# How a Representative Judiciary Ensures Judicial Legitimacy

Sybil L. Dunlop, Greene Espel PLLP Jenny Gassman-Pines, Greene Espel PLLP Lola Velazquez-Aguilu, Medtronic, Inc.

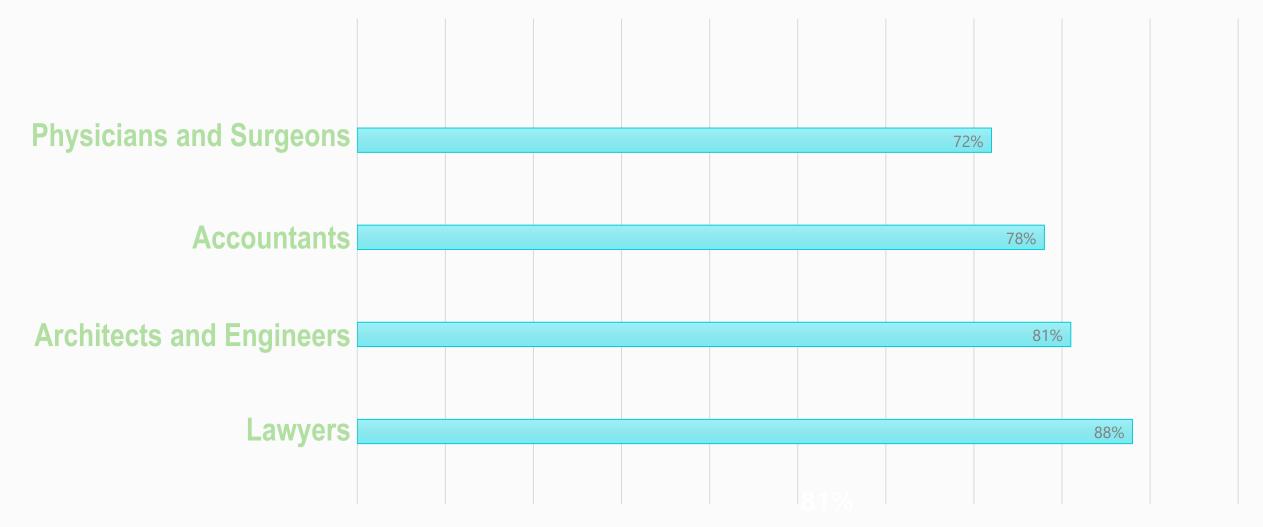
#### Agenda

- 1. Is the judiciary diverse (and why not)?
- 2. Does a representative judiciary increase legitimacy?
- 3. How can we improve judicial diversity?



Is our judiciary diverse (and why not)?

#### Law is the least racially diverse profession in the nation







#### **Explicit Bias:**

Labeling behavior as unconscious that could just as easily be described as explicit means much of contemporary discrimination is likely to evade legal liability

