JUDGING IMPLICIT BIAS: A NATIONAL EMPIRICAL STUDY OF JUDICIAL STEREOTYPES

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Abstract

American judges, and especially lifetime-appointed federal judges, are often revered as the pinnacle of objectivity, possessing a deep commitment to fairness, and driven to seek justice as they interpret federal laws and the U.S. Constitution. As these judges struggle with some of the great challenges of the modern legal world, empirical scholars must seek to fully understand the role of implicit bias in judicial decision-making. Research from the field of implicit social cognition has long documented negative implicit biases towards a wide range of group members, some of whom may well be harmed in various ways across the legal system. Unfortunately, legal scholarship, and particularly empirical legal scholarship, has lagged behind in terms of investigating how implicit biases, beyond Black and White, may lead to unfair outcomes in a range of legal areas, including those relevant to judges' potentially landmark legal decisions.

This Article proposes, and then empirically tests, the proposition that even today negative implicit biases may manifest in federal and state judges against even so-called privileged minorities, such as Asian-Americans and Jews. We present the results of an original empirical study we conducted on 239 sitting federal and state judges (including 100 federal district judges representing all Circuits) and consider the ways in which these judicial implicit biases may manifest. The study found that the judges harbored strong to moderate negative implicit stereotypes against Asian-Americans and Jews, while holding favorable implicit stereotypes towards Whites and Christians. These negative stereotypes associate Asians and Jews with immoral traits, such as "greedy," "dishonest," and "controlling," and associate Whites and Christians with moral traits, such as "trustworthy," "honest," and "giving." The study further found that federal district court judges sentenced Jewish defendants to marginally longer prison terms than identical Christian defendants and that implicit bias was likely the cause of the disparity.

This Article suggests, and the empirical study supports the claim, that automatic biases and cognitions indeed influence a much broader range of judicial decisions than has previously been considered.

INTRODUCTION

American judges, and lifetime-appointed federal judges in particular, are often revered as the pinnacle of objectivity, possessing a deep commitment to fairness, and driven to seek justice as they interpret federal laws and the United States Constitution.[1] Curiously, despite the growing interest in the concept of implicit bias among judges and legal

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1. *E.g.*, 28 U.S.C. § 453 (2012) (requiring that all justices and judges of the United States take an oath or affirmation in which they affirm that they "will administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . will faithfully and impartially discharge and perform all the duties incumbent upon [them]"); Michael B. Hyman, *Implicit Bias in the Courts*, ILL. B.J., Jan. 2014, at 40, 43 ("Judges must be impartial, as a matter of ethical principle, professional identity, and oath.").

commentators,[2] only one empirical study has measured judges' individual implicit biases, and that study only measured a single implicit bias among a sample of state trial judges.[3] Implicit bias research has been compelling for a range of reasons—perhaps chiefly among them that individual implicit biases often diverge from people's egalitarian self-concepts.[4] This disconnect between a person's commitment to fairness, on the one hand, and their possession of justice-obscuring automatic biases on the other, highlights the question of whether American judges can actually fairly perpetuate the justice they hold so dear.

As federal judges, in particular, struggle with some of the great challenges of the modern legal world—the role of the government in health care,[5] the boundaries of affirmative action,[6] the legal status of executive orders over immigration,[7] the role of the judge in sentencing,[8]

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2. *See, e.g.*, Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 158, 168 (2010) (discussing judge-dominated voir dire and the *Batson* challenges and how these processes exacerbate problems of implicit bias in jury selection and jury determinations, and proposing two possible solutions—increasing lawyer participation in voir dire and eliminating peremptory challenges—to address the implicit biases of jurors and lawyers throughout these processes). As a gauge of the interest in implicit bias among judges and attorneys more generally, it is notable that the authors of this Article, alone, have given hundreds of trainings to judges and lawyers on implicit bias-related topics.

3. *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009) (finding that state court judges harbor White–Black implicit racial biases and that these biases can influence their judgment). The authors of that study indicate that they also included a gender Implicit Association Test (IAT) as part of their study, but they do not report the results. *Id.* at 1208 n.68.

4. *See* Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 J. PERSONALITY & SOC. PSYCHOL. 181, 190 (1995) (finding that explicit expressions of sexism or stereotypes were not correlated with the observed implicit gender bias in fame judgments); *see also* Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1235 (2007) (finding that physicians held implicit racial biases against African-Americans that affected treatment recommendation, but no similar predictive validity was found by asking doctors about their explicit racial preferences); Laurie A. Rudman et al., *Measuring the Automatic Components of Prejudice: Flexibility and Generality of the Implicit Association Test*, 17 SOC. COGNITION 437, 460 (1999) (finding that the average effect size for implicit prejudice based on ethnicity (Jewish vs. Christian), age (young vs. old), and nationality (American vs. Soviet) was large (d = 1.32) as compared to moderate (d = 0.49) for self-reported measures of prejudice).

5. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012).

6. *See, e.g.*, Fisher v. Univ. of Texas, 133 S. Ct. 2411, 2421 (2013), *aff'd*, 136 S. Ct. 2198 (2016).

7. *See, e.g.*, Texas v. United States, 809 F.3d 134, 186 (5th Cir. 2015), *aff'd by an equally divided court*, United States v. Texas, 136 S. Ct. 2271 (2016) (per curium).

8. Mark W. Bennett, Justin D. Levinson & Koichi Hioki, *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. (forthcoming 2017).

and the status of the death penalty[9]—it is indeed worth pursuing a vibrant research agenda that seeks to fully understand the role of implicit bias in judicial decision-making. As studies of the harmful effects of implicit bias against African-Americans in law and society continue to make an impact in scholarship and in practice, scholars must also expand the consideration of implicit bias in the law with special regard for judicial biases beyond the Black–White paradigm.[10] Research from the field of implicit social cognition has long documented negative implicit biases towards a wide range of group members, some of whom may well be harmed in various ways across the legal system.[11] Unfortunately, legal

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9. Hurst v. Florida, 136 S. Ct. 616, 621 (2016).

10. *See, e.g.*, Melody S. Sadler et al., *The World Is Not Black and White: Racial Bias in the Decision to Shoot in a Multiethnic Context*, 68 J. Soc. Issues 286, 306 (2012) (finding that college-age participants and police officers were quicker to correctly shoot armed Black targets and to indicate "don't shoot" for unarmed Latino, Asian, and White targets but noting that police officers showed additional racial biases in reaction times towards Latinos compared to Asians and Whites); *see also* John Pyun, *When Neurogenetics Hurts: Examining the Use of Neuroscience and Genetic Evidence in Sentencing Decisions Through Implicit Bias*, 103 Calif. L. Rev. 1019, 1032, 1037 (2015) (arguing that given the strong implicit bias against disability and mental illness, the admission of neuro-genetic evidence of mental illness may hurt, rather than help, a defendant claiming mental illness as the cause of their actions).

This Article does not mean to suggest that work focusing on implicit bias within the Black–White paradigm is anywhere near complete. There still remain a wide range of areas within the legal system in which the role of implicit bias, specifically with respect to automatic discrimination towards African-Americans, has yet to be conducted. Some of our own work, in particular, continues to focus on the unaddressed problems related to racial disparities that most harm African-Americans. *See, e.g.*, Robert J. Smith, Justin D. Levinson & Koichi Hioki, Race and Retribution: An Empirical Study of Racialized Punishment and Implicit Bias in America 43 (Feb. 29, 2016) (unpublished manuscript) (on file with authors) (finding that jury-eligible citizens associate Black with Payback and White with Mercy and that these racial associations are correlated with overall support for retributive theories of punishments); Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 Yale L.J. F. 406 (2017), http://www.yalelawjournal.org /forum/systemic-implicit-bias.

11. *See, e.g.*, Becca R. Levy & Mahzarin R. Banaji, *Implicit Ageism*, *in* Ageism: Stereotyping and Prejudice Against Older Persons 49, 54–55 (Todd D. Nelson ed., 2002) (finding that there is a negative implicit bias toward the elderly); Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring: Real World Evidence*, 17 Labour Econ. 523, 529 (2010) (finding that a negative implicit association toward Arab-Muslim men can affect human resource officers' choice of job candidates); Marlene B. Schwartz et al., *Weight Bias Among Health Professionals Specializing in Obesity*, 11 Obesity Res. 1033, 1037 (2003) (finding that health professionals exhibited a significant pro-thin and anti-fat implicit bias); *see also* Laurie A. Rudman & Stephanie A. Goodwin, *Gender Differences in Automatic In-Group Bias: Why Do Women Like Women More Than Men Like Men?*, 87 J. Personality & Soc. Psychol. 494, 497, 506 (2004) (finding that both genders implicitly prefer their own group but that women have a much stronger implicit bias favoring their own group than men do and that men were implicitly associated with violence and aggression more readily than women); *cf.* Christopher L. Aberson et al., *Implicit Bias and Contact: The Role of Interethnic Friendships*, 144 J. Soc. Psychol. 335, 344 (2004) (finding that participants with close friends who were Latino or African-American

scholarship, and particularly empirical legal scholarship, has lagged behind in terms of investigating how implicit biases, beyond Black and White, may lead to unfair outcomes in a range of legal areas.[12] Because of these implicit biases, judges and other well-intentioned actors in the criminal justice system and beyond may also harm stereotyped groups, such as Latinos, Native Americans, the disabled, the mentally ill, the overweight, immigrants, the LGBT community, the elderly, women, Asians, Arab-Muslims, Jews, and many others.[13]

This Article proposes, and then empirically tests, the proposition that even today negative implicit biases may manifest in federal and state judges against even so-called privileged minorities, such as Asian-Americans and Jews. This Article presents the results of an original empirical study we conducted on 239 sitting federal district judges, federal magistrate judges, and state judges, and considers the ways in which judicial implicit biases may manifest. This Article aims to broaden the scholarly discourse around implicit bias by presenting this study, in which we measured judges' levels of implicit bias towards Asians and Jews (as compared to Whites and Christians, respectively) and asked judges to sentence a hypothetical white-collar criminal defendant.

This study found that federal district court judges, federal magistrate judges, and state court judges harbored strong to moderate negative implicit stereotypes against Asians and Jews, while holding favorable

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exhibited less implicit bias toward those groups than participants without close friends in those particular groups).

 12. *But see* Susan K. Serrano & Breann Swann Nu'uhiwa, *Federal Indian Law: Implicit Bias Against Native Peoples as Sovereigns*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 209, 210–11 (Justin D. Levinson & Robert J. Smith eds., 2012) (discussing implicit biases toward Native Peoples as foreign and less American, violent and aggressive, and nonacademic and in need of benevolent assistance); Eric K. Yamamoto & Michele Park Sonen, *Reparations Law: Redress Bias?*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra*, at 244, 246 (discussing implicit gender bias in redress); Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886, 887–88 (2010) (studying implicit attitudes related to Asian and White litigators); *see also* Sara R. Benson, *Reviving the Disparate Impact Doctrine to Combat Unconscious Discrimination: A Study of* Chin v. Runnels, 31 T. MARSHALL L. REV. 43, 44 (2005) (analyzing a court's ruling "regarding the exclusion of Hispanic-Americans, Chinese-Americans, and Filipino-Americans from serving as grand jury forepersons"); Justin D. Levinson, Koichi Hioki & Syugo Hotta, *Implicit Bias in Hawai'i: An Empirical Study*, 37 U. HAW. L. REV. 429, 433 (2015) (studying implicit stereotypes and attitudes related to Japanese-Americans, Whites, Native Hawaiians, and Micronesians in Hawai'i as compared to other states in the United States); Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 4 (2010) (studying implicit gender biases related to women in the legal profession); Darren Seiji Teshima, *A "Hardy Handshake Sort of Guy": The Model Minority and Implicit Bias About Asian Americans in* Chin v. Runnels, 11 ASIAN PAC. AM. L.J. 122, 132 (2006) (finding "a stronger implicit association between white and American than between Asian and American").

 13. *See supra* notes 10–12.

implicit stereotypes towards Whites and Christians.[14] These negative stereotypes associate Asians and Jews with immoral traits, such as "greedy," "dishonest," and "controlling," and associate Whites and Christians with moral traits, such as "trustworthy," "honest," and "giving." The study further found that federal district court judges were marginally more likely to sentence a Jewish defendant to longer terms than a Christian defendant, and state court judges were more likely to sentence a White defendant to longer terms than an Asian defendant.[15] A regression analysis also revealed that judges' anti-Jewish (pro-Christian) implicit stereotypes predicted shorter sentences for Christian defendants.[16] Finally, the study revealed various judicial differences in explicit (self-reported) negative attitudes towards Asians and Jews in America, and in particular among state judges (as compared to federal judges) and among judges that self-identified as either Catholic or Protestant (as compared to judges who reported no religious affiliation).[17]

Part I of this Article considers the current landscape of knowledge regarding implicit bias in the legal system, highlighting the fact that very little is known about judges' implicit biases and fairly little is known beyond the well-documented concerns relating to implicit biases towards African-Americans. Part II contextualizes this project within both social science and legal scholarship related to two groups: Asians and Jews in America. We tested judges' implicit biases toward these groups for two main reasons: first, both of these groups have been perceived as having overcome many of the historical barriers that hindered their progress; and second, if judges indeed harbor negative implicit biases against even the most favored minority groups, one could predict that further research would uncover a massive range of judicial implicit biases against a wide range of less privileged groups. This Part therefore presents the evolving historical role of both positive and negative stereotypes of Asians and Jews in America and concludes with a summary of modern social science findings that connect negative stereotypes—specifically those related to trustworthiness—with members of both groups. Part III presents the methods and results of the empirical study we conducted. We studied 239 federal and state judges, including 100 federal district court judges from all Circuits; provided them with a realistic white-collar criminal case (in which they read about an Asian, White, Jewish, or Christian defendant);

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14. *See* discussion *infra* Subsections III.D.1, III.D.2.

15. Bennett, Levinson & Hioki, *supra* note 8 (manuscript at 28–29). When data was combined across all conditions, 75% of federal trial judges and a lesser percentage of other judges gave the exact minimum possible sentence. *Id.* (manuscript at 27). This result likely reflects a larger issue related to the Federal Sentencing Guidelines and judges' perceptions of sentencing severity for white collar crime. We examine these particular study results in the context of the Federal Sentencing Commission, in a separate article. *Id.*

16. *See infra* Subsection III.D.

17. *See infra* Subsection III.D.10.

asked them to sentence the defendant in accordance with an agreed upon plea-bargain range (consistent with the Federal Sentencing Guidelines); and then tested both their implicit and explicit bias levels.

Part III then discusses the results of the study, which found that: (1) judges displayed strong to moderate negative implicit biases towards Asians and Jews, (2) state judges self-reported stronger anti-Asian attitudes than federal judges, (3) Catholic and Protestant judges held stronger pro-Christian, anti-Jewish biases than "no religion" judges, (4) Protestant judges self-reported some stronger anti-Asian biases than "no religion" judges, and (5) participants' pro-Christian, anti-Jewish implicit bias levels predicted shorter sentencing of a Christian defendant. The study further found that federal district court judges sentenced (of marginal statistical significance) Jewish defendants to longer sentences than Christian defendants, and that state court judges sentenced Asian defendants to shorter sentences than White defendants.[18] Part IV offers suggestions about the next stage of implicit bias scholarship and concludes by calling for a robust expansion of research.

I. Implicit Bias, Judges, and Legal Scholarship: Expanding Beyond Black and White

Scholarship on implicit bias[19] has altered society's way of understanding ethnic and racial disparities in the legal system.[20] That work, and in particular empirical studies conducted on the role of race and implicit bias, has made a profound contribution to law and policy literature, both in the criminal justice realm and beyond.[21] Because of the continuing and

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18. For an extensive detailing of this sentencing result, see Bennett, Levinson & Hioki, *supra* note 8 (manuscript at 28–29).

19. Simply stated, the concept of implicit bias describes "the process whereby the human mind automatically and unintentionally reacts to different groups in divergent ways, a process that can have unfortunate consequences." Justin D. Levinson et al., *Implicit Racial Bias: A Social Science Overview*, *in* Implicit Racial Bias Across the Law, *supra* note 12, at 9, 10.

20. *See id.* at 9–10; *see also* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1186 (2012).

