# Othering and Belonging in the Criminal Legal System: Historical and Scientific Perspectives

john a. powell & Rachel D. Godsil

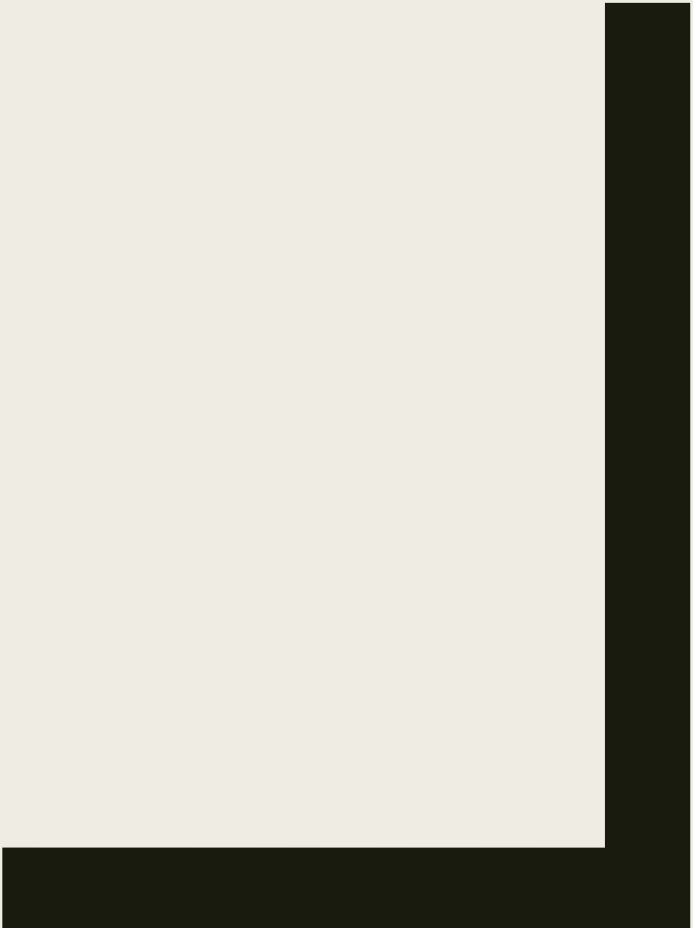That the Number of purely   white People in the World is proportionably very small. All *Africa* is   black or tawny. *Asia* chiefly tawny. *America* (exclusive of the new   Comers) wholly so. And in *Europe*, the *Spaniards*, Italians,   *French*, *Russians* and *Swedes*, are generally of what we call   a swarthy Complexion; as are the *Germans*   also, the *Saxons* only   excepted, who with the *English*, make the principal Body of White People   on the Face of the Earth.

# I: Promoting Belonging in the Justice System

**PRESENTER**
john a. powell

# Othering, Defined...

We define othering as a set of processes, structures, and dynamics that denies full humanity and belonging  across any of the full range of human differences. Othering and marginality can occur on a group basis or at the individual level.

# Dimensions of othering



Dimensions include but are not limited to, sex, religion, race, ethnicity, socioeconomic status, disability, sexual orientation, and skin tone.



A settlement approved Tuesday prohibits North Carolina's government from banning transgender people from using bathrooms in state buildings that match their gender identity.
Sara D. Davis/Getty Images

# Belonging

- Belonging or being fully human means more than having access. Belonging entails being respected at a basic level that includes the right to both co-create and make demands upon society.

- The term belonging reflects an objective position as well as the inter-subjective nature of group-based identities. In that respect, the process of othering and belonging are deeply relational and important in forming group identities and the self.
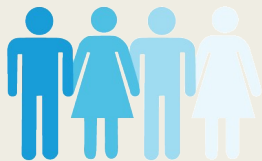
# Narratives of Othering and Belonging

**Breaking:** When a group turns inwards and explicitly pushes away from other groups who are seen as dangerous or a threat

**Bonding:** Connecting to people like you in some important way

**Bridging:** Ties to people who are unlike you in some important way; stories, structure contact

# Breaking…

There is **hard breaking** and **soft breaking**.  Hard breaking is building a wall, a travel ban, or outright exclusion.

Some bonding/breaking is defensive:
- Booker T. Washington's campaign for self-help under the oppression of Jim Crow segregation is an example of this.

- Similarly, break away or autonomous movements such as those initiated by the Kurds of northern Iraq is defensive breaking.
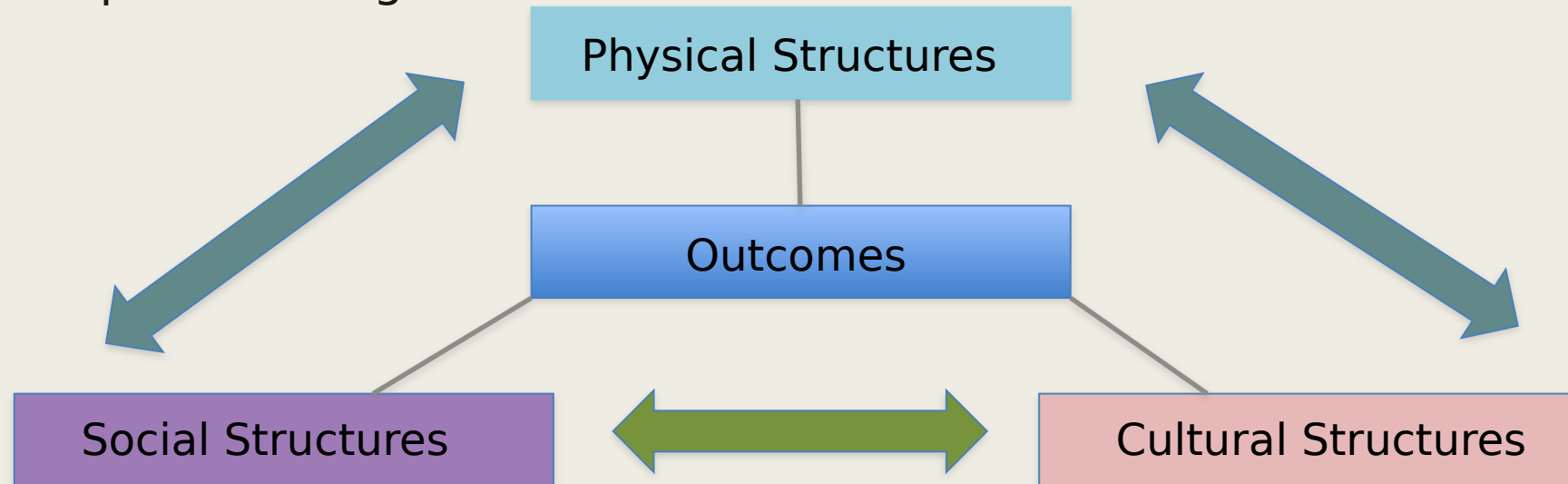
# …and Bridging

There are **short bridges** and **long bridges**.

Some bridges require more effort to build and maintain.  Others are a short distance. Bridge with the other including in ourselves.

# Understanding Structures as Systems

We are all situated within structures but **not evenly**. Structures interact in ways that produce a differential in outcome. Structures unevenly distribute benefits and burdens to various groups. Institutions can operate jointly to produce negative outcomes.

# Structural marginalization limits opportunity

We can define opportunity through access:



**EDUCATION**

**ECONOMICS**

**TRANSPORTATION**

**FOOD**

**HOUSING**

**JUSTICE**

**COMMUNICATIONS**

**HEALTHCARE**

This is an issue of **membership** and **belonging.**

# Structural Racism & Racialization

- Structural Racism: This is a claim that these opportunity structures are *racialized*, meaning that they *produce* and *reinforce* racial advantages and disadvantages.

