s. They were also able to ensure that the standing committee offered them a permanent place within the structure of the court system from which to continue their critique. However, recommendations for enhanced training as the response to deep cracks in the foundation of our legal system are incomplete at best. In fact, time has shown that despite enhanced training about gender and domestic violence, bias clearly persists.⁴¹ Rather than express disappointment that it did not follow the logic of its own conclusion, I invite us to take up the gauntlet the Task Force threw down as an invitation for contemporary concerned lawyers and judges. If the 1986 recommendations fall short of the lofty goals stated at the outset, it is not because the authors were blind to the implications of their findings. Instead, they chose to accomplish the first step in what they surely viewed as a long project. Although the courts did undertake an updated report in 2002, no new questions were raised, and the broader implications of the project were not advanced. So today, we should pick up where the Task Force left off.

39. See Hon. Sol Wachtler, *The Lady in the Harbor and the Lady in Albany—Two Symbols of Freedom*, 15 FORDHAM URB. L.J. 3, 5 (1986) (enumerating the Task Force's efforts to address the problems women face in the courts).

40. The courts throughout the country made a long-term commitment as well. In 1999, the National Conference on Public Trust and Confidence in the Justice System voted to prioritize implementation of the task forces' recommendations. The National Judicial Education Program has created several documents to assist jurisdictions with this goal. In 2005, for instance, the program developed a guide to court watching in domestic violence and sexual assault cases. The Gender Fairness Strategies Project was developed as a collaborative effort among five national organizations: NAWJ, the National Judicial College, the National Center for State Courts, the American Bar Association Commission on Women in the Professions, and NJEP. The collaborative published an implementation plan in 2001 to sustain the work of the gender bias task forces. The chair of the Gender Fairness Strategies Project is New York Judge Betty Weinberg Ellerin, who led the New York effort and went on to become a national leader in this movement.

41. See, e.g., PETER JAFFE, NANCY K.D. LEMON & SAMANTHA E. POISSON, CHILD CUSTODY AND DOMESTIC VIOLENCE: A CALL FOR SAFETY AND ACCOUNTABILITY 138–39 (2003) (noting that although California is one of the only states to mandate training on domestic violence for custody evaluators, many of the evaluators still ignore the presence of violence in their findings); Allison C. Morrill, Jianyu Dai, Samantha Dunn, Iyue Sung & Kevin Smith, *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, in 11 VIOLENCE AGAINST WOMEN 1076, 1103–04 (2005) (finding that mandated education did not predictably correlate with improved outcomes, and that future work should focus less on training mandates and more on training quality).

The equally radical questions for today would focus on more subtle forms of gender bias and their ramifications. What do we do with a body of Family Court case law that is built on decisions that view female witnesses with skepticism? What if well-trained judges, who can articulate an understanding of gender and its implications, are still making decisions based on outdated assumptions about childrearing roles and gender-appropriate behavior? And what if women generally perceive the courts as an unreliable place in which to have the most personal facts of their lives determined? How might that affect the decisions women make in their lives outside of the courtroom? We too may be unable to answer the questions of 2012 immediately, but as the Task Force showed, there is transformative power even in asking the right questions.

IV.

GENDER BIAS QUESTIONS AND GOALS FOR 2012

I was inspired to write this article by two simultaneous reactions I had to reading the 1986 N.Y.S. Report. I was impressed with the breadth of the critique and vision it expressed, but also disappointed in the remedies that seemed to fall so far short of its potential. The questions I pose below are both continuations of the questions asked twenty-five years ago, as well as questions that I think lay hidden beneath the surface of that Report. The Report states that “[c]ultural stereotypes of women’s role in marriage and in society daily distort courts’ application of substantive law,” yet the Task Force does not ask how we remedy that biased legal history.⁴² The Report states that “the courts are viewed by a substantial group of our citizenry as a male-dominated institution disposed to discriminate against persons who are not part of its traditional constituency.”⁴³ Yet it does not ask how that view affects the participation of those individuals, but rather tries to institute a way to prevent such alienation from happening in the future. The questions below represent how we might continue the investigation initiated by the 1986 Report. The analyses I am proposing would require the assistance of academics in partnership with the courts. The completion of such an analysis would then allow the courts and the legislature to take appropriate action based on the results.

A. Work towards an Adequately Diverse Bench

The lack of data that would allow for statistical analysis of gender bias caused the various task forces to recommend that the court start collecting what was needed. Despite their recommendations, unfortunately, little data is yet collected on a routine basis. We can, however, update the numbers given in 1986 regarding representation of women in the field; the change is less than dramatic. A report issued by the SUNY Albany Center on Women in Government and

42. THE REPORT, *supra* note 1, at 17.

43. *Id.* at 18.

