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Introductory Essay: The Relevance of Gender Bias Studies

Blake D. Morant*

The work of this study is of abiding importance. It struck me that justice is a woman, but she's been notoriously blind to the subtle but deeply entrenched prejudices that are found in the legal system Gender issues in legal education are of profound importance to our society and no less critical, of course, is the study of gender bias matters which pervade the administration of justice.¹

I. Introduction

In October 2000, the Commonwealth of Virginia joined over thirty-nine other states in the completion of a sweeping gender bias study of its court system.² A diverse task force composed of twenty-three citizens³ appointed

* Professor of Law, Washington and Lee University School of Law. B.A., J.D., University of Virginia. I wish to express sincere gratitude to many at the Washington and Lee University School of Law who made the Colloquium – Gender Bias in the Courts of the Commonwealth of Virginia – and these essays a reality: to the talented and distinguished jurists who took the time to prepare comments and submit essays for this collection; to the Women Law Students Organization for their invaluable efforts to arrange the colloquium; to Professor W. Bradley Wendel for his insight on ethical issues implicated by gender bias in judicial decision making; and to Dean David Partlett, who readily and graciously provided the resources necessary to bring the Colloquium to Washington and Lee. I also appreciate the dedicated efforts of Ms. Alice Decker, my research assistant. Of course, completion of this Essay and the success of the Colloquium are due in large measure to the support of Lynn Fitch, my secretary, and Paulette J. Morant, my spouse.

1. Dean David E. Partlett, Washington and Lee University School of Law, Introductory Comments, Colloquium on the Study of Gender Bias in the Courts of the Commonwealth of Virginia, March 7, 2001.

2. For a listing of states that have completed gender bias studies of their respective court systems, see Myra C. Selby, *Examining Race and Gender Bias in the Courts: A Legacy of Indifference Or Opportunity?*, 32 IND. L. REV. 1167, 1183 app. (1999).

3. The members of Virginia's Gender Bias Task Force were The Honorable Elizabeth B. Lacy, Justice, Supreme Court of Virginia, Task Force Chair; Susan G. Anderson, National Organization for Women, and Virginia Polytechnic and State University; Susan Armstrong, Esq., Mays & Valentine; Miriam A. Bender, Esq., League of Women Voters; The Honorable Sam W. Coleman III, Judge, Court of Appeals of Virginia; Ms. Phyllis E. Galanti; Brian K. Jackson, Esq.,

by Chief Justice Henry Carrico of the Supreme Court of Virginia sought to discover the extent to which gender inequity affected various aspects of the judiciary. Completed near the end of the twentieth century, Virginia's study functions as a referendum on the reality of gender neutrality in the profession of law.⁴ This ambitious study's timing and exposure of the subtleties and perception of bias in the judicial system expand its significance beyond the jurisdiction of the Commonwealth.

This issue of the *Washington and Lee Law Review* contains a notable collection of Comments authored by four distinguished jurists who played major roles in this historic study of gender bias in the courts of the Commonwealth. These Comments memorialize remarks delivered in a live colloquium at the Washington and Lee University School of Law on March 7, 2001, and highlight significant observations and findings contained in the study. The topics covered by the jurists include the study's genesis and methodology; the effect of gender in matters of family law and domestic violence; possible disparate treatment of women and men in criminal sentencing and civil judgments; treatment of female lawyers, judges, and witnesses in various judicial procedures and interactive contexts; and the practical implications of gender in personnel hiring and promotion decisions.