21. *See, e.g.*, Kang et al., *supra* note 12, at 888 (finding that explicit and implicit biases in favor of Whites and against Asian-Americans altered the evaluation of a litigator's deposition); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345, 350 (2007) (finding that "the race of a civil plaintiff or a criminal defendant can act implicitly to cause people to misremember a case's facts in racially biased ways"); Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 521 (2014) [hereinafter Levinson et al., *Devaluing Death*] (finding that death-qualified jurors harbored stronger implicit and self-reported explicit racial biases than excluded jurors); Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 Ohio St. J. Crim. Law 187, 190 (2010) [hereinafter Levinson et al., *Guilty by Implicit Racial Bias*] (finding that people implicitly associate Black and Guilty compared to White and Guilty); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307, 309 (2010) (finding that "jurors automatically and unintentionally evaluate[d] ambiguous trial evidence in racially biased ways");

overwhelming racial disparities in America, especially those related to employment,[22] education,[23] home ownership,[24] and criminal justice,[25]

Rachlinski et al., *supra* note 3, at 1197 (finding that judges harbor the same kinds of implicit biases as others and that these biases can influence their judgment).

22. Between 1972 and 2013, the ratio of unemployment rates among Blacks versus that among Whites were between 2 and 2.5. Neil Irwin et al., *America's Racial Divide, Charted*, N.Y. TIMES (Aug. 19, 2014), http://www.nytimes.com/2014/08/20/upshot/americas-racial-divide-charted.html?_r=2. Even among people with similar levels of education, the Black unemployment rate is higher. *Id.* For example, in 2013, among people with a Bachelor's degree or higher, the unemployment rate for Blacks was 5.7%, compared with 3.5% for Whites. *Id.* Additionally, in 2013, the median weekly earnings of full-time wage and salary workers was 21.6% higher for Whites, and an analysis of Federal Reserve data by the Urban Institute suggests that White families were 6.1 times as wealthy as Black families in 2010. *Id.*

23. The disparities are apparent both at the level of high-school graduation as well as in advanced degree attainment. *Table 1: Educational Attainment in the United States: 2014—Detailed Tables*, U.S. CENSUS BUREAU (2014), http://www.census.gov/hhes/socdemo/education/data/cps/2014/tables.html (under Table 1, click on hyperlinks for "Black alone" and "Non-Hispanic White alone" for statistics) (including data from 24,864 Blacks and 140,124 non-Hispanic Whites). For example, in 2014, 32.5% of Blacks had attained a Bachelor's or Associate's degree or higher, compared to 46.1% of Whites. *Id.* In 2008, 44% of White 18- to 24-year-olds were enrolled in colleges and universities, compared to 32% of Black 18- to 24-year-olds. SUSAN AUD ET AL., U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 117 (2010), http://nces.ed.gov/pubs2010/2010015.pdf. In 2008, 17% of Black children had a mother with at least a Bachelor's degree, compared with 36% of White children. *Id.* at 20. Black K-12 students are nearly three times more likely to be held back as their White peers. Lindsey Cook, *U.S. Education: Still Separate and Unequal*, U.S. NEWS & WORLD REP. (Jan. 28, 2015, 12:01 AM), http://www.usnews.com/news/blogs/data-mine/2015/01/28/us-education-still-separate-and-unequal (citing the U.S. Department of Education's Civil Rights Data Collection). On the SAT, black students had a mean score of 428 for critical reading and 428 for math, compared with mean scores for white students of 527 for critical reading and 536 for math. *Id.* (same).

24. Access to homeownership may be the most important factor driving the wealth gap between Blacks and Whites. *See* Laura Shin, *The Racial Wealth Gap: Why a Typical White Household Has 16 Times the Wealth of a Black One*, FORBES (Mar. 26, 2015, 8:00 AM), http://www.forbes.com/sites/laurashin/2015/03/26/the-racial-wealth-gap-why-a-typical-white-household-has-16-times-the-wealth-of-a-black-one/#13799aab6c5b; *see also* THOMAS SHAPIRO ET AL., INST. ON ASSETS & SOC. POLICY, THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE 2–3 (2013), http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf (finding that in a study of 1,700 families over a period of twenty-five years, the number of years families owned their homes was the largest predictor of the gap in wealth growth by race in families with positive wealth growth, accounting for 27% of the difference in relative wealth growth between White and African-American families); U.S. CENSUS BUREAU NEWS, RESIDENTIAL VACANCIES AND HOMEOWNERSHIP IN THE SECOND QUARTER 2016, at 9 (2016), http://www.census.gov/housing/hvs/files/currenthvspress.pdf (finding that between 2012 and 2016, the homeownership rate for Blacks was 41–44%, compared to 71–73% for Whites).

25. Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 4 (2013) (explaining that one in nine Black men between the ages of twenty and thirty-four is behind bars, and Black males are incarcerated at nearly seven times the rate of White males); Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences* 3

much of the legal scholarship has rightfully focused on the Black–White paradigm of racial injustice.[26] This work has established the need for a comprehensive examination and systemic response to implicit racial bias that spans the entire legal system, perhaps beginning with, but certainly not limited to, judges. This section examines what is known and not known about judges' implicit biases, considers the successes and limitations of existing empirical work on implicit bias in the law, and outlines how social scientists studying implicit bias have outpaced legal scholars in understanding how implicit biases operate outside of the Black–White paradigm. It thus sets the stage for this Article's empirical study of judges' implicit biases beyond Black and White, specifically regarding judicial implicit biases related to Asian-Americans and Jews.

A. *Judges' Implicit Bias: A Little-Studied Domain*

When looking at the powerful range of ways that implicit bias can lead to harm for stereotyped group members in the legal system, perhaps one of the most interesting places to look is at the role of the judge. Judges possess tremendous discretion in a vast range of legal areas. In criminal law, for example, discretion spans the entire trial process, beginning with

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(Univ. of Mich., Law & Econ. Working Paper Series, Working Paper No. 12-002, 2012), http://ssrn.com/abstract=1985377 (explaining how federal criminal charging and sentencing found that, on average, Blacks receive almost 10% longer sentences than comparable Whites arrested for the same crimes and that prosecutors are more likely to file charges carrying the mandatory minimum sentences against Blacks); *Arrest Data Analysis Tool*, BUREAU JUST. STAT., http://www.bjs.gov/index.cfm?ty=datool&surl=/arrests/index.cfm# (last visited Jan. 4, 2017) (showcasing that in 2012, the arrest rate for Blacks was 7,920.1 people per 100,000, compared to just 3,392.3 people per 100,000 for Whites); *see also* Mark W. Bennett, *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing* Kimbrough *Justice, and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873, 880–81 (2014) (quoting MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 7 (2010)) (stating that in 2012, over 72% of the defendants in federal court sentenced for drug trafficking offenses were Black or Hispanic and in some states Black men have been admitted to prison on drug charges at rates twenty to fifty times greater than those of white men).

    26. *See, e.g.*, Levinson et al., *Guilty by Implicit Racial Bias*, *supra* note 21, at 190; *see also* Charles Ogletree et al., *Criminal Law: Coloring Punishment: Implicit Social Cognition and Criminal Justice*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 12, at 45, 46; Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383 (2006); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1554 (2004) (questioning whether implicit racial bias influences trial judge decision-making); Levinson, *supra* note 21, at 398–99; Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599, 599–600 (2009); L. Song Richardson & Philip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2628, 2630 (2013) (examining implicit racial bias in the context of the public defender's office); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 795 (2012).

bail decisions and culminating in sentencing.[27] Similarly, judges are always present: unlike individual jurors (who are not present in many legal proceedings, are not present during important legal decisions even during jury trials, and may never sit on another jury), the cumulative courtroom impact of an individual judge's implicit bias, as well as the potential impact of a "de-biased" judge, is considerable.[28] However, only one empirical study has examined the role of the judge with regard to implicit bias.[29] No studies have tested the implicit bias levels of U.S. district court or magistrate judges, and no studies have examined judges' implicit biases towards stereotyped groups beyond Black and White.

Considering the tremendous discretion judges possess throughout the American legal system, it is surprising that the role of implicit bias in American judges has largely been unexamined empirically. Although a range of scholars may frequently allude to potential biases in judicial decisions,[30] only one study has in fact measured whether judges hold similar types of implicit bias as the rest of the population, and that study only investigated one type of implicit bias.[31] In this study, Professor Jeffrey Rachlinski and his colleagues conducted a study of 133 state or local trial judges at three different judicial conferences.[32] Judges were tested both using an Implicit Association Test (IAT) and a separate priming measure.[33] In the IAT portion of the study, judges completed what is known as the Black–White attitude IAT.[34] In this variation of the

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27. *See* Richard B. Spindle, *Judicial Discretion in Common Law Courts*, 4 WASH. & LEE L. REV. 143, 145, 147–48, 152 (1947) (discussing the wide range of a judge's discretion, including a judge's discretion to grant or refuse a continuance, apply the rules of evidence, and decide probation, bail, and matters of procedure such as change of venue, setting aside order of dismissal, setting aside motion for default, setting aside default judgment, extension of time, separation of defendants on joint trial, consolidating several tort actions, amendment of pleadings, pretrial examination of state's evidence in a criminal case, changing plea, compelling election, order of putting on evidence, and declaring a mistrial); *see also* Mark Osler & Mark W. Bennett, *A "Holocaust in Slow Motion?" America's Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. SOC. JUST. 117, 153, 155 (2014) (stating that prior to the U.S. Sentencing Guidelines established in 1987, judges had virtually unlimited discretion, and even now, after the Guidelines have been deemed advisory, judges, in their discretion, remain committed to the Guidelines).

28. *See* Rachlinski et al., *supra* note 3, at 1221.

29. *See id.* at 1208 (finding that judges harbor the same kinds of implicit biases as others and that these biases can influence their judgment).

30. *See, e.g.*, Bennett, *supra* note 2, at 150; Hyman, *supra* note 1, at 41–42.

31. Rachlinski et al., *supra* note 3, at 1197 ("In this Article, we report the results of the first study of implicit racial bias among judges.").

32. *See id.* at 1205–06, 1208, 1209 n.59 (finding that in two of these three judicial trainings, judges presumably were unaware of the topic of the study and in the third training, judges had voluntary chosen to attend a session that referenced the "unconscious bias" topic in conference materials).

33. *Id.* at 1208.

34. *Id.* at 1209, 1238.

IAT, judges categorized photos of White and Black faces with positive attitude words (e.g., peace, pleasure, friend) or negative attitude words (e.g., nasty, evil, awful) as quickly as possible.[35] The researchers hypothesized that judges would display the same implicit biases as have been found in the rest of the population—judges would associate Black with bad and White with good.[36]

The second part of the study involved a nonconscious priming task, in which the experimenters rapidly flashed coded words (e.g., dreadlocks, hood, rap, for the Black prime; summer, stress, trust, for the control group prime) on the judge participants' computer screens at high speeds.[37] Following this racial (or non-racial, in the case of the control group) priming, the researchers asked the judges to complete simulated trial decision tasks related to two juvenile defendants, one involving a shoplifting case and the other involving a robbery case.[38] The researchers were interested first in whether judges who had been nonconsciously primed with Black-related words would respond to the trial decision tasks in harsher ways as compared to judges who were in the control group;[39] and second, whether judges' IAT scores predicted biased decisions on the decision-making task.[40]

The results of the study showed that, on the IAT, judges indeed harbored the anti-Black implicit biases that the rest of the population has been repeatedly shown to possess—judges more readily associated Black with bad and White with good.[41] On the priming task, however, the judges did not display the predicted results—judge participants who were exposed to the subliminal priming that presumably cognitively triggered the racial category of "Black" were not harsher in their judgments as compared to the control group.[42] IAT scores, however, were shown to be related to the judges' ultimate decisions.[43] Judges with higher implicit bias scores indeed rendered harsher judgments when the judges had been primed with the racial category of "Black."[44]

Other than this one study, however, there have been no empirical examinations of judges' implicit biases, and no studies have examined

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35. *Id.* at 1238–39.

36. *Id.* at 1210–11.

37. *Id.* at 1212, 1213 & nn.86–87.

38. *Id.* at 1214–15, 1217 (explaining that the researchers also presented the judges with one trial decision task in which the researchers explicitly identified the race of the defendant).

39. *Id.* at 1214.

40. *Id.*

41. *Id.* at 1210 (finding "a strong white preference among white judges" but "[t]he black judges, by contrast, demonstrated no clear preference overall").

42. *Id.* at 1215.

43. *Id.* at 1214.

44. *Id.* at 1217. This finding was reported as being "marginally significant." *Id.*

judges' implicit biases other than with regard to Black and White. A significant number of scholars, however, have empirically examined the ways in which implicit bias, and mostly Black–White bias, manifests in the legal system, and particularly in the criminal justice system.[45]

B. *Implicit Bias in the Law: Empirical Studies, Black and White*

This Subsection briefly reviews empirical studies that demonstrate what is known about implicit bias in the legal system. Our review demonstrates that, despite major progress in the understanding of how implicit bias functions in the law, most of the work has focused on the Black–White paradigm in the field of criminal law. No studies have been conducted on federal judges or have compared different types of judges to each other. Little work has assessed how implicit bias may operate in the context of other minority groups, such as Asians and Jews.[46] The empirical study we designed and describe in Part III seeks to begin to fill this gap.

Before describing the contributions of modern studies on implicit bias, which have disproportionately focused on discrimination against African-Americans in the criminal justice system, we wish to contextualize the discussion with the story behind one of social psychology's earlier and most interesting studies, which raises a range of interesting legal questions not only about the role of race in perceptions of behavior and criminality but also about the role of stereotyped groups in the law more generally. This study, conducted by Professors Gordon W. Allport and Leo Postman, who originally designed it to test the psychology underlying rumors, almost accidentally began an era of study that focused on the power of negative racial stereotypes.[47] In Professors Allport and Postman's study, participants viewed a picture of passengers on a streetcar (one of whom was Black).[48] In the picture, a White passenger holds a razor blade and a Black passenger is empty-handed.[49] After viewing the picture, participants were asked to describe the picture to other participants who had not seen the picture, much like the traditional "telephone game" in which stories tend to transform as a story is told and retold.[50] As participants told and retold the story to others, the story changed, and it did so in a racialized context.[51] After participants had retold the story several times, some participants reported that the

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45. *See supra* notes 25–26.

46. *See* Sadler et al., *supra* note 10, at 287.

47. *See* GORDON W. ALLPORT & LEO POSTMAN, THE PSYCHOLOGY OF RUMOR 63–64 (1947).

48. For a description of the Allport and Postman study, see Levinson, *supra* note 21, at 381.

49. *Id.*

50. *Id.*

51. *Id.*

Black passenger—not the White passenger—held a razor blade. [52] In psychological terms, the results of the study (which had originally focused on retelling accuracy) demonstrated a source-attribution error—the razor blade possession shifted from one memory source (the White passenger) to another (the Black passenger). [53]

If, through storytelling, a knife can somehow migrate from the hand of a White perpetrator to the hand of his innocent Black neighbor, how does one deconstruct and analyze any law-related story that depends on facts, stories, and memories (e.g., employment, [54] health care, [55] rights of native peoples, [56] tax, [57] property [58])? And how can one analyze the places within each law-related story that are susceptible to possible distortions triggered by racial or other group-based stereotypes? Modern empirical studies have done a fairly good job in beginning this dialogue but have left much undone. These studies have focused upon the cognitive elements of error that negative implicit attitudes and stereotypes can introduce into law and society, ranging from private action, to legislative progress, to jury decision-making. Why are voting citizens, for example, more likely to sign a petition to end so-called "three strikes" laws when

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52. *Id.*

53. *Id.*

54. *See* Nancy Gertner & Melissa Hart, *Employment Law: Implicit Bias in Employment Litigation*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 12, at 80, 81–82 (discussing the role implicit bias plays in employment discrimination law in the courtroom).

55. *See* Michele Goodwin & Naomi Duke, *Health Law: Cognitive Bias in Medical Decision-Making, in* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 12, at 95, 96–97 (discussing the threat of implicit bias to medical decision-making, the physician–patient relationship, and quality of care, and the challenges of combatting racial discrimination in the health care system given that implicit bias is outside the scope of Title VI of the Civil Rights Act).