Civil Society revealed that as of 2012, no state has gender parity on the state or federal bench, with women only representing 26 percent of the state and federal bench nationally.⁴⁴ New York is slightly above the norm: women make up 30.9 percent of its judiciary, with a higher representation on the state than federal bench.⁴⁵ While in this report, New York scores in the top tier of states that count over 30% of female judges, the details of the data tell a slightly more complex story. The distribution of women on the bench in New York varies widely by region, with a consistently stronger representation on the Family Court bench than elsewhere in the system. The judiciary, while not yet a paragon of gender equity, fares much better under this type of analysis than other segments of the legal community. A 2009 Report found that only 6% of the nation's largest firms have female managing partners, and that fewer than 16% of firm equity partners are women.⁴⁶

Having women represented in positions of power in the court system serves both a real and symbolic good. For women to view the legal profession as welcoming, they have to know that they can advance in the profession as men do. The presence of women in those positions also serves an important symbolic function to the general public and to litigants in the courts. When litigants see justice rendered by individuals who are "like" them, there is a greater sense that the system is just.⁴⁷ Furthermore, a breadth of life experiences on the bench makes assessments of reasonableness and credibility more likely to be equitable.⁴⁸ When the statistics show that women have not achieved numeric parity, we must analyze why. However, numeric parity is not a complete proxy for equal treatment.

A richer statistical analysis is called for. In the 2001 report, examples such as "the rate of dismissal of domestic violence charges compared to the dismissal rate for all case categories" and "the number of mental examinations ordered for males compared to females" demonstrate how we could mine for deeper information.⁴⁹ If this kind of truly comprehensive gendered statistics were

44. DINA REFKI ABIGYA ESHETE & SELENA HAJIANI, CTR. FOR WOMEN IN GOV'T & CIVIL SOC'Y, WOMEN IN FEDERAL AND STATE-LEVEL JUDGESHIPS 1 (2012), http://www.albany.edu/womeningov/publications/summer2012_judgeships.pdf.

45. *Id.* at 5.

46. NAT'L ASS'N OF WOMEN LAWYERS & THE NAT'L FOUNDATION, REPORT OF THE FOURTH ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 2 (2009).

47. Anita Hill clearly stated most people's perception that: "The face of judging, in an emblematic way, matters as a reflection of access to justice; the diversity of the bench affects public perceptions of fairness." Anita F. Hill, *The Embodiment of Equal Justice Under the Law*, 31 NOVA L. REV. 237, 250 (2007).

48. *See, e.g.*, Czapanskiy, *supra* note 21, at 47 (analyzing a case cited in the Maryland Gender Bias in the Courts Report of 1989 in which a physically large male judge found a female witness's testimony regarding domestic violence to be non-credible "since [he] wouldn't let that happen to [him], [he] c[ould]n't believe that happened to [her].").

49. *See* SCHAFFRAN & WILKER, *supra* note 4, at 56 (giving examples of the types of statistical data that could be collected regularly).

collected, we could begin to answer the question of how the treatment of women and men in the courts differ.

B. Analyze Court Decisions for Gender Bias

If gender bias is as rampant in the courts as the Task Force found it to be, that bias must affect the courts' substantive decision-making. Given our system of *stare decisis*, entire bodies of law may be built—necessarily—upon biased foundations. For example, trial court judges are often called upon to make decisions about reasonableness or credibility. As a trial court determination that is usually not appealable, final decisions based on a credibility determination should be analyzed to see if the credibility of individual female litigants is being assessed equally when compared with individual male litigants. The original Task Force findings suggest that women are often found not credible; we should look to see how that results not only in their individual harm, but also in institutionalized harm in the body of case law developed through those decisions.⁵⁰

Similarly, it is not difficult to find examples of cases in which a behavior exhibited by a woman is judged to be unreasonable, when the same behavior exhibited by a man would be deemed reasonable. Even ten years prior to The Report, a court found the gender-specific language of the “reasonable man standard,” when used in a homicide trial of a 5’4” woman in a leg cast accused of killing a 6’2” intoxicated man, to have been so unfair as to warrant overturning the conviction.⁵¹ Similarly, a victim of domestic violence may not seem reasonable when overwrought, angry, or paranoid in the context of a custody dispute; when reassessed, however, within the history of violence she has experienced, that same woman’s behavior may be judged as quite reasonable.⁵² Given the prevalence of intimate partner violence in contested custody cases, any bias regarding domestic violence in general, or its victims in particular, will have a particular effect on custody decisions.⁵³ In this way, legal

50. Some Gender Bias Reports have conducted a more thorough analysis of biased outcomes. See, e.g., GENDER BIAS TASK FORCE, *supra* note 10, at 1026 (including a review of case law for biased outcomes).

51. *State v. Wanrow*, 5559 P.2d 548 (Wash. 1977).