General Counsel, Ukrop's Supermarkets, Inc.; Ms. Cynthia I. Jessup, Clerk, Fifteenth Judicial District; The Honorable Jerrauld C. Jones, Member, House of Delegates; C. Shireen Kirk, Esq., Flippen, Densmore, Morse, Rutherford & Jessee; Ms. Emily McCoy, Virginia National Organization for Women; The Honorable Tammy McElyea, Commonwealth Attorney, Lee County; Ms. Ruth G. Micklem, Director, Virginians Against Domestic Violence; The Honorable William C. Mims, Member, Senate of Virginia; Blake D. Morant, Professor of Law, Washington and Lee University School of Law; The Honorable Jane Marum Roush, Judge, Nineteenth Judicial Circuit; The Honorable Wilford Taylor, Jr., Judge, Eighth Judicial Circuit; Ms. Eva S. Teig, Senior Vice President, Virginia Power; The Honorable Wenda K. Travers, Judge, Thirty-First Judicial District; The Honorable Philip Trompeter, Judge, Twenty-Third Judicial District; Ms. Margaret B. Urquart, Chief Magistrate, First Judicial District; F. Blair Wimbush, Esq., General Solicitor, Norfolk Southern Corporation; and The Honorable Judy L. Worthington, Clerk, Twelfth Judicial Circuit.

4. I use the phrase "gender neutrality" to reference decision making and behavior that is totally devoid of considerations of gender. For various discussions of the concept of gender neutrality as an aspiration, but not truly reflective of reality, see Shannon N. Ball, Note, *Separate But Equal Is Unequal: The Argument Against an All-Women's Law School*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 171, 194 (2001) (noting gender neutrality as goal, yet recognizing effect of gender on perception); Nancy E. Dowd, *Women's, Men's and Children Inequalities: Some Reflections and Uncertainties*, S. CAL. REV. L. & WOMEN'S STUD. 587, 597 (1997) (discussing "the stark difference between the rhetoric of gender neutrality and the reality of gendered patterns of nurturing"); Thomas C. Grey, *Cover-Blindness, the 1998-99 Brennan Center Symposium Lecture*, 88 CAL. L. REV. 65, 69 (2000) (stating that "[c]ivil rights laws . . . were committed to requiring blindness to all gender or race differentiations"); Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 325 (1997) (arguing that "the influence of race and gender is so relentless" that gender or race neutrality "remains realistically out of reach").

As the sole legal academic on the Task Force, my scrutiny of this study has been both empirical and theoretical. Empiricism relates to gender bias's manifestation revealed objectively in data gleaned through surveys, court observations, focus groups, reviews of records and databases, and public hearings.⁵ Data alone, however, fails to demonstrate the totality of bias's influence on conduct and perceptions of fairness. Human behavior intersects with attitudes and beliefs, the precursors of bias. This basic theoretical tenet of human behavior, explained through social psychological principles, confirms bias's subtle and sometimes unavoidable effect on reasoning and perception.⁶

II. The Need to Study Possible Gender Bias in the Judiciary – The Subtlety and Perception of Bias as Problematic Norms

A fundamental question overshadows Virginia's gender bias study and the Comments from this Colloquium: why study the influence of gender in judicial administration and decision making? Perhaps preliminary answers to this query lie in ethical rules. Provisions of the American Bar Association's (ABA) Model Code implore judges to administer justice objectively and fairly, without regard to race or gender.⁷ Many federal and state jurisdictions endorse the ABA's prescriptions, having adopted rules that proscribe and hopefully discourage biased conduct by court officers.⁸ Thus, studies like that conducted in the Commonwealth gauge the effectiveness of these rules, raise

5. See GENDER BIAS IN THE COURTS OF THE COMMONWEALTH OF VIRGINIA – FINAL REPORT at ii, 8, 13 (2000) [hereinafter FINAL REPORT] (describing methodology of study).

6. See *infra* notes 26-39 and accompanying text (providing summary description of social cognition, which explains impact of bias on decision making and behavior).

7. Several provisions of the ABA's Model Code of Judicial Conduct mandate unbiased decision making. Canon 2C states that "[a] judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin." Canon 3B(5) requires a judge to

perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Judges must also ensure that other participants in court proceedings refrain from biased behavior. Canon 3B(6) proscribes that "[a] judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon [the categories in 3B(5)] against parties, witnesses, counsel or others. This Section does not preclude legitimate advocacy when [the prohibited categories] are issues in the proceeding."

