

REGULATING IMPLICIT BIAS IN FEDERAL COURT

Irene Oritseweyinmi Joe*

ABSTRACT

Like other lawyers, federal judges have twin responsibilities. They must comport with ethical and professional rules that govern their own behavior while simultaneously monitoring other attorneys to ensure they are not violating similarly-controlling rules. The judicial robe, however, adds an extra dimension in the trial oversight process as judges necessarily oversee litigation processes that can easily encompass attorney misbehavior. As legal regulations develop to embrace modern science on unconscious bias, a particularly insidious form of misbehavior, this responsibility means that federal judges have an opportunity and, to some degree, a mandate to adopt practices that limit the impact of such bias on the criminal court process and its resulting case outcomes.

The federal judge holds court, grants motions, and issues orders demanding particular conduct or accounting from the parties involved. The court also facilitates, to a large extent, the scheduling or timing of court action. All of this means that the court can ask specific questions that require attorneys to reflect on whether their own decisions are biased and liberalize any unnecessary time constraints. Although the research on solutions to implicit bias is still developing, these judicial actions would be important systemic changes to a criminal justice process that is particularly susceptible to unconscious discrimination. Both the adequate time to make decisions and the opportunity to engage in personal reflection of one's own decisions provide opportunities to address and remove choices or value assessments that would ordinarily be subject to implicit bias. At the very least, these changes would more easily provide the formal accounting necessary to enable disciplinary proceedings for noncompliant attorneys while encouraging all criminal justice institutions to adopt procedures that better address the existence of implicit bias in the criminal courtroom.

INTRODUCTION

I.	REGULATING BIAS IN THE CRIMINAL COURTROOM.....	3
a.	ABA Model Rule 8.4g	5
b.	Implicit Bias in Criminal Court.....	7

* Assistant Professor of Law, Martin Luther King, Jr. Hall Research Scholar, and Affiliated Faculty of Aoki Center for Critical Race and Nation Studies at the University of California, Davis School of Law. Thanks to Afra Afsharipour, Monica Bell, Scott L. Cummings, Jessica Eaglin, Bruce Green, Eisha Jain, Martha Minow, Michele Benedetto Neitz, Lisa Pruitt, Deborah L. Rhode, Shayak Sarkar, and Aaron Tang.

REGULATING IMPLICIT BIAS IN FEDERAL COURT

i. Bias in Prosecutors	8
ii. Bias in Public Defenders	9
II. JUDICIAL RESPONSIBILITY AND OPPORTUNITY	10
a. <i>The Applicable Rules</i>	11
b. <i>The Disciplinary Process</i>	12
c. <i>Specific Steps for the Court</i>	14
i. Educating Court Decision-Makers	15
ii. Allowing Sufficient Time for Decisions	15
iii. Gathering Relevant Data	16
iv. Additions to the Plea Colloquy	18
CONCLUSION	

INTRODUCTION

Federal courts occupy a unique and laudable role in American history. Although tasked with exercising restraint and interpreting and applying the law, history has proven these courts to be fertile grounds for decisions and policies that move the nation towards better practices regarding racial dynamics.¹ Indeed the courts were designed in a manner to facilitate such influence on these and other noteworthy issues. Article III of the United States Constitution establishes the judicial branch of government and lays out the appointment procedure for federal judges.² Section I of this Article provides federal judges with lifetime tenure, after appointment by the executive branch and approval by the legislative branch.³ This selection process distinguishes these judges from state court judges who, although similarly tasked with interpreting the law and governing the judicial process, may hold positions that are more subject to whichever public attitude might hold sway for the moment.⁴ Such separation from public

¹ See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that racially restrictive covenants in property deeds are unenforceable); *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 488 (1954) (ruling that racial segregation in public schools is unconstitutional); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down state laws banning interracial marriage); and also *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that a prosecutor violates the Equal Protection Clause of the Fourteenth Amendment if he excludes jurors based solely on their race). See also Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 Geo. L.J. 965 (2007).

² U.S. Const. art. III

³ See U.S. Const. art. III, § 1 and *FAQs: Federal Judges*, U.S. COURTS, <https://www.uscourts.gov/faqs-federal-judges> (last visited July 21, 2019).

⁴ See David Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008); Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411, 1421-25 (2001).

REGULATING IMPLICIT BIAS IN FEDERAL COURT

opinion allows these judges to determine the reach, expanse, and limitations of the law without a corresponding concern for pleasing a constituency that could determine the judge's ongoing livelihood.

This essay discusses an important improvement that judges should make to their courtroom management process – limiting the opportunities for implicit bias to affect attorney decision-making. Inherent to the ability of federal judges to focus solely on the law and ensure the fairness of the court process is a duty to reform any judicial practices within their courtrooms that would otherwise undermine such principles or fail to adequately address current problems. The research on implicit bias continues to grow but our current understanding of the science suggests that criminal court defendants are substantially likely to suffer extreme consequences from it.⁵ There may also be behaviors that court actors can adopt to reduce such incidence.⁶ The likely presence of implicit bias in the criminal court process, and the ability to do something about it, place an ethical and professional duty upon federal judges to adopt a scheme that addresses its existence.

This contribution unfolds in two parts. Part I discusses the role that implicit bias can play in the decision-making process of various court actors. This Part details how the criminal court process lends itself to decisions marked by hidden bias and how professional and ethical rules have sought to combat that reality. Part II discusses the federal judiciary's role in ensuring compliance with ethical and professional rules in the federal criminal process. It concludes by exploring how federal judges can reduce the impact of unconscious bias on attorney decision-making. These changes, which have been adopted in other contexts, would help judges comply with their own ethical obligations in courtroom management. They would also reinforce the nation's commitment to a fair and just process by incorporating a newer understanding of how racial bias infects court processes and adopting strategies to combat it.

⁵ See, e.g., L. Song Richardson, *Book Review, Systemic Triage: Implicit Racial Bias in the Criminal Courtroom Crook County: Racism and Injustice in America's largest Criminal Court* by Nicole Van Cleve, 126 YALE L. J. 862 (2017); Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827 (2012); and Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835 (2016).

⁶ See, e.g., Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 UC IRVINE L. REV. 843 (2015) (providing a process for addressing and combating implicit racial bias in jury selection).