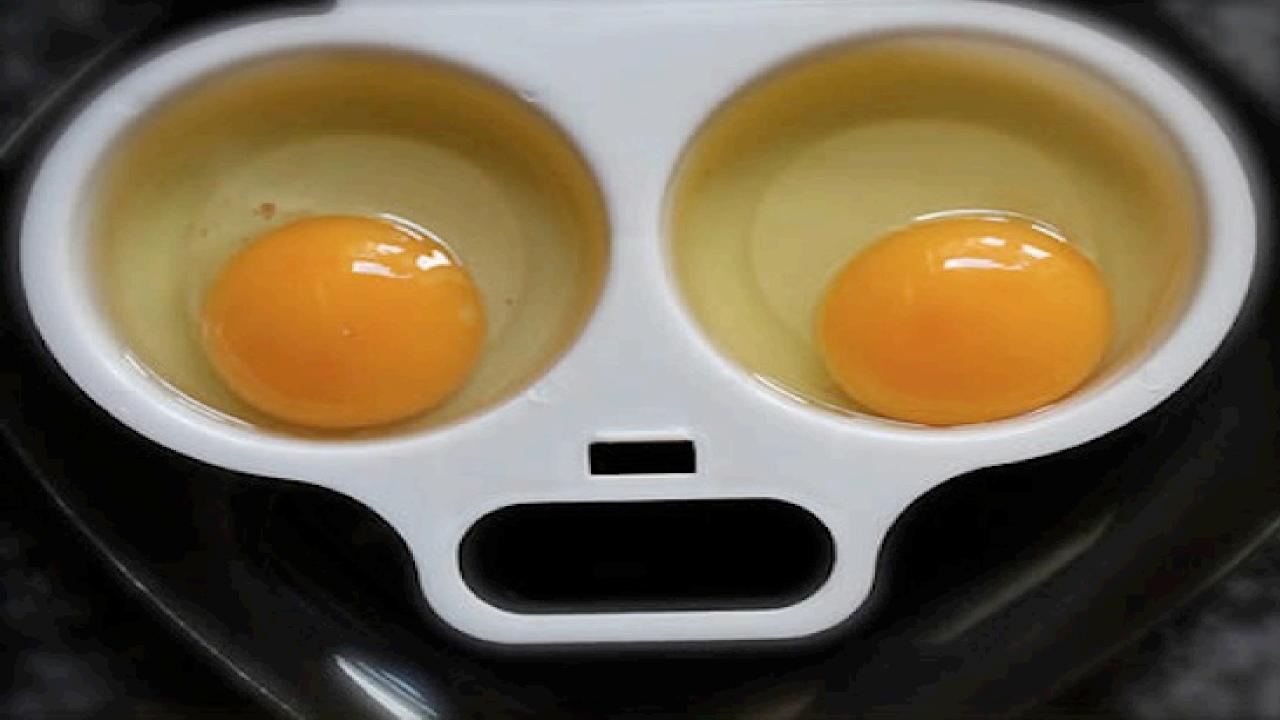
#### **Unconscious Bias:**

The bias in judgment and behavior that results from subtle cognitive processes that operate below conscious awareness and without intentional control

# Our brains play tricks on us













The color of a coffee mug can change the way coffee tastes.