52. See CLAIRE DALTON, LESLIE DROZD & HON. FRANCES Q.F. WONG, NAVIGATING CUSTODY & VISITATION EVALUATIONS IN CASES WITH DOMESTIC VIOLENCE: A JUDGE’S GUIDE 17 (2006), available at <http://www.thelizlibrary.org/liz/NCFCJ-guidebook.pdf> (noting that the “vulnerable partner” in an abusive relationship may “present as a less than competent parent, but his or her deficiencies may be because of the emotional and physical toll the abuse has taken”). See generally MARY ANN DUTTON, EMPOWERING AND HEALING THE BATTERED WOMAN: A MODEL FOR ASSESSMENT AND INTERVENTION (1992) (describing how behavior that may seem irrational to outsiders, when understood in the context of a victim’s experience with her partner and the system, is in fact quite rational).

53. See, e.g., Mary A. Kemic, Daphne J. Monary-Ernsdorff, Jennifer K. Koepsell & Victoria L. Holt, *Children in the Crossfire: Child Custody Determinations Among Couples with a History of Intimate Partner Violence*, in 11 VIOLENCE AGAINST WOMEN 991, 992–93 (2005) (summarizing literature that suggests that more than 150,000 of the one million children who are subject to

standards can be set that ratify biased assumptions, shackling future judges to that strain of law. While many of these decisions track the facts of each case, analyses should be done to see whether any precedent-setting decisions were premised on false assumptions, and, if so, whether our system of laws allows for their correction.

Another example of biased outcomes based on a facially neutral standard is the courts' reliance on a "friendly parent" analysis when making custody decisions.⁵⁴ Custodial determinations are difficult, especially when both parents appear to be fit. When searching for an equitable "tie-breaking" factor, judges began looking to see which parent was "friendlier," meaning more prone to cooperate and to seek to promote the child's relationship with the other parent, and less likely to complain or point fingers. However, this seemingly neutral standard has resulted in more unfit fathers gaining custody. If a father has been abusive, a mother is then perceived as unfriendly when she calls attention to the father's behavior, is unwilling to make certain compromises, or tries in other ways to ensure that the court recognize the abusive parent's deficiencies. The results have been that legitimate complaints by women are minimized by the court and may result in the loss of custody.⁵⁵

Members of New Jersey's gender bias task force have assessed the findings of their own 1991 report, concluding that "reducing gender bias in the court environment is less difficult than reducing gender bias in judges' decisions about substantive law."⁵⁶ They recommended then, as I do now, that task forces emphasize looking at how gender bias alters the interpretation and application of substantive law.⁵⁷ The first federal report focused not on the actions of bias per

custody determinations each year live in homes with intimate partner violence).

54. The New York Appellate Courts have rejected "friendly parent" as an acceptable standard of analysis, but it continues to be a routine expectation experienced by lawyers and litigants in the trial courts. See *Tekester B.-M. v. Zeineba H.*, 830 N.Y.S.2d 415, 415 (App. Div. 2007) (reversing the lower court, and stating that "an award of custody must be based on the best interests of the children and not a desire to punish a recalcitrant parent"); *John A. v. Bridget M.*, 16 A.D.3d 324, 330 (N.Y. App. Div. 2005) (citing the trial court's finding that "the father was an experienced and caring parent, loved by the twins, and that he would be capable of fostering a relationship with their mother, while she was incapable of reciprocating").

55. Margaret K. Dore, *The "Friendly Parent" Concept: A Flawed Factor for Child Custody*, 6 LOY. J. PUB. INT. L. 41, 47-48 (Fall 2004) (arguing against the use of the friendly parent standard as particularly harmful in cases of domestic violence); Daniel G. Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns*, Harrisburg, PA: VAWnet, a project of the National Resource Center on Domestic Violence/Pennsylvania Coalition Against Domestic Violence 1, 7 (October 2007) (within an overall assessment of how domestic violence does or does not factor into custody decisions concludes that "a surprising number of battered women lose custody of their children," especially when a friendly parent provision is in effect).

56. Norma Juliet Wikler & Lynn Hecht Schafran, *Learning from the New Jersey Supreme Court Task Force on Women in the Courts: Evaluation, Recommendations and Implications for Other States*, 12 WOMEN'S RTS. L. REP. 313, 361 (1991).

57. See generally Molly Dragiewicz, *Gender Bias in the Courts: Implications for Battered Mothers and Their Children*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 5-1 (Mo Therese Hannah & Barry Goldstein eds., 2010)

se, but on the effects of gender – how the presence of bias changed the resulting court decisions.⁵⁸ The federal report also took a more nuanced approach to the implications of gender bias, recognizing that any result of a gendered stereotype was evidence of a biased outcome, even if that bias inured to the benefit of women. These questions are much harder to answer than simply whether women are statistically represented on the bench, or whether gender-neutral language is used in the courts. But they are the essential questions today for unpacking the ways that bias sneaks into decisions and therefore into our system of laws.⁵⁹

C. Apply the Theory of Implicit Bias to Gender

The original Task Force Report gave scathing examples of overt bias, which although occasionally present, is probably much diminished today. However, bias continues to infect daily decision-making, including decisions made in courts. As one writer has stated, “a model of explicit discrimination is not up to the task of responding to implicit bias, which is pervasive but diffuse, consequential but unintended, ubiquitous but invisible.”⁶⁰

Implicit bias studies also provide a scientific analysis of patterns of bias that are much harder to identify on a case-by-case basis.⁶¹ A rich literature has developed around the idea of implicit bias that addresses how assumptions inform decisions even, or sometimes especially, among those who believe themselves to be impartial.⁶² The bulk of this research as applied to the legal system analyzes the effects of implicit bias on race and anti-discrimination law, but the theory as a whole has been used to document implicit bias against other groups as well, such as the elderly and women in the rendering of legal decisions.⁶³ A valuable extension of the literature would be to build upon this

(analyzing how gender bias affects outcomes for domestic violence victims in court).