REGULATING IMPLICIT BIAS IN FEDERAL COURT

I. REGULATING BIAS IN THE CRIMINAL COURTROOM

The last decade has seen significant growth in formally understanding how unconscious bias influences individual decision-making.⁷ During this same period, explicit bias has remained at the forefront of reform discussions, as there remains much to do to combat its existence in legal practice, but implicit bias has become a more significant part of the national conversation. Social science research has just begun to uncover the far-reaching and insidious effects of implicit bias and propose solutions for limiting its impact. The evidence has captured some by surprise and some types of legal practice have seen a fervent desire to address and remove it.⁸

By formal definition, implicit bias refers to "relatively unconscious and relatively automatic features of prejudiced judgment and social behavior."⁹ The United States has a dark and persistent history of adopting particular stereotypes for minorities. These stereotypes, which are often negative, rely solely on immutable and easily ascertainable characteristics such as racial coloring, gender, and ethnicity.¹⁰ They, like other forms of misbehavior, are also more likely to occur in stressful situations marked

⁷ Relatedly, numerous studies have confirmed the link between race and prosecutorial decisions. *See, e.g.*, Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 647 (2012) (finding that Caucasians are less likely to have charges filed against them in the criminal process); *see also Race and the Prosecutor's Charging Decision*, 101 HARV. L. REV. 1520 (1988) (providing more evidence of racial disparities in prosecutorial charging decisions).

⁸ One important example concerns adolescent education (particularly the school-to-prison pipeline and decisions by school officials about student "misbehavior" is due to cultural differences or negative associations of minorities and criminal behavior. Another is employment and how the assignment of certain ethnicities to particular names can greatly reduce hiring.

⁹ Implicit Bias, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/implicit-bias/> (last visited June 10, 2019); *see also* Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 278, 280 (2014) ("our seemingly neutral, logical, and reasoned judgments are actually influenced by unconscious frameworks of thinking about the world that are triggered by our autonomic nervous system").

¹⁰ R. Richard Banks, et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169 (2006) (describing the myriad ways in which implicit bias creates racial imbalances in society). Jeffrey J. Rachlinski, et al., *Does Unconscious Racial Bias Affect Trial Judges*, 84 NOTRE DAME L. REV. 1195 (2009) (finding that "[j]ustice is not blind" and that racial disparities in the criminal justice system are pervasive).

by high-stake decision-making.¹¹ This is rarely more apparent than in the criminal process.

Studies repeatedly show that unconscious bias works to the detriment of people of color in the criminal process. For example, implicit racial bias influences how dangerous people view an alleged perpetrator. A police officer's decision about whether to use deadly force appears influenced by the suspect's ethnicity.¹² Researchers also created simulations that called on ordinary persons to view an image quickly to determine if the person depicted was holding a weapon. They found that the race of an individual did affect how much more likely people view innocuous objects to be firearms.¹³ There is no reason to suspect that individual attorneys are not susceptible in similar ways.

It is not uncommon for attorneys to allow their personal and professional passions on a particular subject matter to alter the sense of appropriate behavior that they would ordinarily hold in less meaningful or sensitive circumstances. Adding the inherent stress of representing another individual whose life or liberty may be at stake only increases the possibility that an attorney may not carefully self-regulate and limit misbehavior. Concerns about client's rights and victim's safety, as well as the pride and career advancement of the practicing attorney, can lead even the most well-meaning attorney to engage in behaviors that invite discipline by the state and federal bar.¹⁴

Much has been done, to some degree of success¹⁵, to address and eliminate explicit bias from the criminal court process but implicit bias is just beginning to achieve salience in the criminal justice reform.¹⁶ The American Bar Association, ostensibly recognizing the need to continue

¹¹ L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862 (2017).

¹² See, e.g., Joshua Correll et al., *The Influence of Stereotypes on Decisions to Shoot*, 37 EUR. J. SOC. PSYCOL. 1102, 1115 (2007). See also Banks, et al *supra* 19 at 1173.

¹³ See, e.g., JENNIFER EBERHARDT, *BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO* (2019).

¹⁴ See, e.g., *In re Pautler*, 47 P.3D 1175 (Colo. 2002) (fearing that a victim might still be at risk and the accused's unwillingness to speak with law enforcement without an attorney present, the prosecutor pretended to be a public defender. The ruse was eventually discovered and the prosecutor was disciplined.)

¹⁵ Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505 (warning that the modern attention to combatting implicit bias in the court process should not lead reformers to ignore the continued presence of explicit bias).

¹⁶ See, e.g., Jonathan Feingold and Karen Lorang, *Defusing Implicit Bias*, 59 UCLA L. Rev. Discourse 210 (2012) (describing as insufficient the attention paid to the connections of decisions on gun use with implicit bias).

REGULATING IMPLICIT BIAS IN FEDERAL COURT

addressing explicit bias in the legal profession, added an additional rule to its model for regulating attorney conduct in 2016.¹⁷ This addition more directly addresses attorney bias and provides a vehicle for the those tasked with governing attorney behavior to address implicit bias. The following section briefly details this new addition and the process by which it has undergone adoption by state bars.

a. ABA Model Rule 8.4g

In 2016, the ABA amended its Model Rules of Professional Conduct to include a rule specifically prohibiting discriminatory behavior.¹⁸ Model Rule 8.4(g) reads: “It is professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law.”¹⁹ This rule applies broadly to “conduct related to the practice of law” and expands the original rule’s focus on conduct related to the “administration of justice.”²⁰

Although some scholars refer to this rule addition as largely symbolic²¹, its influence could encourage practitioners to more swiftly consider how implicit bias affects their legal practice. As mentioned *supra*, the existence of *explicit* bias in the criminal law sphere has been part of the national conversation for decades and its regulation is more visible. For example, federal prosecutors and federal public defenders, who are critical to the administration of justice, have already adopted practices and policies that seek to prevent discriminatory conduct from infecting courtroom proceedings. Rule 8.5(g)’s broader application to “conduct related to the practice of law” would seem to introduce an additional requirement to review discriminatory behaviors that are not as easily recognizable as explicit bias. This could range from a particular

¹⁷ Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805 (2019).

¹⁸ *Id.*

¹⁹ MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016).

²⁰ MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2010) (former rule).

²¹ David L. Hudson, Jr. *Constitutional Conflict: States Split on Model Rule Limiting Harassing Conduct*, ABA Journal Oct. 2017 available at http://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct

REGULATING IMPLICIT BIAS IN FEDERAL COURT

office's hiring practices²², to charging decisions by the prosecutor, to resourcing decisions by the public defender.²³ In other words, although MR 8.4(g) clearly applies to explicit bias, its general admonition against conduct related to the practice of law that the lawyer reasonably should know is discriminatory, warrants a greater emphasis on addressing implicit bias in the legal profession.