# Is there a way to measure this?

#1	#2	#3
SLB	CFLTK	CFLTK
SPRND	HLMG	CFLTK
SLB	SPRND	SLB
SPRND	HLMG	CFLTK

#1	#2	#3
GREEN	BLUE	GREEN
RED	YELLOW	YELLOW
PURPLE	BLUE	RED
GREEN	RED	PURPLE

#1	#2	#3
RED	GREEN	YELLOW
BLUE	GREEN	BROWN
RED	YELLOW	BLUE
BROWN	BROWN	BLUE

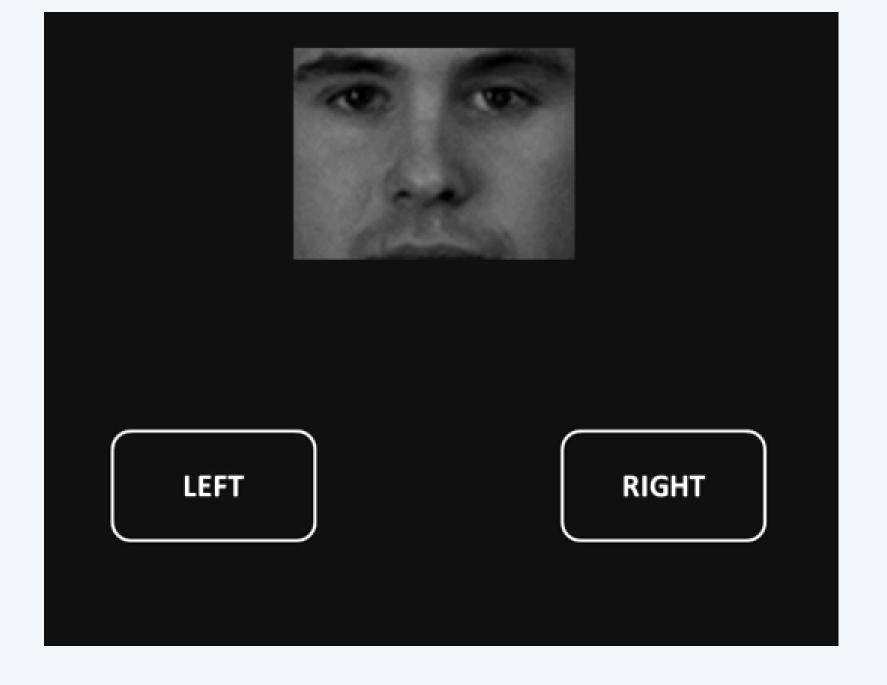


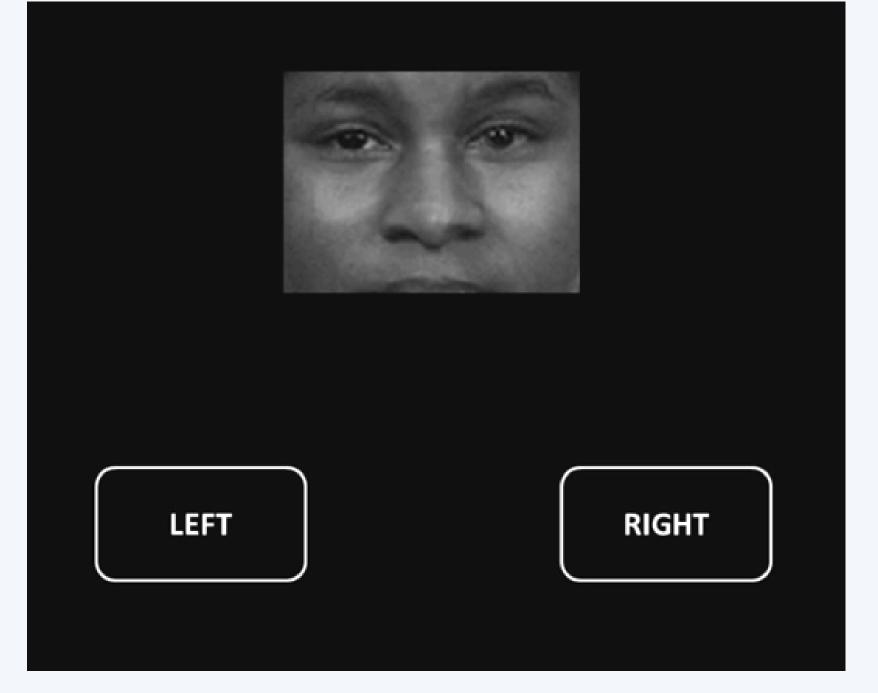
# Implicit Association Test

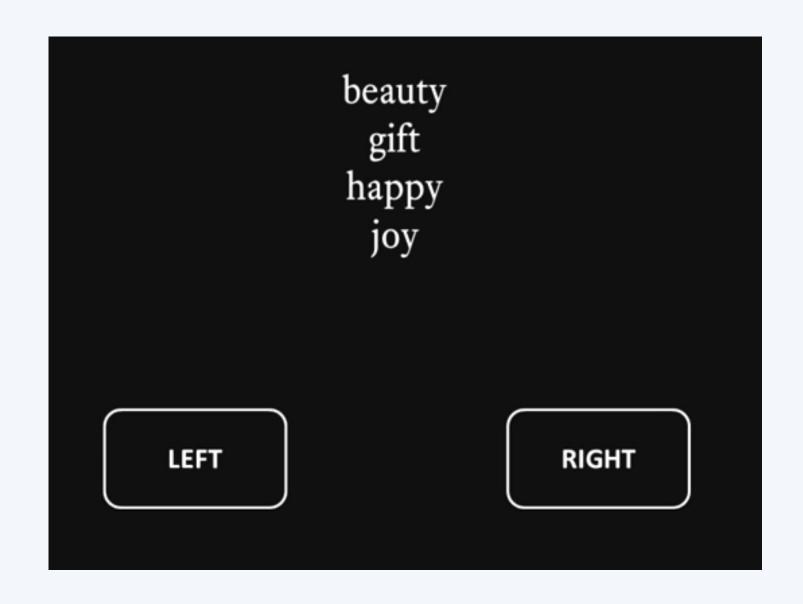
invented by A.G. Greenwald

