

# Regulating Implicit Bias in the Federal Criminal Process

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*Like other supervisory 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 of responsibility in the trial oversight process. Specifically, as our understanding of unconscious bias continues to expand, the judge's responsibility to address its influence also increases. That responsibility demands that judges adopt practices to limit the impact of such bias, especially in criminal court cases.*

*The federal judge has great power over the process and procedure of cases. 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. Given such extensive procedural power, federal judges also have two powerful tools to eliminate or, at minimum, minimize unconscious bias. First, judges can ask attorneys specific questions that require them to reflect on whether their own decisions are biased. Second, judges can liberalize any unnecessary time constraints.*

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*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 reflecting on one's own decisions and taking adequate time to make decisions would allow attorneys to address and remove choices or value assessments that would ordinarily be subject to implicit bias. Even if these changes failed to encourage newer decision-making practices that are less susceptible to implicit bias, they could still contribute to reducing the impact of such bias on attorney behavior. This is because new courtroom procedures would provide the formal framework necessary to bring disciplinary proceedings against a noncompliant attorney by creating a court record of the attorney's behavior and purported reasons for engaging in such conduct. This alone would be a significant contribution to both the profession's attempts to regulate bias in legal practice and federal judges' responsibility to manage fair and just court processes.*

|  |     |
|--|-----|
| Introduction.....  | 966 |
| I. Regulating Bias in the Criminal Courtroom.....                                    | 968 |
| A. Implicit Bias in Criminal Court.....  | 970 |
| 1. Bias in Prosecutors.....  | 971 |
| 2. Bias in Public Defenders.....   | 972 |
| II. Judicial Responsibility and Opportunity.....                                     | 974 |
| A. The Applicable Rules Governing Attorney Behavior.....                             | 975 |
| B. ABA Model Rule 8.4(g).....  | 976 |
| C. The Disciplinary Process.....   | 978 |
| D. Specific Steps for the Court to Take to Reduce or Eliminate<br>Implicit Bias..... | 980 |
| 1. Educating Court Decision-Makers.....  | 980 |
| 2. Allowing Sufficient Time for Decisions.....                                       | 981 |
| 3. Gathering Relevant Data.....  | 982 |
| 4. Additions to the Plea Colloquy.....   | 984 |
| Conclusion.....  | 987 |

#### INTRODUCTION

Federal courts occupy a unique and laudable role in American history. Although tasked with exercising restraint in interpreting and applying the law, history has proven these courts to be fertile grounds for decisions and policies

that move the nation toward better practices regarding racial dynamics.<sup>1</sup> Indeed, the courts were designed to facilitate such influence on these and other noteworthy issues.<sup>2</sup> Article III of the United States Constitution establishes the judicial branch of government and lays out the appointment procedure for federal judges. Section I of Article III provides federal judges with lifetime tenure, after appointment by the executive branch and approval by the legislative branch.<sup>3</sup> 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 public attitude.<sup>4</sup> Such separation from public opinion allows federal 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 independence also gives federal judges the freedom to adopt courtroom practices reflecting changes in the law or modern science. This Article discusses one important improvement that judges should make to their courtroom management process: combating implicit bias in attorney decision-making. Inherent in federal judges' ability to ensure fairness in the court process is a duty to reform any judicial practices that would undermine such principles or fail to adequately address modern 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

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1. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 84 (1986) (holding that a prosecutor violates the Equal Protection Clause of the Fourteenth Amendment if he excludes jurors based solely on their race); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down state laws banning interracial marriage); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (ruling that racial segregation in public schools is unconstitutional); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that racially restrictive covenants in property deeds are unenforceable).

2. See generally Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965 (2007) (describing how the federal judiciary's design facilitates judicial independence).

3. See U.S. CONST. art. III, § 1; *FAQs: Federal Judges*, U.S. CTS., <https://www.uscourts.gov/faqs-federal-judges> [<https://perma.cc/CZA7-JHAF>].