As of the writing of this essay, only a few states have adopted this new ABA rule.²⁴ Its adoption, however, has been considered by many more.²⁵ Vermont was the first state to adopt the ABA Model Rule, with Maine following in 2019.²⁶ Some states, such as South Carolina²⁷ and Montana²⁸, have formally declined to adopt the rule. Decision-makers in both states that rejected the rule, expressed concern for the impact the rule might have on freedom of speech, free exercise of religion, and freedom of association.²⁹ Many states had already incorporated versions of rules that prohibited bias in legal practice but in a narrower fashion.³⁰ These states

²² The author is currently working on a project that explores whether anti-discrimination rules require prosecutor offices to adopt hiring practices that better diversify their line attorneys.

²³ See *supra* footnote 20.

²⁴ Debra Cassens Weiss, *Second State Adopts ABA Model Rule Barring Discrimination and Harassment by Lawyers*, ABA Journal June 2019, available at <http://www.abajournal.com/news/article/second-state-adopts-aba-model-rule-barring-discrimination-by-lawyers>

²⁵ *Id.*

²⁶ Debra Cassens Weiss, *Second State Adopts ABA Model Rule Barring Discrimination and Harassment by Lawyers*, ABA Journal: Ethics (June 30, 2019 11:39AM CDT), <http://www.abajournal.com/news/article/second-state-adopts-aba-model-rule-barring-discrimination-by-lawyers>.

²⁷ Lisa Smith-Butler, *South Carolina Declines to Incorporate ABA Model Rule 8.4(g) into the SC Rules of Professional Conduct*, The Barrister (June 20, 2017), <https://lawlibrarybarrister.wordpress.com/2017/06/20/south-carolina-declines-to-incorporate-aba-model-rule-8-4g-into-the-sc-rules-of-professional-conduct/> (Blog).

²⁸ Kristine A. Kubes, *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, ABA Groups: Forum on Construction Law (March 8, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring2019/model_rule_8_4/.

²⁹ See Dennis Rendleman, *The Crusade against Model Rule 8.4(g)*, ABA News: Ethics in View (Oct. 2018), <https://www.americanbar.org/news/abanews/publications/youraba/2018/6october-2018/the-crusade-against-model-rule-8-4-g/>.

³⁰ This has not been done solely in the ethical rules or by the state bar but instead in other civil rights laws or legal avenues. See, e.g., 5 M.R.S. § 4552 (2019); Fla. Stat. § 760.01 (2019); N.J. Stat. § 10:5n.

REGULATING IMPLICIT BIAS IN FEDERAL COURT

provide anti-discrimination rules in other legal fields such as contract, employment, or tort law, that could be used to prohibit biased behavior in the legal sphere. It remains to be seen if the majority of states will adopt this model rule. However, the slow pace of adoption by the states should not discourage federal courts from incorporating practices that limit the influence of bias in proceedings that may occur before them.

b. Implicit Bias in Criminal Court

Although implicit bias is present in all spaces where decisions can be made without stringent rules or formal guidelines on decision-making, its existence in the criminal process is particularly worrisome.³¹ This nation has a long and sordid history in its treatment of minorities through its criminal process.³² From the slavery, convict leasing, and Jim Crow against African-Americans, to our current recognition of mass prosecution, the criminal arena has often been a tool that was primarily used to police black and brown bodies.³³ With the growth in research about the racial impact of implicit bias, there is little reason for courts to be slow in adopting practices to address limit its influence.³⁴ Some states require attorneys to complete elimination of bias trainings to maintain their bar licenses.³⁵ There is still, however, a dire need for more directed training for those who make some of the most important decisions in the criminal process as they have the greatest consequence for minority communities. This section briefly describes how implicit bias can affect decisions by both prosecutors, those tasked with serving as ministers of justice, and

³¹ Jerry Kang, et.al, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

³² See generally, IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA (2017).

³³ See generally, Michelle Alexander, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

³⁴ *Batson v. Kentucky*, 476 U.S. 70, 86 (1985); *People v. Boone*, 30 N.Y.3d 521, 526 (2017).

³⁵ See e.g., CAL. RULES FOR MINIMUM CONTINUING LEGAL EDUC. r. 2.72(A)(2) (2014) (requiring California bar members to complete one hour every three years of continuing legal education that "deal[s] with the recognition and elimination of bias in the legal profession and society by reason of, but not limited to, sex, color, race, religion, ancestry, national origin, physical disability, age, or sexual orientation"); MINN. RULES OF THE BD. OF CONTINUING LEGAL EDUC. r. 2(G), 6(B), 9(B)(2) (2016) (requiring Minnesota bar members to complete every three years at least two hours of "elimination of bias" courses, which it defines as "a course directly related to the practice of law that is designed to educate attorneys to identify and eliminate from the legal profession and from the practice of law biases against persons because of race, gender, economic status, creed, color, religion, national origin, disability, age or sexual orientation.").

public defenders, those tasked with preserving the individual rights of indigent defendants.

i. Bias in Prosecutors

Research has shown that, like the majority of people, many prosecutors fail to adequately incorporate a modern understanding of implicit bias and contemplate how it might affect important decisions.³⁶ Some district attorney offices provide trainings on bias for their attorneys³⁷, but the author does not know of any office that has incorporated every formal mechanism that experts agree would greatly reduce biased prosecutorial decisions. Some individual prosecutors may adopt many of these solution-oriented practices on their own volition but there is significance in having formal office-wide policies that convey to the public how serious office leaders deem the implicit bias problem.

Prosecutors face myriad choices at all stages of a criminal trial.³⁸ These initial choices include whether or not to charge someone and what crime to charge them with. Prosecutors also have discretion to decide whether to contest bail or offer a plea bargain. Many of these decisions are related to the prosecutor's personal evaluation of the suspect and how dangerous she views the alleged offender to be.³⁹ These type of value judgments are ripe areas for unconscious associations between race and certain negative characteristics.⁴⁰ Despite this reality, there has been insufficient focus on changing prosecutor offices. This might be because disciplinary systems have yet to establish a significant role in curbing prosecutorial misbehavior.

³⁶ See generally

<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1077&context=ijls> e (prosecutor discusses bias and proposes ways to reduce bias in the courtroom).

³⁷ See, e.g., Memorandum from U.S. Dep't of Justice Deputy Attorney General Sally Q. Yates to All Department Law Enforcement Agents and Prosecutors on "Implicit Bias Training" (June 27, 2016), <https://www.justice.gov/opa/pr/departments-justice-announces-new-department-wide-implicit-bias-training-personnel> (announcing mandatory implementation of implicit bias training at the DOJ). These trainings are also being held in state prosecutor offices. See, e.g., <https://www.davisenterprise.com/local-news/yolo-prosecutors-receive-implicit-bias-training/>

³⁸ See generally, Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009) (discussing the wide discretion afforded to prosecutorial decisions).