56. *See* Serrano & Nu'uhiwa, *supra* note 12, at 210–11 (discussing how implicit biases toward Native Peoples as foreign, violent, and nonacademic undergird modern barriers to Native self-governance, such as legislation, case law, and administrative action limiting Native peoples' governing power).

57. *See* Dorothy A. Brown, *Tax Law: Implicit Bias and the Earned Income Tax Credit*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 12, at 164, 165–66 (discussing how implicit bias toward Blacks and welfare in the earned income tax credit context has harmed hard-working White taxpayers, led to the failure to monitor noncompliance and large instances of tax fraud, and led to little reduction of the error rate, which would help lift more hard-working Americans out of poverty).

58. *See* Michelle Wilde Anderson & Victoria C. Plant, *Property Law: Implicit Bias and the Resilience of Spatial Colorlines*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 12, at 25, 26, 39–40 (discussing implicit bias in the context of racially ordered housing, neighborhoods, and mortgage markets, and the challenges of combatting racial discrimination in the housing and land context given that implicit bias is outside the scope of the Fair Housing Act and other antidiscrimination laws).

prison is depicted as *less* Black?[59] Why are resumes with White-sounding names more likely to elicit a phone call for a job interview than resumes with Black-sounding names?[60] Why are guns, for example, more quickly identified and categorized when they are associated with Black faces?[61] Why is a "for sale" home evaluated as being more desirable when there is a photo with a White family (as opposed to a Black family) on the mantle?[62] And how is it that mock jurors evaluate the same ambiguous evidence differently based on the perpetrator's skin color? [63] These questions are likely best resolved by understanding the automatic and uncontrolled nature of group-based bias in the broader context of the legal system.

A summary of implicit-bias related legal studies may help begin to signal just how broad the discussion of implicit bias in the law can and should be, when one considers the impact of gender, disability, race, ethnicity, sexuality, religion, body shape, national origin, and more. Notably, however, a large proportion of existing implicit bias studies focus on African-Americans in the criminal justice system. These studies prove to be a great example of what can come next as researchers begin

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59. *See* Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCHOL. SCI. 1949, 1950–51 (2014) (finding that "[w]hen a penal institution was represented as 'more Black,' people were more concerned about crime and expressed greater acceptance of punitive policies than when the penal institution was represented as 'less Black'").

60. *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004) (finding that submitting resumes with White-sounding names as opposed to African-American-sounding names resulted in 50% more callbacks for interviews, and finding that callbacks are also more responsive to resume quality for White names than for African-American names).

61. *See* B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 185 (2001) (finding that participants identified guns faster when primed with Black faces than with White faces and that participants misidentified tools as guns more often when primed with a Black face than with a White face); *see also* Joshua Correll et al., *The Influence of Stereotypes on Decisions to Shoot*, 37 EUR. J. SOC. PSYCHOL. 1102, 1102, 1107 (2007) (finding that using a video game simulation, participants who read stories about Black (vs. White) criminals had increased bias in the decision to shoot Black targets and that an increased number of armed Blacks in the simulation led participants to shoot armed Blacks more quickly than armed Whites).

62. *See* Anderson & Plant, *supra* note 58, at 35; *see also* Courtney Marie Bonam, Devaluing Black Space: Black Locations as Targets of Housing and Environmental Discrimination (Aug. 2010) (unpublished Ph.D. dissertation, Stanford University) (on file with the Stanford University Libraries) (arguing that people discriminate against Black, relative to White, space, evaluating and treating a Black space more poorly, and that people devalue Black space relative to White space).

63. *See* Levinson & Young, *supra* note 21, at 309–10 (proposing and confirming the Biased Evidence Hypothesis, which "posits that when racial stereotypes are activated, jurors automatically and unintentionally evaluate ambiguous trial evidence in racially biased ways").

to think about implicit bias in broader contexts. In the criminal justice system, for example, implicit racial cues can even influence something as fundamental as societal support for law reform. A study by psychologists Rebecca C. Hetey and Jennifer L. Eberhardt found that, when they showed Californians photographs depicting over-incarceration in the wake of the state's highly criticized "three strikes law," a significantly larger percentage of citizens were willing to sign a real petition urging the repeal of the law when the prison population was depicted in the photographs as *less* Black.[64] Racial cues can affect juries, too. For instance, one of the authors of this Article, Professor Justin D. Levinson, studied how mock-jurors remembered "trial" information presented to them. His study found that mock-jurors who read about an African-American perpetrator had better memories of the aggressive case facts than those who read the same case but with a White perpetrator, a process thereby likely to skew their subsequent judgments.[65]

In other jury-focused studies, Professor Levinson and his colleagues examined race in the context of the presumption of innocence and found that mock-jurors automatically associated Black with Guilty and White with Not Guilty on an IAT.[66] In addition, they found that mock-jurors were more likely to evaluate ambiguous evidence as guilt-prone after having briefly seen a security camera image of a dark-skinned perpetrator (as compared to a lighter-skinned perpetrator in the same image).[67] Even criminal defense lawyers, a group that is presumably motivated to avoid racial bias, can be susceptible to these biases. Professors Theodore Eisenberg and Sheri Lynn Johnson found that even capital defense lawyers implicitly associated Black with bad and White with good on an IAT that they conducted.[68] Researchers later found that jurors eligible to sit on a death penalty trial actually harbored stronger Black-Worthless and White-Worth implicit associations than jurors who would not be allowed to sit on such juries.[69] Finally, researchers have noted that even rationales for punishment may be infused with implicit racial bias. In a 2016 study, Professor Robert J. Smith and his colleagues found that, in a national study, jury-eligible citizens (on an IAT) actually associate Black with Payback and White with Mercy—core punishment concepts that are supposedly devoid of racial content and underlie fair criminal punishment.[70]

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64. Hetey & Eberhardt, *supra* note 59, at 1950–51.

65. Levinson, *supra* note 21, at 350.

66. Levinson et al., *Guilty by Implicit Racial Bias*, *supra* note 21, at 190.

67. Levinson & Young, *supra* note 21, at 309–10.

68. Eisenberg & Johnson, *supra* note 26, at 1545.

69. Levinson et al., *Devaluing Death*, *supra* note 21, at 521, 564.

70. *See* Smith et al., *supra* note 10, at 43.

We need not recount all such implicit bias in criminal law studies here. There are quite a range, and most of them lead to the same conclusion: implicit racial bias can influence legal decision-making at every single stage of the criminal justice system, from law making, to policing, to the courtroom, to sentencing, and finally, to parole.[71] Yet, outside of the Black–White paradigm, and outside of criminal law, a key theme that emerges from this research review is that empirical study of implicit biases in other legal domains lags behind social science findings, particularly outside the context of Black and White.

C. *Beyond Black and White: Social Science and the Big Picture of Implicit Bias*

Current legal scholarship has largely failed to reflect fully the extraordinary breadth of social science work on implicit bias. Specifically, few scholars have conducted implicit bias legal scholarship outside the Black–White paradigm,[72] and few empirical studies have examined any legal domain outside of criminal law.[73] One may begin to understand these shortcomings of legal scholarship by looking first to the field of implicit social cognition, where hundreds of studies have documented a wide range of implicit biases beyond Black and White.

Social scientists have published hundreds of articles dedicated to exploring implicit bias, its rationales, and its effects.[74] Although the

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71. *See* Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1325 (2002); Eberhardt et al., *supra* note 26, at 384; Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876, 881, 883, 885–87 (2004); Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 302, 304 (2008); Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1527 (2015).

72. *But see supra* note 12.

73. *But see, e.g.*, Rachlinski et al., *supra* note 3, at 1197 (finding that judges harbor the same kinds of implicit biases as others and that these biases can influence their judgment).

74. *See, e.g.*, Correll et al., *supra* note 61, at 1103 ("The current studies examine whether experimental manipulations designed to increase the accessibility of the Black-danger stereotype exacerbate bias in the decision to shoot. This research borrows from work on the malleability of implicit associations."); *see also* Correll et al., *supra* note 71, at 1320 (finding that in a video game simulation, participants were able to make the decision to shoot an armed target more quickly and more accurately if the target was Black); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 12 (1989) (showing that the consequence of subconscious activation of negative black racial stereotypes is evaluating ambiguous behavior as aggressive); Eberhardt et al., *supra* note 71, at 881–83, 885–87 (finding that individuals, including police officers, who saw split-second images typically associated with crime prior to completing a study, were more likely to focus their attention on an image of a Black man as opposed to the White man on the same screen, even though they did not realize where they were looking); Goff et al., *supra* note 71, at 296, 302 (showing that individuals

research is too numerous to recount fully here, and there is indeed a wealth of research demonstrating the presence and societal effects of anti-Black implicit bias, it is helpful for the purposes of this Article to recognize the breadth of this research beyond Black and White. Researchers using implicit social cognition methods, such as the now well-known IAT,[75] have found that a majority of Americans consistently hold a varied range of implicit biases. Because of the flexibility of the measures, the IAT has allowed researchers to test, and statistically confirm the presence of, a huge range of implicit associations and stereotypes, including demonstrating that Americans implicitly associate: Asian-American or Native American with foreign (White as American),[76] Arab-Muslim with bad (White as Good),[77] women with family (male with the workplace),[78] gay as bad (straight as good),[79] disabled as bad

subconsciously associate Black faces with apes and that the association, once triggered, can change the way an individual views violence against a Black person); John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881, 893, 912 (2004) (arguing that, psychologically, there is an unconscious ideological motive that supports the status quo and that this motive explains why members of minority groups sometimes express preferences toward the majority group); Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36, 38 (2007) (summarizing the results of more than 2.5 million IAT results that studied various implicit biases); Payne, *supra* note 61, at 190 (discovering that individuals who saw split-second images of Black men prior to beginning a study were more likely to misidentify tools as guns in a timed experiment); Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359, 368 (2007) (showing that an IAT that focuses on racial stereotypes can sometimes predict the likelihood that someone has participated in overt acts of racial discrimination in the past).

75. *See* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464 (1998).

76. *E.g.*, Nosek et al., *supra* note 74, at 20 (summarizing data from IATs and self-reports and finding, among other things, that participants more easily associated Asian or Native American faces with "Foreign" and European American faces with "American"); *see also* Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCHOL. 447, 452 (2005) (finding that Asian-Americans as groups are less associated with the "American" culture than are White Americans); Nosek et al., *supra* note 74, at 20 (finding that Native Americans are implicitly viewed as less American than White Americans).

77. *E.g.*, Kristin A. Lane et al., *Understanding and Using the Implicit Association Test: IV: What We Know (So Far) About the Method*, *in* IMPLICIT MEASURES OF ATTITUDES 59, 66 (Bernd Wittenbrink & Norbert Schwarz eds., 2007) (finding that based on over 2.5 million online tests of seventeen different IATs, "participants demonstrated, on average, greater positivity for White over Black [and] Other Peoples (non-Arab Muslims) over Arab Muslims"); *see also* Jaihyun Park et al., *Implicit Attitudes Toward Arab-Muslims and the Moderating Effects of Social Information*, 29 BASIC & APPLIED SOC. PSYCHOL. 35, 38 (2007) (finding that participants exhibited a strong implicit preference for White over Arab-Muslim names).

78. *E.g.*, Lane et al., *supra* note 77, at 64, 68.

79. *E.g.*, *id.* at 66–67.

(abled as good),[80] obese as bad (thin as good),[81] old as bad (young as good),[82] and so many others.[83] In many of these domains, Americans' self-reported attitudes and stereotypes often vary widely from, or even conflict with, their documented implicit biases. For example, most Americans will self-report that they consider Native Americans to be the most American of all groups, but these self-reports contrast deeply with their implicit associations revealed by scientific testing.[84] Researchers estimate that the vast majority of Americans possess the implicit biases listed above, and many others, too.[85] Thus, research has consistently shown that the practice of simply asking people about their group-related attitudes or stereotypes captures only a limited amount of relevant information.[86]

Social scientists have also employed a variety of methods other than the IAT to test how implicit biases affect cognitive processing and behavior across a wide range of groups. Of the many articles chronicling implicit bias outside of the Black–White paradigm, consider one that demonstrates how certain actions can simply and easily activate implicit bias in people's minds. In an empirical study, researchers showed study participants a video of a research assistant holding cue cards that contained unfinished word fragments.[87] One-half of the participants saw an Asian research assistant in the video, and the other half saw a White research assistant.[88] The cue cards that the research assistant held contained incomplete words, several of which conformed to Asian

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80. *E.g.*, *id.*

81. *E.g.*, *id.* at 67.

82. *E.g.*, *id.* at 66–67.

83. *E.g.*, *id.* at 66–68 (finding that people implicitly associate males with science (females with the liberal arts), light skin with good skin (dark skin with bad skin), and White with harmless objects (Black with weapons)).

84. *See* Nosek et al., *supra* note 74, at 20 (finding that participants' self-reported responses reflected the view that Native Americans were more "American" than whites).

85. *See, e.g.*, Anthony Greenwald, *Race in America: The Invisible Hand of the Implicit* Mind, PSYCHOL. TODAY (Aug. 12, 2015), https://www.psychologytoday.com/blog/the-violent-mind/201508/race-in-america-the-invisible-hand-the-implicit-mind; Dennis Junius, *AP Poll: U.S. Majority Have Prejudice Against Blacks*, USA TODAY (Oct 27, 2012, 8:37 AM), http://www.usato day.com/story/news/politics/2012/10/27/poll-black-prejudice-america/1662067/.

86. This Article does not suggest, however, that asking people about their self-reported biases is a waste of time. Indeed, there are times in which people will indeed admit such biases or preferences, and researchers should scrutinize these admissions. For example, Levinson and collaborators found that participants who self-reported more explicit bias displayed more sentencing bias in a death-penalty task. *See* Levinson et al., *Devaluing Death*, *supra* note 21, at 562.

87. Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, 60 J. PERSONALITY & SOC. PSYCHOL. 509, 510 (1991).

88. *Id.*

stereotypes, such as "POLI_E," "RI_E," "S_ORT," and "S_Y."[89] The researchers challenged participants to formulate as many word completions as they could during a limited time.[90] The researchers found that participants who saw the Asian research assistant completed more Asian-stereotyped words (POLITE, RICE, SHORT, AND SHY) as compared to participants who saw a White assistant.[91]

Such a simple study can have more complex implications. Recognizing the ease with which an entire network of stereotypes became activated and readily available in cognition in the study, one might consider how easily group membership can function to prime stereotypes in the legal system. Particularly in the context of judging, one could predict that a judge could pick up on a huge range of cues (appearance of a person or categorization of a last name, as the simplest examples) and that those cues could potentially work to rapidly activate one or more networks of stereotypes.

The next Part builds upon this discussion of implicit bias beyond Black and White and sets the stage for this Article's empirical study by considering why it might be important to empirically investigate judicial implicit biases related to Asian-Americans and Jews.

II. BIASES BEYOND BLACK AND WHITE: ASIANS AND JEWS IN AMERICA

Although the vast majority of legal scholarship on implicit bias has dealt with African-Americans and the harmful stereotypes that can influence a range of areas across the law (namely, aggressive stereotypes such as violence[92]),[93] there is detailed empirical research from the social sciences that documents the history of discrimination, both explicit and implicit, against both Asian-Americans[94] and Jews in America.[95] Within

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89. *Id.*

90. *Id.*

91. *Id.* at 513.

92. *See* sources cited *supra* note 26.

93. Justin D. Levinson, Understanding the Full Impact of Implicit Bias in the Criminal Justice System: From Lawmaking to Parole, and Back Again, Presentation at the University of Hawai'i Law Review Conference (Jan. 16, 2015) (on file with author).

94. *See supra* note 75 and accompanying text. This Article uses the term "Asian-American" in full recognition of the multiple meanings of the term and the risks of grouping together all American people of Asian descent. As a Harvard Law Review note discusses, this descriptor "obscures not only the differences among Asian-American individuals qua individuals but also the historic disputes that have separated Asian peoples. Moreover, it helps conceive individuals as components of monolithic blocs defined primarily by common physical traits." Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1932 (1993); *see also* Masako Iino, *Asian Americans Under the Influence of "Japan Bashing,"* 32 AM. STUD. INT'L 17, 17 (1994) ("Asian Americans are diverse. They are people who are, or whose ancestors are, from such countries in Asia as China, Japan, Korea, the Philippines, India, Vietnam, Laos, and Cambodia.").