58. GENDER BIAS TASK FORCE, *supra* note 10.

59. I am hardly the only one to call for more such research, *see, e.g.*, Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GEND. SOC. POL'Y & L. 657, 661 (2003) (noting the need for more extensive research to understand “what is happening in private custody/domestic violence litigation,” particularly regarding the effect the judicial decisions have on the well-being of children).

60. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063, 1079–80 (2006).

61. *See* SHANKAR VEDANTAM, *THE HIDDEN BRAIN: HOW OUR UNCONSCIOUS MINDS ELECT PRESIDENTS, CONTROL MARKETS, WAGE WARS, AND SAVE OUR LIVES* 98 (2010) (discussing how, because there are so many mitigating factors in individual cases, it is almost impossible to show definitively that any particular outcome was due to bias, whereas bias can be shown by looking at patterns with scientific rigor).

62. *See, e.g.*, Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 971 (2006) (outlining research showing that most people have implicit, unconscious biases against traditionally disadvantaged groups).

63. Theories of implicit bias have been used to analyze the paucity of women in leadership positions in the legal profession and have been used outside of the legal field to measure the effect the presence of an implicit bias has on decision-making, as well as how relatively easy it is to trigger an implicitly biased reaction based on gender assumptions. *See, e.g.*, Justin D. Levinson &

work and evaluate whether gender-related implicit bias was present in judicial decision-making, and if so, how it changed the case law that developed with those biased assumptions at its core.⁶⁴

Implicit bias is a concept taken from psychology, which asserts that “actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.”⁶⁵ While it is relatively easy to identify individuals who express bias through overt acts, implicit bias is more subtle. An implicit bias – and we all have them – can cause otherwise rational actors to act in ways or make decisions that deviate from their explicitly endorsed beliefs or principles.⁶⁶ A classic example of an implicit gender bias is uncovered in an old joke: A man and his son are in a terrible car accident; they are rushed to the hospital by ambulance. The man dies *en route*; the boy is taken into the operating room, but the doctor, upon seeing the child, backs away saying, “I cannot operate on my own son.” If you hesitated for a second in understanding the facts of this story, you are experiencing the implicit bias that assumes doctors are usually male.

The field of psychology has developed a test for implicit bias called the Implicit Association Test (“IAT”).⁶⁷ While the IAT is best known for having been applied to test bias against African Americans, the IAT results find with some consistency that most people have an implicit and unconscious bias against all traditionally disadvantaged groups.⁶⁸ Perhaps even more important, is that the research indicates that the presence of implicit bias is predictive of behavior.⁶⁹ In

Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. OF GENDER L. & POL’Y. 1 (2010) (finding that law students did show an implicit bias regarding women in the legal profession, but that students were able to resist that bias, and make decisions in a gender neutral way); Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 147–48 (2004); Mahzarin R. Banaji, et al., *Implicit Stereotyping in Person Judgment*, 65 J. PERSONALITY & SOC. PSYCH. 272, 274 (1993); Alison P. Lenton, et al., *Illusions of Gender: Stereotypes Evoke False Memories*, 37 J. EXPERIMENTAL SOC. PSYCH. 3, 5-6 (2001) (showing that when study participants were shown words that tend to fall into gender stereotypes, even though they were not presented that way, when questioned later about what they had seen, then described the words in a gender-stereotyped way).

64. See, e.g., Jolls & Sunstein, *supra* note 62, at 980 (highlighting implicit biases specifically with regard to race and discussing attempts to “de-bias” outcomes with laws regarding affirmative action).

65. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006).

66. *Id.* at 951.

67. See *id.* at 952 n.23 (noting that the IAT was first reported in 1998). There is some controversy about the scientific validity of the IAT test that is beyond the scope of this article. Whether or not the tool is determined to be scientifically valid, I believe that the problem it highlights – of bias invisible even to the most conscientiously equitable person – remains an important and relevant line of inquiry. For a cogent discussion of the critiques of the IAT, see Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477, 477–493 (2007).

68. See Jolls & Sunstein, *supra* note 62, at 971.

69. Greenwald, *supra* note 65, at 954.

other words, holding implicit biases – which are typically unconscious and therefore unrecognized – changes the way a person makes decisions.