³⁹ Justice Michael B. Hyman, *Implicit Bias in the Courts*, 102 ILL. B.J. 40, 42 (2014).

⁴⁰ Robert J. Smith, Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012) (discussing examples of how unconscious bias can affect all stages of a prosecutor's decision-making process).

REGULATING IMPLICIT BIAS IN FEDERAL COURT

The reality is that bar complaints for prosecutorial misconduct have seen very little success. A 2013 report from the Center of Prosecutor Integrity, calculates that there were 3,625 cases brought against prosecutors for misconduct between 1963 and 2013.⁴¹ In those cases, just 63 prosecutors received any type of sanction for their wrongdoing.⁴² This means that of the thousands of cases where prosecutorial misconduct was alleged at both the state and national levels, only 2 percent faced disciplinary outcomes.⁴³ There may be a multitude of reasons for such a small proportion of prosecutor complaints to receive formal discipline. Many of those charged cases may have been without merit or may have simply lacked the evidence necessary to move forward. Another reason may be that the investigative arm of disciplinary bodies can be very limited. Regardless, this ratio suggests there is work to be done to create more formal mechanisms for addressing misconduct or at least clarifying such disproportionate outcomes. Different accounting requirements, discussed *infra*, by judges could affect the latter reason.

ii. Bias in Public Defenders

Prosecutors are not the only attorneys in the federal courtroom whose decisions are subject to implicit bias. In their essay for the Yale Law Journal, *Implicit Bias in Public Defender Triage*, L. Song Richardson and Philip Atiba Goff note that, despite best intentions, implicit bias affects public defender decision-making.⁴⁴ Implicit bias, they note, is most prevalent in stressful situations where attorneys must make quick decisions with incomplete information.⁴⁵ It also presents where individuals must compare situations or people and make value judgments.⁴⁶ Public defenders responsible for various clients facing significant challenges must make decisions that are ripe for suffering the effects of unconscious bias on a constant basis.⁴⁷

Although the individual attorney caseload in federal court has not reached the same level of notoriety of state court caseloads, federal public

⁴¹ Matt Ferner, *Prosecutors are Almost Never Disciplined for Misconduct*, HuffPost: Politics (Feb. 11, 2016 4:16PM), https://www.huffpost.com/entry/prosecutor-misconduct-justice_n_56bce00fe4b0c3c55050748a.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ L. Song Richardson & Philip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 Yale L.J. 2626 (2013).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

REGULATING IMPLICIT BIAS IN FEDERAL COURT

defenders are not without their own resource limitations. Federal public defenders have to request expert witnesses from judges.⁴⁸ This means that these defenders may make value judgments, or question whether a judge is more likely to feel the witness is relevant to a particular case outcome, on which cases judges might be more inclined to support their request for such assistance.⁴⁹ These defenders also have to counsel clients on which plea offers are appropriate. Their own implicit ideas about what types of punishments various offenders might be able to withstand can certainly affect their counseling to the client about whether a deal is appropriate. It may also unintentionally affect their willingness to push back against a prosecutor's particular plea offer.

As outlined in the subsequent section, it is incumbent upon federal judges to counter legal practices, like those outlined above, that might be the result of biased decision-making and that are significantly likely to occur in their courtroom. This can be accomplished either by instituting systems within their courtrooms, reporting misconduct, or making their own determinations about the failure to comply with ethical rules and issuing necessary judgments. Regardless of the method undertaken or even explored, the growing literature on implicit bias suggests that courts should consider how best to address and limit its influence and provides them with opportunities to do so.

II. JUDICIAL RESPONSIBILITY AND OPPORTUNITY

In 1906, legal scholar and educator Roscoe Pound administered a public address in St. Paul, Minnesota on "The Causes of Popular Dissatisfaction with the Administration of Justice". This public talk served as a call to action for judicial reform.⁵⁰ In the address, Pound extolled the virtues of the legal process while demanding more of the judges tasked with fair adjudication.⁵¹

In the decades since Pounds's call to action, ethical and professional rules have developed as a means of formalizing the appropriate behaviors of judges.⁵² Ethical adjudication, however, is not just limited to concerns

⁴⁸ David Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335 (2017).

⁴⁹ *Id.*

⁵⁰ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906).

⁵¹ *Id.*

⁵² See, e.g., MODEL CODE OF JUDICIAL CONDUCT (2007).

REGULATING IMPLICIT BIAS IN FEDERAL COURT

about the ethical behavior of practicing judges. It also encompasses the ability of these judges to police the ethical behavior of those attorneys who practice before them. As discussed *supra*, criminal trials are a ripe environment for unconscious bias to influence attorney decision-making. An ethical judge, in order to ensure ethical practice by those attorneys practicing before her, can therefore rightly take steps to reduce the opportunities for implicit bias to take hold.

Above all else, federal judges preserve courtroom dignity and the rule of law. These judges use their own sense of propriety and procedural rules to maintain order but can turn to more generalized ethics rules to add context and restrictions to the decisions that attorneys make while representing clients in their courtrooms. The following section details some of the rules that federal judges consider and adopt, as well as the role that federal judges assume in ensuring attorneys comply with the rules.

a. The Applicable Rules

Federal courts adopt and promulgate their own ethical rules and these are often just the rules of the state court in which they reside.⁵³ In other words, attorneys who practice in federal court usually must abide by the same rules prescribed to attorneys practicing in the corresponding state court. Technically, this means that there is not one uniform set of ethical rules by which attorneys must abide. In many ways, however, this makes federal practice easier and more fluid. Individual attorneys can represent defendants under either state or federal rules of procedure without concern for conflicting professional rules.

So, what are the rules that federal courts adopt to govern attorney behavior? In 1983, the American Bar Association set forth the Model Rules of Professional Conduct, which serve as a guide for the ethics rules adopted and promulgated by individual jurisdictions.⁵⁴ The vast majority of states have adopted these rules in part or in whole thereby giving them the effect of law in the attorney disciplinary process.⁵⁵

⁵³ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (2000).

⁵⁴ MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 1983).