4. See Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411, 1421–25 (2001) (describing how party affiliation affects judicial elections); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 268–69 (2008) (detailing how greater public influence through judicial elections limits the broader judicial role in the democratic process).

from it.<sup>5</sup> However, there may also be behaviors that court actors can adopt to reduce implicit bias.<sup>6</sup>

This Article unfolds in two parts. Part I discusses the role that implicit bias can play in the decision-making processes of various court actors in criminal proceedings.<sup>7</sup> It 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 proposed changes to federal criminal courts, which have been adopted in other contexts, would help federal 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 contemporary understanding of how racial bias infects court processes and by adopting strategies to combat it. As they have at critical junctures in the past, the federal courts would again provide a directive to other institutions on how best to ensure an equitable process in a diverse nation.<sup>8</sup>

## I.

### REGULATING BIAS IN THE CRIMINAL COURTROOM

The last decade has seen significant growth in both our understanding of unconscious bias and the legal reforms available to address it.<sup>9</sup> Social science research has just begun to uncover the far-reaching and insidious effects of

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5. See, e.g., NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT* (2016) (describing the role of implicit bias in one Illinois county); L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 *YALE L.J.* 862 (2017) (reviewing VAN CLEVE, *supra*) (describing how implicit bias influences the type and quality of representation that indigent defendants receive from their assigned counsel); Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 *CONN. L. REV.* 827 (2012) (detailing how implicit bias prevents a defendant from receiving a fair and impartial jury); 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) (describing how individuating information such as a defendant's testimony can combat negative implicit associations).

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

7. This Article focuses only on implicit bias in the criminal court process. There is a similar regulatory duty in the civil context, and similar risks associated with implicit bias, but such discussions are beyond the scope of this contribution. For a discussion on the impact of implicit bias in other courtroom proceedings, see, for example, Kevin R. Johnson & Serena Faye Salinas, *Judicial Remands of Immigration Cases: Lessons in Administrative Discretion from INS v. Cardozo-Fonseca*, 44 *ARIZ. ST. L.J.* 1041 (2012).

8. See *supra* note 1 and accompanying text.

9. See, e.g., Research Working Grp., *Task Force on Race and 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).

implicit bias and to propose solutions for limiting its impact. The evidence has taken some by surprise, and some types of legal practice have seen a fervent desire to address and remove it.<sup>10</sup>

By formal definition, implicit bias refers to “relatively unconscious and relatively automatic features of prejudiced judgment and social behavior.”<sup>11</sup> 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.<sup>12</sup> Like other forms of misbehavior, stereotyped judgments are more likely to occur in stressful situations marked by high-stakes decision-making.<sup>13</sup> 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 whether people view an alleged perpetrator as dangerous. A police officer’s decision about whether to use force can be subconsciously influenced by the suspect’s racial appearance.<sup>14</sup> Researchers also created simulations that called on ordinary persons to view an image quickly to determine if the person depicted was holding a weapon.<sup>15</sup> They found that a person’s race affects the likelihood that an innocuous object held in her hand will be viewed as a weapon.<sup>16</sup>

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10. One important example concerns adolescent education (particularly the school-to-prison pipeline and decisions by school officials about whether student “misbehavior” is due to cultural differences or to negative associations of minorities with criminal behavior). See KIMBERLÉ WILLIAMS CRENSHAW ET AL., AFRICAN AM. POLICY FORUM, BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED (2015), [https://www.law.columbia.edu/sites/default/files/legacy/files/public\\_affairs/2015/february\\_2015/black\\_girls\\_matter\\_report\\_2.4.15.pdf](https://www.law.columbia.edu/sites/default/files/legacy/files/public_affairs/2015/february_2015/black_girls_matter_report_2.4.15.pdf) [<https://perma.cc/CHN3-UR2B>]; MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS (2016). Another example is employment and how the assignment of certain ethnicities to particular names can greatly affect hiring. 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 (2004).