- Structural Racialization: This is a term that acknowledges how race and racism are processes as opposed to simply individual intentional acts. Structural racialization leads to marginalization (race, gender, ability, etc.) and blocked access to opportunity

- Although invidious discrimination persists, structural exclusion is the underlying problem.
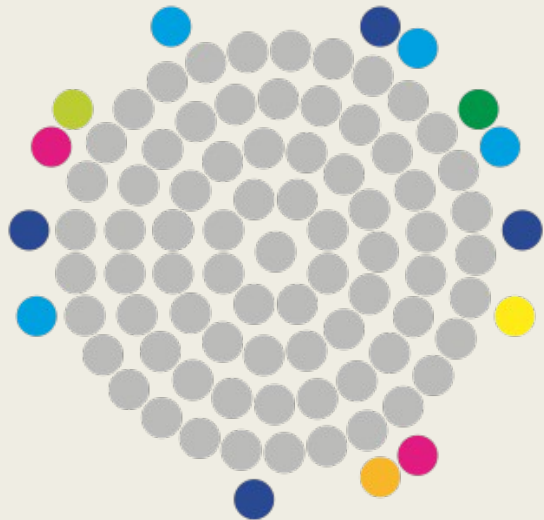  - E.g. not enough teachers of color in the "pipeline" or enough workers of "color" in the labor market.

# What causes or precedes Structural Racialization?

Structural Racialization starts with Othering.


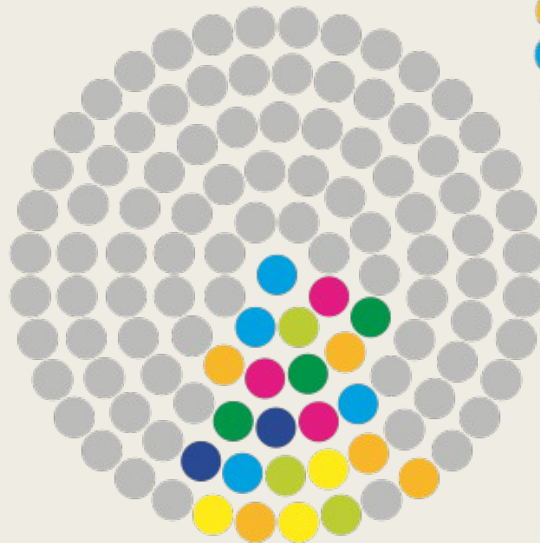
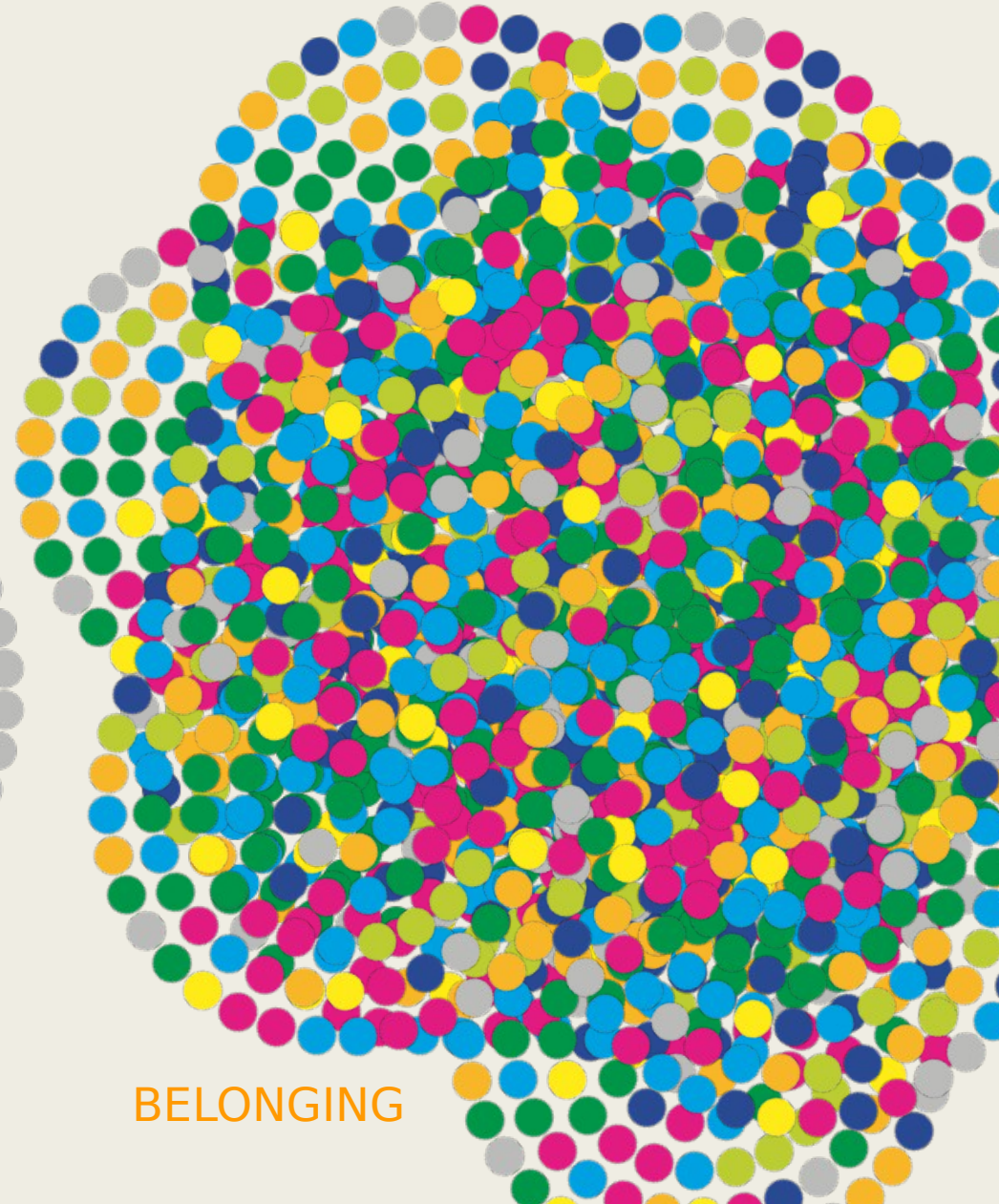The problem of Othering is the problem of the 21st century.

# Bridging: Listen, engage, organize, love



EXCLUSION      INCLUSION      BELONGING

# Imagination and Storytelling

The ability to imagine a larger "we" is very human. The ability to create a larger "we" is made possible by telling stories.

"Humans think in stories rather than in facts, numbers, or equations, and the simpler the story, the better."

--Yuval Harari, 21 Lessons for the 21st Century.

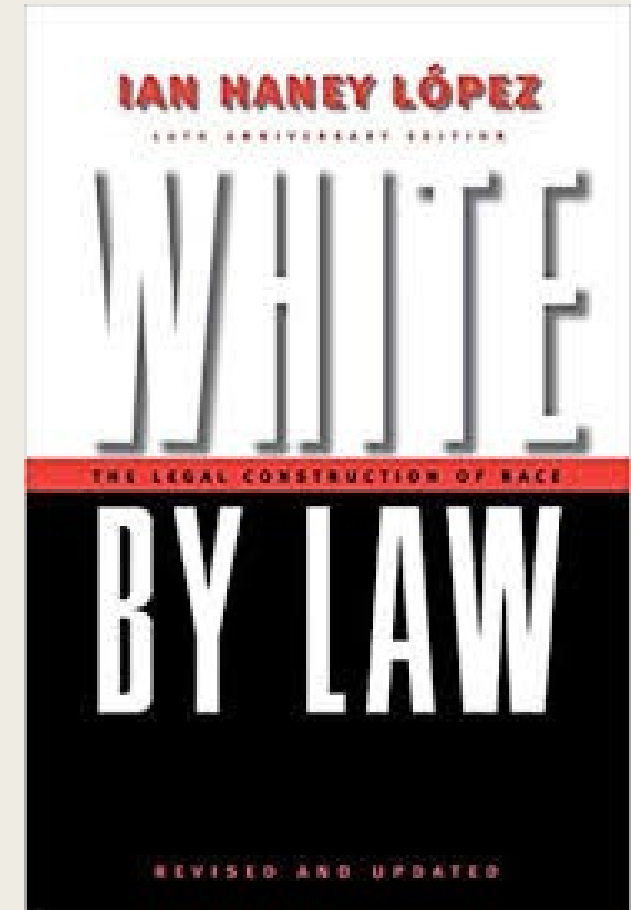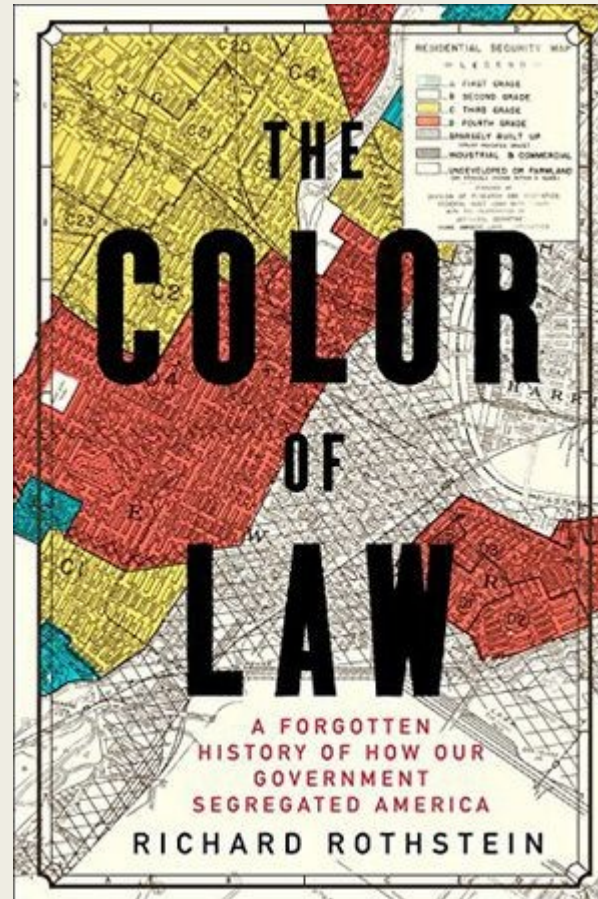# II: Understanding Context & the Role of Prosecutors in the Jim Crow Era