LEFT

RIGHT





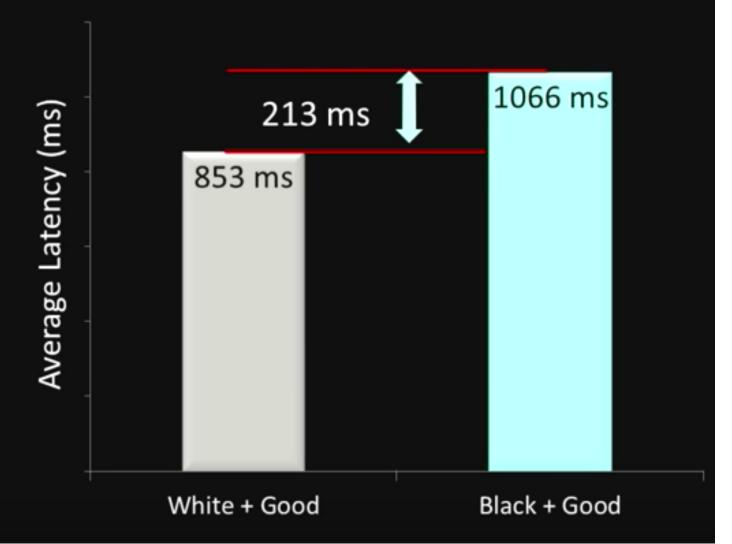








# Implicit Association Effect



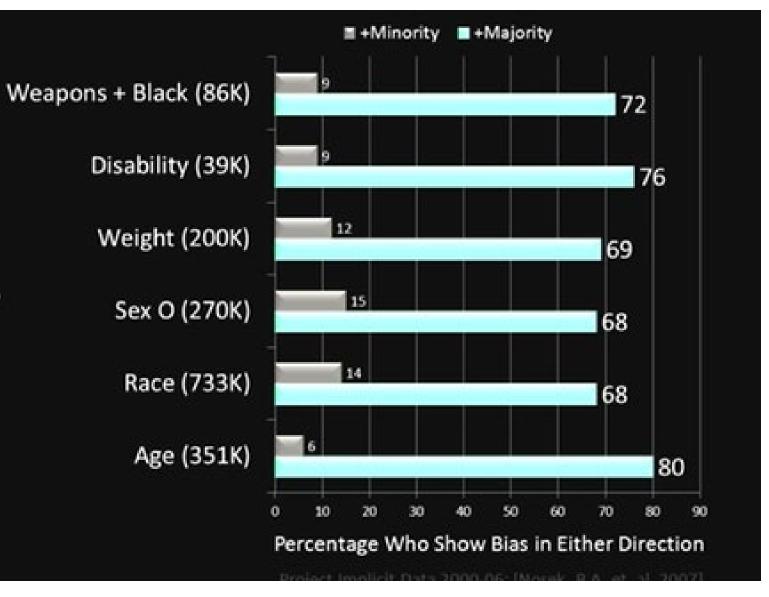


PROJECT IMPLICIT

B.A. Nosek

M.R. Banaji

A.G. Greenwald



# How did your presenter do?

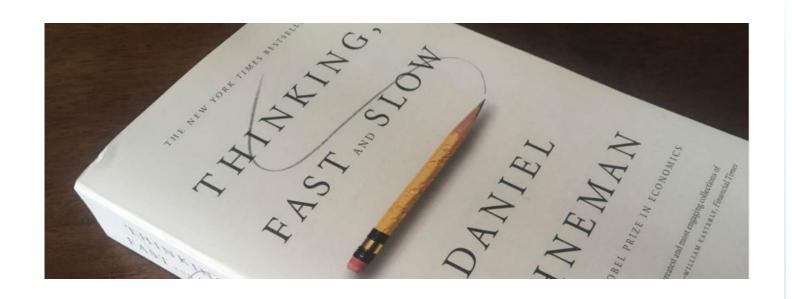
#### Here is your result:

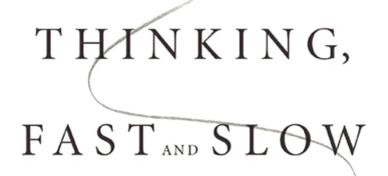
Your data suggest no automatic preference between Old people and Young people.