11. *Implicit Bias*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2015), <https://stanford.library.sydney.edu.au/archives/sum2017/entries/implicit-bias> [<https://perma.cc/28C3-83C5>]; see also Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 278, 280 (2014) (“[O]ur 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.”).

12. See R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1171–78 (2006) (describing the myriad ways in which implicit bias creates racial imbalances in the criminal process); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196 (2009) (finding that “[j]ustice is not blind” and that racial disparities in the criminal justice system are pervasive).

13. Richardson, *supra* note 5, at 864.

14. See Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235 (2017) (noting that both implicit bias and racial anxiety can influence a police officer’s decision to use force).

15. See, e.g., Banks et al., *supra* note 12, at 1173; Joshua Correll et al., *The Influence of Stereotypes on Decisions to Shoot*, 37 EUR. J. SOC. PSYCHOL. 1102, 1103–04 (2007).

16. See JENNIFER L. EBERHARDT, *BIASED* 66–68 (Penguin Books 2020) (2019).

There is no reason to suspect that individual attorneys are not susceptible to bias in similar circumstances. It is not uncommon for attorneys to allow their personal and professional passions on a particular subject matter to alter their sense of appropriate behavior, even when they would ordinarily maintain composure and civility.<sup>17</sup> 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 clients' rights and victims' 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 relevant licensing entity.<sup>18</sup>

### A. *Implicit Bias in Criminal Court*

Although implicit bias is present wherever decisions can be made without stringent rules or formal guidelines, its existence in the criminal process is particularly worrisome.<sup>19</sup> This nation's treatment of minorities through the criminal process has a long and sordid history.<sup>20</sup> From slavery, convict leasing, and Jim Crow to our current practice of mass prosecution, the criminal arena has often been a tool used to police African Americans and Latinxs.<sup>21</sup> With the growth in research about the racial impact of implicit bias, there is little reason for courts to be slow in adopting practices that limit its influence. While some states require attorneys to complete bias trainings to maintain their bar licenses,<sup>22</sup> there is still a dire need for more directed training for decision-makers in the criminal process, as they have the greatest consequence for targeted communities. This Section briefly describes how implicit bias can affect decisions by both prosecutors—those tasked with serving as ministers of

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17. Robert B. Tannenbaum, Comment, *Misbehaving Attorneys, Angry Judges, and the Need for a Balanced Approach to the Reviewability of Findings of Misconduct*, 75 U. CHI. L. REV. 1857 (2008) (noting that attorneys acting unethically and unprofessionally is not uncommon in federal courts).

18. See, e.g., *In re Pautler*, 47 P.3d 1175, 1176–77, 1184 (Colo. 2002) (disciplining a prosecutor who, fearing a victim was still at risk, pretended to be a public defender to entice the accused to speak with law enforcement).

19. See Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1169 (2012).

20. See generally IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* (2016) (providing a detailed historical account of anti-black racist ideas).

21. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (describing how the criminal justice system creates a racial caste system that exists for African Americans).

22. See, e.g., CAL. RULES FOR MINIMUM CONTINUING LEGAL EDUC. rr. 2.71, 2.72(A)(2) (2019) (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. rr. 2(G), 6(B), 9(B)(2), app. III (2016) (requiring Minnesota bar members to complete every three years at least two hours of an “elimination of bias” course, 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”).

justice—and public defenders—those tasked with preserving the individual rights of indigent defendants.

### 1. *Bias in Prosecutors*

Research has shown that most people, even those within the criminal justice process, fail to adequately understand implicit bias and contemplate how it might affect important decisions.<sup>23</sup> There is no reason to suspect that prosecutors do not possess the same shortcomings. Some district attorney offices provide bias trainings for their attorneys,<sup>24</sup> but the author does not know of any office that has incorporated every formal mechanism that experts agree could reduce biased prosecutorial decisions.<sup>25</sup> Some individual prosecutors may adopt many of these solution-oriented practices on their own, but there is significance in having formal office-wide policies that publicly convey the importance of the implicit bias problem.

