

Boxes, Survival and Our Better Angels

James Drennan
August, 2017

It's an old story

- (39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, **except by the lawful judgment of his equals or by the law of the land.**
- + (40) To no one will we sell, to no one **deny or delay right or justice.**

What is this?

“To protect and preserve the rights and liberties of all the people, as guaranteed by the Constitutions and laws of the United States and **North Carolina**, by providing a fair, independent, and accessible forum for the just, timely, and economical resolution of their legal affairs”

And this?

“Ask citizens what they want from a court system and an immediate answer is likely to be “fairness.” A system is fair when cases are decided based on the law as applied to the relevant facts. Bias arising from characteristics such as wealth, social class, ethnicity, race, religion, gender, and political affiliation have no place in a fair decision.”

Why This Matters



It's about "GOOD PEOPLE"



At Their Core, Courts

- Confer benefits
- Impose burdens
- Set ground rules

Roger Warren

outcome

- Things that matter
 - Voice
 - Neutrality
 - Respect
 - Trustworthiness



And its universal



Many of Your Decisions As Advocate Are Discretionary

Between “have to”



AND

Can't



Questions For A Judge

Do I find some people them “worthy” and not others similarly situated?

Do any of my interactions discourage a person from finding me trustworthy? (*body language, facial expressions*)

Will I accept a greater punishment for some? (*perceived dangerousness*)

Does unconventional appearance affect my perception or actions toward a person?

Do I take a risk for this person?

Do I believe the person?

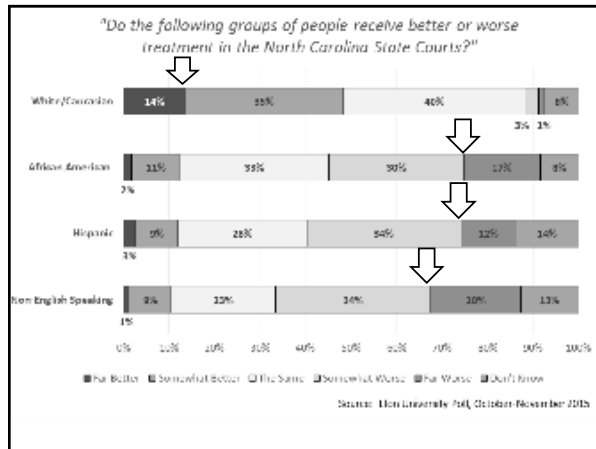
What People Are Saying or Thinking

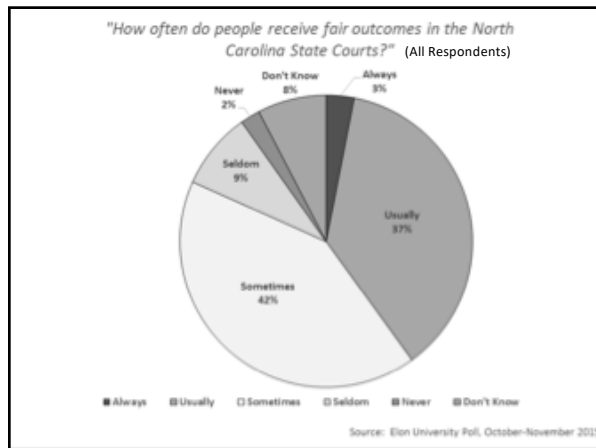
For example, many of our anti-discrimination policies focus on finding the bad apples who are explicitly prejudiced. In fact, the serious discrimination is implicit, subtle and nearly universal. Both blacks and whites subtly try to get a white partner when asked to team up to do an intellectually difficult task. In computer shooting simulations, both black and white participants were more likely to think black figures were armed. In emergency rooms, whites are pervasively given stronger painkillers than blacks or Hispanics. Clearly, we should spend more effort rigging situations to reduce universal, unconscious racism.