8. Jennifer Gerarda Brown, *Sweeping Reform From Small Rules?: Anti-bias Canons as a Substitute For Heightened Scrutiny*, 85 MINN. L. REV. 363, 371 nn.23-24 (2000) (noting state ethical rules).

awareness of their import, and foster a more objective judiciary. Prescriptive rules alone, however, fail to justify completely the need to study the prevalence of gender bias.

Present day demographics and social constructs of the modern judiciary seemingly militate against the need for gender bias studies. To some, the study of gender bias as it relates to the plight of women in the judiciary has become a passé exercise of dubious utility.⁹ Objective data appears to buttress this belief. The number of women jurists has increased steadily in the last twenty years¹⁰ – roughly the period in which states have conducted gender bias studies.¹¹ Moreover, incidents of overt discrimination¹² against women in the judicial setting have seemingly diminished over time.¹³ Isolated data from the

9. For example, a male attorney in the Roanoke, Virginia area, during a Task Force sponsored public hearing on the Virginia study, asserted that, in his opinion, women attorneys in the Roanoke area perform well and need little assistance in matters of acceptance or bias. *See generally* FINAL REPORT, *supra* note 5, at 8-11 (discussing use of public hearings to gather data about gender bias in Virginia's courts).

10. *See* Debra Baker, *Plague in the Profession*, A.B.A. J., Sept. 2000, at 41 (stating that "[w]ith women now representing half of incoming law students and almost a third of all lawyers, it seems odd that such harassment in the legal profession continues to any degree"); Rebecca Korzec, *Working on the "Mommy-Track": Motherhood and Women Lawyers*, 8 HASTINGS WOMEN'S L.J. 117, 120-21 (1997) (noting that "[a]lthough the number of women lawyers has increased dramatically, the achievements of women measured in traditional terms are disappointing"); Debora L. Threedy, *Feminists and Contract Doctrine*, 32 IND. L. REV. 1247, 1247 (1999) (citing KATHARINE T. BARTLETT & ANGELA P. HARRIS, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 750-51 (2d ed. 1998) (asserting that "number of women law students, lawyers and judges has increased dramatically")). Baker further notes that "with the increased number of female lawyers has come a greater fear, at least among some men, that their position in the profession is being threatened." Baker, *supra*, at 41; *see also* Barbara Allen Babcock, *Feminist Lawyers*, 50 STAN. L. REV. 1689, 1703 (1998) (reviewing VIRGINIA DRACHMAN, *SISTERS IN THE LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY* (1998)) (noting "astonishing increase in the number of women lawyers").

11. *See supra* note 2 and accompanying text (noting the previous gender bias studies completed in other states).

12. *See* Susanne M. Browne, Note, *Due Process and Equal Protection Challenges to the Inadequate Response of the Police in Domestic Violence Situations*, 68 S. CAL. L. REV. 1295, 1315 (1995) (distinguishing overt and covert gender discrimination). *See generally* Heather Nelson, "Fatal in Fact?": *An Examination of the Viability of Affirmative Action for Women in the Post-Adarand Era*, 21 WOMEN'S RTS. L. REP. 151 (2000) (describing programs designed to remedy inequitable results of years of overt discrimination against women and minorities).