Implicit bias can permeate prosecutorial decision-making at various stages of a criminal trial, and office leadership needs to adopt certain policies and procedures to adequately address its potential influence.<sup>26</sup> Implicit association between crime and race can impact the initial choices of whether or not to charge someone and what crime to charge them with.<sup>27</sup> It can also infect decisions like whether to contest bail or offer a plea bargain. The myriad of decisions that a prosecutor must make during the life cycle of a case results from the prosecutor's evaluation of the suspect and how dangerous they view the alleged offender to

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23. See generally Stanley P. Williams Jr., *Double-Blind Justice: A Scientific Solution to Criminal Bias in the Courtroom*, 6 IND. J.L. & SOC. EQUALITY 48 (2018) (discussing bias as a prosecutor and proposing ways to reduce bias in the courtroom).

24. See, e.g., Lauren Keene, *Yolo Prosecutors Receive Implicit Bias Training*, ENTERPRISE (Apr. 9, 2016), <https://www.davisenterprise.com/local-news/yolo-prosecutors-receive-implicit-bias-training/> [<https://perma.cc/MF4Q-S455>] (describing an implicit bias training provided to prosecutors in Yolo County, California); see also Press Release, U.S. Dep't of Justice, Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel (June 27, 2016), <https://www.justice.gov/opa/pr/departement-justice-announces-new-department-wide-implicit-bias-training-personnel> [<https://perma.cc/B46D-4D9V>] (announcing mandatory implementation of implicit bias training at the DOJ). County prosecutor offices also hold these trainings.

25. See Kang et al., *supra* note 19, at 1169–86 (describing ways to decrease implicit bias and sever the link between bias and behavior); see also Natalie Salmanowitz, *Unconventional Methods for a Traditional Setting: The Use of Virtual Reality to Reduce Implicit Racial Bias in the Courtroom*, 15 U.N.H. L. REV. 117 (2016) (encouraging individuals to receive virtual reality training as a way to address unconscious bias in courtroom decision-making).

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

27. Michael B. Hyman, *Implicit Bias in the Courts*, 102 ILL. B.J. 40, 42 (2014); see generally Besiki Luka Kutateladze et al., *Opening Pandora's Box: How Does Defendant Race Influence Plea Bargaining?*, 33 JUST. Q. 398 (2016) (showing that black defendants are less likely to receive reduced plea offers and that both black and Latinx defendants are more likely to receive plea offers that include custodial management).

be.<sup>28</sup> These types of value judgments are ripe areas for unconscious associations between race and certain negative characteristics.<sup>29</sup> Despite this, there has been insufficient focus on reforming prosecutorial decision-making environments to prevent such influence. This might be because disciplinary systems have yet to establish a significant role in curbing prosecutorial misbehavior.

The reality is that bar complaints for prosecutorial misconduct have seen very little success. A 2013 report from the Center of Prosecutor Integrity found that 3,625 cases were brought against prosecutors for misconduct between 1963 and 2013.<sup>30</sup> Of those cases, only sixty-three prosecutors received any type of sanction for their wrongdoing.<sup>31</sup> This means that of the thousands of cases that alleged prosecutorial misconduct at both the state and national levels, only 2 percent resulted in disciplinary outcomes.<sup>32</sup>

There may be many reasons that such a small proportion of prosecutor complaints received 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 arms of disciplinary bodies can be very limited. Regardless, this ratio of cases to disciplinary outcomes suggests there is still work to be done to create more formal mechanisms for addressing misconduct or at least clarifying such disproportionate outcomes. Different accounting requirements by judges using their investigative capacity, discussed below, could supplement the otherwise limited investigatory powers of the attorney disciplinary bodies.