**PRESENTER**
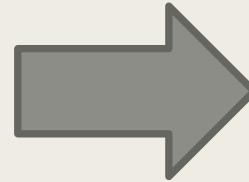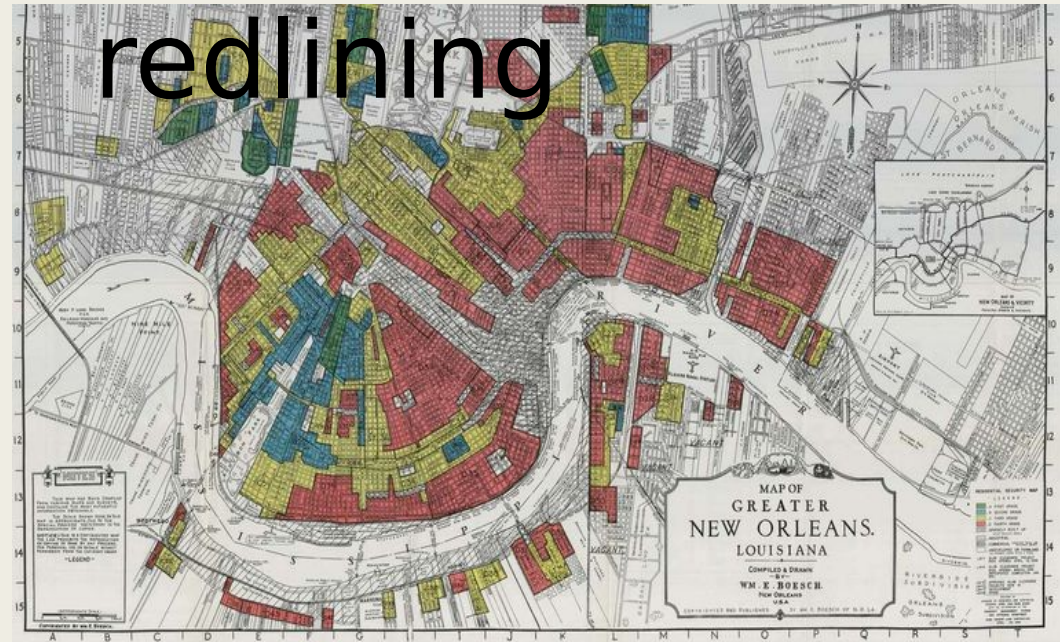john a. powell

# Jim Crow era prosecution in context

## The law does not merely act on race...it enforces racial lines

That the Number of purely white People in the World is proportionably very small. All *Africa* is black or tawny. *Asia* chiefly tawny. *America* (exclusive of the new Comers) wholly so. And in *Europe*, the *Spaniards*, Italians, *French*, *Russians* and *Swedes*, are generally of what we call a swarthy Complexion; as are the *Germans* also, the *Saxons* only excepted, who with the *English*, make the principal Body of White People on the Face of the Earth.



THE COLOR OF LAW
A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA
RICHARD ROTHSTEIN



IAN HANEY LÓPEZ
10TH ANNIVERSARY EDITION
WHITE
THE LEGAL CONSTRUCTION OF RACE
BY LAW
REVISED AND UPDATED

# Racialization is not exclusive to criminal law
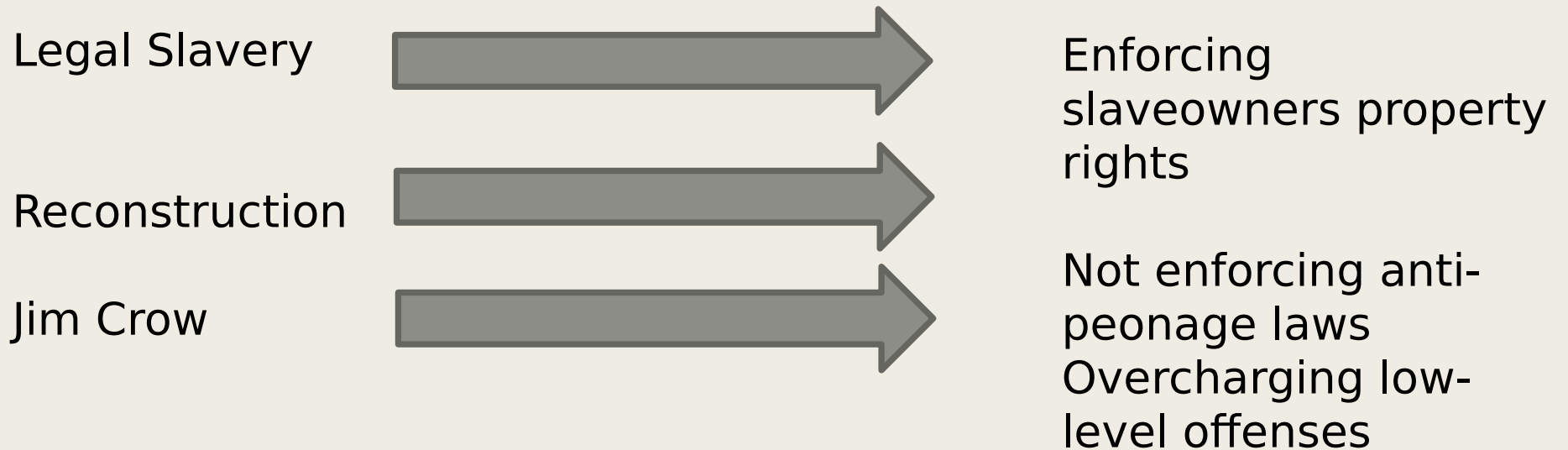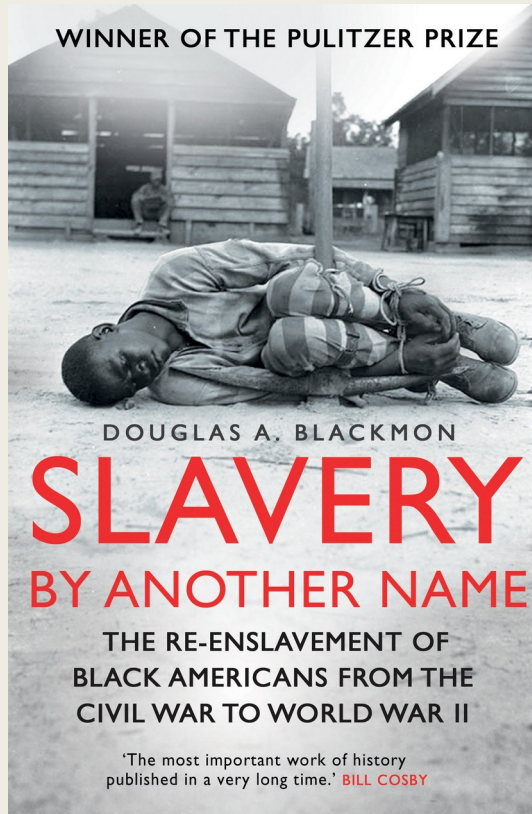
## History of redlining