13. *See* CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 183 (2d ed. 1993) (noting increasingly larger recruiting pool among law firms); Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 260 (1998) (noting that overt discrimination against women has diminished significantly). *But see* Martha W. Barnett, *Women Practicing Law: Changes in Attitudes, Changes in Platitudes*, 42 FLA. L. REV. 209, 212-16, 218 (1990) (noting continued, albeit diminished, existence of gender

Virginia study lends some support to these views.¹⁴

The intuitive and subtle nature of bias, however, argues against the assumption of a completely objective judiciary. Despite more positive data suggesting that discrimination against women has diminished,¹⁵ the Virginia study strongly acknowledges the prevalence of subtle gender bias.¹⁶ In fact, testimony and statistical information from Virginia's study supports the notion that a number of men and women perceive some degree of gender bias on a subtle unconscious and, sometimes, conscious level.¹⁷ An excerpt of the testimony of a member of the Virginia Women's Attorney Association captures succinctly the complexity of subtle gender bias:

[Gender bias] has been reduced to some subtleties. As one of my colleagues mentioned, it's sometimes difficult to put a finger on it But it's those subtle gender biases that are sort of difficult to identify It's a feeling you get. And those feelings are manifested when you do have a client that believes possibly a male attorney would be better for them or a female attorney would be better for them, for whatever reason. Maybe the male judge will like my female attorney better. Maybe the male judge went to law school with my male attorney.¹⁸

The public's *perception* that decision making is biased also looms as a serious challenge for the judiciary. Virginia's study documents several areas of perceived bias or, at the least, a belief that judicial decision makers are insensitive to the issues of gender. A notable number of female family law attorneys, female prosecutors, and family service providers believe that judges fail to appreciate the dynamics of domestic abuse.¹⁹ Various constituent

barriers); John P. Heinz et al., *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735, 739 (1999) (finding that while overt discrimination has become less common, women continue to experience adverse treatment in form of structural barriers and covert expressions of hostility toward their presence in legal profession).

14. Testimony and surveys from the Virginia study suggest that overt discrimination against women seemingly exists in the rarest of instances, and that gender bias is less prevalent today than in past years. See FINAL REPORT, *supra* note 5, at 11 (noting decline of overt gender bias). But see *id.* at 35 (indicating judiciary's seeming bias against victims of domestic violence); *id.* at 47 (alluding that fathers face more obvious bias in decisions related to custody of young children).

15. See *supra* notes 12-15 and accompanying text (noting decrease of overt gender discrimination).

16. See FINAL REPORT, *supra* note 5, at 97-98 (noting continuing problem of gender bias).

17. *Id.* at 15, 19, 60 (noting subtle gender bias in certain family law matters, court dynamics, and criminal sentencing).

18. *Id.* at 20.

19. See *id.* at 34 n.28 (articulating perception that judges do not appreciate dynamic of domestic violence).

groups, including fathers and family law attorneys, think that judges discriminate against men in child custody, visitation, and support decisions.²⁰

Both the manifestation of unconscious or subtle bias and the perception that it exists potentially compromise judicial integrity and undermine public confidence in the judicial system.²¹ Few would argue that overtly biased behavior demands affirmative efforts that sanction the perpetrator and discourage future, similar conduct. But if true judicial objectivity remains a universal goal, overt behavior cannot operate as the sole trigger for the implementation of bias reduction measures.²² The perception of bias or its subtle manifestation compels affirmative action, such as periodic studies of the court system, to ensure the judiciary's continued viability.²³

Substantiation of subtle or unconscious bias, however, remains problematic.²⁴ It is difficult to document the prevalence of biased attitudes without discernable proof. This, in turn, prompts outright denial of bias or a reluctance to take proactive action to minimize its possible effects.²⁵ Perhaps no simple, definitive methodology can confirm bias's unconscious operation. Social psychologists, however, verify biased behavior as a natural cognitive function. As summarily presented below, psychological principles establish the nexus between the natural function of human decision making and resultant biased conduct.

20. See *id.* at 48-49 (noting male perception of male-based discrimination). For more on the public's perception of bias in the Virginia judiciary, see *infra* note 23 and accompanying text.

21. See Brown, *supra* note 8, at 441 (quoting Texas Judicial Conduct Commission's finding that biased statements of judges lessen public confidence in judiciary and diminish judicial integrity).