⁵⁵ *State Adoption of the ABA Model Rules of Professional Conduct*, ABA CTR. FOR PROF'L RESP.,

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (listing the states that have adopted the Model Rules). Until recently, California and New York maintained ethical guidelines that were most divergent from the Model Rules. In the fall of 2018, California adopted the format of the Model Rules while still maintaining some of its primary differences. For example, the state did not adopt proposed rule 1.14 which

REGULATING IMPLICIT BIAS IN FEDERAL COURT

Although this essay primarily discusses the Model Rules, federal courts also adopt other rules for attorney ethical and professional behavior. Some federal courts have adopted the ABA Model Federal Rules of Disciplinary Enforcement.⁵⁶ Other procedural rules in federal court can also set forth standards of conduct. Regardless of the particular source of the rules that govern attorney behavior in federal court, they are all guided by principles of due process. These principles require some notice and fairness to the claims and/or eventual findings that a particular attorney has violated a rule before a punishment is levied upon the attorney.⁵⁷

Unsurprisingly perhaps, some judges have begun to consider how they can address unconscious bias in their own decision-making.⁵⁸ This self-assessment is important but it only represents a portion of the judicial mandate to ensure a fair process in the courtroom. Judges must also consider how the attorneys in their courtroom may be violating principles of fairness and equity by allowing implicit bias to affect their decision-making. The ABA has made it even more incumbent on judges to adopt some practice to govern this behavior by adopting a model rule that explicitly prohibits biased legal practice.⁵⁹ As described *supra*, this Rule does not distinguish between explicit and implicit bias and instead demands that lawyers operate in a way that excludes any behavior that they know or should have reason to know is discrimination on the basis of suspect classifications and identity markers for oft-marginalized persons.

b. The Disciplinary Process

Federal courts maintain inherent power to sanction individuals for violating ethical rules.⁶⁰ A federal court judge can conduct their own investigation if they believe an attorney has engaged in any sort of

relates to a lawyer's obligation with regards to clients with diminished capacity. Admin. Order S240991, Order Re Request for Approval of Proposed Amendments to the Rules of Professional Conduct of the State Bar of California 6 (May 9, 2018), <http://www.calbar.ca.gov/Portals/0/documents/Supreme%20Court%20Order%202018-05-09.pdf>.

⁵⁶ MODEL FED. RULES OF DISCIPLINARY ENFORCEMENT R. IV(B) (1978).

⁵⁷ *In re Ruffalo*, 390 U.S. 544, 547 (1968) (citing *Theard v. United States*, 354 U.S. 278 (1957)).

⁵⁸ Pamela M. Caset et. al, *Addressing Implicit Bias in the Courts*, 49 COURT REVIEW 64, 65-69 <YEAR> (<http://aja.ncsc.dni.us/publications/courtrv/cr49-1/CR49-1Casey.pdf>).

⁵⁹ MODEL RULES OF PROF'L CONDUCT R. 8.4 (2016).

⁶⁰ Tonia Lucio, *Standards and Regulations of Professional Conduct in Federal Practice*, FED. LAWYER 50 (2017), http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2017/July/Features/Standards-and-Regulation-of-Professional-Conduct-in-Federal-Practice.aspx?FT=.pdf

REGULATING IMPLICIT BIAS IN FEDERAL COURT

misbehavior or unethical conduct.⁶¹ The court can then reach a final determination of the allegation of misbehavior and issue any sanction it deems appropriate. This practice, the final decision and any final sanction are, of course, subject to principles of due process.⁶²

Different agencies within the federal government also maintain procedures for disciplining attorneys. For example, the Executive Office for Immigration Review regulates the professional conduct of immigration attorneys and their representatives.⁶³ That agency has a Disciplinary Counsel that investigates complaints of alleged misconduct.⁶⁴ The Staff Attorney's Office for the United States Court of Federal Claims is the case manager for attorney discipline matters before that court and all of the disciplinary matters are referred to a three-judge Standing Panel on Attorney Discipline.⁶⁵ The United States Court of Appeals for the Federal Circuit also processes attorney discipline case with a Standing Panel on Attorney Discipline comprised of three judges.⁶⁶

An additional mechanism for disciplining lawyers accused of ethics violations, however, is through referral to the state bar or the Court of Federal Claims. The referral is followed by an investigation and possible hearing by the disciplinary committee.⁶⁷ The Court of Federal Claims has nationwide jurisdiction over any disciplinary violation.⁶⁸ Even if a violation occurs in federal court, as the entity authorizing the lawyer's ability to practice law in a given jurisdiction, the state bar also always

⁶¹ *Id.* at 52.

⁶² *In re Ruffalo*, 390 U.S. 544, 549-51 (1968) (citing *Theard v. United States*, 354 U.S. 278 (1957)).

⁶³ *Attorney Discipline Program*, U.S. DOJ (June 12, 2019), <https://www.justice.gov/eoir/attorney-discipline-program>

⁶⁴ *Id.*

⁶⁵ RULES OF THE U.S. COURT OF FED. CLAIMS r. 83.2 (2019); Meg, Beardsley, *Attorney Discipline Procedures in the United States Court of Federal Claims*, <https://www.uscfc.uscourts.gov/conferences/2018/materials/Ethics/Ethics%20Program%20-%20Attorney%20Discipline%20Procedures%20in%20the%20USCFC.pdf> (last visited Jul. 19, 2019).

⁶⁶ *Federal Circuit Court Attorney Discipline Rules*, U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/sites/default/files/rules-of-practice/fcadrules.pdf> (last visited Jul. 20, 2019).

⁶⁷ *E.g.*, Lawyer Regulation, STATE BAR OF CA <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Lawyer-Regulation> (last visited Jul. 19, 2019).

⁶⁸ Rules of the United States Court of Federal Claims 83.2.

REGULATING IMPLICIT BIAS IN FEDERAL COURT

maintains the authority to question the violating attorney's fitness to practice law through its own disciplinary process.⁶⁹

The current attorney discipline framework, both within the adopted ethical rules and the procedural rules adopted in the federal system, provides federal judges with authority to address and sanction misbehavior. This authority ideally positions federal judges to address implicit bias in their courtrooms. Some would argue that the legal system has been slow to recognize and counteract the effects of implicit bias.⁷⁰ This might be because courts are designed to move slowly and deliberately.⁷¹ The assignment of power to address bias through these disciplinary procedures, however, suggests that adopting practices that counteract implicit bias would be in keeping with an acceptable pace for change and improvement. Although it is difficult to completely eliminate the role that unconscious bias has on decision-making, there are a number of steps, as outlined in the next section, that federal judges could take to limit its influence in their courtrooms.

c. Specific Steps for the Court

There are methods that individuals can adopt to better combat the effect of implicit bias on decisions. Courts can also adopt these steps as they primarily require one to recognize the problem and be open to addressing it. This short essay cannot address all of the possible avenues for reform, or even discuss a substantial portion of the present and forthcoming research that suggests current solutions are inadequate. The following section, however, does suggest areas that current and past research suggests might allow for important improvements. Each suggestion is, conceivably, within the primary control and the authority of the court and federal judges could at least consider them as they reflect on

⁶⁹ MODEL RULES OF PROF'L CONDUCT R. 8.5(a).