## Single family

# Many groups affected . . . .

- "hazardous" for bank lending because of the presence of blacks or European immigrants, especially Jews
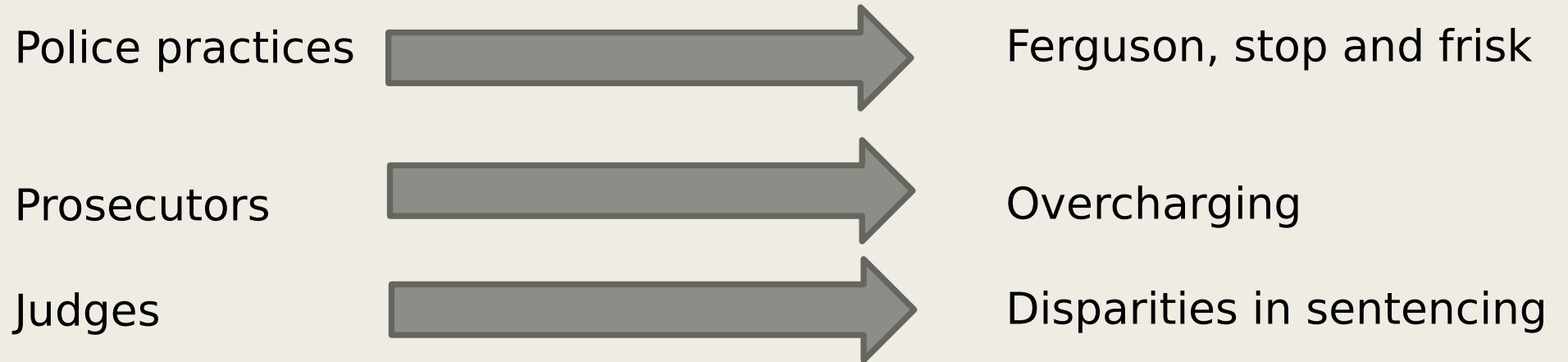
# Manifestations in the criminal legal system: the old versions

Legal Slavery

Reconstruction

Jim Crow

Enforcing slaveowners property rights

Not enforcing anti-peonage laws
Overcharging low-level offenses

"The triviality of the charges used to justify the massive numbers of people forced into labor never diminished. More than 12,500 people were arrested in Alabama in 1928 for possessing or selling alcohol; 2,735 were charged with vagrancy; 2,014 with gaming; 458 for leaving the farm of an employer without permission; 154 with the age-old vehicle for stopping intimate relations between blacks and whites: adultery."

# Manifestations in the criminal legal system: risks

Police practices → Ferguson, stop and frisk

Prosecutors → Overcharging

Judges → Disparities in sentencing

# Manifestations in the criminal legal system: the new versions (continued)

| | Index crimes per prosecutor | Index arrests per prosecutor | Index + drug arrests per prosecutor | All arrests per prosecutor | Prison admissions per prosecutor |
|---|---|---|---|---|---|
| 1974 | 588 | 141 | 176 | 617 | 9 |
| 1990 | 725 | 145 | 200 | 710 | 25 |
| 2007 | 377 | 73 | 133 | 473 | 23 |

From John Pfaff's *Locked In*

# Manifestations in the criminal legal system: the new versions (continued)

Investigation of the
Ferguson Police Department

# Race as a verb

"Essential reading for everyone implicated by race in America—and that means everyone."
– Deepak Bhargava, Center for Community Change

## RACING TO JUSTICE

Transforming Our Conceptions of Self and Other to Build an Inclusive Society

john a. powell

The law enforces the racial line...but the line is always moving

That the Number of purely white People in the World is proportionably very small. All *Africa* is black or tawny. *Asia* chiefly tawny. *America* (exclusive of the new Comers) wholly so. And in *Europe*, the *Spaniards*, Italians, *French*, *Russians* and *Swedes*, are generally of what we call a swarthy Complexion; as are the *Germans* also, the *Saxons* only excepted, who with the *English*, make the principal Body of White People on the Face of the Earth.
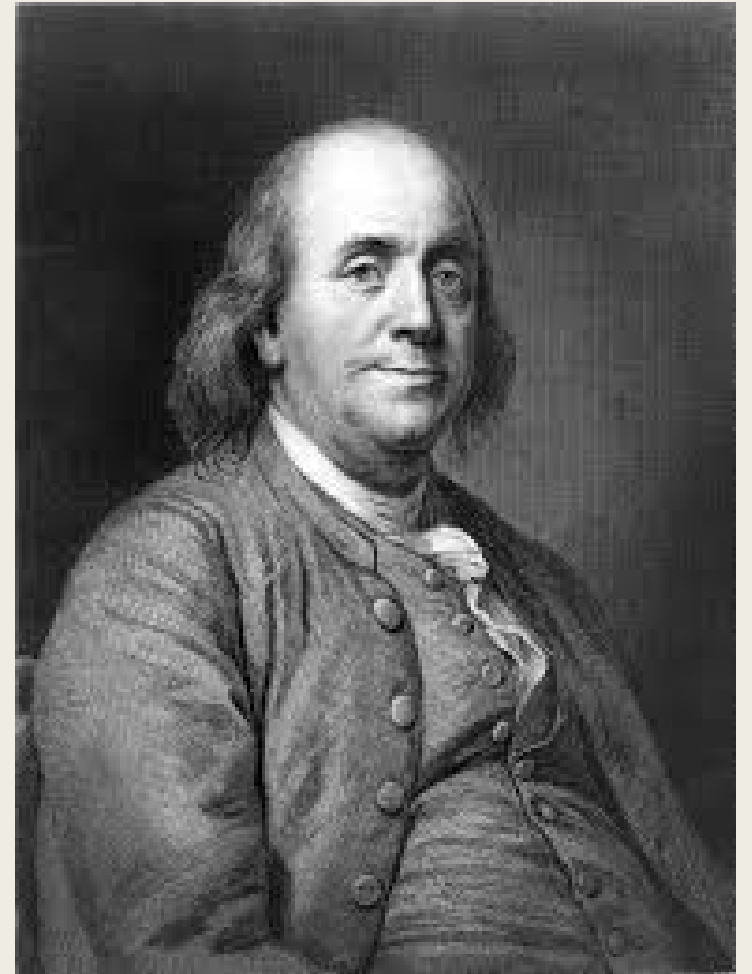
# Race as a verb (continued)



Homer Plessy

# Race as a verb (continued)



The path to whiteness for Italian Americans

# III: Addressing Implicit Bias, Racial Anxiety, and Steretype Threat as Obstacles to Justice

**PRESENTERS**

john a. powell & Rachel Godsil

# Don't worry! Unconscious bias is entirely normal

The subconscious mind uses three processes to make sense of the millions of bits of information that we perceive

1. Sorting into categories
2. Creating associations between things
3. Filling in the gaps when we only receive partial information

# Why do we engage in othering?

Individuals, institutions, and structures engage in othering for many reasons, both intentionally and unintentionally. The law focuses primarily on intentional forms of othering, largely missing the majority of othering caused by unintentional factors like:

❖ *Fear & anxiety*
❖ *categorizing*
❖ *stereotyping*
❖ *implicit bias*
❖ *in-group preference*
❖ *racial anxiety*
❖ *confirmation bias*
❖ *stereotype threat*
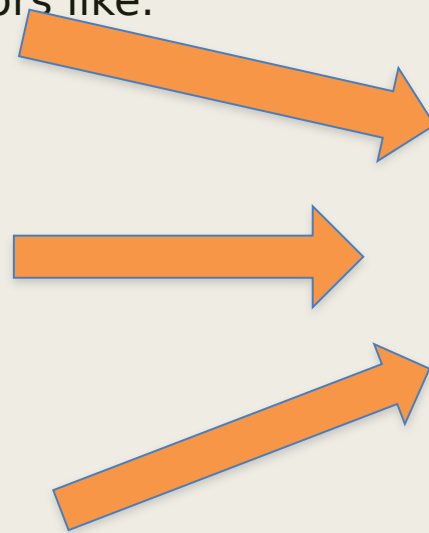
**Mind Science**

# Explicit bias is on the rise…



…but does not predict the likelihood of making a choice influenced by

# Overcoming Stereotypes and Unconscious Racism

"Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof."