Applied to trial court judges with regard to race, the implicit bias test found that judges too had their decisions distorted by inherent bias.⁷⁰ In fact, judges may actually be overconfident in their ability to avoid bias, given their professional dedication to objectivity, coupled with ongoing training to support that goal.⁷¹ This test resulted in three conclusions: (1) judges hold implicit racial biases, (2) these biases can influence their judgment, and (3) judges can, at least in some instances, compensate for their implicit biases.⁷² While the effect of implicit bias on decision-making has been demonstrated with regard to race, no similarly assiduous assessment has been done with regard to gender, at least in the context of the courts.⁷³ As The Report states, the female gender is, in many contexts, a traditionally disadvantaged group. Therefore, it is likely that implicit bias exists regarding women, as well as with regards to people of “non-traditional” sexual orientation, or any other group perceived as non-normative.

The Report references the negative influence of stereotypes in judicial decision-making: “cultural stereotypes of women’s role in marriage and in society daily distort courts’ application of substantive law.”⁷⁴ That observation was based on explicit statements regarding gender norms for marriage and childrearing. Thanks to much of the training encouraged by the Task Force recommendations, such stereotypes are less often expressed outright, yet consistent court outcomes that grant custody to abusive fathers, or even to fathers with little child-raising experience or ability; rape charges that are not prosecuted because victim testimony alone may not be sufficient proof;⁷⁵ and

70. Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1205, 1222 (2009).

71. *Id.* at 1225.

72. *Id.* at 1197.

73. There are suggestions that the judicial community is beginning to acknowledge the relevance of implicit bias. See Shawn C. Marsh, *Beyond Implicit Bias: Exploring the Sometime Wacky World of Human Behavior and Cognition*, Opening Plenary Speech, Nat’l Conf. of the Nat’l Council of Juv. and Family Court Judges, available at <http://www.ncjfcj.org/national-conference-juvenile-and-family-law-conference-summary>. See also Honorable John F. Irwin and Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 43 MCGEORGE L. REV. 1, 1-20 (2010).

74. THE REPORT, *supra* note 1, at 17. As Karen Czapanskiy states, “evidentiary misperceptions occur when a judge finds himself unable to separate the individual woman or man before him from his stereotypes of women and men behave.” Czapanskiy, *supra* note 21, at 4.

75. Substantial research indicates dramatic case attrition in sexual assault cases. See, e.g., Cassia Spohn and Katharine Tellis, *The Criminal Justice System’s Response to Sexual Violence*, in VIOLENCE AGAINST WOMEN 18 (2) 169-192 (2012) (synthesizing research that documents the systemic under-reporting and case attrition common to sexual assault cases, including research that shows that victims are more likely to participate in prosecution if the crime is more serious and if there were witnesses or forensic evidence available). Witness credibility is always a legitimate factor to weigh when preparing a case for trial, particularly in sexual assault cases, which typically do not include physical evidence linking the suspect of the crime, much less the presence of eye witnesses. Therefore, prosecutors must make determinations about “convictability” based on

domestic violence cases in which men are not convicted because in a he said/she said, “he” is more credible, suggest that implicit bias – of judges, juries, and attorneys – is at play in our courtrooms on a regular basis. If implicit bias exists regarding gender in our courts, then previous research would suggest it is influencing the decision-makers in these cases.

Identifying implicit bias is not a simple project, since it is often unconscious on the part of the decision-maker. Court-watching will not necessarily unveil implicit bias because the actors may use gender-neutral terminology and otherwise appear to be making rational, fact-based decisions. Applying the IAT in several communities and contexts would be a good first start to show, as scientifically as possible, whether well-trained, well-intentioned judges still make biased decisions based on unconscious assumptions regarding gender.

The IAT analysis would serve as a contemporary version of the Task Force’s “proof” that women were treated differently in the 1980s. Judges live in the same culture as the rest of us, and it takes only the most cursory glance at popular magazines, television, and other media to see that we still operate largely on assumptions such as girls like pink, women are too emotional to serve in the military, and that men are to be recognized as deeply progressive when they take any real interest in raising children.⁷⁶ The more intriguing analysis will be the next step, which is an outcome analysis to identify how that bias has affected behavior and, perhaps, changed decisions in our case law.

Surely, if we collect and analyze the relevant cases, we should be able to show whether substantive legal outcomes are distorted by implicit bias. Taking one of the Task Force’s original areas of focus, domestic violence, is a good start. There is fairly substantial evidence that custody outcomes do not fall along rational lines and may well be distorted by gender bias. Despite a general recognition of the harm domestic violence has on children, as well as its general prevalence in family court cases, several studies show that individuals with a documented history of violence against their partners are at least as likely, if not more likely, to be granted custody or generous visitation rights than those without such a history.⁷⁷ Researchers have several hypotheses for this outcome.

assumptions about how a jury is likely to assess a witness. Cassia Spohn and David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances and Intimate Partners* (2004), <https://www.ncjrs.gov/pdffiles1/nij/199720.pdf>.