22. For more regarding bias reduction, see *infra* note 39 and accompanying text.

23. Gender and racial bias studies conducted in other jurisdictions also document the public's perception of bias, regardless of the lack of documented manifestation of biased behavior. See FINAL REPORT, *supra* note 5, at 53 (indicating that state task forces struggle with perception versus reality of bias and concluding that "perceptions of bias threaten a court system that stands for fairness"); see also *Commission on Gender, Commission on Race & Ethnicity, Report of the Third Circuit Task Force on Equal Treatment in the Courts*, 42 VILL. L. REV. 1355, 1380, 1506 (1997) (noting on-going duty of courts to reduce perceptions of unequal treatment); Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUDS. 1, 53 (1996) (discussing perception of gender bias).

24. See *Castellano v. Linden Bd. of Educ.*, 400 A.2d 1182, 1188-89 (N.J. 1979) (Handler, J., concurring and dissenting) (noting that discrimination often goes unremedied given difficulty of detection).

25. For more regarding the substantiation of bias and its effects, see Blake D. Morant, *Law, Literature, and Contract: An Essay in Realism*, 4 MICH. J. RACE & L. 1, 25 (1998) (noting evidence of bias and perception in consumer context).

III. Social Cognition Substantiates the Existence of Bias in Decision Making

The study of bias and its resultant effect on decision making and perception require a rudimentary understanding of the cognitive processes inherent in human behavior. While anecdotal evidence suggests that individuals may rely upon attitudes and preformed beliefs in their decision making processes,²⁶ social scientists provide a more compelling methodology that confirms the reality of this conduct. Social psychologists, who often study the influences of perception on human behavior, label this phenomenon social cognition.²⁷ Pursuant to this theory, individuals, as a natural cognitive process, utilize mental shortcuts to process information. This is a natural occurrence. A plethora of information often bombards individuals and, consequently, compels the use of abbreviated mechanisms for individuals to process this data efficiently.²⁸ Such mechanisms often include categorizations²⁹ or stereotypes, the mental shortcuts that speed cognitive processes.³⁰ The Virginia study provides an example of how individuals can be stereotyped in the judicial system. In the following excerpt of testimony from one of the Task Force's public hearings, the witness notes her confrontation with gender and racial stereotypes as she functions in the court system:

In terms of how women attorneys or litigants are treated in the court, for the most part, I honestly believe that people try to be fair. They try to be

26. See FINAL REPORT, *supra* note 5, at 15, 48 (reporting testimony of custodial fathers and family law attorney surveys indicating that certain judges exhibited preference for mother as custodial parent of young children).

27. See ELLIOT ARONSON, *THE SOCIAL ANIMAL* 117-20 (7th ed. 1995) (describing effect of social cognition). See generally Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 419 (1997) (discussing cognitive bias among lawyers).

28. See ARONSON, *supra* note 27, at 117-20 (analyzing behavior as partly function of environmental factors). See generally Hal R. Arkes, *Costs and Benefits of Judgment Errors: Implications for Debiasing*, 110 PSYCHOL. BULL. 486 (1991) (noting efficiency in streamlining informational processes, which ultimately affects behavior).

29. See ARONSON, *supra* note 27, at 141-45 (explaining that categorization into groups leads to stereotype formation that then influences expectation).

30. Stereotypes consist of acquired or learned beliefs, generally associated with distinct groups. See Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 6 (1989) (distinguishing between automatic and controlled human information processing); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 710 (1990) (discussing development of racial stereotypes); Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 489 (1990) (discussing stereotyping process).

fair. They try to do well. You still get subtle biases that are based on people's politeness, their basic perception of how – who people are. You know, I'm a black woman. People think, oh, you must be the litigant. Well no, I'm really the attorney. I'm here today to represent someone.³¹

The social psychological literature calls the use of cognitive shortcuts such as stereotypes "heuristics." This process happens naturally and unknowingly as an impulsive response mechanism. It functions to speed the processing of information.³² Left unchecked, however, the use of heuristics may contribute to errors in reasoning and judgment.³³