- Justice Scalia, in a memo written prior to the opinion in *McClesky v. Kemp*

# Goals for this session

1) Refresh our understanding of how our brain's automatic operations - implicit biases - can impede equality goals.
2) Translate some research-based interventions into best practices that are
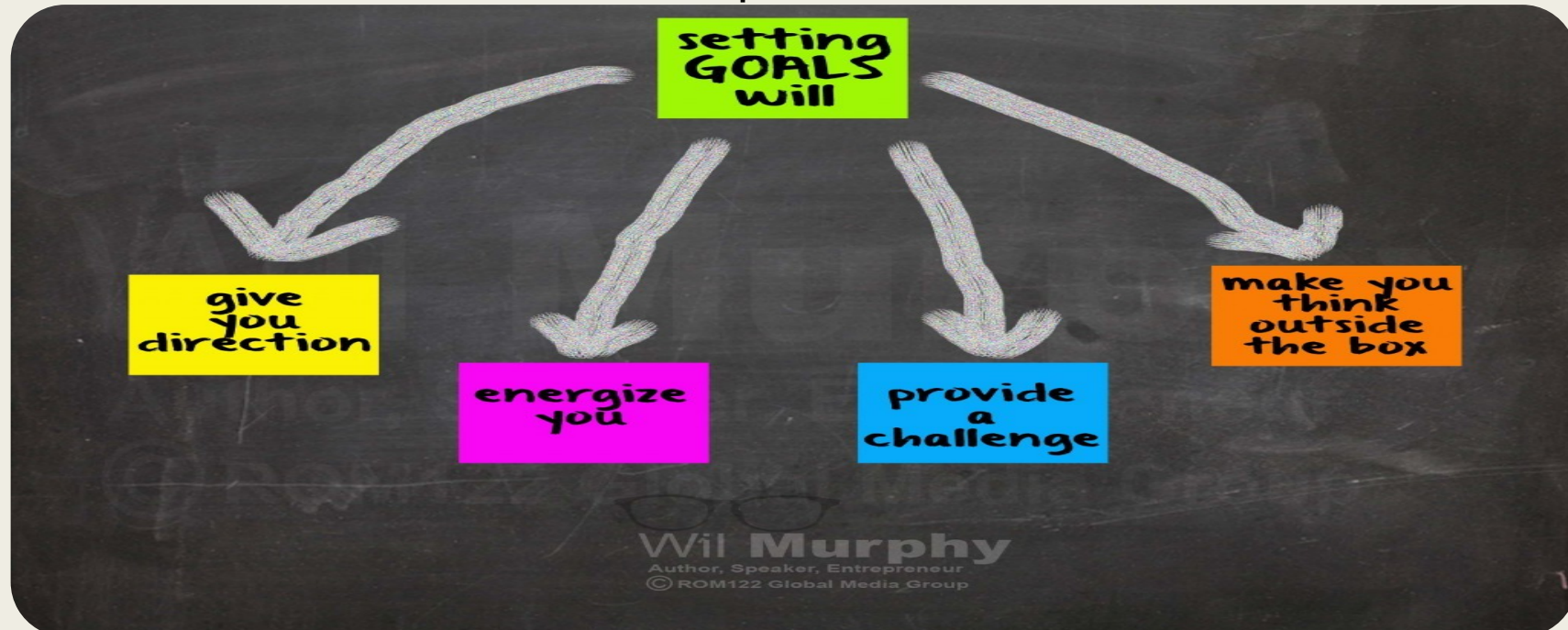
# The Myth of the Rational Actor

*Judges are given a scenario in which a plaintiff is injured in an accident with a delivery truck.*
*They are asked to recommend a damage award.*
*Half are told that plaintiff's counsel demanded $10 million dollars.*
*Should an obviously outrageous demand affect the damage award?*
*Does it?*

|  | Mean Award | *Median Award* |
| --- | --- | --- |
| Control | $808,000 | *$700,000* |
| Anchor | $2,210,000 | *$1,000,000* |

# Schemas: a mental structure we use to organize information around us.

Our brains use schemas to make judgments efficiently and quickly.

# Quick overview of implicit bias

■The Role of the Unconscious Mind

–*Human brain: processes **11 million bites** of information in a second*

■Consciously aware of any 40 of these, at best

■Our **subconscious fills in the lines** for us, to form a shape we are **familiar with**

–*Only **2% of emotional cognition** is available to us consciously*

–*Messages can be **framed** to speak to our unconscious*

–*The process of **Othering** occurs in our unconscious network: this can lead to racial, ethnic, or religious bias*
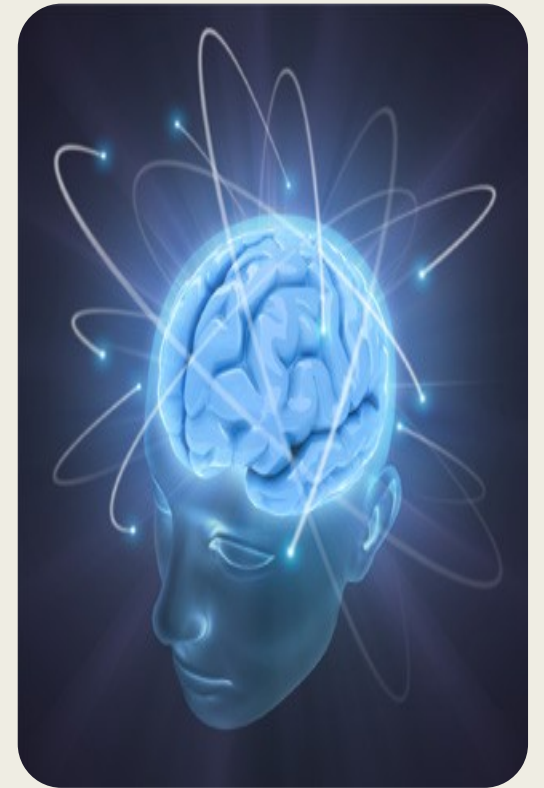
# How do we measure bias?

- Implicit Association Test (found at Project Implicit)

- Measures time differences between "schema consistent pairings" and "scheme inconsistent pairings"

- Most people perform second task more slowly.
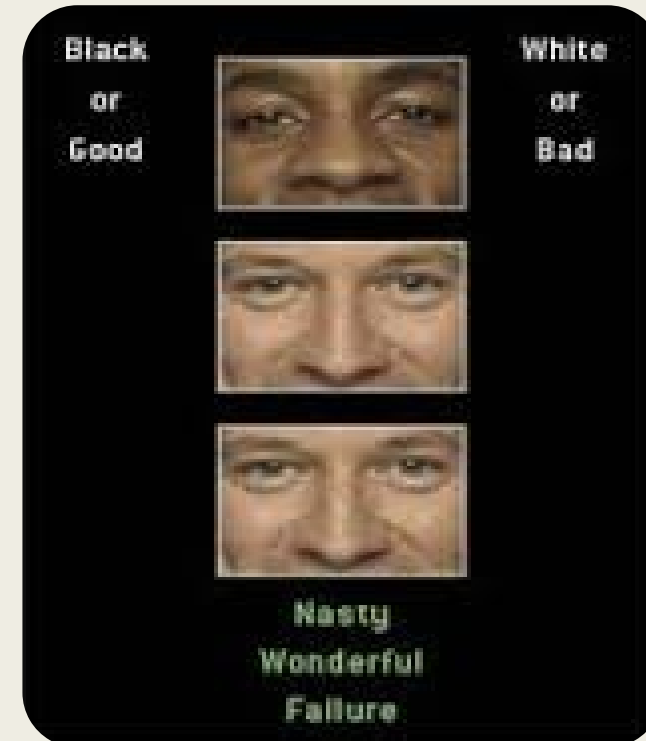
# What does the IAT tell us?

- It is *not* a DNA test – social scientists do not recommend it as a mechanism to "diagnose" an individual.