David Brooks,
New York Times
January 11, 2013

Perceptions of Fairness

- In a 2016 Gallup Survey 46% of whites believed that blacks are treated less fairly in a variety of community interactions. That was up from 37% who had that perception in 2004.
- In that same period, the percentage of blacks who had that perception remained largely unchanged at 84%.
- Implications for the courts? Besides racial groups, what other clusters of people might have perceptions and/or the reality of being treated unfairly?







"Maybe we now realize the way a racial bias can infect us even when we don't realize," he said. "So that we are guarding against not racial slurs but also going against the subtle impulse to call Johnny back for a job interview but not Jamal. Barack Obama, June 26, 2015



"Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract the *unconscious prejudices* and disguised animus that escape easy classification as disparate treatment."
TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS V INCLUSIVE COMMUNITIES PROJECT, INC., ET AL, p. 17
July 27, 2015.

And in Art: From the Whitney 2017 Exhibition of Modern American Art



From the *What* To the *How*



Areas of Research Into Decision Making--Heuristics

- Anchoring
- Confirmation Bias
- Recency
- Availability
- Stereotypes and classification
 - Employment
 - Police shootings
 - Public defenders caseloads
 - Sentencing
 - Medical treatments

How We Think Matters



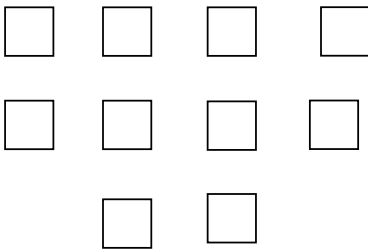
“The normal state of your mind is that you have intuitive feelings and opinions about almost everything that comes your way. You like or dislike people long before you know much about them; you trust or distrust strangers without knowing why. . .

Daniel Kahneman

Automatic Processing and Interference:
Read the **Word**

BLUE BLACK GREEN
YELLOW RED BLUE
RED BLACK GREEN

Say the Color of the Square



Automatic Processing and Interference:
Say the **Color** of the Word

BLACK BLACK GREEN
YELLOW BLUE RED
RED COLORS! BLUE

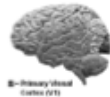
What You See Is Not All There IS



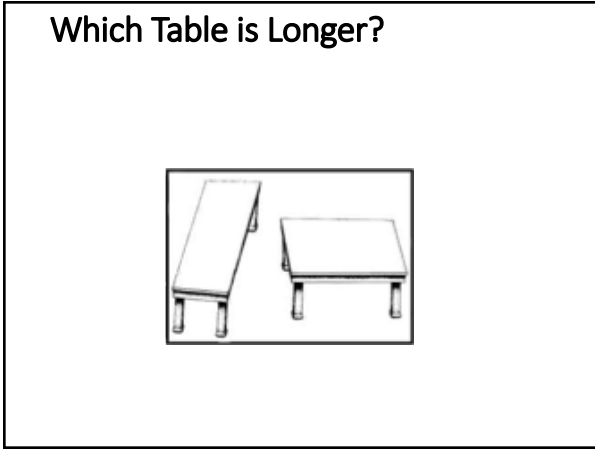
You Don't See With Your Eyes, Only



PLUS









Can You Read This?

I cannoat blveiee l aulaclyt uesdnatnrd waht l am rdanieg. Aoccdnrig to rscheearch at Cmabrigde Uinervtisy, it deosn't mttae in waht oredr the ltteers in a wrod are, the olny iprmoatnt tihng is taht the frist and lsat ltteer be in the rghit pclae. The rset can be a taotl mses and you can sitll raed it wouthit a porbelm. Tihs is bcuseae the huamn mnid deos not raed ervey lteter by istlef, but the wrod as a wlohe.