The sorting test you just took is called the Implicit Association Test (IAT). You categorized good and bad words with images of Black people and White people.

#### During the IAT you just completed:

Your responses suggested a slight automatic preference for White people over Black people.



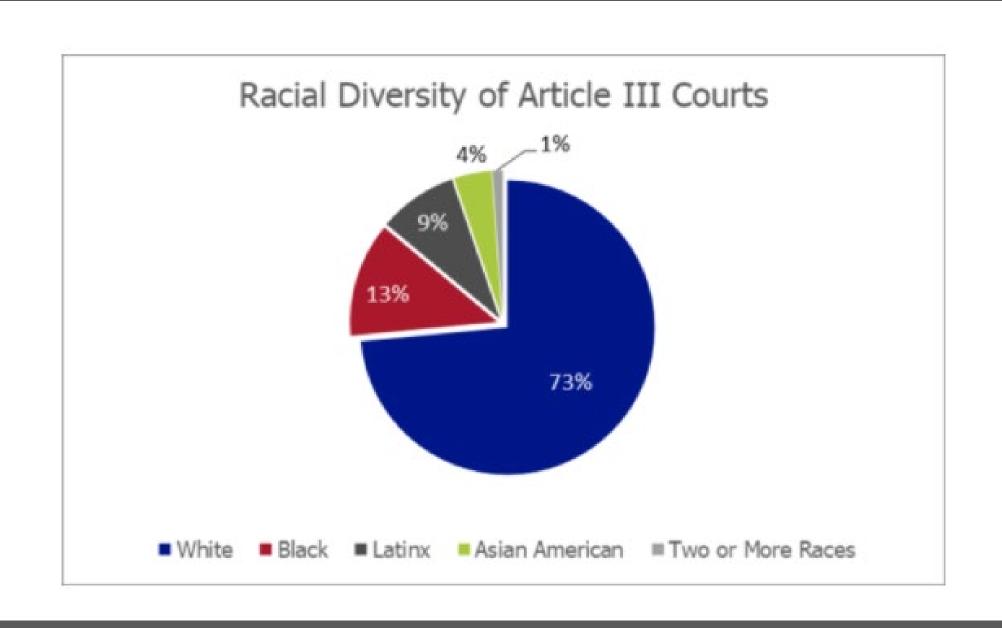




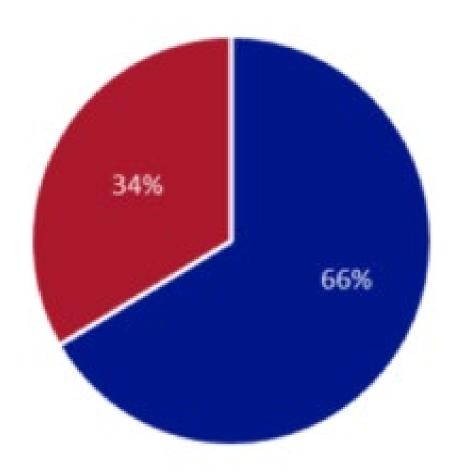
# DANIEL KAHNEMAN

WINNER OF THE NOBEL PRIZE IN ECONOMICS





## Gender Diversity of Article III Courts



### Why does it matter?

(a.k.a. does a representative judiciary ensure judicial legitimacy?)

In the Press, and speedily will be published, THE

#### FEDERALIST,

A Collection of Essays written in fa

By a Citizen of New-York.

Corrected by the Author, with Additions and Alterations.

This work will be printed on a fine Paper and good Type, in one bandsome Volume duo-decimo, and delivered so subscribers at the moderate price of one dollar. A few copies will be printed on superfine royal writing paper, price ten shillings.

No money required till delivery.