76. See, e.g., Jennifer Rubin, *Santorum says ‘other types of emotions’ could preclude women in combat*, WASH. POST, Feb. 9, 2012, <http://www.washingtonpost.com/blogs/right-turn/post/santorum-says-other-types-of-emotions-could-preclude-women-in-combat/2012/02/09/gIQAkiya2Qblog.html> (citing Rick Santorum’s response to the possibility of women serving in combat).

77. See, e.g., CHRIS S. O’SULLIVAN, LORI A. KING, KYLA LEVIN-RUSSELL & EMILY HOROWITZ, *SUPERVISED AND UNSUPERVISED PARENTAL ACCESS IN DOMESTIC VIOLENCE CASES: COURT ORDERS AND CONSEQUENCES* (2006), <https://www.ncjrs.gov/pdffiles1/nij/grants/213712.pdf> (a study interviewing female litigants in the New York City family court system, found that fathers who had been found to be abusive were much more likely to be awarded family-

Judges may favor stable, higher-earning parents, and victims of domestic violence often appear unstable.⁷⁸ Some judges remain unconvinced that violence by one parent against another parent is significant when deciding custody if the child was not directly abused.⁷⁹ Preconceptions that fathers are typically less engaged parents may cause judges to see the effort of fighting for custody as an unexpectedly welcome sign of engagement by a father, instead of a possible continuation of a history of exercising control.⁸⁰

Reports by other states' gender bias task forces have documented negative outcomes based on gender stereotypes. Credibility determinations seem particularly vulnerable to biased assumptions, making it difficult for women to be believed when making allegations about child abuse, for example.⁸¹ Similarly

supervised visitation over supervised visitation – considered a less intrusive recommendation – despite model code recommendations that supervised visitation be used in these circumstances); Kernic, Monary-Ernsdorff, Koepsell & Holt, *supra* note 37, at 1011, 1014 (finding, among other things, that in a study of 800 couples, fathers with a documented history of committing abuse were denied child visitation in only 17 percent of the cases, and mothers with a violent partner were no more likely to obtain custody than other mothers); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 44–45, 78 (1991) (discussing how abusive men are often awarded custody/visitation, sometimes due in part to mothers acceding to those demands because of the ongoing reality and fear of violence); Meier, *supra* note 42, at 662 (observing this phenomenon even in states that have adopted a presumption against custody to batterers); Daniel G. Saunders, *Child Custody Decisions in Families Experiencing Woman Abuse*, 39 SOC. WORK 51, 56 (1994) (recognizing recent legislative efforts to counter this trend); Jay G. Silverman, Cynthia M. Mesh, Carrie V. Cuthbert, Kim Slote & Lundy Bancroft, *Child Custody Determinations in Cases Involving Intimate Partner Violence: a Human Rights Analysis*, 94 AM. J. PUB. HEALTH 951, 953 (2004) (using a human rights framework to discuss custody outcomes in Massachusetts for a set of female victims of intimate partner violence; in these cases judges recommended or awarded custody in just over half of the cases to abusive partners).

78. See AM. PSYCHOLOGICAL ASS'N, VIOLENCE AND THE FAMILY: REPORT OF THE APA PRESIDENTIAL TASK FORCE ON VIOLENCE IN THE FAMILY 80 (1996) (stating that victims of battering can exhibit a range of measurable psychological effects); Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L. Q. 247, 253 (1993) (noting that female litigants are frequently accorded less credibility than male litigants); Nancy S. Erikson, *Use of the MMPI-2 in Child Custody Evaluations Involving Battered Women: What Does Psychological Research Tell Us?* 39 FAM. L.Q. 87, 39 (2006) (discussing the risks of using one particular mental health screen with battered women which may be ordered due to their appearance in court as less stable); Meier, *supra* note 42, at 690–692 (discussing how some battered women experience post-traumatic-stress-disorder and may speak with a flat affect or appear unstable, nervous, or angry).

79. See Morrill, Dai, Dunn, Sung & Smith, *supra* note 27, at 1078–79 (describing judges' sometimes troubling attitudes toward domestic violence).

80. See, e.g., Meier, *supra* note 42, at 680 (explaining that fathers' claims and requests carry greater weight because their involvement in their children's lives is perceived as "rare and important"); Lisa Marie De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 YALE J.L. & FEMINISM 359, 368 (1996) (noting that domestic violence victims may fear that cooperating with the prosecution could undermine her custody battle); Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 1017–18 (1995) (describing "tangential spouse abuse").

81. Meier, *supra* note 42, at 690–91; Joan Zorza, *Protecting the Children in Custody: Disputes When One Parent Abuses the Other*, 29 CLEARINGHOUSE REV. 1113, 1117 (1996); Melissa Hamilton, *Judicial Discourses Involving Domestic Violence and Expert Testimony* 37 (May 2006) (unpublished Ph.D. dissertation, University of Texas at Austin),

biased outcomes may occur even beyond the areas in which gender is almost an element of the case – how are women witnesses perceived in criminal cases other than rape? What about fraud cases? If there is implicit bias, it is important to understand the circumstances in which it emerges, where gender is unconsciously deemed a relevant factor when determining credibility.