- As a tool to be used for research purposes, with millions of users over time, it is of great value in telling us about societal trends.
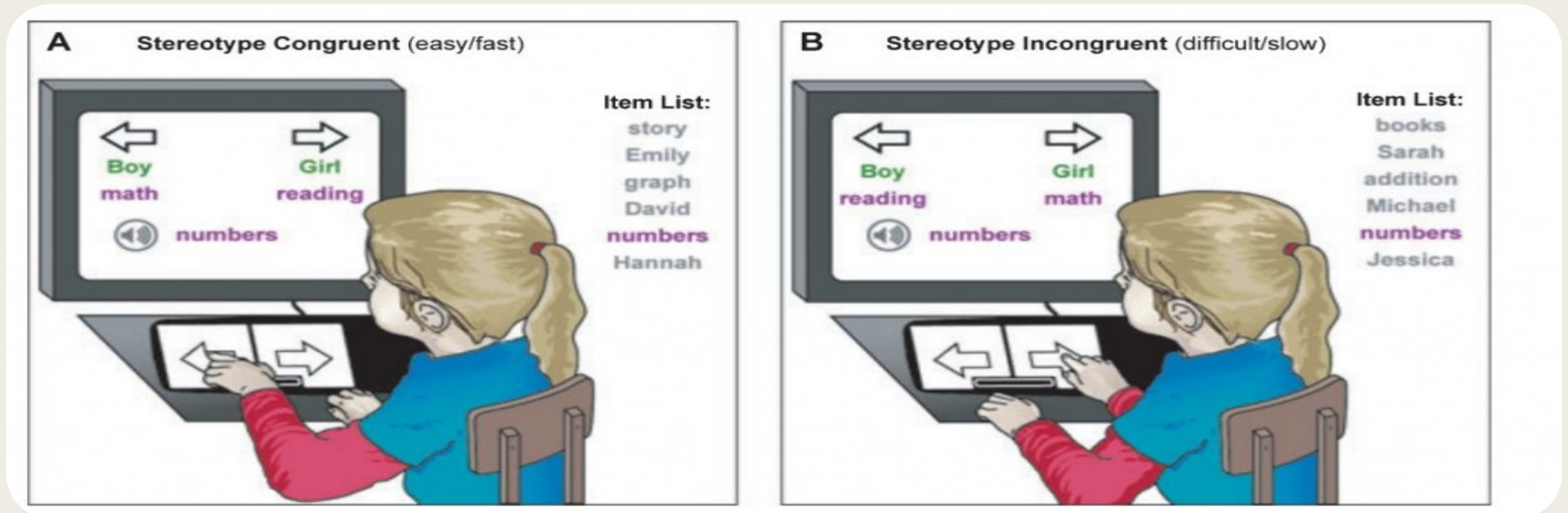
# Priming and its effects inside the courtroom



Cognition
Volume 108, Issue 1, July 2008, Pages 185-200

ELSEVIER

Stereotype priming in face recognition:
Interactions between semantic and visual
information in face encoding

Peter J. Hills [a] ✉, Michael B. Lewis [b], R.C. Honey [b]

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https://doi.org/10.1016/j.cognition.2008.03.004          Get rights and content

## Abstract

The accuracy with which previously unfamiliar faces are recognised is increased by the presentation of a stereotype-congruent occupation label [Klatzky, R. L., Martin, G. L., & Kane, R. A. (1982a). Semantic interpretation effects on memory for faces. *Memory & Cognition, 10*, 195–206; Klatzky, R. L., Martin, G. L., & Kane, R. A. (1982b). Influence of social-category activation on processing of visual information. *Social Cognition, 1*, 95–109]. For example, providing the label 'criminal' both during encoding and test improves recognition for previously unfamiliar faces that look like the stereotypical criminal. Experiments 1 and 2 both replicate this effect and
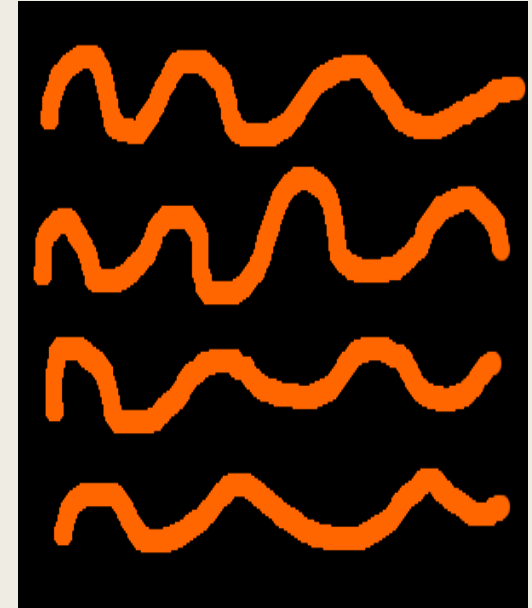
EYEWITNESS IDENTIFICATION REFORM
ACT

North Carolina Department of Justice
Criminal Justice Standards Division

UPDATE MATERIAL

March 1, 2008
(Subject to periodic changes)

# Priming & Stereotypes: Effects on  Eyewitnesses
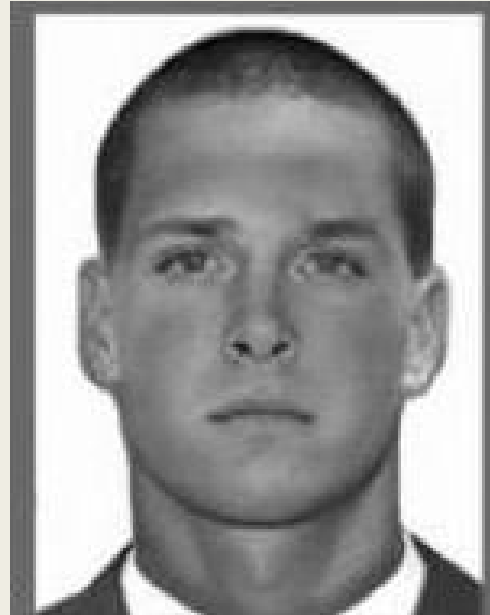


*Eberhardt, J. L., Goff, P. A., Purdie, V. J., & Davies, P. G. (2004)*

# Implicit bias can affect how people remember facts . . .

Describe incident involving either white "William"  or black "Tyronne." Distract for 15 minutes. Ask to recall details about the incident.

Defendant:  William

Recalled fewer aggressive details about the incident

Defendant: Tyronne
Correctly remembered more aggressive details about the incident
Incorrectly attributed aggressive details to Tyronne

# Findings Among Judges

- Implicit bias is pervasive.

- Judges from three districts were given the IAT.

- 87.1% of white judges showed implicit preference for whites.

- 44.2% of black judges showed implicit preference for blacks. (Rachlinski et al, 2009)

Law firms were sent a memo, written by "Tom Meyer"

2.9/7 spelling & grammar errors were found

5.8/7 spelling & grammar errors were found

*Kang, J., Dasgupta, N., Yogeeswaran, K., & Blasi, G. (2010)*

46

# When we hold implicit biases . . . it shows.

# Conditions that increase likelihood implicit bias will influence thoughts and actions:

1. Certain Emotion States

   *Certain emotional states (anger, disgust) can exacerbate implicit bias in judgments of stigmatized group members, even if the source of the negative emotion has nothing to do with the current situation or with the issue of social groups or stereotypes more broadly.*

2. Ambiguity

   *When the basis for judgment is somewhat vague (e.g., situations that call for discretion; cases that involve the application of new, unfamiliar laws), biased judgments are more likely.*

3. Salient Social-Categories

   *A decision maker may be more likely to think in terms of race and use racial stereotypes because race often is a salient, i.e., easily accessible, attribute.*

# Bringing to mind racial disparities can trigger fear and stereotypic associations

3 strategies proposed by Hetey and Eberhardt to mitigate negative impact of discussing racial disparities:
1. Offer context
2. Challenge associations
3. Highlight institutions

# Additional Interventions

■ "Debiasing"
  – *Research is fairly new on eliminating implicit biases.*
  – *Challenging in light of the prevalence of stereotyping in the media and culture.*
  – *Some promising interventions.*