If implemented by decision makers, heuristics can result in the employment of biases and prejudices.³⁴ Because these influences generally function tacitly or unconsciously,³⁵ they may distort judgment. This is particularly true if the decision maker fails to recognize distinctions between the perceived individual and the group to which that individual belongs.³⁶ This behavior

31. FINAL REPORT, *supra* note 5, at 23.

32. See ARONSON, *supra* note 27, at 135-40 (1995) (discussing judgment heuristics); Steven J. Sherman & Eric Corty, *Cognitive Heuristics*, in HANDBOOK OF SOCIAL COGNITION, 189, 193-95 (Robert S. Wyer, Jr. & Thomas K. Srull eds., 1984) (discussing judgmental heuristics as tool for processing information). See generally JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1974).

33. See ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE 53-110 (1999) (discussing problem of relying on heuristics rather than on statistical rules).

34. See Jody Armour, *Stereotypes and Prejudice: Helping Legal Decision-makers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 742 (1995) (noting difference between having knowledge of stereotype and believing stereotype).

35. See John A. Bargh, *Auto-Motives: Preconscious Determinants of Social Interaction*, in 2 HANDBOOK OF MOTIVATION AND COGNITION: FOUNDATIONS OF SOCIAL BEHAVIOR 93, 94 (E. Tory Higgins & Richard M. Sorrentino eds., 1990) (discussing "unintentional, preconscious activation of social stereotypes"); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 472 (1998) (discussing unconscious role race and gender may play in decision of juror). For more regarding unconscious bias, see also Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 983-85 (1993) (noting frequency of unconscious racial bias); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136 (1997) (noting existence of discrimination behind facially-neutral statutes). See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing problems with discrimination/purpose doctrine). Psychology Professors Anthony Greenwald of the University of Washington and Mahzarin Banaji of Yale University have released results from their Implicit Association Test that reveal that ninety to ninety-five percent of people who took the test have unconscious racial bias. See *Roots of Racism Revealed*, at http://abcnews.go.com/sections/living/InYourHead/allinyourhead_11.html (last visited Oct. 26, 2001).

36. Langevoort & Rasmussen, *supra* note 27, at 420 n.4; see also D.F. Wyatt & D.T. Campbell, *On the Liability of Stereotype or Hypothesis*, 46 J. ABNORMAL & SOC. PSYCH. 496,

often becomes the catalyst for bias by the decision maker who is unaware of these influences.³⁷

Remedies for bias, conscious or unconscious, require conscientiousness-raising techniques that alert individuals of their potential cognitive flaws. Awareness then prompts possible rejection of bias and thwarts its negative influence on decision making. Bias reduction efforts are compulsory elements in any strategy to minimize the effects of biased behavior.³⁸ Consistent education on the cognitive operation of heuristical behavior raises awareness of bias and becomes a staple in any strategy to reduce its negative effects. Virginia's study acknowledges education as a critical component of its gender bias reduction strategy, stating that "[t]he most effective means to eliminate gender bias in the court system is continual education of lawyers, judges, and court personnel."³⁹

IV. The Study of Gender Bias to Ensure Reasoned Decision Making

Courts administer justice.⁴⁰ That function generally requires decision-makers to apply legal rules to disparate situations.⁴¹ The intended results are

498 (1951) (discussing results of experiment involving altered perceptions as result of stereotyping). For an example of distorted judgment due to heuristics, see *supra* note 31 and accompanying text (noting possible erroneous categorization of African-American, female attorney).

37. Because of the limited scope of this Essay, the description of heuristics herein is purposefully brief. The goal is to provide some basic understanding of the social psychological implications of decisionmaking. For a detailed explanation of heuristics, see generally ABC RESEARCH GROUP, *SIMPLE HEURISTICS THAT MAKE US SMART* (Gerd Gigerenzer & Peter Todd eds., 1999) (presenting different viewpoints on heuristics).