95. BRUCE E. BLAINE, UNDERSTANDING THE PSYCHOLOGY OF DIVERSITY 87 (2007) (stating that "[s]tereotypes of Jews have long included a mix of positive and negative attributes," such as

legal discourse, there has been a deep and engaged discourse focusing on various elements of injustice within American law and society, primarily focusing on the Asian-American experience[96] but also on the Jewish experience.[97] Because many perceive both of these groups as "model

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intelligence, shrewdness, ambition, success, loyalty to family, dishonesty, money loving, and ruthlessness); BARRY A. KOSMIN & ARIELA KEYSAR, BRANDEIS CTR. & TRINITY COLL., NATIONAL DEMOGRAPHIC SURVEY OF AMERICAN JEWISH COLLEGE STUDENTS 2014: ANTI-SEMITISM REPORT 2– 3 (2015), http://www.brandeiscenter.com/images/uploads/articleuploads/trinity-Anti-Semitism.pdf (finding that in a survey of 1,157 self-identified Jewish students at fifty-five university and four-year college campuses, 54% of Jewish students "reported having been subject to or witnessing anti-Semitism on their campus"); Daniel Katz & Kenneth Braly, *Racial Stereotypes of One Hundred College Students*, 28 J. ABNORMAL & SOC. PSYCHOL. 280, 282, 285 (1933) (finding that in 1933, when researchers asked one hundred Princeton students to select traits from a list of eighty-four adjectives that matched Jews, the top twelve chosen traits for Jews were: shrewd (79%), mercenary (49%), industrious (48%), grasping (34%), intelligent (29%), ambitious (21%), sly (20%), loyal to family ties (15%), persistent (13%), talkative (13%), aggressive (12%), and very religious (12%)); Rudman & Ashmore, *supra* note 74, at 364, 365 (finding that results of a Jewish/Christian negative/positive traits IAT predicted recommended budget cuts (economic discrimination) for Jewish organizations); Edwards S. Shapiro, *Jews with Money*, 36 JUDAISM 7, 8 (1987) ("The association of Jews with money was a staple of American, as well as of British, literature of the nineteenth and early twentieth century."); Stacey Burling, *Jews, Money and Image*, PHILA. INQUIRER (Jan. 11, 2009) ("Jews gravitated toward finance and trade centuries ago, when more highly valued roles in agrarian societies—land owner and warrior—were denied to them. Early Christians were banned from loaning money at interest to fellow Christians, but they needed loans and Jews took on that role.").

96. *E.g.*, Ming W. Chin, *Keynote Address: "Fairness or Bias?: A Symposium on Racial and Ethnic Composition and Attitudes in the Judiciary,"* 4 ASIAN L.J. 181, 181–82 (1997); Harvey Gee, *Asian Americans and Criminal Law and Criminal Procedure: A Missing Chapter from the Race Jurisprudence Anthology*, 2 GEO. J.L. & MOD. CRITICAL RACE PERSP. 185, 185 (2010); Jou-Chi Ho, *The Call for and Role of Asian Lawyers in the Deep South*, 12 SEATTLE J. SOC. JUST. 843, 868 (2014); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 26–27, 89–90 (1999); Nary Kim, *Too Smart for His Own Good? The Devolution of a "Model" Asian American Student*, 20 ASIAN AM. L.J. 83, 84–85 (2013); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1353–54 (1991); Setsuko Matsunaga Nishi, *Perceptions and Deceptions: Contemporary Views of Asian Americans*, *in* A LOOK BEYOND THE MODEL MINORITY IMAGE 3, 3–5 (Grace Yun ed., 1989); Note, *supra* note 94, at 1932; Rhoda J. Yen, *Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the Wayne Lo Case*, 7 ASIAN L.J. 1, 2 (2000).

97. *E.g.*, Kenneth L. Marcus, *Jurisprudence of the New Anti-Semitism*, 44 WAKE FOREST L. REV. 371, 391 (2009) (noting that the view of Jews in America only as a religious group and not as a religious, ethnic, or racial group is problematic in claims of discrimination based on race or national origin); *see also* VICTORIA SAKER WOESTE, HENRY FORD'S WAR ON JEWS AND THE LEGAL BATTLE AGAINST HATE SPEECH 3 (2012) (detailing the discrimination against Jews in the 1920s in the context of *Sapiro v. Ford*); Daniel M. Hinkle, *Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?*, 9 BUFF. CRIM. L. REV. 139, 178 (2005) (proposing that removing Jewish jurors based on the assumption that Jews are intelligent may lead to feelings of exclusion by Jewish jurors); Julie D. Arp, Note, *The* Batson *Analysis and Religious Discrimination*, 74 OR. L. REV. 721, 730–32 (1995) (noting discrimination against Jews as a

minorities" or "success stories," largely due to perceived academic and socio-economic measures as well as stereotypes related to these groups—for example, Asian academic achievement[98] or Jewish business savvy[99]—it may initially seem somewhat counterintuitive for those unfamiliar with the literature to focus on how they may be unintentional targets of discrimination in the legal system.

However, research from the cognitive sciences consistently shows the continuing prevailing stereotypes about these groups.[100] Some of the stereotypes are indeed positive, but there are also strong negative associations between both of these groups and morality-related stereotypes, such as slyness, financial fraud, and an overall lack of trustworthiness.[101] These stereotypes have deep historical roots, but they are not a relic of history; social scientists have demonstrated that they

religious group in peremptory challenges because the U.S. Supreme Court did not explicitly protect religious groups, as opposed to ethnic groups).

    98. In 2013, 65% of Asian-Americans between the ages of 35 and 39 had a four-year college degree, compared with 42% of Whites of the same age. Cass R. Sunstein, *Asians Make It Big in America*, BLOOMBERG VIEW (Mar. 2, 2015), http://www.bloombergview.com/articles/2015-03-02/why-asian-americans-will-soon-be-the-wealthiest-americans; *see also* Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, *in* 2 HANDBOOK OF SOCIAL PSYCHOLOGY 357, 379 (Daniel T. Gilbert, Susan T. Fiske & Gardener Lindzey eds., 1998) ("Asians in the United States are subsumed in the second half of the twentieth century as the Model Minorities: quiet, law-abiding, hardworking, and intelligent." (citation omitted)).

    99. HASIA R. DINER, THE JEWS OF THE UNITED STATES 320 (2004).

    100. One study found that on average, Jews are viewed as wealthier, more intelligent, harder working, more self-supporting, and less violent than Whites in general. Thomas C. Wilson, *Compliments Will Get You Nowhere: Benign Stereotypes, Prejudice and Anti-Semitism*, 37 SOC. Q. 465, 465, 467 (1996) ("Research . . . has identified two sorts of Jewish stereotypes. The first is overly malevolent and clearly anti-Semitic, portraying Jews as pushy, covetous, clannish, ill-mannered, ruthless, dishonest, mercenary, grasping, overbearing, sloppy, loud, money-loving, and uncouth. The second kind of stereotype is ostensibly benign, characterizing Jews as financially successful, ambitious, hardworking, intelligent, loyal to family and other Jews, industrious, energetic, and able to get ahead."). Stereotypes for Jewish people include perceived disloyalty, power, intelligence, and dishonesty, all of which are also stereotypes of Asian-Americans. *See* Fiske, *supra* note 98, at 379–80. In addition, Jews are also seen as "clannish, greedy, ambitious, and pushy," and Asians are also seen as "quiet, law-abiding, hardworking, and intelligent." *Id.* In a study involving over 860 college students associating groups with each of 120 characteristics, Asian-Americans were perceived as more self-disciplined (more self-disciplined, reserved, shy, and quiet, but less noisy), less popular (less sociable, athletic, good looking, and competent), and more traditional (more family committed, tradition-loving, and old-fashioned) than White Americans. *See* Linda A. Jackson et al., *Cognition, Affect, and Behavior in the Prediction of Group Attitudes*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 306, 308, 311 (1996). In a 2001 telephone survey of 1,216 Americans, the poll found that 23% of Americans said they were uncomfortable with the idea of voting for an Asian-American candidate for president (11% for a Jew and 15% for an African American). K. Connie Kang, *Study Finds Persistent Negative Perceptions of Chinese Americans*, L.A. TIMES (Apr. 25, 2001), http://articles.latimes.com/2001/apr/25/news/mn-55180.

    101. *See supra* note 100 and accompanying text.

continue today. [102] Within the law, the existence of negative moral stereotypes can play a dangerous role in a host of domains where moral judgments can become legally relevant, ranging, for example, from legislative and administrative decision-making in criminal law (e.g., implementing stricter sentencing guidelines for white-collar crimes), [103] corporate law (duty of loyalty violations), [104] tort law (punitive damage judgments), securities law (insider trading or disclosure violations), contract law (breach and damages), employment law (trustworthiness of employees and their perceived loyalty to a corporation), and immigration law (moral thresholds). Non-doctrinal but still important legal consequences could additionally flow from the impact of stereotypes on the hiring and promotion of these groups in legal jobs, including law firm positions, judicial clerkships, and academic posts. [105]

We chose to focus on stereotypes of Asians and Jews in America for multiple reasons. First, we wanted to investigate the breadth of implicit bias in federal and state judges beyond Black and White. As discussed in Part I, the concept of implicit bias against African-Americans in the legal system is well-researched and now regularly debated by the media and the public, [106] perhaps because it is supported by so many objective measures of inequality that it is nearly impossible to deny. [107] Second, there is a rich history of discrimination against Asians and Jews in America, both inside and outside the legal context, but a significant amount of public discourse about these groups highlights recent successes and overshadows this history. Testing empirically the current state of bias against these groups (among a group as honored as federal and state judges, who presumably would be among the most motivated to avoid bias) would therefore be illuminating in the context of that history of discrimination.

Third, both of these groups are perceived largely as American success stories, yet somewhat contradictory data complicates these narratives, such as objective indicators of wealth and achievement, as compared to social-science data demonstrating the continued propagation of negative stereotypes. [108] Studying implicit and explicit biases toward these groups

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102. Rudman & Ashmore, *supra* note 74, at 368.

103. Bennett, Levinson & Hioki, *supra* note 8 (manuscript at 18).

104. Judgments relating to the seizing of corporate opportunities for personal gain may well involve moral judgments.

105. Kang et al., *supra* note 12, at 886–87 (finding that explicit and implicit biases in favor of Whites and against Asian-Americans altered the evaluation of a litigator's deposition).

106. MICHELLE ALEXANDER, THE NEW JIM CROW 232–33 (2010).

107. In fact, the only empirical study to examine implicit bias in judges was conducted on Black and White implicit attitudes. Rachlinski et al., *supra* note 3, at 1208, 1210.

108. The median wealth of White families in 2013 was $134,008 compared to $94,440 for Asian-American families and $11,184 for African-American families. Sunstein, *supra* note 98. In

allows us to harness scientific methods to potentially help resolve ambiguity about the state of these biases in the legal system. And finally, we believed that studying groups that are largely considered favored minority groups is important: if strong implicit biases against Asians and Jews (that may be considered counterintuitive by some) were documented among federal and state judges, it would help illuminate the true breadth of implicit bias in the law and all of its attendant dangers.[109]

A. *Anti-Asian Explicit Attitudes and Stereotypes: From Yellow Peril to the "Model Minority"*

There is a long history of anti-Asian sentiment in the United States. Although this history is complex and well-documented, this Article summarizes briefly the evolution of anti-Asian attitudes and stereotypes to set the stage for our report on modern research on implicit and explicit anti-Asian attitudes and stereotypes.[110] According to some scholars, significant anti-Asian sentiment initially grew out of the immigration of large numbers of Chinese and Japanese to the United States, largely beginning

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2013, 65% of Asian-Americans between the ages of thirty-five and thirty-nine had a four-year college degree, compared with 42% of Whites of the same age. *Id.*

    In 2013, 25% of Jews had a household income exceeding $150,000, compared with 8% of the general public, and 58% of Jews were college graduates, compared with 29% of the general public. *A Portrait of Jewish Americans*, PEW RES. CTR. (Oct. 1, 2013), http://www.pewforum.org/2013/10/01/jewish-american-beliefs-attitudes-culture-survey/.

    109. Additional empirical work on other groups in the American legal system is still sorely needed. For example, the incarceration numbers for certain group members, such as Latinos, demonstrate serious concerns that should be investigated in the implicit bias context. Similarly, Muslims in America report overt discrimination in law enforcement. *See* Geneive Abdo, *Muslims Say Fellow Americans Are Lashing Out*, CHI. TRIB. (July 15, 2014), http://articles.chicagotribune.com/2004-07-15/news/0407150256_1_american-muslims-muslim-activist-non-muslim. Future empirical work must examine these biases, as well as others. Unfortunately, due to the voluntary nature of our study and the need to prevent a large drop-out rate, we were limited in what group stereotypes we could investigate empirically.

    110. This summary is not meant to be comprehensive. There are a wide number of sources that can provide a meaningful context to anti-Asian sentiment in the United States. *See generally, e.g.*, ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE (2d ed. 2006) (comparing Asian-Americans' experiences with those of African-Americans in the United States, specifically that they have been the targets of racially based violence); DAVID PALUMBO-LIU, ASIAN/AMERICAN (1999) (arguing that the United States' identity has been strongly attached to the Pacific and various Asian-American identities had been formed as a result); Yuko Kawai, *Stereotyping Asian Americans: The Dialectic of the Model Minority and the Yellow Peril*, 16 HOWARD J. COMM. 109 (2005) (noting that Asian-American's stereotype of the model minority is inseparable from the negative stereotype of "yellow peril"); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71 (1997) (finding that those of Asian descent have been labeled the "model minority," but also "foreign," which reinforces their inferiority to White Americans).

in the 1850s.[111] In California, for example, 17% of the male workforce in the 1870s was composed of Chinese workers.[112] According to the Asian-American Almanac, "once the new immigrants arrived they faced a growing tide of bigotry fueled by white workers' fears of economic competition."[113] These fears manifested as "widespread public rhetoric excoriating Asian immigrants"[114] and "culminat[ed] in a series of restrictive policies."[115] These policies included the Sidewalk Ordinance of 1870,[116] the Chinese Exclusion Act of 1882,[117] and later the Immigration Acts of 1917 and 1924, which essentially shut down Asian immigration for two decades.[118] Although many of these efforts consisted of legally sanctioned discrimination related to negative perceptions and fears of Chinese-Americans in particular, these discriminatory efforts were by no means limited. The Japanese-American experience similarly tells a story of discrimination and fearful legal responses to stereotypes. This fear was at its height just ten weeks after the Pearl Harbor attack, when President Franklin D. Roosevelt signed Executive Order 9066, which codified a policy of "exclusion, removal, and detention" that affected 120,000 people without review.[119] This policy, considered by some to be among the most embarrassing chapters in recent American history,[120] was fueled by fears and stereotypes of Japanese-Americans, known by some as the

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111. THE ASIAN AMERICAN ALMANAC 265 (Susan B. Gall & Irene Natividad eds., 1995).

112. *See id.*

113. *Id.*

114. *Id.* at 337.

115. *Id.* at 265.

116. This law "prohibited persons from walking on the streets while using poles to carry goods, a practice used only by Chinese Americans at the time." *Id.* at 337.

117. *Id.* at 206 (suspending "the immigration of Chinese laborers to the United States for ten years" (emphasis omitted)).

118. *Id.* at 266.

119. Don T. Nakanishi, *Surviving Democracy's "Mistake": Japanese Americans & the Enduring Legacy of Executive Order 9066*, 19 AMERASIA J. 7, 7 (1993) (quoting COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 2 (1982), https://www.archives.gov/files/research/japanese-americans/justice-denied/summary.pdf).

120. *See, e.g.*, Saito, *supra* note 110, at 74.

> "[T]he broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership." Based on this report, the president issued an official apology and Congress passed legislation providing for at least symbolic redress. These, too, imply that the experience was an unfortunate detour in an otherwise honorable history of respect for the rights of citizens.

Id. (footnotes omitted) (quoting COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, *supra* note 119, at 18).