⁷⁰ Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J. FORUM, 391, 392 (noting that one criminal defense attorneys cited implicit bias in a brief nearly 90 years before the article's publication).

⁷¹ The very idea that the courts must rely on precedent in their decisions requires them to move incrementally. Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035 (2013) (describing judicial reliance on precedent in its decision-making and how that ensures stability in the legal system). See also Edward John Main, *Removal, Remand, and Review of "Bad Faith" Workers' Compensation Claims*, 13 T.M. COOLEY L. REV. 121, 132 (1996) (stating that Congress does not permit federal courts to consider how much more slowly justice moves in federal court than in state counterparts while considering remand issues).

REGULATING IMPLICIT BIAS IN FEDERAL COURT

their responsibility to address implicit bias and the opportunities they have to do so.

i. Educating Court Decision-Makers

As other scholars have noted, one could limit implicit bias by educating the decision-makers in the process about its existence. There is mixed evidence on how helpful these trainings are in combatting implicit bias. Such steps, however, are known to have allowed individuals to meaningfully recognize its existence in the short term and attempt to self-regulate.

One could only guess what kinds of changes that attorneys who are more educated about implicit bias might make in their legal practice. For example, these attorneys might introduce implicit bias into discussions they might have with client, witness, and jurors during the limited voir dire process.⁷² Much like the trainings, this discussion might limit the presence of unconscious bias in decision-making for the all-important first impression of the trial, the defendant's level of responsibility and how decision-makers might perceive the defendant, or the witness's contribution to the prosecutor's case-in-chief. Judges could even then include an instruction on implicit bias during their initial read of the charges to the defendant, any testifying witnesses, and to the jury.⁷³

ii. Allowing Sufficient Time for Decisions

Truly, implicit bias is difficult to completely remove from the decision-making process, but judges do play a central part on another important

⁷² Federal judges conduct the majority of questioning for jury voir dire in criminal cases so attorneys would be limited in what they could ask. But an informed attorney may prioritize implicit bias in their juror questioning. Courts have been consistent in addressing racial bias in jury decision-making and recently, the Supreme Court, has issued two decisions emphasizing this. In *Pena-Rodriguez v. Colorado*, the Court pierced the secrecy of jury deliberations to overturn a verdict where one juror expressed racist beliefs during jury deliberation. *Pena-Rodriguez v. Colorado*, 137 U.S. 855, (2017). The Court just recently issued a 7-2 decision in the case of Curtis Flowers, again noting that removing jurors for racial reasons is unacceptable in the trials. *Flowers v. Mississippi*, 136 U.S. 2157 (2016).

⁷³ The unconscious bias videos used in the Northern District of California, and Western District of Washington provide useful examples. The use of these videos is subject to judicial discretion but they provide a way for judges to address hidden bias. See "Unconscious Bias Video for Potential Jurors" U.S. District Court of Northern California, <https://www.cand.uscourts.gov/attorneys/jury-video>; See also Marella Gayla, "A Federal Court Asks Jurors to Confront Their Hidden Biases," (Jun. 21, 2017) <https://www.themarshallproject.org/2017/06/21/a-federal-court-asks-jurors-to-confront-their-hidden-biases>

REGULATING IMPLICIT BIAS IN FEDERAL COURT

environmental characteristic, that if changed, could reduce its impact. As L. Song Richardson and Philip Attiba Goff note in their article, *Implicit Bias in Public Defender Triage*, decisions that are made in a rushed manner and under severe time limitations are particularly susceptible to unconscious bias.⁷⁴ Since the judge has primary control over her calendar, she can use any discussion of best practices to develop a personal rubric for how much time she will allow for the attorneys to prepare for and conduct the hearings. Indeed, there are some limits on how much time courts can allow for certain court hearings. Criminal defendants have a right to a speedy trial.⁷⁵ Additionally, although the prosecution may not have the same right to a speedy trial of which defendants are entitled to receive, their authority to institute and bring charges means they can properly request timely proceedings.⁷⁶ The Supreme Court has also put important time limitations on how long a defendant can be held in custody before the attachment of counsel and a formal finding of probable cause.⁷⁷ If a federal judge expands time to the level most allowable under the law, however, that would certainly facilitate decisions that are more likely to be unencumbered by implicit bias.

iii. Gathering Relevant Data

Little can be done to address unconscious bias without formal data and records. Criticism of implicit bias centers on its “invisibility” and an inability to confirm whether a decision was made because of unconscious bias or because of some other unique characteristic. However, difficulty in complying with an ethical standard does not remove its mandate to address when it might be violated. Instead, data and formal records of static characteristics like race, the plea offers extended by a prosecutor, and the length of time or number of cases the public defender has at the time of representation could serve as important data for determining the incidence of implicit bias in the courtroom.

⁷⁴ *Supra* note 53.

⁷⁵ See U.S. Const. VI Amend., Alan L. Schneider, Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476 (1968).

⁷⁶ Witness memories fade and the community’s right to justice require criminal processes to move forward. Some jurisdictions specifically capture this prosecutorial right in its criminal procedure rules. See, e.g., LA Code of Crim Pro 61 – “Subject to the supervision of the attorney general, as provided in Article 62, the district attorney has entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute.”

⁷⁷ See *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), *Gerstein v. Pugh*, 420 U.S. 103 (1975).

REGULATING IMPLICIT BIAS IN FEDERAL COURT

One difficulty in addressing prosecutorial bias is the lack of transparency in prosecutorial charging decisions and plea offers. As opposed to state prosecutors, however, some of the practices of federal prosecutors allow for a bit more public information about these decisions.⁷⁸ The United States Attorney General sets the standards for each U.S. Attorney's Office, and the prosecutors and staff that work in the offices.⁷⁹ The Attorney General will often publicize directives on what charges, offenders, or behaviors those within her supervisory control should prioritize.⁸⁰ These directives can be used to explore any resulting biased outcomes and compared with previous formal data to see if the directives might have a causal relationship to any biased outcomes.