Each case taken alone and screened for overt bias may appear reasonable. The cumulative result, however, shows skewed results as men found guilty of spousal abuse or an insignificant “track record” of child-care are more likely to obtain custody of their children than mothers who have not been abusive and who have been primary caretakers. A fuller assessment of implicit bias regarding gender and parenting needs to be done in order to effect a comprehensive correction for such distortions. Judges presented with these outcomes are typically startled, believing that they are free of bias and are judging each case fairly. Judges who want to make decisions that are likely to result in the best outcome for children – and that is surely most judges – need training on the available research to start, but would also benefit in participating in future research to rout out those implicit biases that are inadvertently infecting their decision-making.

D. Test Legal Reforms to Correct for the Harms of Gender Bias

To return to the example above of fathers proven to be abusive being likely to receive custody of or visitation with their children, many states, including New York, passed laws requiring that judges consider domestic violence when making custody decisions.⁸² Such a law attempts to correct for a distorted outcome by ratifying as social policy that violence perpetrated by one parent against another should be a necessary consideration in making a determination about parental fitness.

Unfortunately, more than a dozen years after New York’s passage of such a law, practitioners’ observations are that batterers are still disproportionately likely to be awarded custody.⁸³ Since family court decisions are rarely written,

<http://www.lib.utexas.edu/etd/d/2006/hamiltonm41820/hamiltonm41820.pdf> (explaining how the use of discourse analysis can identify bias in the language of judicial decisions in their descriptions specifically of domestic violence and its victims).

82. As of 2008, 27 states had adopted a presumption of some kind against awarding custody to batterers. *Child Custody and Domestic Violence by State*, AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC VIOLENCE, http://www.americanbar.org/groups/domestic_violence/resources/statutory_summary_charts.html.

83. Rebuttable presumption laws have been shown to have better outcomes if part of a broader statutory scheme. See Nancy K. D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601, 622 (2001); Morrill, Dai, Dunn, Sung & Smith, *supra* note 27, at 1091–94 (2005) (analyzing a survey that demonstrated that with the presumption more mothers were given custody, with structured visitation for the father, although that outcome was mitigated if there was also a “friendly parent” provision and presumption for joint custody).

the judge need only state that she has considered the domestic violence, but that custody goes to the father, without further explanation of the correlation between those two statements. Apparently, the legislative restraint was not sufficiently successful in countering the powerful combination of inherent biases and social norms. A more recent law goes further, requiring that judges articulate that correlation.⁸⁴ It remains to be seen if that law will achieve the protections against inherent biases as intended. Another promising legal reform suggestion is to change our standards when awarding custody by acknowledging prior history of caretaking, independent of or in combination with a consideration of gender.⁸⁵ Such a gender-neutral rule would simply recognize that, by the time a family arrives in court, there is usually one parent or caregiver who has had the primary role in the child's life, and making a presumption in favor of that parent or caregiver is more likely to reflect the best interests of the child.

The Task Force's projects do in part serve to create controls on the risks of implicit bias as well. Training can be given to dispel certain strongly held, yet misguided assumptions about gender; guidelines around the use of language can be implemented; and institutionalized monitoring of the outcomes of those efforts can also serve to correct for the slow creep of implicit bias. However, the success of such measures must be assessed through substantive case outcomes, not merely through systems reform assessments. Research on case outcomes, reasonableness and credibility determinations, and other judicial decisions, cross-cut with information regarding race, class, and sexual orientation, should be conducted regularly, and their results widely disseminated both within the judiciary and without.

E. Question Whether Women Perceive the Court System to be Legitimate

The courts have long known that the public perception of their legitimacy is essential to their ability to deliver justice.⁸⁶ There are typically two ways in

84. N.Y. DOM. REL. LAW § 240(1)(a) (Consol. 2008) (providing, in relevant part, “[w]here either party to an action concerning custody of or a right to visitation with a child alleges . . . that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party . . . and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section *and state on the record how such findings, facts and circumstances factored into the direction.* . . .”) (emphasis added).

85. See, e.g., Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GEND. 1, 47 (2008) (arguing in support of a “firm primary caretaker presumption within a best interest analysis”). This approach is also called “the approximation rule” since it aims to approximate post-family dissolution of the caretaking roles that were in place prior to dissolution. The American Law Institute also endorsed this approach in its PRINCIPLES OF LAW OF FAMILY DISSOLUTION, ANALYSIS AND RECOMMENDATIONS § 2.03.

86. See, e.g., Gregory C. Pingree, *Where Lies the Emperor's Robe? An Inquiry into the Problem of Judicial Legitimacy*, 86 OR. L. REV. 1095, 1102 (2007) (describing the significance of judicial legitimacy); Penny J. White, *Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy*, 74 MO. L. REV. 635, 636 (2009)

which litigants form opinions about the legitimacy of the courts: whether they agree with outcomes and/or whether they feel that they receive procedural fairness.⁸⁷ In fact, studies of criminal defendants have shown that their impression of the courts can be favorable, even if the ruling goes against them, if they feel that the court treated them equitably.⁸⁸ Therefore, perceptions of court bias may have even greater meaning for the system's legitimacy than unpopular decisions.