To render this work more complete, will be added, without any additional expence,

#### PHILO-PUBLIUS,

AND THE

Articles of the Convention,

The idea that diversity on the bench promotes public confidence in the legitimacy of the courts is as old as our nation.

"It is ESSENTIAL to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it . . . ."

# Modern scholars continue to assert similar positions.

"[D]iversity on the bench promotes public confidence in the legitimacy of the courts. It's not that a judge from lowa is biased in favor of lowa litigants. It's that if all the judges on the Circuit are from lowa, then Minnesota litigants or Arkansas litigants might lose confidence in the fairness of the court."

- Sherrilyn A. Ifill





What does the research tell us?





# Research suggests that public mistrust of the justice system breaks down along racial lines:

- 1995 nationwide poll shows that 66% of Black respondents think the justice system is racist, while only 37% of White respondents perceive bias.
- A poll by the ABA showed that 45% of White lawyers believe that less racial bias exists in the justice system than in the rest of society, while more than 90% of Black lawyers feel that racism in the justice system is either the same or greater than in other segments of society.



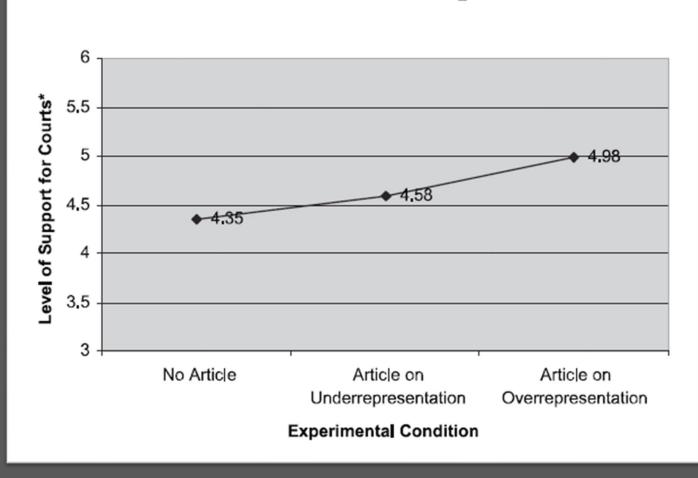
The Journal of Politics, Vol. 72, No. 1, January 2010, Pp. 90–104 © Southern Political Science Association, 2010

# Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the U.S. Courts

Nancy Scherer Wellesley College Brett Curry Georgia Southern University

## FIGURE 1 Levels of Diffuse Support by Experimental Condition

#### FIGURE 1a African American Respondents



## FIGURE 1 Levels of Diffuse Support by Experimental Condition



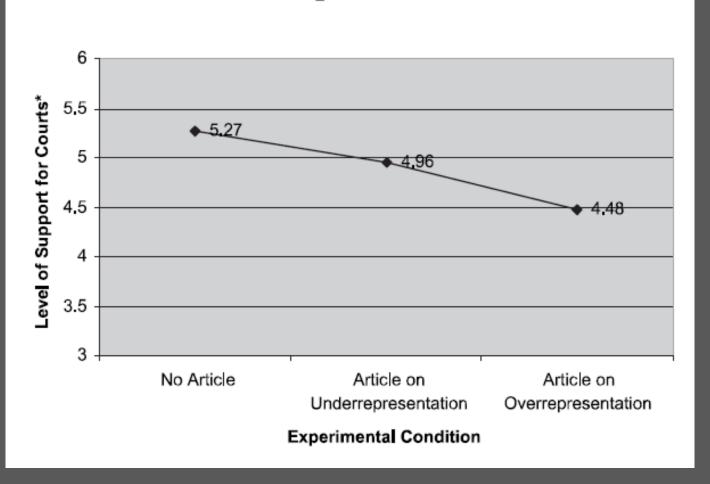
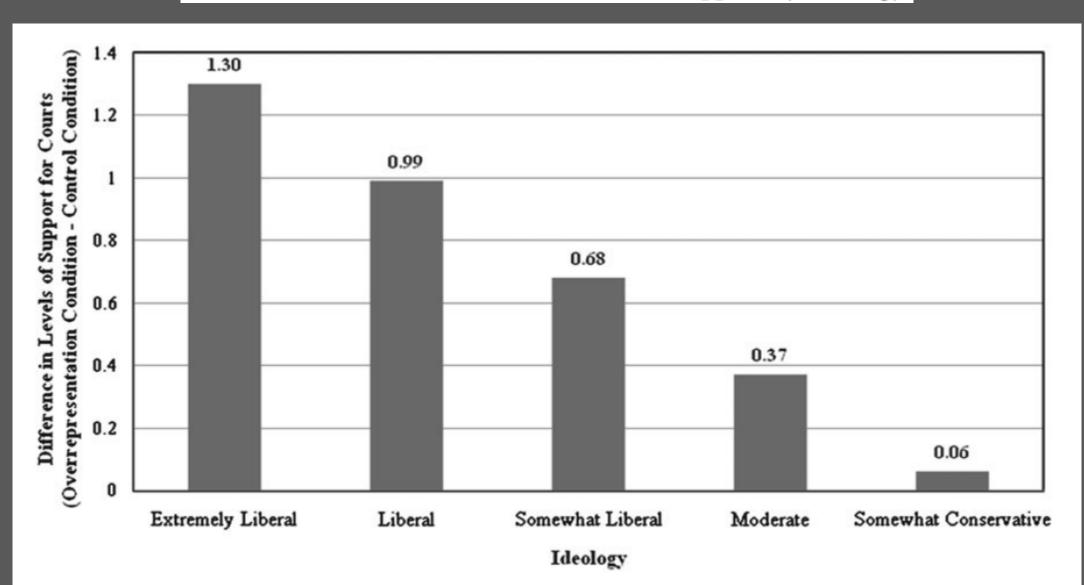


FIGURE 2 Differences in Levels of Diffuse Support by Ideology







#### But research also suggests that fixing this mistrust is complicated.

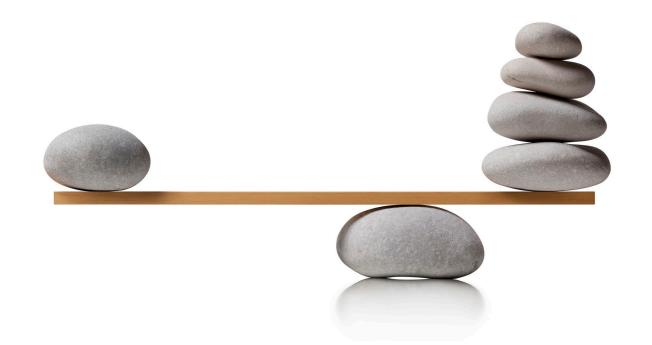
In a 2010 study, researchers found that, for African Americans surveyed, there exists a strong and positive causal relationship between aggregate levels of descriptive race representation within an institution and diffuse support for that institution.

White respondents, however, reacted to the experimental condition in the opposite manner; white diffuse support declined when blacks were well-represented on the bench.



So, what *does* the research tell us?

How else can diversity impact the legitimacy of the courts?

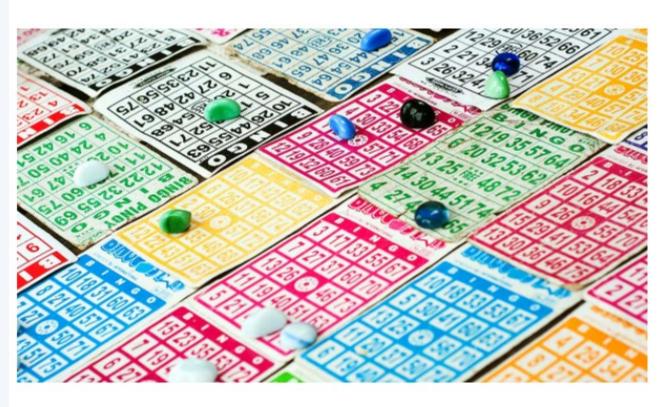




### Why Diverse Teams Are Smarter

by David Rock and Heidi Grant

November 04, 2016



#### They focus more on facts.

 In mock-jury research, diverse panels raised more facts related to the case than homogenous panels and made fewer factual errors while discussing available evidence.