## 2. *Bias in Public Defenders*

Prosecutors are not the only attorneys in the federal courtroom whose decisions are subject to implicit bias. In their seminal essay for the *Yale Law Journal*, *Implicit Bias in Public Defender Triage*, L. Song Richardson and Philip Atiba Goff noted that, despite best intentions, implicit bias affects public defender decision-making.<sup>33</sup> Implicit bias, they wrote, is most prevalent in stressful situations where attorneys must make quick decisions with incomplete

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28. Kutateladze et al., *supra* note 27. This study concluded that the differences are largely explained by legal factors such as the arrest circumstances and available evidence.

29. See generally 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).

30. CENTER FOR PROSECUTOR INTEGRITY, AN EPIDEMIC OF PROSECUTOR MISCONDUCT 8, app. B (2013), <http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf> [https://perma.cc/PEX8-2BC8]; see also Matt Ferner, *Prosecutors Are Almost Never Disciplined for Misconduct*, HUFFINGTON POST (Feb. 11, 2016), [https://www.huffpost.com/entry/prosecutor-misconduct-justice\\_n\\_56bce00fe4b0c3c55050748a](https://www.huffpost.com/entry/prosecutor-misconduct-justice_n_56bce00fe4b0c3c55050748a) [https://perma.cc/YBC7-WGAJ] (discussing results of report).

31. CENTER FOR PROSECUTOR INTEGRITY, *supra* note 30, at 8, app. B.

32. *Id.*

33. L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2628 (2013).



information.<sup>34</sup> It is also present where individuals must compare situations or people and make value judgments.<sup>35</sup> Public defenders responsible for various clients facing significant challenges must constantly make decisions that are ripe for unconscious bias.<sup>36</sup>

Although the individual attorney caseload in federal court has not reached the same level of notoriety as state court caseloads, federal public defenders are not without their own resource limitations.<sup>37</sup> In fact, many of the same problems of imbalance and control that exist in the state arena also exist in federal courts. Like some state public defenders, federal public defenders have to request expert witnesses from judges.<sup>38</sup> This means that these defenders' use of expert witnesses may rely on their assessment of whether the judge will find the witness relevant.<sup>39</sup>

These defense attorneys also have to counsel clients on plea offers—another decision that can be influenced by implicit bias. Their own unconscious ideas and associations 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.<sup>40</sup> Bias may also unintentionally affect their willingness or desire to push back against a prosecutor's particular plea offer because they view it as acceptable.<sup>41</sup>

As the next Section describes, it is incumbent upon federal judges to counter legal practices in their courtrooms that might be the result of biased decision-making. Judges can accomplish this by instituting systems within their courtrooms, by reporting misconduct, or by making their own determinations about the failure to comply with ethical rules and issuing necessary judgments. Regardless of the method undertaken or explored, the growing literature on implicit bias, which suggests that courts should consider how best to address and limit its influence, also provides them with opportunities to do so.

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34. *See id.* at 2632–35.

35. *See id.*

36. *See id.* at 2628.

37. *See, e.g.,* J. Harvie Wilkinson III, Essay, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1127 (2014) (describing the federal public defender as the “gold standard” of indigent defense representation); *see also* Jessica Trieu, Note, *The Federal Budget Crisis and Its Unintended Ethical Consequences: How Will Judges, Prosecutors, and Public Defenders Meet Their Ethical Obligations?*, 27 GEO. J. LEGAL ETHICS 917, 925–26 (2014) (discussing insufficient staffing levels and excessive caseloads of federal public defenders).

38. *See* David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335 (2017) (arguing that the federal public defender should not exist under the judicial branch of the federal government because it requires defenders to seek funds for expert witnesses from federal judges).

39. *Id.* at 369.