"yellow peril" era.[121] During this era, "Japanese were depicted as degenerate mongrels and the voters [in California] were urged to save 'California-the White Man's Paradise' from the 'yellow peril.'"[122]

Social science research began to document negative explicit (self-reported) attitudes and stereotypes against Asian-Americans as early as the 1930s. A 1933 study of Princeton students sought to document their racial and ethnic stereotypes, including stereotypes of Chinese- and Japanese-Americans.[123] Researchers asked study participants to choose traits from a list of adjectives and match those traits to groups.[124] For Japanese, participants selected "Intelligent," "Industrious," "Progressive," "Shrewd," and "Sly."[125] For Chinese, the participants' top six choices were "Superstitious," "Sly," "Conservative," "Tradition-loving," "Loyal to family ties," and "Industrious."[126]

Although one can see the beginnings of mixed negative with positive stereotyping in the Princeton survey, researchers report a stronger shift toward positive stereotyping that occurred primarily in the second half of the twentieth century, perhaps beginning in earnest across the American population around the 1960s.[127] Self-reported attitudes toward Asian-Americans in the United States appear to evolve as the "Model Minority" stereotype began to emerge clearly; Asians began to be seen as "quiet, law-abiding, hardworking, and intelligent,"[128] as well as "self-disciplined," attributes that are believed to go along with educational and career success.[129] These "model" stereotypes, however, were not always positive and failed to entirely evade the negative moral stereotypes that were clear in the early 1900s.

The "model minority" and other stereotypes about Asian-Americans did not disappear in the aftermath of the Civil Rights Movement. Modern researchers have been sensitive to the multi-directionality of stereotypes and have investigated the way seemingly positive stereotypes can actually activate a threat response, whereby White Americans became concerned about the overrepresentation of Asian-Americans in desirable

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121. Kawai, *supra* note 110, at 113 ("[T]he 1941 Pearl Harbor bombing by Japan during World War II inflated the yellow peril stereotype and led to the detention of Japanese Americans in concentration camps.").

122. Saito, *supra* note 110, at 72 n.3 (quoting Oyama v. California, 332 U.S. 633, 658–59 (1948)).

123. Katz & Braly, *supra* note 95, at 285.

124. *Id.* at 282.

125. *Id.* at 285.

126. *Id.*

127. Nakanishi, *supra* note 119, at 11.

128. Fiske, *supra* note 98, at 379.

129. Colin Ho & Jay W. Jackson, *Attitudes Toward Asian Americans: Theory and Measurement*, 31 J. APPLIED SOC. PSYCHOL. 1553, 1553–54 (2001).

academic and professional positions. In a 2001 study of American attitudes towards Asian-Americans, for example, Professors Colin Ho and Jay Jackson presented survey participants with a series of questions that make up what they call the "Attitude Toward Asians (ATA) Scale."[130] The ATA is an explicit measure that asks participants how much they agree or disagree with statements like, "Asian Americans tend to be hardworking and diligent," "Asian Americans should think in more American ways," and "Asian Americans are gradually taking over the United States."[131] The researchers hypothesized that "[b]eing perceived as intelligent, industrious, and successful may elicit admiration and respect, but may also elicit threat, resentment, envy, and hostility."[132]

The results of their study confirmed these expectations and found that "[f]our stereotype factors were found to underlie the stereotype of Asian Americans: a negative stereotype, a model-minority stereotype, an artistic stereotype, and a quiet stereotype."[133] One can expect this kind of multi-directionality and complexity of explicit self-reported measures to be found in continuing empirical studies. With the implicit social cognition revolution, however, researchers have not been limited to using explicit measures to investigate Asian-American stereotypes. The next Section summarizes this research endeavor and sets the stage for this Article's empirical study of Asian-American implicit stereotypes held by federal and state judges.

B. *Anti-Asian Attitudes and Stereotypes: Implicit Biases*

Modern studies of implicit bias have occasionally, though not frequently, examined implicit biases that Americans hold towards Asians. These studies have shown that people implicitly classify Asian-Americans as foreigners, ineffective litigators, and inhibited, among other negative categorizations. A 2007 study by Professors Laurie A. Rudman and Richard D. Ashmore, for example, found that college student participants associated Asians (on an IAT) with negative traits (reserved, stiff, inhibited) and Whites with positive traits (warm, friendly, outgoing).[134] When combined with an economic discrimination measure, in which researchers asked students to employ budget cuts to various student organizations at their university, the researchers found that the implicit bias levels predicted students' discrimination against an Asian student group (the "Japanese Cultural Association").[135]

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130. *Id.* at 1556.
131. *Id.* at 1563.
132. *Id.* at 1555.
133. *Id.* at 1570.
134. Rudman & Ashmore, *supra* note 74, at 364.
135. *Id.* at 367 (finding that explicit self-reported attitudes towards Asians also predicted discrimination in the budget cut task).

Research has also found Asian-Americans to be less associated as "American" compared to White Americans.[136] In that study, researchers Thierry Devos and Mahzarin R. Banaji created an IAT in which they asked participants to pair photos of Whites or Asians with symbols that were easily identifiable as "American" (such as the American flag, Mt. Rushmore, Capitol building) or "Foreign" (UN Building in Geneva, Ukrainian bill, Green and White flag).[137] Results of the study showed that participants implicitly associated White with American and Asian with Foreign, relative to one another.[138]

In the legal context, one study has measured how implicit bias may affect Asian-Americans. In that study, Professor Jerry Kang and his colleagues investigated whether the stereotype of the successful litigator was indeed a White stereotype.[139] The researchers in that study employed two different IATs designed to measure how implicit associations of Asians and Whites may be related to stereotypes of successful litigators.[140] In one IAT, Kang and his colleagues instructed participants to group together photos of male Asian faces and White faces with attribute words typically associated with successful scientists (e.g., analytical, methodical, mathematical) or litigators (e.g., eloquent, charismatic, verbal).[141] In the second, participants grouped together the photos with positive or negative attitudes (often called the good/bad IAT), including, for example, "beauty, gift, happy," for the category "Good," and "filth, pain, hurt," for the category "Bad."[142] In both IATs, the researchers found the predicted implicit bias—participants not only associated White with good and Asian with bad, but they also associated White with successful litigator traits and Asian with successful scientist traits.[143] Furthermore, the researchers found that when participants were asked to rate the performance of a litigator (whom they heard by audio and was labelled as either White or Asian), their implicit biases predicted their ratings of the litigator when he was labelled as White.[144] The more implicit bias they held associating White with successful litigator attributes (as opposed to successful scientist attributes), the more likely they were to judge a White litigator as being competent, the more likely

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136. Devos & Banaji, *supra* note 76, at 453.

137. *Id.* at 454, 456, 457 (using identifiable Asian and White names instead of photos for the IAT, a second study found similar results).

138. *Id.* at 463.

139. *See* Kang et al., *supra* note 12, at 887.

140. *Id.* at 892, 895.

141. *Id.* at 893–94.

142. *Id.* at 895.

143. *Id.* at 900.

144. *Id.* at 896, 901–02.

they were to like him, and the more likely they were to hire or refer him to others.[145]

In light of the historical evidence regarding anti-Asian discrimination, as well as the more modern implicit stereotypes of Asians in America described in this Subsection, it is not surprising that scholars have considered the ways in which Asian-Americans might face automatic discrimination in the legal setting.[146] These scholarly accounts have included a range of claims that posit, for example: "The yellow peril stereotype tends to increase the likelihood of acquittal in cases involving Asian American victims;"[147] "Asian American and other non-white victims tend to receive less attention from law enforcement officers at all stages of the criminal arrest, investigation, and pre-trial processes;"[148] law enforcement officers, due to stereotypes of Asians as morally inferior, may "apply tactics of harassment or brutality to dominate Asian suspects;"[149] Asian intellectual and "masterminding" stereotypes may make it less likely for a jury to agree with an insanity defense;[150] and

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145. *See id.* at 900–01. For the Asian-litigator condition, however, it was the participants' explicit bias, not their implicit bias, that predicted their evaluations of his performance. *See id.*

146. *See* Gee, *supra* note 96, at 195, 197 (arguing that the model minority myth prevents Asian-Americans from becoming jury forepersons where Asian-Americans are not parties to the litigation; can help Asian defendants secure more lenient sentences than they deserve; and combined with the characterization of Asian-Americans as foreign, often create obstacles for Asian-Americans to establish *prima facie* claims of racial discrimination due to a belief that they are less protected under the Fourteenth Amendment than are African-Americans); Yen, *supra* note 96, at 15, 19–20 (arguing that the "yellow peril" stereotype devalues Asian lives because the perception of Asian-Americans as foreign or non-American is a significant hurdle for prosecutors in convincing a non-Asian jury to identify with an Asian victim, and that police who perceive Asian-Americans as foreign may attempt to take advantage of Asian suspects by failing to comply with criminal procedures).

147. Yen, *supra* note 96, at 13–15 (arguing that the image of Asian men as dangerous foreigners or martial artists has influenced jurors' views of "reasonableness" in self-defense contexts, such as in *Hattori v. Peairs*, 662 So. 2d 509 (La. Ct. App. 1995), and *Kansas v. Simon*, 646 P.2d 1119 (Kan. 1982)).

148. *Id.* at 16 ("Police often assume that Asian and Asian American victims are unable to speak coherent English and instead speak to white witnesses. Asian victims also may distrust police and fail to assert their grievances. As a result, police likely make fewer arrests for Asian and Asian American victims as compared to white victims." (footnote omitted)).

149. *Id.* at 19 (noting that a New York court convicted a police officer of attempted assault of a Korean storeowner after the officer called the storeowner and his brother "f—ing Orientals" and "animals" as he beat them).

150. *See* Kim, *supra* note 96, at 93–94 ("The model minority stereotype, which disproportionately attributes intelligence and wiles to Asian Americans, packs the potential to influence trials for Asian American defendants . . . . [T]he prosecution can insist that Asian Americans are capable of 'masterminding' crimes and outsmarting non-Asians, even when the crimes lack clear design. . . . In the end, it may be too paradoxical for jurors to find that a scholarly and well-educated defendant has a mental defect that clouds his ability to discern right from

Asians are less likely to be selected to be jury forepersons, among others.[151]

C. *Anti-Jewish Explicit Attitudes and Stereotypes: From Peddler to Wall Street*

Although Asians and Jews took quite different paths in terms of their settlement in America, there are some historical similarities, both in chronology and in stereotypes that have led to the development of a mix of negative and positive group-based stereotypes. As psychologist Susan Fiske summarizes, "Stereotypes for Jewish people . . . share some of the content for Asians: perceived disloyalty, power, intelligence, and dishonesty overlap."[152] Here, this Article briefly traces the historical development of Americans' attitudes and stereotypes toward Jews.

The largest Jewish immigration occurred from Europe between the years of 1820–1924.[153] During these years, over 2.5 million Jews immigrated to the United States, both as a response to intolerable anti-Semitism and harsh economic conditions in Europe and to the economic opportunities available in America.[154] Jews settled into a new life in the United States, often becoming peddlers to make a living.[155] This new life did not come without discrimination, however. Jews in the nineteenth century were often stigmatized "for what many considered essential racial traits—greed, depravity, crudeness, and clannishness."[156] Prior to the 1880s, however, most Americans also perceived Jews to be "white," which made legally-sanctioned discrimination more difficult.[157] After the 1880s, however, a more racialized view of Jews emerged in America. A large swath of private enterprises formalizing policies to exclude Jews (e.g., law firms, universities, hotels, clubs) accompanied this racialization,[158] but this

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wrong—though subsequent events continue to point to a correlation between a high level of intelligence and mental illness.").

151. *See, e.g.*, Chin v. Runnels, 343 F. Supp. 2d 891, 895, 906 (N.D. Cal. 2004); *see also* Teshima, *supra* note 12, at 122–24 (citing *Chin*, 343 F. Supp. 2d at 895, 906); Benson, *supra* note 12, at 43–44 (citing *Chin*, 343 F. Supp. 2d at 895, 906).

152. Fiske, *supra* note 98, at 379–80.

153. DINER, *supra* note 99, at 88, 112.

154. *Id.* at 88–89, 92 (describing the pogroms of Eastern Europe, in which Jewish civilians and communities were attacked indiscriminately).

155. *Id.* at 99–100.

156. *Id.* at 164.

157. *Id.*; *see also* ERIC L. GOLDSTEIN, THE PRICE OF WHITENESS 6–7 (2006) (describing the development and complexity of Jewish identity in the United States from the early 1820s to present day).

158. DINER, *supra* note 99, at 209–10 ("From the early 1920s through the mid-1940s, most American colleges and universities, particularly those on the East Coast, imposed quotas on Jewish students. Schools like Harvard worried that if academic merit alone became the standard in the admissions process, they would become 'too Jewish.'"). Similar worries have been publicly

discrimination was not embodied in specific anti-Jewish legislation. Rather, unlike the more explicit Congressionally sanctioned discrimination against Asians of this era, governmental inaction and the decision not to enforce anti-discrimination laws seemed to be the prevailing response to this form of private discrimination.[159]

The twentieth century "did not spell the end of anti-Jewish behavior and rhetoric," but rather, the 1920s and 1930s served as the "peak" of anti-Semitism in the United States.[160] Part of this height of anti-Jewish attitudes was attributable to the continuation of racialized stereotypes that derived from European cultural trends and then-current political rhetoric, which attempted to connect the notions of a Jewish race to varying forms of human immorality.[161] Another part of it emerged from a combination of economic pressures leading up to the Depression, when "Americans facing unemployment and the loss of economic status blamed the Jews for their problems,"[162] a phenomenon that was exacerbated by "a stream of anti-Semitic organizations, publications, and speakers who competed in viciously vilifying the Jews."[163] Indeed, some Americans of this era believed that "Jews, whom they assumed were controlling Wall Street[164] . . . [and] Hollywood, conspired to destroy American rural life"[165] and control the government.[166] Even at this height of anti-Semitism in America, however, explicit negativity towards Jews was not universal. Jewish politicians and cultural figures were finding some level of success in local elections and in the entertainment world, and some non-Jewish intellectuals and cultural leaders openly fought to call out automobile manufacturer Henry Ford and others for their anti-Semitism.[167]

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addressed regarding Asian-Americans in modern college admissions. *See* Don T. Nakanishi, *A Quota on Excellence? The Asian American Admissions Debate*, *in* THE ASIAN AMERICAN EDUCATIONAL EXPERIENCE 273 (Don T. Nakanishi & Tina Yamano Nishida eds., 1995).

159. *See* DINER, *supra* note 99, at 164–65.

160. *Id.* at 207–08, 210.

161. *Id.* at 208.

162. *Id.* at 210.

163. *Id.* at 211.

164. *Id.* at 209 (footnote added). For more on the association between Jews and money, see Shapiro, *supra* note 95, at 8 ("The association of Jews with money was a staple of American, as well as of British, literature of the nineteenth and early twentieth century.").

165. DINER, *supra* note 99, at 209. Around the same time, Henry Ford waged his well-known assault on Jews, largely beginning with his 1920 publication, "The International Jew: The World's Foremost Problem," and continuing with his purchasing a newspaper that regularly told of the "international Jewish conspiracy," making these ideas known "to anyone who came to buy an automobile." *Id.*

166. *Id.* at 212. For an interesting parallel discussion regarding Jewish stereotypes in Europe, see Werner Bergmann, *Anti-Semitic Attitudes in Europe: A Comparative Perspective*, 64 J. SOC. ISSUES 343, 346 (2008).

167. GOLDSTEIN, *supra* note 157, at 123.

Empirical study of attitudes and stereotypes of Jews in America began largely in the 1950s, but interestingly, some of the first telling self-report data that emerged for Jews came in the same 1933 Princeton study that examined students' attitudes toward Japanese and Chinese.[168] Participants' five most selected traits for Jews were "Shrewd," "Mercenary," "Industrious," "Grasping," and "Intelligent"[169]—multi-directional (both positive and negative) traits that one could indeed trace to the propagation of stereotypes surrounding Jewish control of Wall Street. This type of stereotype multi-directionality has persisted through more modern research. A 1950 study by Professor Gregory Razran, for example, asked 150 male American participants to rate photos of college-aged women based on a variety of characteristics.[170] Professor Razran randomly gave the photos either Jewish, "Old American," Irish, or Italian names.[171] He found that participants disliked photos labeled with Jewish names the most, and participants more harshly judged the photographed women's character, as compared to the same photos labeled with non-Jewish names.[172] However, he also found that participants were more likely to judge the women labelled with Jewish names as ambitious and intelligent, as compared to the other groups.[173]

Modern measures of self-reported attitudes toward Jews display some of the same multi-directionality revealed in the historical account. According to Professor Bruce Evan Blaine, "On the one hand, Jews are regarded as intelligent, shrewd, ambitious, successful, industrious, and loyal to family. On the other hand, Jews are associated with traits such as dishonesty, money loving, pushy, and ruthlessness."[174] As previously discussed, Susan Fiske summarizes modern stereotypes as sharing some of the same stereotypes as Asians, such as "perceived disloyalty, power, intelligence, and dishonesty overlap. In addition, Jews are seen as clannish, greedy, ambitious, and pushy."[175]

Over time, explicit self-reports of negative attitudes and stereotypes have shown that openly expressed anti-Semitic attitudes and stereotypes have declined, much as have openly expressed stereotypes toward many

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168. Katz & Braly, *supra* note 95, at 282, 285.