#### They process those facts more carefully.

 Research suggests that considering the perspective of an outsider helps groups make the correct decisions (identifying a "murderer" in a research game).

#### They are more innovative.

 Companies with more women are more likely to introduce radical new innovations into the market over a two-year period.





Inclusive decision making contributes directly to the bottom line. Shutterstock

One study analyzed approximately 600 business decisions made by 200 different business teams in a wide variety of companies over two years, using the Cloverpop decision-making database. In general:

- Inclusive teams make better business decisions up to 87% of the time.
- Teams that follow an inclusive process make decisions 2X faster with 1/2 the meetings.
- Decisions made and executed by diverse teams delivered 60% better results.
- Compared to individual decision makers, all-male teams make better business decisions 58% of the time, while gender diverse teams do so 73% of the time.
- Teams that also include a wide range of ages and different geographic locations make better business decisions 87% of the time.

### How do we do better?

(a.k.a. how do we improve judicial diversity?)



Objectivity is not the answer.





# Depoliticizing the judiciary is key.

Exposure may reduce bias.







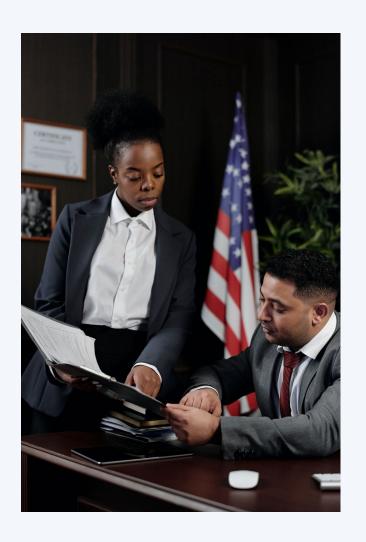
## **Merit-Based Judicial selection**

- Active recruitment
- Vacancy description and job posting
- Training and preparation
- Standardize interviews
- Deliberate deliberately



#### Clerk selection and mentorship

- Broaden your recruiting pool
- Create your own pipeline
- Reduce bias in resume review
- Change your interview processes
- Write down interview impressions
- Give specific and behavioral feedback
- Stay connected to your clerks







# What can you do in the courtroom?



## Ten Commandments for the New Judge

Judge Devitt presents ten helpful suggestions to new federal judges, pointing out that these observations may be of assistance to all new judges, and also of interest to members of the Bar. In addition to such recommendations as kindness, patience and dignity, Judge Devitt advises as to a judge's attitude toward reversals, unimportant cases, and the imposition of long sentences, etc.

by Edward J. Devitt • Chief Judge of the United States District Court for the District of Minnesota

# **Embrace (and enhance) Judge Devitt's Ten Commandments**



## **Other Practical Tips**

- Create procedures that address bias
  - Split arguments
  - Jury bias info
  - Big decisions early in the day
- Practice empathy



# Recommended Reading List

- Eberhardt, Jennifer. *Biased: Uncovering the Hidden Prejudice that Shapes What We See, Think, and Do.* Penguin Books, 2019.
- Gladwell, Malcolm. Blink: the Power of Thinking without Thinking. Back Bay Books, 2019.
- Ifill, Sherrilyn. *Judicial Diversity*. 13 Green Bag 2D 45, http://www.greenbag.org/v13n1/v13n1 ifill.pdf
- Kahneman, Daniel. *Thinking, Fast and Slow*. Farrar, Straus and Giroux, 2015.
- Kang, Jerry, National Campaign to Ensure the Racial and Ethnic Fairness of America's State
  Courts, Implicit Bias A Primer for Courts (August
  2009), <a href="http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-lmplicit-Bias-Primer-for-courts-09.pdf">http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-lmplicit-Bias-Primer-for-courts-09.pdf</a>.
- Joan Williams et al., <u>You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession</u>, American Bar Association and Minority Corporate Counsel Association, 2018.

#### **Thank You!**

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