Even if a court does not wish to proceed with formal disciplinary proceedings outside of the court⁸¹, it can use its formal judgment or opinion to provide a record for other actors to use in pursuing discipline or demonstrating an unacceptable pattern of conduct. "Benchslaps", which some judges have used to admonish misbehavior by attorneys in place of formal disciplinary proceedings, are published decisions and orders that publicly shame lawyers who have violated professional and ethical rules.

Scholars do view these benchslaps as problematic for three reasons. First, they presumably violate the judge's own ethical obligation to take more formal, regulated action when witnessing ethical violations. Judges are as beholden to the same self-regulatory aspects of the legal profession as prosecutors and should likewise follow the rules set forth in the regulatory rules. The second problem with benchslaps is that they seemingly violate the judge's ethical obligation to treat those in their courtroom proceedings with courtesy, respect, and patience. The third problem with these published orders admonishing misbehavior by attorneys is that they violate due process by not affording the attorney the opportunity to appeal the public shaming the opinion invites upon them.

⁷⁸ *Justice Manual*, "Principles of Federal Prosecution," U.S. DEP'T OF JUSTICE, Sections 9-27.200, 9-27.220, 9-27.230, <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.120>.

⁷⁹ Amie N. Ely, Note, *Prosecutorial Discretion as an Ethical Necessity: The Ashcroft Memorandum's Curtailment of the Prosecutor's Duty to 'Seek Justice'*, 90 CORNELL L. REV. 237 (2004), Douglas A. Berman & Steven L. Chanenson, *Taking Stock of Changing Prosecutorial Policies*, 30 Fed. Sent. R. 1 (2017).

⁸⁰ See, e.g., Eric Holder Memo, Jeff Session memo, and William Barr memo.

⁸¹ Perhaps the court is unable to act because another right is implicated by the disciplinary violation. For example, a court might hear of misdemeanor through conversations that are subject to rules on attorney-client confidentiality. Ethical rules provide for exceptions in such cases and the court would rightly be acting within its ethical obligation by not reporting such information to the appropriate disciplinary committee.

REGULATING IMPLICIT BIAS IN FEDERAL COURT

Regardless of the underlying concerns about benchslaps, they can be a useful tool for directing future behavior by particular prosecutorial offices. Civil rights litigation that demands change in the criminal process can only succeed when records of misbehavior demonstrate a strong correlation between misbehavior and violation of legal rights. Section 1983 requires the plaintiff to demonstrate a pattern of wrongdoing by a prosecutor's office.⁸² Data about the race of the defendants, the plea deals offered, the time that lapsed between institution of the formal criminal process and disposition, could provide important preliminary information for addressing systemic problems through such litigation.

iv. Additions to the Plea Colloquy

The majority of federal criminal court cases end in a plea agreement between the government and the defendant. There are myriad reasons for this⁸³, but the fundamental reason is that the stipulated sentence or recommendation by the government is more pleasing to the defendant than the risks associated with trial. As part of the plea agreement, federal defendants prospectively waive a number of appellate rights and federal judges engage in a formal waiver of those rights.

The plea colloquy⁸⁴ is a question call-and-solicited answer in written or spoken form, between the judge and the defendant that establishes the constitutionality of the plea. It often begins with several introductory questions to establish that the defendant is in the appropriate frame of mind to enter a plea. The questions then move forward to include broad questions about the defendant's satisfaction with their legal

⁸² *Connick v. Thompson*, 563 U.S. 51, 54 (2011). A prime example of this is John Thompson's case out of Louisiana and the 14-million-dollar award that was vacated by the Supreme Court because of this failure. Also cite to any other similar cases or any in which an award was upheld or the state or prosecutorial jurisdiction settled the matter out of court. Even if one cannot assume guilt from the decision to settle, one can understand that sufficient evidence was presented for the state to deem it was in its best interest to settle the matter.

⁸³ Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 12-15 (2013).

<https://scholarlycommons.law.northwestern.edu/jclc/vol103/iss1/1>

See also Lindsey Devers, CSR, Incorporated, *Plea and Charge Bargaining*, <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.

⁸⁴ Sample of Rule 11 colloquy available here

<https://www.mied.uscourts.gov/pdffiles/Clelandrule11colloquy.pdf>

REGULATING IMPLICIT BIAS IN FEDERAL COURT

representation.⁸⁵ The colloquy may also include questions that convey to the defendant that the government has future decisions to make about the value it will assign for any assistance the defendant may provide in facilitating criminal prosecutions of additional perpetrators or making the victim whole. It is these latter questions that provide an opportunity for judges to limit the influence of implicit bias by adding more questions.

Although a bit of a paradox, consciousness can actually ameliorate unconscious bias. Simply asking an individual whether they have acted in a biased way can encourage that individual to reconsider any stereotypes they would have otherwise been included in their reasoning.⁸⁶ This is because asking the question brings to the forefront an otherwise subconscious consideration and allows the “thinker” to purposefully reject it. Judges could include a question in the plea colloquy that confirms that the attorneys involved in the plea agreement have considered whether their decisions have been influenced by unconscious bias. This inclusion would require these attorneys to self-reflect and may encourage the type of forethought that limits the influence of implicit bias.

In adding questions to the plea colloquy, courts will have to consider various rights and privileges that both the defendant and the prosecution possess. For example, defendants are entitled to confidential communications with their attorneys.⁸⁷ The questions cannot be designed in any way that might elicit private conversations between the attorney and the client. Additionally, the right to remain silent means that they also should not elicit any information that might prove harmful to the defendant.⁸⁸ These considerations, however, do not suggest that it is impossible to design a question that requires such reflection without violating the defendant’s rights.

Adding a requirement for prosecutors to provide an answer in the plea colloquy about whether unconscious bias has infected their decisions could be similar to other type of formal questions they must answer in court proceedings. For example, some courts require prosecutors to confirm that they have complied with the duty to turn over exculpatory

⁸⁵ Julian A. Cook, *Federal Guilty Pleas under Rule 11: The Unfulfilled Promise of the Post-Boykin Era*, 77 NOTRE DAME L. REV. 597 (2002), <https://scholarship.law.nd.edu/ndlr/vol77/iss2/5>.

⁸⁶ Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 999, 1022-1040 (2013).

⁸⁷ MODEL RULES OF PROF’L CONDUCT r. 1.6 (AM. BAR ASS’N 2016).

⁸⁸ This might prove more difficult because any comment the defendant might make could be used against the defendant in a future case for the effective assistance of counsel. Will need to include information on how that has been handled in the ordinary plea context.