38. See Armour, *supra* note 34, at 757-60 (endorsing tactics that prompt individuals to employ nonprejudicial beliefs in their thought processes).

39. FINAL REPORT, *supra* note 5, at 97. For the specific areas where the Virginia Task Force recommends the establishment or enhancement of educational programs to raise awareness of gender bias's tacit operation, see *id.* at 25 (suggesting education committee for judges); *id.* at 26 (requesting enhancement of Virginia Continuing Legal Education); *id.* at 39-40 (requesting judicial education on domestic abuse and enforcement of protective orders); *id.* at 44-45 (requiring education courses regarding rules for access to marital funds and award of attorney's fees); *id.* at 51 (advocating education programs regarding stereotypes in child custody decisions); *id.* at 55 (recommending programs that educate judges on spousal support guidelines and deviations therefrom); *id.* at 79 (requesting programs that instruct on use of gender-neutral language); and *id.* at 94 (supplementing new judges' course to include awareness of gender bias issues).

40. See *Peralta v. United States*, 70 U.S. (3 Wall.) 434, 439 (1865) (noting necessity of applying "fixed rules" in administration of justice).

41. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 765 (1999) (describing historically requirement that courts apply constitution as law to cases); Scott Fruehwald, *Pragmatic Textualism and the Limits of Statutory Interpretation: Dale v. Boy Scouts of America*, 35 WAKE FOREST L. REV. 973, 1001-02 (2000) (noting value of pragmatic textualism as mechanism which fosters courts' traditional role of applying law to case facts).

objective and reasoned decisions.⁴² Yet human decision making, which usually intersects with attitudes and beliefs, can sometimes defy objectivity.

Legal decision making can be an unpredictable exercise. Legal rules, those who apply and administer those rules, and individuals subject to those rules form a complex matrix of divergent interests and often diverse beliefs. Conflicting beliefs and biases of those in that matrix can impact or distort seemingly impartial decisions. Thus, systemic gender and racial bias studies, like those conducted in Virginia and other states,⁴³ constitute critical tools that reveal the influence of bias and prompt implementation of measures that counteract its influence on judicial decision making.

Bias, whether it be gender or any other form,⁴⁴ strikes at the very heart of reasoned decision making. Virginia's study and the Comments that follow this Essay reveal a stark reality: despite the inadvertence of overt discriminatory behavior or actual proof of biased conduct,⁴⁵ the subtle remnants of bias⁴⁶ and its perceived operation in judicial decision making⁴⁷ remain formidable challenges for Virginia and other jurisdictions. The elimination of gender bias or any other form of bias becomes a difficult, yet perpetual goal. It also forms the predicate for the continual study of possible biased conduct of members of the judiciary.

A compelling feature of the gender bias study in Virginia is its uncanny timing. As previously noted, history reveals that incidents of overt bias were more numerous in past years.⁴⁸ Earlier studies have documented the influences of bias and have led to efforts designed to counter its negative effects.⁴⁹ But

42. Courts generally administer justice through the implementation of fixed rules, coupled with experience and wisdom necessary to foster a just result. *See generally* Quirk v. Rooney, 62 P. 825 (Cal. 1900) (applying res judicata); Gentile Bros. Co. v. Florida Indus. Comm'n, 10 So. 2d 568 (Fla. 1942) (defining statutory language via common law principles); Davis v. J.C. Nichols Co., 761 S.W.2d 735 (Mo. Ct. App. 1988) (emphasizing authority of ordinance).

43. *See supra* note 2 and accompanying text (noting prevalence of studies).

44. Bias can be based on race as well as gender. For states which have studied the prevalence of racial bias in their respective court systems, see Selby, *supra* note 2, app. at 1183; *see also* William B. Rubenstein, *Queer Studies II: Some Reflections on the Study of Sexual Orientation Bias in the Legal Profession*, 8 U.C.L.A. WOMEN'S L.J. 379, 381-2 (1998) (discussing development of racial, gender, and sexual orientation bias studies within jurisdictions).