169. *Id.* at 285.

170. Gregory Razran, *Ethnic Dislikes and Stereotypes: A Laboratory Study*, 45 J. ABNORMAL PSYCHOL. 7, 7 (1950).

171. *Id.* at 8.

172. *Id.* at 15, 22.

173. *Id.* at 15. It was during this era that Jewish law firms began to prosper in New York City, which Eli Wald has argued is due to a unique combination of anti-Jewish hiring discrimination and positive stereotyping. *See* Eli Wald, *The Jewish Law Firm: Past and Present*, *in* JEWS AND THE LAW 65, 65–66 (Ari Mermelstein et al. eds., 2014).

174. BLAINE, *supra* note 95, at 98.

175. Fiske, *supra* note 98, at 379–80.

other groups. In this context, research using implicit methods has allowed researchers to introduce a more dynamic way to measure attitudes and stereotypes.

D. *Anti-Jewish Attitudes and Stereotypes: Implicit Biases*

Modern studies of implicit bias confirm that negative stereotyping of Jews persists on an automatic level. In one such study, Professor Laurie Rudman and her colleagues asked participants to complete IATs that required them to group together Christian and Jewish names with negative and positive attitude words (e.g., positive: rainbow, paradise; and negative: vomit, murder), and then to answer explicit attitude questions about how warmly they feel towards Christians and Jews.[176] The researchers hypothesized that while out-group implicit biases would emerge, they did not expect non-Jewish participants to self-report similar negative attitudes toward Jews as would be revealed using the IAT.[177] Indeed, confirming their predictions, the researchers found that non-Jewish participants showed significant anti-Jewish (pro-Christian) implicit bias on IAT but only showed small self-reported attitude preferences for Christian over Jewish when completing the feeling thermometer.[178] The results, the researchers indicate, underscore the need to investigate intergroup biases not only by asking people about their attitudes but also by employing implicit methods.[179]

In another study of implicit bias related to negative Jewish stereotypes, Professors Rudman and Ashmore also tested implicit biases of participants towards Jews and measured the effect of those biases on economic decision-making.[180] They found, on an IAT, that participants displayed significant associations between Jewish and immoral traits (e.g., cheap, controlling, dominating) and Christian and moral traits (e.g., generous, charitable, friendly) and that these negative stereotype levels predicted their budget cuts to a Jewish university campus organization.[181] Put simply, the stronger the participants' anti-Jewish implicit bias, the more likely they were to cut the budget of a Jewish student organization.

In addition to these two studies showing negative out-group biases against Jews, other studies indicate that implicit attitudes related to

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176. Rudman et al., *supra* note 4, at 441−43. This measure is called a "feeling thermometer." *Id.* at 443.

177. *Id.* at 441.

178. *Id.* at 460–61.

179. *See id.* at 460.

180. *See* Rudman & Ashmore, *supra* note 74, at 363–68. This is the same study, described previously, that measured participants' implicit biases toward Asian-Americans and then asked them to make budget cuts to university groups.

181. *Id.* at 363–64, 365–68.

Judaism, at least, may not be as negative as implicit attitudes toward other religions. For example, researchers who have studied IAT results gathered by Harvard University's Project Implicit demonstration website [182] report that Americans' implicit attitudes towards Judaism (rather than specifically regarding Jewish people) are actually favorable. In those studies, researchers measured implicit attitudes towards religions by using symbols to represent Judaism (rather than using last names, for example, to represent Jewish people) and a mix of other religions. [183] In these studies, about 50% of participants show positive implicit attitudes toward Judaism, with approximately 26% showing negative attitudes. [184] This study, in the context of the studies presented above, thus echoes the historical multi-directionality of attitudes and stereotypes regarding Jews. On the one hand, Judaism and Jews may well be favored as compared to other minority groups, but on the other hand, negative morality-based stereotypes still persist.

Considering the vast history of anti-Semitism in the United States and the continuing multi-directional stereotypes of Jews in modern America, it is somewhat surprising that the legal literature has not fully considered the ways in which Jews may face intentional or unintentional discrimination in the legal system. Two scholars, for example, have concluded that Jews may be discriminated against in jury selection due both to stereotypes regarding intellectual ability (Jews may be difficult to convince) or based on other perceived biases. [185] Yet other legally focused scholarship has not deeply considered the ways in which the negative moral stereotypes of Jews may manifest in other areas of the law, for example, in white-collar fraud cases, medical malpractice, products liability tort cases, and other legal claims that could be related to morality.

It is based upon these similar explicit and implicit attitudes and stereotype profiles that we decided to craft identical measures of both explicit and implicit bias and apply them both to Asian-Americans and Jewish Americans.

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182. *See* Nosek et al., *supra* note 74, at 18.

183. *Id.* at 52.

184. *Id*. at 18. The other participants showed no significant preference for Judaism or other religions. *Id.*

185. *See* Hinkle, *supra* note 97, at 178 ("[A] lawyer may use his peremptories to strike all the Jews from the jury on the assumption that Jews are intelligent because the lawyer is hoping for the dumbest jurors he can find."); *see also* Benjamin Hoorn Barton, *Religion-Based Peremptory Challenges After* Batson v. Kentucky *and* J.E.B. v. Alabama*: An Equal Protection and First Amendment Analysis*, 94 MICH. L. REV. 191, 210 n.89 (1995) ("For a particularly bizarre example of religious stereotyping in the use of the peremptory challenge, consider the Marcos-Khashoggi trial. Imelda Marcos, wife of the ex-President of the Philippines, and Adnan Khashoggi, an Arab businessman and arms-dealer, were on the same side at trial, yet Khashoggi's lawyers wanted to eliminate Jewish potential jurors because of supposed anti-Arab bias, while Marcos's lawyers thought Jewish jurors would be ideal because Jews are 'sensitive to persecution and suspicious of government power.'").

III. The Empirical Study

Building upon prior research testing implicit biases in the legal system as well as on stereotype research relating to Asians and Jews in America, we designed a study to measure implicit and explicit stereotypes of Asians and Jews among a group of federal district court judges, federal magistrate judges, and state trial judges, and to test the effects of group membership on white-collar sentencing. We conducted the study using three types of judges not only to get a broad judicial sample but also to compare the responses of the different types of judges.

A. *Participants*

Two hundred thirty-nine judges participated in the study, all of whom participated voluntarily on their own time and on their own computers.[186] One hundred eighty federal judges participated in the study, 100 of whom were district court judges (representing all federal judicial circuits)[187] and 80 of whom were magistrate judges (also representing all federal judicial circuits).[188] Fifty-nine state judges from eight states participated in the study.[189] 71% of the judges were male, and 29% were female. The vast majority of judges, 91.6%, identified themselves as White. 3% identified themselves as African-American. 2% identified themselves as Asian, and 2% identified themselves as "more than one race."[190] Judges were asked to indicate their age within the span of a decade (to preserve anonymity), with judges' ages ranging from 21–30 to 80-plus. The majority of judges, 71%, were between the ages of 51 and 70.[191] We asked participants their religious affiliation in part due to historical studies that indicate a relationship between religiosity and prejudice (including anti-Semitism).[192] In response to this question, 31% identified themselves as

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186. State judges were typically invited to participate by a judicial training office in their state after Judge Mark W. Bennett obtained permission from the Chief Justice of that state. Federal judges were invited by email to participate by Judge Mark W. Bennett. They were not provided compensation for their participation.

187. District court judges from the Ninth (19), Eighth (15), Seventh (10), Fourth (12), and Fifth Circuits (9) were the most heavily represented among district court judge participants.

188. District court judges from the Ninth (19), Eleventh (11), and Sixth (10) were the most heavily represented among magistrate court judge participants.

189. State court judges from Missouri (14), Washington (11), Kentucky (10), and Arizona (9) were the most heavily represented among state court judge participants.

190. We separately asked if judges identified as Hispanic or Latino, and 5% of judges indicated that they identified as Hispanic or Latino.

191. Specifically, 37% reported being between the ages of 51–60 and 34% between the ages of 61–70.

192. Gordon W. Allport & J. Michael Ross, *Personal Religious Orientation and Prejudice*, 5 J. Personality & Soc. Psychol. 432, 432 (1967) (finding that religious participants displayed higher levels of out-group bias).

Protestant, 30% identified as Catholic, 21% identified as "none," and 11% identified as Jewish. The remaining judges identified religious affiliations including Baptist, Latter Day Saints, and others.

B. *Materials*

Because of the nuanced and multi-directional stereotypes relating to Asians and Jews in America, we were interested in measuring both implicit and explicit attitudes and stereotypes regarding these groups. To investigate this potential link, this study employed both implicit methods and explicit (self-report) methods. The primary implicit method employed was the IAT.[193] Explicit (self-report) questions were employed using scaled survey-style questions.

The IAT measures implicit cognitions in an easy and compelling manner. It instructs participants to rapidly classify information, "and then calculates a participant's reaction time (in milliseconds) and accuracy in completing the categorization task.[194] The wisdom behind the IAT holds that statistically significant speed and accuracy-based differences in a person's ability to categorize different types of information reflect something meaningful in that person's automatic cognitive processes.

What follows is an in-depth description of how researchers typically conduct the IAT: While using computers, study participants rapidly press two pre-designated keyboard keys after viewing particular words or images on their computer screens. The words and images that participants view are classified into meaningful categories, which require participants to "pair an attitude object (for example, Black or White . . .) with either an evaluative dimension (for example, good or bad) or an attribute dimension (for example, home or career, science or arts)."[195] Participants finish several trials of the matching activities so researchers can measure how participants perform in pairing each object with each dimension. For instance, "in one trial of the most well-known IATs, participants pair the concepts Good-White together by pressing a designated response key and the concepts Bad-Black together with a different response key." After finishing the trial, participants then match the opposite concepts with

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193. The following few paragraphs briefly describe the scientific principles underlying the IAT. An almost identical version of this Subsection appeared in Levinson et al., *Guilty by Implicit Racial Bias*, *supra* note 21, at 191–93.

194. As psychologists Nilanjana Dasgupta and Anthony Greenwald summarize, "When highly associated targets and attributes share the same response key, participants tend to classify them quickly and easily, whereas when weakly associated targets and attributes share the same response key, participants tend to classify them more slowly and with greater difficulty." Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 803 (2001).

195. Levinson, *supra* note 21, at 355.

each other: in this example, Good-Black and Bad-White.[196] Computer software gathers the data[197] and "measures the number of milliseconds it takes for participants to respond to each task. Scientists can then analyze (by comparing reaction times and error rates using a statistic called "D-prime")[198] whether participants hold implicit associations between the attitude object and dimension tested." Race IAT results consistently demonstrate that "white Americans express a strong 'white preference' on the IAT."[199]

The IAT is a flexible measure. Researchers have developed several types of IATs. Some examples of IATs include: "Gender-Science IAT, Gay-Straight IAT, and the Fat-Thin IAT, among many others."[200] For instance, the Gender-Science IAT requires participants to pair Male and Female images with Science and Liberal Arts words.[201] One should note "the flexibility of the IAT to test either evaluative dimension words (such as grouping Male-Female with Good-Bad), or attribute dimension words (such as grouping Male-Female with Career-Family)." The two IATs we created for the present study, the Caucasian-Asian stereotype IAT, and the Christian-Jewish stereotype IAT, require participants to group together words associated with the group category (easily identifiable last names of members of the four groups, such as Chang, Goldberg, and Baker)[202] and either positive or negative stereotype words (such as honest and generous versus controlling and greedy).[203]

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196. Because participants may naturally be quicker at responding with one of their hands, participants complete these tasks twice, once for each response key, to eliminate differences based on hand preference. The order of the IAT tasks is also usually randomized to reduce order effects.

197. In our empirical study, we used the software Inquisit, produced by Millisecond Software.

198. *See* Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197, 201 (2003).

199. Rachlinski et al., *supra* note 3, at 1199; Levinson, *supra* note 26, at 612 (noting that "a majority of test takers exhibit implicit racial bias" and referencing one IAT which found that "sixty-eight percent of participants demonstrated an implicit preference for 'White people' versus 'Black people'").

200. *See, e.g.*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit (last visited Oct. 23, 2016).

201. *Id.*

202. The names selected for the IAT stimuli were, for Asian: Chang, Wu, Lee, Kwan, Choi, Tanaka, and Yamada; for Caucasian and Christian: Miller, Taylor, Johnson, Baker, Smith, Andrews, and Higgins; and for Jewish: Shapiro, Cohen, Friedman, Weinstein, Eisenberg, Siegel, and Zucker. It should be noted that we attempted to at least somewhat balance the Asian names by including recognizable names that are Chinese, Japanese, or Korean in origin, but these names are by no means a perfect representative of Asian-American names. For a brief discussion of the limitations of categorizing a diverse group of Americans into one category, see sources cited *supra* note 94.

203. *See* Greenwald et al., *supra* note 75, at 1466. The words we used for positive moral stereotypes were moral, generous, giving, charitable, trustworthy, friendly, and honest. The words

In addition to measuring implicit stereotypes with IATs, we also asked judges to self-report their stereotypes towards Asians and Jews. To do this, we used composite scale measures that we developed from existing, validated, scales.[204] These measures ask participants, for example, how much they agree with the statements "Asians are taking more than their fair share of jobs in America," and "Jews are trying to control America." The purpose of these measures is to quantify self-reported attitudes towards each group. These questions were each completed on 1–7 scales, and the scores were compiled into scales.[205]

After giving informed consent and completing demographic information, participants began the online study by completing the sentencing task. In this task, judges read about either a White defendant, an Asian-American defendant, a Christian defendant, or a Jewish defendant. We initially designed the study to compare two defendants of different religions—Jewish or Christian—and two defendants of different ethnicities—Asian or White.[206] Using different defendant names varied the defendant's group membership. The White and Christian defendants were named Nathaniel Kinnear. The Asian defendant was named Michael Zhang.[207] The Jewish defendant was identified as Nathanial Goldberg.[208] For the Jewish and Christian defendants, the religion of the defendant was identified by stating that the defendant and his wife were active in either the Christian or Jewish community and that the defendant's brother served as a member of the clergy of either a Christian church or Jewish synagogue. All other information about the defendant was identical, including age (47), marital status (married), citizenship (U.S.), birth place (Chicago, IL), and education (Master's degree). Other names in the presentence report (e.g., names of defendant's parents) were made to be consistent with the group membership condition.

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we used for negative moral stereotypes were dishonest, liar, scheming, controlling, dominating, competitive, and greedy.

204. To create these scales, we blended measures from previously validated scales. The purpose of the blending was to simplify and shorten the length of the study, as well as to narrow the stereotypes examined to those that would be most relevant in a legal context.

205. The full list of items was as follows: "Asian Americans are trying to control America; Asian Americans cannot be trusted; Asian Americans are taking more than their share of good jobs; Asian Americans are honest people; Asian Americans possess good moral values; Asian Americans are cunning." The same items were also asked relating to Jews.

206. We therefore conducted statistical analysis separately, comparing the results for Asian as compared to White, and Jewish as compared to Christian.

207. It should be noted that the surname Zhang is a traditionally Chinese name and therefore does not represent all Asian-American names. If participants identified the name as Chinese, and hold specific stereotypes of Chinese-Americans that are different from other Asian-American stereotypes, the results of the study could have been affected by this difference.