■ Preventing Bias
  – *Research is much more developed that we can use our conscious and explicit intentions to over-ride the behavioral effects of implicit bias.*
  – *Requires effort and thoughtful approaches that are context dependent.*
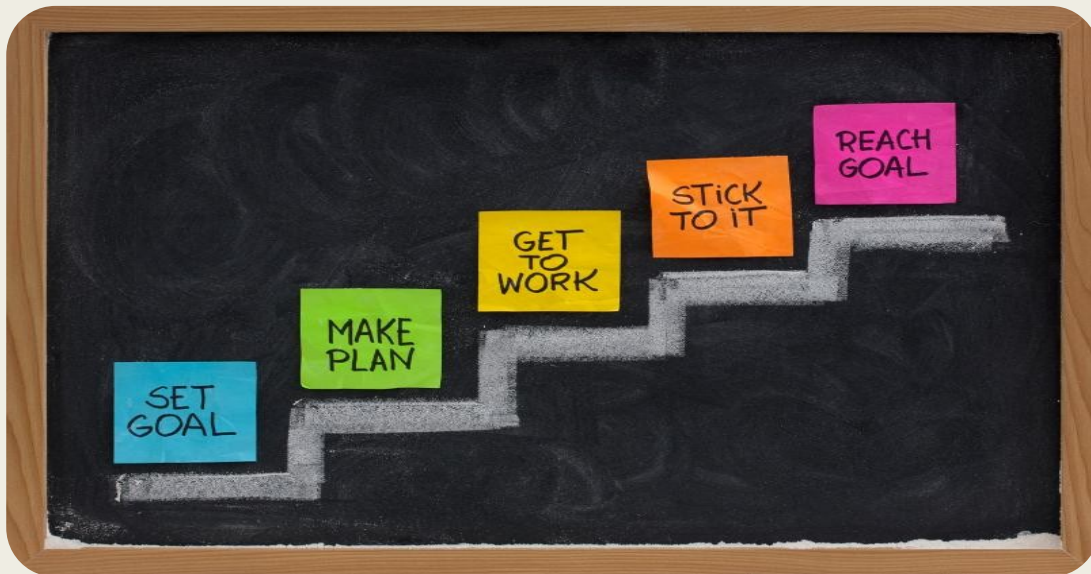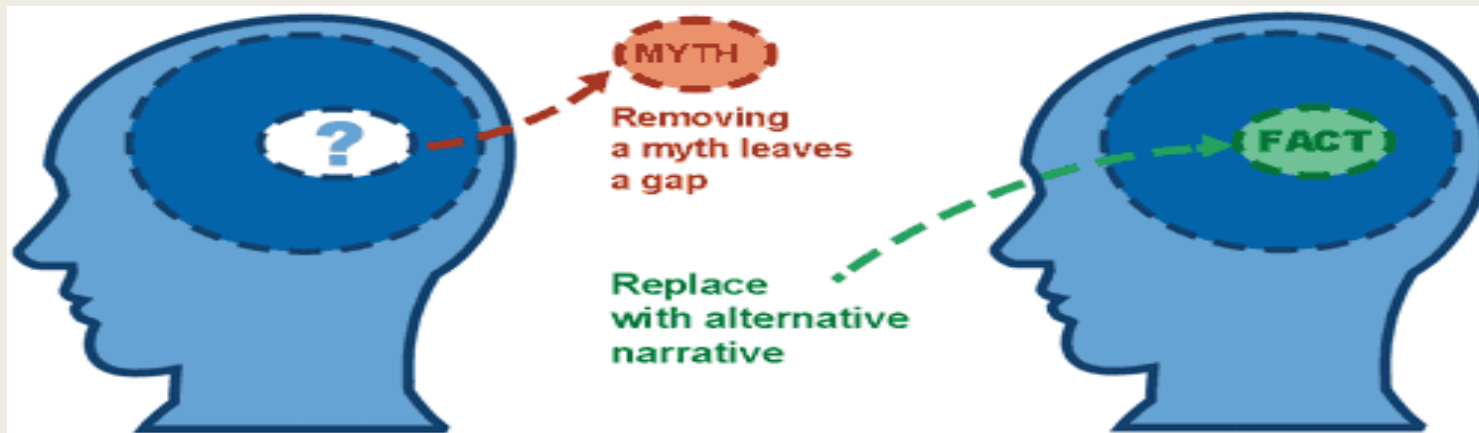
# Implicit Bias Confirmation: *"Debiasing" or Reducing Implicit Bias*

■ Devine et al. (2012) found success in reducing implicit racial bias, increasing concern about discrimination, and raising awareness of personal bias by <u>combining multiple interventions to "break the prejudice habit".</u>

■ Interventions:

- *Stereotype replacement*
- *Counter-stereotypic imaging*
- *Individuation*
- *Perspective taking*
- *Increasing opportunity for contact*

# Implicit Bias Interventions: *"Debiasing" or Reducing Implicit Bias (continued)*

**Individuation**

*This strategy relies on preventing stereotypic inferences by obtaining specific information about group members (Brewer, 1988; Fiske & Neuberg, 1990).*

**Perspective taking**

*This strategy involves assuming a first-person perspective of a*

# Reducing the Bias



■ When we observe positive images of people from stereotyped groups, we can begin to conquer our biases.

■ When people of color are in leadership positions, implicit bias is reduced among everyone in the group.

■ When we are in close peer relationships with people from other races, implicit bias is reduced



True Beauty and Happy has no color, shape, race, or size. These are spiritual qualities deep within and anyone of whatever size, race, or shape can possess them, whether outwardly beautiful or not.

# Implicit Bias: Examples from Charlotte

Countering Systemic Bias

- Talk about race – to make sure that it isn't affecting decisions.

- Group rounds for major charging decisions

- Data available about charges in comparable cases for real time comparisons

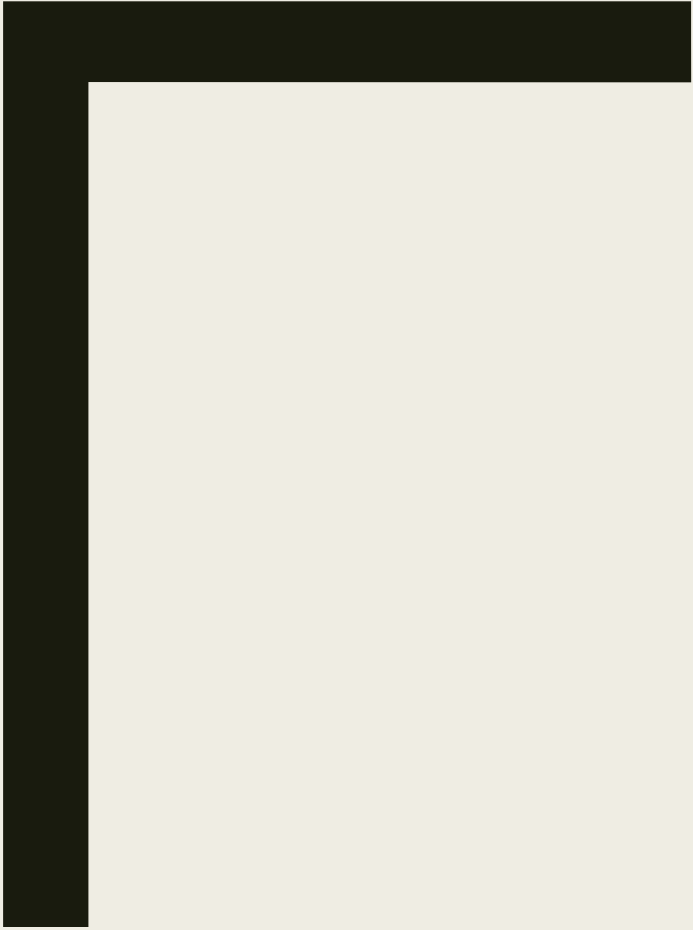- Invoke promise to over-ride implicit biases from jurors

- Encourage prosec

# IV: Racial Anxiety and Stereotype Threat

**PRESENTER**
Rachel Godsil

# How do we experience Racial Anxiety?

**People of color** may fear they will experience discrimination, hostile treatment, or invalidation.

**White people** may fear their words or actions will be perceived as racist.

**Shows up as** discomfort, distancing, less eye contact, cognitive fatigue, avoidance, awkward attempts to connect, stress of racial disappointment.