REGULATING IMPLICIT BIAS IN FEDERAL COURT

evidence imposed upon them under the due process clause and clearly articulated in *Brady v. Maryland*.⁸⁹ This *Brady* obligation has also been institutionalized in ethical rules about how prosecutors should handle exculpatory evidence within their control during a criminal proceeding.⁹⁰ The rule reinforces the notion of fundamental fairness that lies in the Due Process Clause of the Fifth and Fourteenth Amendments.⁹¹ Requiring a similar accounting in the plea colloquy would reinforce the system's dedication to fairness by addressing the, as research suggests, strong possibility that a prosecutor might have made decisions that were influenced by unconscious bias.

⁸⁹ See *Brady v. Maryland*, 373 U.S. 83 (1963).

⁹⁰ Most states have adopted a rule based on ABA Model Rule of Professional Conduct 3.8(d) which requires timely disclosure of Brady material. The discovery process in the criminal system is far more stringent than in civil court. David E. Singleton, *Brady Violations: An In-depth Look at "Higher Standard" Sanctions for a High Standard Profession*, 15 WYO. L. REV. 139, 139 (2015). This is for good reason. Unlike the civil process, the criminal process necessitates a charge initiated by the government and conceivably includes all of the powers that the government has at its disposal. A civil case can also include a government actor and its corresponding power and resources. However, the criminal process includes this power in addition to the invited judgment and moral condemnation from a society that has viewed certain behaviors contrary to fundamental values of an orderly community. In recognition of the importance of expansive discovery in the criminal process, courts assign an affirmative duty to prosecutors to disclose certain information related to a defendant's innocence.

⁹¹ See *id.* at 87 (describing the withholding of evidence favorable to the accused as a violation of Due Process). It may be true that prosecutors do continue to violate the Brady rule in some cases. One high profile example was in the Ted Stevens case. Carrie Johnson, *Report: Prosecutors Withheld Evidence in Ted Stevens Case*, NPR.ORG (Mar. 15, 2012), <https://www.npr.org/2012/03/15/148687717/report-prosecutors-hid-evidence-in-ted-stevens-case>. After the trial, defense counsel alleged that the prosecutors concealed thousands of pages of evidence. This included a written note by Senator Stevens and impeachment evidence that included documentation of a government witness's sex act with a minor. In re Special Proceedings, 842 F. Supp. 2d 232, 255 n.23 (D.D.C. 2012); Del Quentin Wilber & Sari Horwitz, *Prosecutors Concealed Evidence in Ted Stevens Case, Report Finds*, WASH. POST (Mar. 15, 2012), https://www.washingtonpost.com/local/crime/prosecutors-concealed-evidence-in-ted-stevens-case-report-finds/2012/03/15/gIQAJ5GNFS_story.html?utm_term=.577fbb47df5b. Special Counsel was appointed to document the Brady violations that occurred during the prosecution. The investigation of the Special Counsel culminated in a 514-page report detailing numerous *Brady* violations. See Henry F. Shuelke III, Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009 (Shuelke Report) at 99 (at <http://www.nacdl.org/discoveryreform>). Something similar could occur if it was later discovered that bias played a role in the decision-making.

REGULATING IMPLICIT BIAS IN FEDERAL COURT

Undoubtedly, the steps for reform articulated above are not a panacea for combatting the impact of implicit bias in the criminal court process. They are, however, important steps for federal courts to consider in how best address the research on implicit bias and its likely presence in the court process. Although they move prove limited in their impact, they do move the court in the direction of better complying with its ethical and professional obligations and its role as preserver of the rule of law in the criminal process.

CONCLUSION

This essay's emphasis on regulating implicit bias among the attorneys should not bely the reality that recognizing and regulating t unconscious bias is extremely hard. Neither should it discount other stages of the criminal process that are particularly susceptible to implicit bias.⁹² Similarly, this essay does not provide an exhaustive account of attorney misbehavior under the model ethics rubric that deserve more action by the federal judiciary or suggest alternatives to achieving more disciplinary hearings for misbehavior.⁹³ It is precisely the far-reaching influence of implicit bias and the seeming dearth of disciplinary action against attorneys who have misbehaved that makes the prescriptions outlined in this paper most important.

⁹² Judges, of course, also have a duty to combat implicit bias in their own decisions – whether it pertains to hiring of staff or clerks or determining appropriate sentences for criminal defendants. Indeed, eliminating any incidence of unconscious bias in judges' chambers and within their own decisions would help better police such occurrence by the attorneys and jurors in their courtroom. The simple presence of a person of color can affect the stereotypes that certain individuals may hold about minorities. Studies have shown that the presence of one black male juror on a jury can drastically change criminal case outcomes. For example, The presence of a black judge or staff member in the courtroom could, at a minimum, improve notions of procedural justice. Yale professors Tracey Meares and Tom Tyler have defined procedural justice as society's acceptance of a criminal process as fair and just by how it reflects the community's understanding of what "fair" would look like.

⁹³ For example, although the federal public defender institution has not received nearly as much attention as their state counterparts for resource deficiencies, federal defendants can and do face attorney limitations. The most obvious situation where this occurs is during government shutdowns or similar periods where federal employers are furloughed. Operations for federal courts can continue beyond a formal government shutdown because of the court's handling of court fees. This creates a reserve for the courts to use to maintain practices. Should it become obvious that the federal defense bar, which is comprised of a number of private attorneys that accept court appointments for indigent clients, cannot meet the client need, then the court would have to intervene.

REGULATING IMPLICIT BIAS IN FEDERAL COURT

The judge's role as a supervisor of others in maintaining a fair and just process simply cannot be overstated. The approaches articulated in this article are necessary because regulating implicit bias is a place where an ounce of prevention is not just worth a pound of cure. Rather, since there is no "cure" to be had after the fact, it must be adequately addressed on the front end. The ABA has provided the ethical guidance to address misbehavior but the most important contribution of MR 8.4(g) is to provide more support for judges to address the problem *ex ante*.

At the time of Roscoe Pound's 1906 address on judicial administration, notable educators described the profession as "unalive to the shortcomings of our justice, unthinking of the urgent demands of the impending future, unconscious of their potential opportunities, unaware of their collective duty and destiny."⁹⁴ At the time, Pound's words revitalized the legal profession and the judicial process by emphasizing its importance and duty to respond to changing times. Social science research on implicit bias provides yet another modern improvement that courts must consider. Federal judges must consider how to respond to such an ever-present call to serve as a reliable beacon of a fair and just court process by finding new ways to respond to implicit bias research.

⁹⁴ Tom C. Clark, *A Tribute to Roscoe Pound*, 78 HARV. L. REV. 1, 2 (1964) (citing Dean John H. Wigmore).