208. Spouse names also conformed with the defendant names.

The sentencing task asked judges to read a federal-style presentence report for a fraud case. To create a more manageable presentence report, we chose to conduct the sentencing for an 11(c)(1)(c) plea bargain, for which the stipulated sentencing range was 151–235 months. The presentence report described a fraud crime in which the alleged perpetrator had agreed to plead guilty to federal securities fraud in violation of 18 U.S.C. § 1348. Judges read that "the defendant abused his position of trust within the company by persuading [a company for which he was the director] to give him money and stock under the guise that he was going to take the company private through a stock buyback." The amount involved in the fraud was estimated to be between $6,800,000 and $7,200,000. Under the Federal Sentencing Guidelines, a conviction for such a crime results in a sentence between 151–235 months in prison.[209] Judge participants were instructed to sentence the defendant within this range.[210] Although it would only be typical for federal district court judges to deliver the sentence in a crime such as the one presented, we nonetheless provided the same sentencing measure to all judges. Because federal magistrate judges are familiar with federal presentence reports and the sentencing guidelines, we expected that the task would not be difficult for them to follow. State judges were presumably less familiar with the sentencing rules and presentence report that were used in this study. However, we gave the same sentencing task to state and federal judges because we did not want to have different stimuli for different groups.

After the judges completed the sentencing task, they were asked questions relating to their personal sentencing philosophy. This scale included four questions: two designed to measure support for retributive punishment ("A person who commits the harshest crime deserves the harshest punishment" and "Those who hurt others deserve to be hurt in return"), and two to measure mercy or rehabilitation-based punishment ("People who commit serious crimes often should receive treatment instead of punishment" and "People who commit serious crimes sometimes deserve leniency"). They then completed an IAT: either a stereotype IAT for the groups Asian and Caucasian or a stereotype IAT for the groups Christian and Jewish. Judges who were randomly assigned to the Asian or White defendant condition received an Asian-Caucasian IAT, and judges who were randomly assigned to the Christian or Jewish defendant condition received a Christian-Jewish IAT.

After completing the IAT, participants next completed the self-report stereotype measure for both Asians and Jews. These measures consisted

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209. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1, at 82 (U.S. SENTENCING COMM'N 2015).

210. If a judge attempted to enter a number not within the range, the study was programmed to reject the response and request a response between the 151–235 month guidelines.

of six questions each and were identical except for the target of the question (Asians or Jews). For example, participants were asked how much they agreed or disagreed with the following statements: "Asian Americans are taking more than their fair share of jobs," and "Jews are trying to control America." For each such question, participants responded based on a range of strongly agree to strongly disagree (1–7 scale). These questions were also presented in counterbalanced order, so that different participants answered these questions in different orders (to eliminate order effects). After completing these explicit stereotype measures, the survey concluded and participants were thanked for their participation.

C. *Hypotheses*

Based upon previous scholarship related to implicit bias in the criminal justice system, as well as knowledge gained through previous empirical research on stereotypes of Asians and Jews in America, we made the following hypotheses[211]:

Hypothesis 1: Judges will harbor implicit biases associating Asians with negative economic and moral stereotypes and Whites with positive economic and moral stereotypes.

Hypothesis 2: Judges will harbor implicit biases associating Jews with negative economic and moral stereotypes and Christians with positive economic and moral stereotypes.

Hypothesis 3: Judges will sentence Jewish defendants more harshly than Christian defendants and will sentence Asian defendants more harshly than White defendants.

Hypothesis 4: Judges' implicit bias scores (on the IATs) will predict the length of their hypothetical defendant's sentence. For example, judges with higher levels of implicit bias towards Asians will give longer sentences to Asian defendants.

Hypothesis 5: Judges' self-reported agreement with Asian and Jewish stereotypes will be less likely than the IAT scores to predict discrimination in sentencing, but it may still somewhat predict group-based sentences.

Hypothesis 6: Judges will use judicial philosophy to justify higher punishment of Asians and Jews. Phrased another way, judges who respond to a case with an Asian or Jewish defendant will embrace more retributive or punitive philosophies, and less rehabilitative philosophies, compared to judges who see a case with a White or Christian defendant.

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211. We documented these hypotheses before conducting the study, in conformity with best empirical practices.

In calculating the IAT results, we used the updated scoring algorithms suggested by Professor Anthony Greenwald and his colleagues.[212] These updated algorithms addressed challenges that were raised regarding the original IAT scoring algorithm.[213]

D. *Results: Implicit Bias, Federal Judges, and Sentencing*

To test our hypotheses, we conducted several statistical analyses. For hypotheses one and two, we examined whether judges held implicit biases by using one-sample T-tests.[214] For hypothesis three, we compared whether judges gave different sentences based on defendant ethnicity or religion using analysis of variance (ANOVA) tests.[215] This statistical analysis also was employed to determine whether different types of judges reported different levels of self-reported bias or harbored different levels of implicit bias. For the remaining hypotheses, we employed regression analyses. IAT D scores were regressed upon judicial retributive and mercy philosophies. Sentencing decisions were regressed upon ethnicity or religion of defendant, implicit and explicit biases, sentencing philosophies, and the two-way interactions between these variables.

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212. *See* Greenwald et al., *supra* note 198, at 213–15.

213. As Levinson et al., summarized:

> Greenwald, Nosek and Banaji's suggested improved scoring measure for the IAT, called a *D* score, has improved test-response detection (for instance, it throws out indiscriminate responses or responses that indicate a lack of attention) and incorporates an inclusive standard deviation for all congruent trials (for instance, both the practice and test block of white-guilty and black-not guilty). Mean latencies are computed for each block, and complimentary blocks are subtracted from each other (e.g., practice white-not guilty and black-guilty would be subtracted from practice white-guilty and black-not guilty). These two difference scores are divided by their inclusive standard deviation score, and the average of these two scores is called *D*.

Levinson et al., *Guilty by Implicit Racial Bias*, *supra* note 21, at 203 n.80 (citations omitted). For more on Greenwald and his colleagues' scoring algorithm, see Rachlinski et al., *supra* note 3, at 1245–46.

214. A one-sample T-test tests whether a single population differs from a hypothesized value. *See* Ronald Christensen, Analysis of Variance, Design and Regression 37–42 (1996) (explaining one-sample T-tests). In the case of the IAT, the hypothesized value is zero, or no bias. An IAT score that is significantly different from zero would indicate bias in the population. Thus, the one-sample T-test referenced here tested whether the study population's IAT score was significantly different than zero.

215. Generally, ANOVA, or Analysis of Variance, is a series of statistical techniques that segment the observed variance in a dataset into the sources of variance, allowing for the comparison of the means between two or more groups. For example, is the variance in a sample (e.g., measured height) attributable to differences between two groups (such as Democrats and Republicans), or is it due to other, unexplained or unmeasured variation within the group (such as how much coffee they had this morning)?

1. Judges Implicitly Biased Against Asians

Federal and state judges displayed strong to moderate implicit bias against Asians (relative to Caucasians) on the stereotype IAT,[216] such that Asians were associated with negative moral stereotypes (e.g., greedy, dishonest, scheming) and Caucasians were associated with positive moral stereotypes (e.g., trustworthy, honest, generous).

2. Judges Implicitly Biased Against Jews

Federal and state judges displayed strong to moderate implicit bias against Jews (relative to Christians) on the stereotype IAT,[217] such that Jews were associated with negative moral stereotypes (e.g., greedy, dishonest, scheming), and Christians were associated with positive moral stereotypes (e.g., trustworthy, honest, generous).

3. Federal District Court Judges (Marginal Significance) Gave Longer Sentences to Jewish (vs. Christian) Defendants; State Court Judges Gave Longer Sentences to White (vs. Asian) Defendants

Federal district judges gave (of marginal significance) longer sentences to Jewish defendants than Christian defendants.[218] There were no significant differences in how these judges sentenced White as compared to Asian defendants. Magistrate judges' sentences did not vary significantly based on the defendant's group membership. State judges, contrary to prediction, sentenced White defendants to significantly longer sentences than Asian-American defendants.[219]

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216. $M = .46$, $t(108) = 9.20$, $p < .001$.

217. $M = .52$, $t(101) = 9.44$, $p < .001$.

218. $F(1, 52) = 2.89$, $p = .095$, $\eta p2 = .05$, MJewish = 160.12, SD = 15.51, MChristian = 153.90, SD = 6.51.

219. $F(1, 26) = 6.77$, $p = .05$, $\eta p2 = .21$, MWhite = 184.00, SD = 24.06, MAsian = 163.50, SD = 14.73. For an interesting study analyzing Asian defendants in federal sentencing, see Brian D. Johnson & Sara Betsinger, *Punishing the 'Model Minority': Asian-American Criminal Sentencing Outcomes in Federal District Courts*, 47 CRIMINOLOGY 1045, 1075, 1079 (2009) (finding that for white-collar crimes, Asian-American defendants received similar or more lenient sentences to their White counterparts).

FIGURE 1.
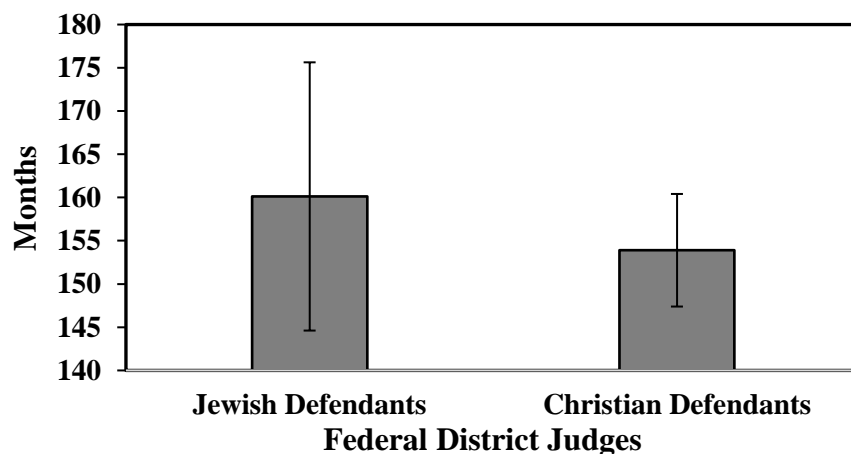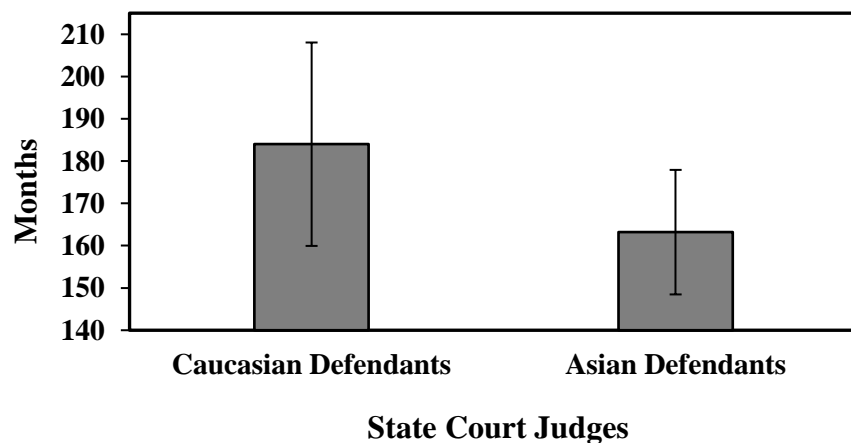Mean Sentence (+/- 1 SD) Given by Federal District Judges

Federal District Judges

FIGURE 2.
Mean Sentence (+/- 1 SD) Given by State Court Judges

State Court Judges

4. All Judge Cohorts Possessed Similarly Strong Implicit Biases

Each of the three types of judges we tested displayed significant negative implicit biases towards Asians (relative to Caucasians) and Jews (relative to Christians), and there were no statistically significant differences between IAT score and type of judge participant.[220]
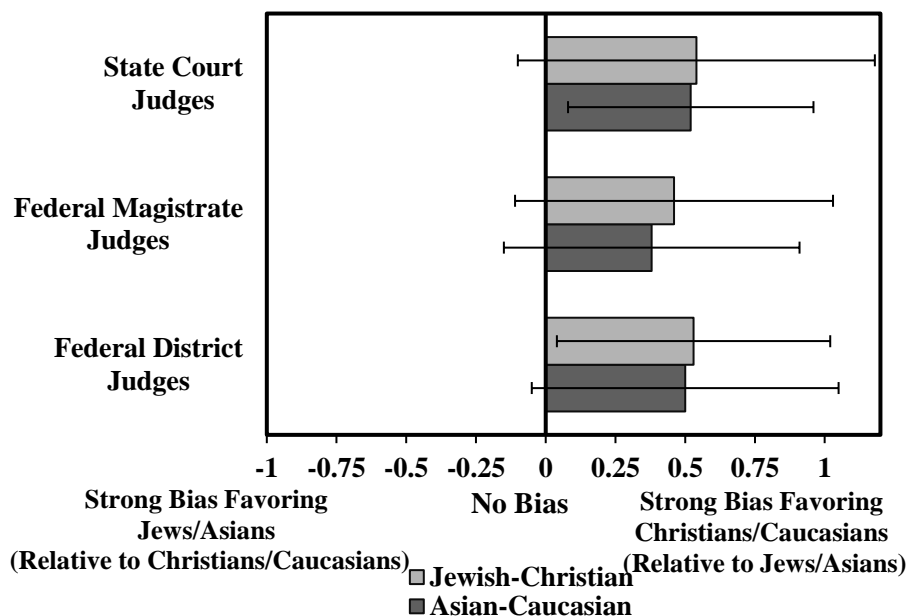
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220. $F_{Asian-Caucasian}(2, 106) = .77$, ns., $F_{Jewish-Christian}(2, 99) = .19$, ns. The scores were: for Federal District Court judges, *MAsian-Caucasian* = 0.50 (SD = 0.55), *M*Jewish-Christian = 0.53 (SD = 0.49); for Federal Magistrate judges, (*MAsian-Caucasian* = 0.38 (SD =

5. Male Judges Showed Stronger Anti-Jewish Implicit Bias

There was a significant difference whereby male judges displayed stronger anti-Jewish implicit biases as compared to female judges.[221] For the Asian-Caucasian IAT, there were no statistically significant differences between male and female judges.[222]

FIGURE 3.

Mean IAT Scores (+/- 1 SD) for Types of Judge Participants

6. Political Party of Appointing President Did Not Predict Different IAT Scores

We were able to categorize federal district court judges based upon the political party of their appointing president. Judges appointed by Republicans appeared to display higher overall IAT bias scores than Democrats; however these differences did not reach statistical

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0.53), *M*Jewish-Christian = 0.46 (SD = 0.57); and for state court judges, *MAsian-Caucasian* = 0.52 (SD = 0.44), *M*Jewish-Christian = 0.54 (SD = 0.64).

221. FJewish-Christian(1, 100) = 4.14, p < .05, ηp2 = .04. For male judges, *M*Jewish-Christian = 0.59 (SD = 0.48). For female judges, *M*Jewish-Christian = 0.36 (SD = 0.65).

222. FAsian-Caucasian(1, 107) = 0.16, ns.; FJewish-Christian(1, 121) = 1.69, ns. For male judges, *MAsian-Caucasian* = 0.45 (SD = 0.53). For female judges, *MAsian-Caucasian* = 0.49 (SD = 0.50).

significance.[223]

7. Protestant and Catholic Judges Had Higher Pro-Christian/Anti-Jewish IAT Biases Compared to Judges Who Reported No Religion

Judges who self-identified as Catholic or Protestant displayed significantly higher pro-Christian (anti-Jewish) biases on the Jewish-Christian IAT, as compared to judges who self-identified as affiliated with no religion and as compared to Jewish judges.[224] Jewish judges showed no significant bias towards Jewish or Christian stereotypes.[225] Catholic and Protestant judges did not, however, hold significantly higher implicit biases towards Asians as compared to judges who reported no religion.