The Report stated that “the courts are viewed by a substantial group of our citizenry as a male-dominated institution disposed to discriminate against persons who are not part of its traditional constituency.”⁸⁹ What are the implications of fully half of the citizenry feeling that they receive discriminatory treatment in the courts? How does that perception alter utilization of the courts, or implementation of and adherence to court decisions?⁹⁰ Finally, how does the changed behavior based on that impression alter the substantive legal decisions delivered by the court?

Similar observations have been made in recent literature regarding communities of color, and *their* perception that the criminal justice system is a white-dominated institution disposed to discriminate against persons who are not part of its traditional constituency. In the context of race, the analysis suggests that when a significant constituency distrusts a system's ability to deliver justice, the credibility of the justice system as a whole is at risk.⁹¹ Could the same analysis be conducted regarding women's perception of the courts?

If the 1986 Report is still correct—that over half of our population views the

(observing that courts, “[l]ike any institution,” need public support and participation to maintain their institutional legitimacy). *See generally* Jeffrey Fagan, *Legitimacy and Criminal Justice*, 6 OHIO ST. J. CRIM. L. 123, 123 (2008) (discussing how a lack of legitimacy undercuts the criminal justice system).

87. White, *supra* note 67, at 637. I am unaware of any research that has asked non-litigant women about their perceptions of the legitimacy of the courts. Groups of women who have experienced the court system have been forming, but I don't believe it has entered many women's consciousness in the same way that the complexities of the criminal justice system's presence in the lives of persons of color are openly acknowledged. Low-income women are surely more generally familiar with likely court outcomes in family matters because they are disproportionately represented in the country's trial courts, but an inquiry as to whether women as a group have a different impression of the courts' legitimacy than men would be worth studying.

88. KEVIN BURKE & STEVE LEVEN, THE AMERICAN JUDGES ASSOCIATION, PROCEDURAL FAIRNESS: A KEY INGREDIENT IN PUBLIC SATISFACTION, 5 (2007); *See generally*, ALLAN E. LIND AND TOM TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCH. 117 (2000).

89. THE REPORT, *supra* note 1, at 18.

90. *See generally* AMY NEUSTEIN & MICHAEL LESHER, FROM MADNESS TO MUTINY: WHY MOTHERS ARE RUNNING FROM THE FAMILY COURTS – AND WHAT CAN BE DONE ABOUT IT (2005) (analyzing how the courts' treatment of cases in which mothers allege sexual abuse by their children's father affects both outcomes and women's use of the courts).

91. *See, e.g.*, Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 217 (2008) (reasoning that legitimacy “may be strongest when law and legal actors express moral and social norms that are widely shared by both dominant and subordinate social groups”).

court system as likely to discriminate—is that perception of illegitimacy contributing to a cyclical erosion in which women as a whole do not actively seek out the courts to address wrongs, and are unlikely to participate in the court system when called (as litigants, witnesses, or perhaps jurors), contributing to the court’s inability to in fact redress the wrongs suffered by women? We know that this outcome is present in certain areas. There is much research on the challenges faced by victims of domestic violence and sexual assault when choosing whether or not to enlist the court’s protection.⁹² We know less about whether a similar reluctance to trust the system is experienced by women in other jurisdictional areas, such as housing, commercial litigation, or other non-“gendered” criminal matters. And given that the courts have a monopoly on the regulation of certain family and criminal matters, even if women do find the system illegitimate, it is hard to think how they might change their behavior accordingly.

If the system has lost its credibility among women, what changes could we envision to restore confidence? If the court system has caused the erosion of trust, what can it do to restore that trust? These are complicated questions that must be grappled with if we hope to deliver legitimate justice to all. The original authors of the Task Force have my heartfelt appreciation for having the vision to ask the hard questions, and the determination to institutionalize an entity to work to find the answers. To follow faithfully in the footsteps of those determined jurists, we must push their questions to their logical conclusions.

V. CONCLUSION

As we look forward to further analyses that might lead us towards a system that treats all litigants equally and that creates law based on the presumption of equality, one of my favorite quotes from The Report comes to mind: “the laws of New York, no matter how enlightened, are not self-executing,” and “[j]udges, attorneys and court administrators must breathe life into legal reforms.”⁹³ As a policy-maker who has worked on legislative reform, I am often frustrated by the calls for new legislation in reaction to the most recent heinous crime. While some new laws are inevitably needed as society changes, often what is needed even more is the system’s consistent, predictable, and equal application and enforcement of existing laws. As The Report made clear, that is the step that is the most challenging, and, in many ways, the most important.

92. See generally Spohn and Tellis, *supra* note 73.

93. THE REPORT, *supra* note 1, at 17.