45. *See supra* notes 12-14 and accompanying text (describing decline of overt discrimination).

46. *See supra* notes 16-18 and accompanying text (noting continued presence of subtle bias).

47. *See supra* notes 19-20 and accompanying text (describing perception of judicial bias).

48. *See supra* notes 13-14 and accompanying text (noting historically higher incidences of overt bias).

49. For the cites to gender and racial bias studies performed by states other than Virginia, see Selby, *supra* note 2, app. at 1183.

those studies, conducted during periods of changing demographics and cultural adjustments in the legal profession,⁵⁰ seemingly had a greater sense of contextual urgency. The more blatantly discriminatory atmosphere for women who worked in the judiciary years ago easily justified concerted efforts to stem biased behavior.⁵¹ The Task Force in Virginia, on the other hand, performed its study in a climate that was less hostile to women.⁵² That context might have fueled the argument that the judiciary need not implement measures to ensure gender neutrality.

Yet Virginia's gender bias study, performed during the dawn of the new millennium, becomes an important barometer of genuine progress toward judicial objectivity. From the inception of gender bias studies in the 1980s to Virginia's completed study in the year 2000, pundits can evaluate both the reality of a gender-neutral judiciary and the public's perception of judicial fairness. The Virginia study, and the Comments that follow, become important contemporary commentaries on the inescapable intersection between human cognition and the application of law.

In her Comment, Justice Elizabeth B. Lacy provides the contextual background for the study of gender bias in Virginia's court system. She notes the methodology employed to perform the study and the organizational framework for the task force and staff members who conducted the study. Her Comment also provides a historical description of the objective for the study, which is to examine what gender bias is and to discover its operations both overtly and subtly.

Perhaps the most polemic portion of the Virginia study included the examination of gender bias in matters of domestic relations and domestic violence. Judge Philip Trompeter highlights the most exemplary findings of bias within certain aspects of domestic relations matters such as divorce, child support, and child custody. Judge Trompeter's Comment further describes the manifestation of bias as it relates to the judiciary's handling of domestic violence matters. His Comment portrays the subtle nature of gender bias, its more obvious manifestations as it relates to child custody, and the difficult pathology of domestic violence.

Judge Jane Marum Roush then provides an overview of the manifestation of bias in various substantive law matters related to the judiciary's sentencing of defendants and the authoring and interpretation of criminal laws that relate

50. *See supra* notes 10-12 and accompanying text (noting steady increase of women jurists).

51. *See supra* notes 10-13 and accompanying text (describing changing demographics of legal profession in context of overt bias).

52. *See supra* note 10 and accompanying text (noting increase in number of women in various roles in judiciary).

to parties of different genders. Most notable in Judge Roush's Comment is the effect of the gender bias study on matters of statutory law: she highlights the Virginia legislature's response to problems uncovered by the study.

In the final Comment, Judge Sam Coleman III pragmatically focuses on the operation of gender bias in various matters related to the courts' physical facilities and general operation. He highlights the treatment of women as both attorneys and litigants. It is important to note here the subtlety of bias in the judiciary's treatment of court participants of different genders. Judge Coleman particularly highlights some women's disparate treatment, which is perceived by women, but not by male members of the judiciary. He also reveals the subtlety of gender bias in such matters as physical space and the availability of comfort facilities for women who conduct business in the courthouse.

As you read and contemplate the following Comments, recall the recurrent postulate contained in this Essay. Tacit recognition of the gender of those who participate in court proceedings or operations *may* consciously or unconsciously lead to biased decision making. Gender consciousness also impacts the public's perception of the fairness of those decisions. Raised awareness of this phenomenon of human behavior, and the need to counter its effects, will be the thematic legacies of this insightful collection of Comments.