40. Richardson & Goff, *supra* note 33, at 2638–40.

41. *Id.*

## 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.<sup>42</sup> In the address, Pound demanded more of the judges tasked with fair adjudication.<sup>43</sup>

In the decades since Pound’s call to action, ethical and professional rules have developed as a means of formalizing the appropriate behaviors of judges.<sup>44</sup> Ethical adjudication, however, is not limited to concerns about the ethical behavior of practicing judges. It also encompasses judges’ abilities to police the ethical behavior of the attorneys who practice before them. As discussed above, criminal trials are a ripe environment for unconscious bias to influence attorney decision-making and should thus invite judicial intervention.

Unsurprisingly perhaps, some judges have begun to consider how they can address unconscious bias in their own decision-making.<sup>45</sup> This self-assessment is important, but it only represents part 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.

Much has been done, to some degree of success,<sup>46</sup> to address and eliminate explicit bias from the criminal court process, but implicit bias is just beginning to achieve salience in discussions about criminal justice reform.<sup>47</sup> The American Bar Association (ABA), ostensibly recognizing the need to continue addressing explicit bias in the legal profession, in 2016 added an additional rule to its model

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42. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 742 (1906) (decrying the “[u]ncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice”). Portions of Pound’s speech are provided in Tom Clark’s tribute to the legal architect. *See infra* note 123 at 2–3.

43. *See* Pound, *supra* note 42, at 742; *see also* James J. Alfani, Foreword, *Centennial Reflections on Roscoe Pound’s 1906 Address to the American Bar Association: Fanning the Spark that Kindled the White Flame of Progress*, 48 S. TEX. L. REV. 849, 851–52 (2007) (noting that Pound was surprised by the negative reaction to his address as he felt he was endorsing the legal system and merely criticizing its deficiencies).

44. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT (AM. BAR ASS’N 2010).

45. *See* Pamela M. Casey et al., *Addressing Implicit Bias in the Courts*, 49 CT. REV. 64, 65–69 (2013) (noting that the authors worked with a group of judges to create their recommendations).

46. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79 (1986) (invalidating the use of peremptory challenges that are the result of racial bias). *But see* Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 507–10 (2018) (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).

47. *See, e.g.*, Jonathan Feingold & Karen Lorang, *Defusing Implicit Bias*, 59 UCLA L. REV. DISCOURSE 210, 218–20 (2012) (arguing that insufficient attention is paid to the role of implicit bias in gun use decisions because current scholarship does not address the implicit bias motivating state gun laws).

for regulating attorney conduct.<sup>48</sup> This addition addresses explicit attorney bias, but I argue that it also provides a vehicle for 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. *The Applicable Rules Governing Attorney Behavior*

Federal courts adopt and promulgate their own ethical rules and can thus change those rules to reflect how they believe their courtrooms should operate.<sup>49</sup> The rules that the federal courts adopt are often the rules of the highest court of the state in which the federal court resides.<sup>50</sup> 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 across federal courts.<sup>51</sup> In many ways, however, this makes federal practice easier and more fluid. Individual attorneys who appear in both state and federal court need not worry about different professional rules in different courts.

So, what are the state court 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.<sup>52</sup> The vast majority of states have adopted these rules in part or in whole,<sup>53</sup> thereby giving them the effect of law in the attorney disciplinary process. Thus, it is these model rules that inform the attorney behavioral rules adopted by federal courts.

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48. Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 810–11 (2019).

49. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (Am. Law Inst. 2019).

50. *Id.*

51. As discussed in the following paragraph, the majority of states have adopted the American Bar Association's Model Rules of Professional Conduct, so there is some similarity between many of the ethical rules governing legal practice in federal court.

52. See Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243 (1985) (providing an overview of the ABA's approval process for the Model Rules of Professional Conduct in 1983).