You Don't See With Your Eyes, Only



PLUS



And You Always FILL IN THE GAPS



Survival Is Job One, So Give Me Some Boxes





Two Problems With Automatic Thinking

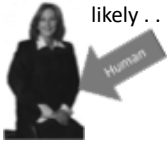
- Classification, association, and stereotype

- The quicker you decide, the more automatic it is

- So what we flavor our classification system with matters

The Dilemma

- We all have human brains, hard-wired to make rapid decisions making survival more likely . . .



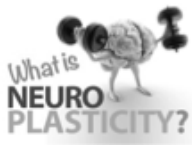
- . . . But fairness requires a brain more concerned with accuracy than survival.



You have no control over what your brain does first.

You have a choice about what happens next.

It's not Hopeless



We are what we repeatedly do.
-Aristotle

Don't have a Dream



Consciously take note of differences (and similarities, too). ↓

Increased risk of in-group bias

Increased risk of out-group bias

Us and Them

When faced with inconsistent information


- We sometimes revise our beliefs

-BUT-


- We are more likely to create a subgroup category (an "exception") thus leaving our belief intact




Think about your thinking.
Make a conscious effort --engage in an intentional thought process.



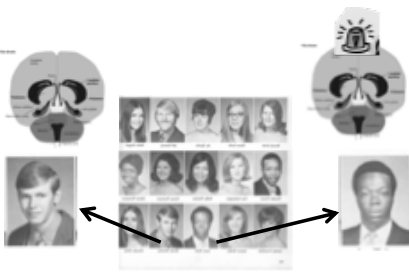
The illustration shows a profile of a human head with gears inside, representing thought. Three thought bubbles are connected to the brain by dashed lines, symbolizing the process of thinking.



African American or Bad European American or Good



Implicit Association Test
www.implicit.harvard.edu/implicit



The diagram illustrates the structure of an Implicit Association Test. It features two brain icons at the top, each with a different symbol (a scale of justice and a crown). Below the brains are two columns of faces: the left column shows a white male face and a grid of diverse faces; the right column shows a black male face and a grid of diverse faces. Arrows point from the brain icons to the corresponding columns of faces.

Consciously confront stereotypes.

- IAT www.implicit.harvard.edu/implicit
- “Reverse” the parties?
- Seek images and relationships that defy stereotypes

Take your time.

- Are interactions with some groups or types of people usually longer? Shorter? Why?



When it matters, avoid autopilot

Hurried

Tired

Upset

Stressed



Angry

Good Habits Help

Develop capacity to focus attention

Avoid decisional fatigue.

Resist shortcuts



Make a conscious effort to wait until all facts are present before judging; i.e. do what we tell jurors to do every day



Maximize accountability.

- Ask a colleague to observe
- Get staff input
- Look for patterns in your decisions.



Keep Learning







Engage in constant vigilance.

People with low-prejudiced beliefs are assisted by reminding themselves or being reminded by others of those beliefs.



Best Individual Advice

- Intention
- Attention
- Effort
- Take your time
- Recognize that we all need to improve

*Credit to Professor Jack Glaser, Goldman School of Public Policy, UC Berkeley.

It's Also a System Issue

- Acknowledge the importance of minimizing bias as an institutional goal
- Educate
- Think about processes
- Structure decisions—e.g., sentencing, bonds
- Create checklists
- Promote an inclusive environment
- Ensure diversity in appointments, images, etc. on system projects

It's Also A System Issue

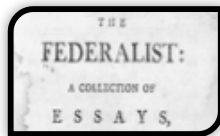
- Provide officials the resources (ex. time) to minimize automatic processing decisions in important matters
- Promote personal and systemic accountability
- Learn from other disciplines—medical review panels, mortality reviews, etc.
- Promote mentorships to provide honest feedback
- Develop measures and collect the data

To Repeat: It's not really new

- (39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, **except by the lawful judgment of his equals or by the law of the land.**
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Or Ever Finished

Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.



No. 51

May It Be So

'when again touched, as surely they will be, by the better angels of our nature.'



In other words, don't give



To people who deserve