8. Catholic and Protestant Judges Self-Reported More Agreement with Asian and Jewish Stereotypes, as Compared to "No Religion" Judges (for both Positive Stereotypes and Negative Stereotypes)

There were numerous differences in terms of judges' religion and their agreement with Asian stereotypes. Generally, Catholic and Protestant judges were more likely to self-report anti-Asian stereotypes as compared to judges who affiliated with no religion or as compared to Jewish judges,[226] on the averaged following measures: Asians control America,[227] Asians take jobs,[228] and Asians are cunning.[229] There were no statistically significant differences between religious groups on positive stereotypes of these groups, including on the following measures[230]: Asians are honest[231]

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223. $F_{Asian-Caucasian}(1, 42) = 2.58$, ns., $F_{Jewish-Christian}(1, 43) = 1.00$, ns. For Republican appointees, *MAsian-Caucasian* = 0.67 (SD = 0.61), *M*Jewish-Christian = 0.63 (SD = 0.37). For Democratic appointees, *MAsian-Caucasian* = 0.40 (SD = 0.50), *M*Jewish-Christian = 0.48 (SD = 0.55).

224. $F(3, 92) = 8.46$, $p < .001$, $\eta p2 = .05$, MCatholic = 0.59 (SD = 0.58), MProtestant = 0.71 (SD = 0.45), MNo religion = 0.32 (SD = 0.32), MJewish = -0.19 (SD = 0.55).

225. $t(7) = 0.98$, ns. This result may have been due to the small number of Jewish judges (8) who completed this particular IAT. The stats came from a T-test comparing with 0. Prior studies have indicated that Jewish participants have favored Judaism over other religions in attitude IATs. Rudman et al., *supra* note 4, at 446.

226. $F(3, 188) = 5.52$, $p = .001$, $\eta p2 = .08$.

227. MCatholic = 1.6 (SD = 1.08), MProtestant = 1.06 (SD = 0.87), MJewish = 1.42 (SD = 0.24), MNo religion = 1.23 (SD = 0.78).

228. MCatholic = 1.95 (SD = 1.21), MProtestant = 1.80 (SD = 1.17), MJewish = 1.06 (SD = 0.24), MNo religion = 1.33 (SD = 0.75).

229. MCatholic = 2.42 (SD = 1.54), MProtestant = 2.18 (SD = 1.46), MJewish = 1.78 (SD = 1.11), MNo religion = 1.72 (SD = 1.22).

230. $F(3, 188) = 0.49$, ns.

231. MCatholic = 4.28 (SD = 1.93), MProtestant = 4.62 (SD = 1.82), MJewish = 4.11 (SD = 1.68), Mno religion = 4.49 (SD = 1.76).

and Asians have good morals.[232]

Catholic judges were also more likely to agree with statements of Jewish stereotypes as compared to Protestant, Jewish, and "no religion" judges on the following measures[233]: Jews control America,[234] Jews take jobs,[235] Jews are cunning.[236] Interestingly, Catholic and Protestant judges were also more likely to agree with the following positive Jewish stereotypes as compared to Jewish judges[237]: Jews are honest[238] and Jews have good morals.[239] These findings indicate that, for at least Protestant judges, they were more likely to self-report agreement with all Jewish stereotypes and not just negative stereotypes.

9. State Judges Were More Anti-Asian in Their Self Reports

State judges, as compared to all federal judges, were more likely to self-report agreement with negative Asian attitudes and stereotypes,[240] including the statements "Asians are trying to control America,"[241] "Asians are taking more than their share of jobs,"[242] and "Asians are cunning."[243]

10. Judges' Self-Reported Agreement with Asian Stereotypes Were Correlated with Their Agreement with Jewish Stereotypes

Agreement with (self-reported) negative stereotypes relating to Asians and (self-reported) negative stereotypes relating to Jews were correlated with one another.[244] The more likely a judge was to report agreement with a negative Asian stereotype, the more likely the judge was to similarly report agreement with a negative Jewish stereotype. There was no such correlation for agreement with positive stereotypes:

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232. MCatholic = 4.28 (SD = 1.93), MProtestant = 4.62 (SD = 1.82), MJewish = 4.11 (SD = 1.68), Mno religion = 4.49 (SD = 1.76).

233. $F(3, 188) = 2.79$, p = .04, $\eta p2$ = .04.

234. MCatholic = 1.71 (SD = 1.2), MProtestant = 1.29 (SD = 0.7), MJewish = 1.22 (SD = 0.73), MNo religion = 1.37 (SD = 0.98).

235. MCatholic = 1.8 (SD = 1.23), MProtestant = 1.47 (SD = 0.93), MJewish = 1.33 (SD = 0.77), MNo religion = 1.44 (SD = 0.98).

236. MCatholic = 2.36 (SD = 1.48), MProtestant = 2.15 (SD = 1.46), MJewish = 1.78 (SD = 1.26), MNo religion = 1.91 (SD = 1.31).

237. $F(3, 188) = 2.26$, p = .08, $\eta p2$ = .04.

238. MCatholic = 4.97 (SD = 1.61), MProtestant = 4.46 (SD = 1.75), MJewish = 3.78 (SD = 1.86), MNo religion = 4.53 (SD = 2.02).

239. MCatholic = 4.75 (SD = 1.77), MProtestant = 4.75 (SD = 1.73), MJewish = 4.11 (SD = 1.68), MNo religion = 4.26 (SD = 1.97).

240. $(F(2, 202) = 5.15$, p=.007, $\eta p2$=.05).

241. MFD = 1.45 (SD = 0.98), MFM = 1.31 (SD = 0.82), MST = 1.53 (SD = 0.81).

242. MFD = 1.58 (SD = 1.03), MFM = 1.57 (SD = 1.00), MST = 1.96 (SD = 1.18).

243. MFD = 2.21 (SD = 1.47), MFM = 1.74 (SD = 1.22), MST = 2.63 (SD = 1.46).

244. $r = .56$, $p < .001$.

self-reported positive stereotypes relating to Asians and self-reported positive stereotypes relating to Jews were not significantly correlated.[245]

11. Federal District Judges' Support for Retribution Predicted Higher Anti-Asian Implicit Bias

In selecting regression models, we were first interested in examining which of our other variable measures—and specifically, our questions regarding judges' retributive or mercy philosophies—served as predictors of judges' implicit bias levels. When analyzing federal district judges, the results of this regression showed that judges' self-reported retributive punishment philosophies (but not their mercy punishment philosophies) predicted anti-Asian implicit biases.[246] This may be best understood by referencing the correlation: the higher the support for retribution, the higher the anti-Asian bias.

12. Anti-Jewish, Pro-Christian Implicit Biases Predicted the Sentence Length of Christian Defendant: the Higher the Bias, the Shorter the Sentence

One of the interesting questions raised by IAT research has been whether implicit attitudes and stereotypes predict differences in decision-making and behavior.[247] We therefore conducted a second regression, this time on the judges' sentences, based upon the defendant's group membership. In this analysis, the results showed that pro-Christian, anti-Jewish stereotypes predicted the length of a Christian defendant's sentence, so that the higher the implicit bias (Jew with immorality and Christian with morality), the lesser the sentence was of a Christian defendant.[248] Also, the results showed that retributive attitudes positively

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245. r = .18, ns.

246. A regression model on the IAT D score of Asians (Asian IAT d = beta1 x retribution + beta2 x mercy + C) was predicted by retribution score but not mercy score (Adjusted R square = .10, $F_{(2, 41)}$ = 3.44, p = .05, beta1 = .35, t = 2.30, p < .05; beta2 = -.06, t = 0.39, ns.). However, the same model of the IAT D score of Jewish was not significant (Adjusted R square = .05, $F_{(2, 42)}$ = 0.02, ns.).

247. *See* Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 18 (2009) (finding that IAT scores do indeed predict a range of behaviors and decision-making).

248. For this statistical analysis, we tested a regression model of sentencing behavior (Sentence of Defendant = beta1 x IAT score + beta2 x positive Jewish stereotype + beta3 x negative Jewish stereotype + bata4 x retributive attitude score + bata5 x mercy attitude score + C). We tested the model on the Christian and Jewish defendant conditions separately. The model was significant only on Christian defendant condition (Christian condition: $F_{(5, 12)}$ = 2.80, p = .07; Jewish condition: $F_{(5,19)}$ = 1.22, ns.). The results showed that implicit anti-Jewish (pro-

predicted the length of a Christian defendant's sentence.[249] We tested the same model (replacing Jewish stereotypes with Asian stereotypes) on the White or Asian defendant condition, however, results were not statistically significant.[250]

IV. DISCUSSION: ANTI-ASIAN AND ANTI-JEWISH IMPLICIT BIASES

The results of the study raise additional questions not only about how implicit biases may work against Asian-Americans and Jews in the legal system but also trigger questions related to the broader risks of hidden, automatic biases in judicial decision-making. Here, this Article discusses the implications of our direct study findings and considers the implications beyond our study, specifically regarding current legal issues where judicial discretion will likely shape and reshape America.

First and foremost, our findings confirm that the federal and state judges we surveyed indeed harbored strong to moderate negative implicit biases about groups that are largely viewed not as subordinated but rather as American success stories. In light of the heavy ethical burden resting on the shoulders of judges—and lifetime-appointed federal judges in particular—these results are concerning. The biases revealed by the study focused on the judges' implicit judgments of morality, connecting group membership with traits such as *scheming*, *dominating*, and *controlling*, and manifested without regard to judges' length of service, age, or type of judgeship. Thus, the primary message revealed by the study is that implicit biases, even about groups not usually discussed in the national conversation of discrimination, may be lurking as part of a complex, deep, and hidden network of cognitive associations, even in the most egalitarian of judges.

Beyond the mere existence and strength of these biases, though, the study results raise further reason to worry. The results of the study, for example, showed that federal district judges (the very judges who make sentencing determinations for the federal crime we presented) were more likely (of marginal statistical significance) to sentence a Jewish defendant to a longer sentence than an otherwise identical Christian defendant. This finding was (although we initially predicted it), in retrospect, surprising considering that a full 75% of federal district judges sentenced the defendant to the exact minimum sentence of a possible seven-year sentencing range.[251] Thus, it may be informative to note that no judges

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Christian) stereotypes negatively predicted the length of a Christian defendant's sentence. [bata1 = -.69, t = 3.17, p < .01].

    249.   bata4 = .55, t = 2.30, p < .05.

    250.   Fs < 1.00, ns.

    251.   We focus on the role of judges in federal white-collar sentencing, without regard to bias, in our companion article, Bennett et al., *supra* note 8. We also note that, in a situation in which

gave a Christian defendant a sentence longer than 175 months, while eight (of thirty-four) judges sentenced a Jewish defendant to 180 months or more.

Our corresponding finding on state judges' sentencing, however, is more difficult to explain. Those judges were more lenient on Asian white-collar fraud defendants than similarly situated White defendants, a finding that we did not predict and would seem to be made less likely by those judges' self-report of higher agreement with Asian stereotypes (at least relative to the other judge cohorts). One preliminary explanation for this finding, which could be consistent with the judges' stereotype self-reports, however, could be that stereotypes of Asian men as non-threatening would lead to a perceived need for a shorter sentence. Such an interpretation, however, would mean that other stereotypes that we did not test (e.g., Asian men are non-threatening) could, in the sentencing context, exert a stronger influence than the morality-related and financial stereotypes we did test.[252] We also note that our state judge-only pool was the smallest of all of three judge cohorts and was spread across jurisdictions with different statutes and legal norms, factors that make our result somewhat more difficult to interpret.

The results of the study also address the current state of implicit bias towards Asian-Americans and Jewish-Americans, suggesting that perhaps there is too little modern focus on bias against these groups. Although some commentators have highlighted a small range of possible biases, some relating, for example, to the way that harms to Asian-Americans are either undervalued or erroneously seen as provoked,[253] legal literature has far from addressed the way widely held judicial biases relating to these groups may manifest in legal decision-making. Without endeavoring to make more than a few specific law-related claims here, we first broadly suggest that all areas of law in which morality judgments play a role are overdue for investigation, considering the long history of the stereotypes we uncovered. As preliminary specific suggestions, these areas of investigation could include, for example, judgments of

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judges were more likely to use their discretion to sentence within a range (rather than at the absolute bottom), one could predict that a larger bias would appear.

252. It is notable, though, that a recent empirical study of actual white-collar sentences found no such difference on sentencing. *See* Johnson & Betsinger, *supra* note 219, at 1047, 1076 (finding that Asian-American and White defendants received similar sentences for white-collar crimes).

253. *See* Yen, *supra* note 96, at 11–15; *see also* Hutchinson, *supra* note 96, at 95–96 ("The development of sexualized racial stereotypes was a product of and helped to justify the sexual exploitation and domination of Asian American women and control of Asian American people through the law."); *cf.* Chin, *supra* note at 96, at 185 ("Asians and Pacific Islanders make up about 9 percent of California's population and are expected to be almost 12 percent in 2020. But when you look to the municipal courts, 84 percent of the judges in these courts are Caucasian. Asian-Americans hold only 2.9 percent of these positions." (footnotes omitted)).

intentionality in tort or white-collar criminal law, [254] evaluations of whether, and how, a contract has been breached, considerations of culpability (or punitive damages) in products liability or related cases, and, of course, evaluations of corporate director or officer behavior in the context of fiduciary duties or securities laws violations.

The results of the study also implicate the lack of diversity of America's judicial pool, particularly among federal judges. Of the 100 district court judges who participated in our study, sixty-eight were male while only thirty-two were female, and eighty-seven self-reported as White while only six reported as African-American, and three reported as Asian-American. And yet diversity mattered in our study, as it does more broadly in implicit bias literature. We found, for example, that female judges harbored lower implicit anti-Jewish biases and that Jewish judges did not possess a significant bias that was either pro- or anti-Jewish. These results underscore an important point: not all groups display identical implicit biases.[255] In the broader implicit bias context, although diversity cannot be counted on to eliminate all biases, research has shown that one of the best ways to de-bias others is to view, and have interactions with, leaders who run counter to prevailing stereotypes.[256] These "counter-stereotypical exemplars" are the people who, in turn, through their leadership and actions, act as de-biasing agents, whether or not this de-biasing is intentional. Thus, the results of our study, and related implicit bias work more generally, lead us to support calls for greater diversity in judicial appointments. In our view, this call for diversity is now scientific in nature and not entirely about politics.[257]

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254. Research has shown, for example, that morality information can affect judgments such as those of causation and intentionality. *See* Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCHOL. 368, 368 (1992) (finding that morality information affects causation judgments); Joshua Knobe, *Intention*, *Intentional Action and Moral Considerations*, 64 ANALYSIS 181, 183 (2004) (considering the overlap of morality and intentionality); Justin D. Levinson, *Mentally Misguided: How State of Mind Inquiries Ignore Psychological Reality and Overlook Cultural Differences*, 49 HOW. L.J. 1, 28 (2005) (arguing for psychologically competent legal rules); Justin D. Levinson & Kaiping Peng, *Different Torts for Different Cohorts: A Cultural Psychological Critique of Tort Law's Actual Cause and Foreseeability Inquiries*, 13 SO. CAL. INTERDISC. L.J. 195, 212 (2004).

255. *See* Nosek, *supra* note 74, at 37 (summarizing data from more than 2.5 million IATs).

256. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1107–08 (2006) (summarizing this research and discussing its broader implications).

257. Indeed, our study did not show a statistically significant difference in the implicit bias results of federal judges appointed by Republican Presidents compared to those appointed by Democrat Presidents.

CONCLUSION

Federal judges in America continue to preside over a broad slate of cases that stand to potentially transform the way America is defined—on matters as fundamental and contentious as immigration, gun control, the role and identity of corporations, health care, and even matters of life and death (e.g., abortion and the death penalty). As commentators work to dissect these intricate legal issues, much attention has been paid not only to the substantive legal issues themselves in Constitutional context but also to judges' self-reported and expressed predilections, politics, and previous opinions. Little has been said of the role of the way judges perceive these fundamental issues and the actors involved: how individual lives are automatically valued,[258] how corporations are implicitly perceived,[259] and how fundamental legal principles are unconsciously intertwined with group assumptions.[260] This Article suggests, and the empirical study supports the idea, that automatic biases and cognitions indeed influence a much broader range of judicial decisions than has ever been considered. It is only in this broader, more fundamental context that the role of judicial implicit biases and their impact on the legal system can ever fully be considered.

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258. *See* Levinson et al., *Devaluing Death*, *supra* note 21, at 567 (discussing how jurors automatically value individual lives).

259. *See* Justin D. Levinson, *Corporations Law: Biased Corporate Decision-Making?*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 21, at 146, 163.

260. *See* Smith et al., *supra* note 10, at 46.