# First impressions matter.  Does race affect our interactions?



Whites project warmth

**Goal:  Be liked**

Blacks and Latinos project agency and seriousness
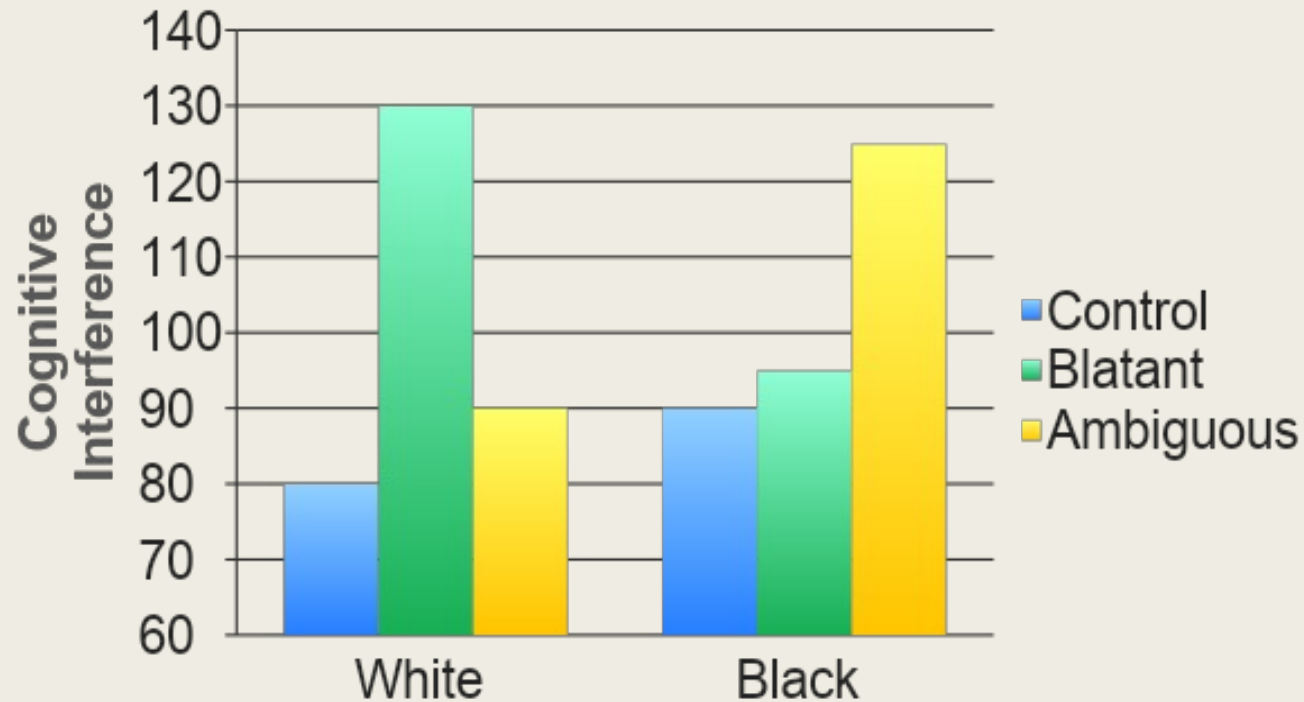
**Goal:  Be respected**

Asians assumed competent and respected

**Goal:  Be liked**

# How do racial dynamics impact our cognition & productivity?

## Blatant v Ambiguous Racial Situations



**Ambiguous Situations:**

- More common in than blatant.

- Often not recognized as harmful.

- Cognitive burden borne by member of the outgroup.

# When to engage around issues of 'ambiguous' bias?

**Content:** Address the content of the conversation immediately if it is blatant or an ambiguous misunderstanding.

**Pattern:** gather data to describe a series of incidents.

**Relationship:** if impact on pattern of behavior affects your ability to work productively with others -- address the cumulative effect of their behaviors on trust, cooperation, self-esteem, etc.

# Interventions for Anxiety

1. Create institutional belonging
2. Preparing for challenging moments: priming and scripts
3. Learn how to fail fast if you say the wrong thing

# Interventions for Anxiety (continued)



*Assumptions of objectivity:* When most people assume that they are free from bias and objective, they are less likely to guard against bias.

*Uncertain criteria*: When criteria for important decisions are vague or subjective, people are at risk of allowing biases or stereotypes to seep into decisions without their awareness.

*Create "identity blind" evaluation mechanisms:* during the early phases, work should be evaluated "blind" so that gender or racial stereotypes don't determine who is a "star."

*Time pressure:* When people are under pressure to make decisions quickly or are stressed, they are more likely to rely upon biases or stereotypes.

*Skewed incentives:* Institutions often

# Racial Anxiety: Examples from Charlotte

**Soothing Racial Anxiety**

- Talk about race – to get comfortable so that it doesn't feel weird when talk about it to the jury.

- Develop a script for talking to victim's families that shows respect, true concern, and competence.

- Develop a script for talking about race when it is an issue in a trial – practice in front of people of other races.

# What Does Stereotype Threat Look Like?



"Poor. Irresponsible."

"Emotional."

"Angry, threatening, intimidating."
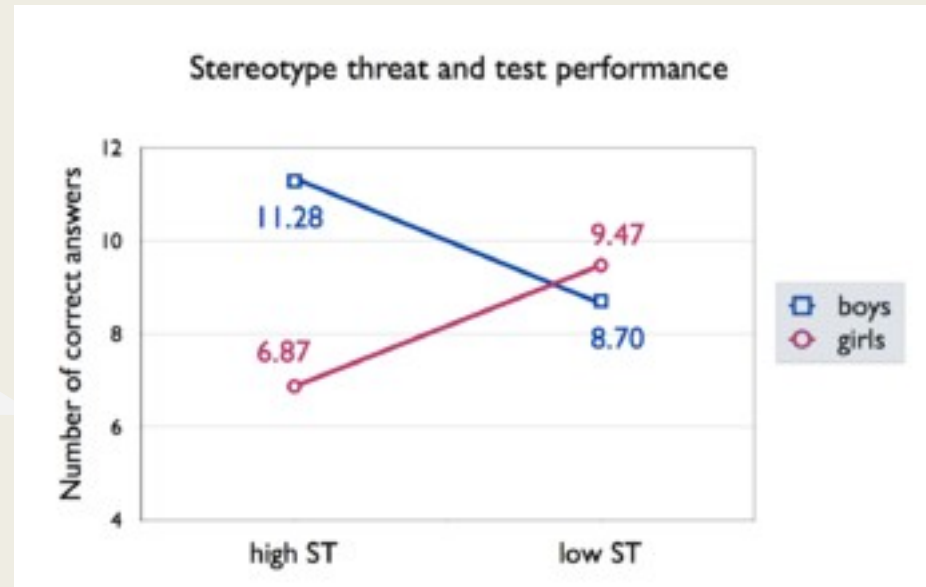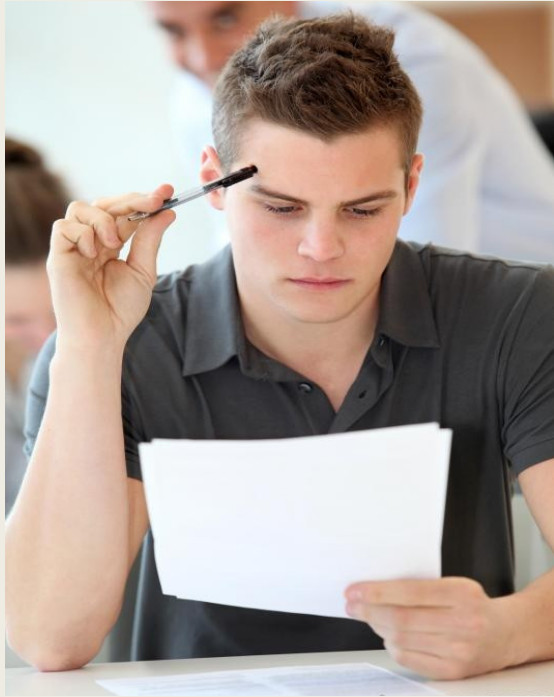
"Not smart."

When a negative stereotype about us is triggered,
it has a physiological effect – and undermines our performance.

# We can all experience Stereotype Threat.

# What can be done?

**Interventions and Solutions**

Create an environment that is identity-safe (Steele, 2010)

Increase feelings of social belonging (Walton & Cohen, 2011)

Encourage self-affirmation (Cohen et al. 2006)

Share "wise feedback." (Walton & Spencer, 2009)

Promote a growth mindset (Dweck, 2006)

# Stereotype Threat: Interventions

**Wise Feedback**

**Identify person's goals** and aspirations

Convey your **expectation for them to meet their goals**

Identify and **convey specific reasons why you think they are capable** of meeting their goals

Candidly **share any constructive criticism.**

# Example of Stereotype Threat Intervention

**Charlotte Prosecutors**

- Changed the local environment: removed images of police officers on the wall in area where witnesses were prepped.

- Focused on conveying respect across race at initial meeting rather than emphasizing "likability."

# Thank you!