53. *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html) [<https://perma.cc/Y5G8-RDXV>] (listing the states that have adopted the Model Rules). Until recently, California's ethical guidelines were the 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 relates to a lawyer's obligation with regards to clients with diminished capacity. Order re Request for Approval of Proposed Amendments to the Rules of Professional Conduct of the State Bar of California, Admin. Order No. 2018-05-09, S240991, at 6 (Cal. May 10, 2018), <http://www.calbar.ca.gov/Portals/0/documents/Supreme%20Court%20Order%202018-05-09.pdf> [<https://perma.cc/9LGM-75E5>]. New York also expressed an unwillingness to adopt the Model Rules. See Mary C. Daly, *An Overview of Ethical Dilemmas*, 9 J. SUFFOLK ACAD. L. 113, 116 (1994) (noting that New York refused to adopt the Model Rules of Professional Conduct despite their approval by the ABA).

Although this Article primarily discusses the Model Rules of Professional Conduct, federal courts also adopt other rules governing attorney ethical and professional behavior. Some federal courts have adopted the ABA Model Federal Rules of Disciplinary Enforcement.<sup>54</sup> Other procedural rules in federal court can also set forth standards of conduct.<sup>55</sup> Regardless of the particular source of the rules that govern attorney behavior in federal court, they are all guided by principles of due process.<sup>56</sup> These principles require that attorneys be treated fairly and receive notice before they can be punished for violating a rule.<sup>57</sup>

### B. ABA Model Rule 8.4(g)

In 2016, the ABA amended its Model Rules of Professional Conduct to include a rule specifically prohibiting discriminatory behavior.<sup>58</sup> Under Model Rule 8.4(g), a lawyer commits professional misconduct by “engag[ing] 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.”<sup>59</sup> This new Model Rule 8.4(g) applies broadly to “conduct related to the practice of law” and expands the original language of Model Rule 8.4, which focused on conduct related to the “administration of justice.”<sup>60</sup>

Although Model Rule 8.4(g) clearly applies to explicit bias, its general admonition against discriminatory conduct related to the practice of law warrants a greater emphasis on addressing implicit bias in the legal profession. Some scholars refer to Model Rule 8.4(g) as “largely . . . symbolic,”<sup>61</sup> but its influence

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54. MODEL FED. RULES OF DISCIPLINARY ENF'T (1978). For example, the United States District Court for the Northern District of Texas has adopted these rules. *See* Kenneth R. Adamo, *Attorney Disqualification in Patent Litigation*, 1 ALB. L.J. SCI. & TECH. 177, 185 (1991). One study in 1998 showed that fifteen states had adopted some version of these model rules. Katherine M. Lasher, Comment, *A Call for a Uniform Standard of Professional Responsibility in the Federal Court System: Is Regulation of Recalcitrant Attorneys at the District Court Level Effective?*, 66 U. CIN. L. REV. 901, 926 (1998).

55. In addition to the Model Federal Rules of Disciplinary Enforcement, federal courts could look to additional rules the ABA has used to supplement its own Model Rules of Professional Conduct, such as the Model Rules of Lawyer Disciplinary Enforcement and the Standards for Imposing Lawyer Sanctions. Robert Kehr, *Lawyer Error: Malpractice, Fiduciary Breach, or Disciplinable Offense?*, 29 W. ST. U. L. REV. 235, 257 (2002).

56. *In re Ruffalo*, 390 U.S. 544, 549–51 (1968).

57. *Id.*

58. *Id.* at 550.

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

60. MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 1983); *see also* Josh Blackman, Reply, *A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and "Conduct Related to the Practice of Law,"* 30 GEO. J. LEGAL ETHICS 241, 250 (2017) (explaining that Model Rule 8.4(g) extends far beyond the original scope of Model Rule 8.4).

61. David L. Hudson, Jr., *States Split on New ABA Model Rule Limiting Harassing or Discriminatory Conduct*, ABA J. (Oct. 1, 2017),

could encourage practitioners to more clearly consider how implicit bias affects their legal practice. As mentioned above, *explicit* bias in the criminal law sphere has been part of the national conversation for decades, and its regulation is more visible than that of implicit bias.<sup>62</sup>

Model Rule 8.4(g)'s broader application to "conduct related to the practice of law" seems to introduce an additional requirement to review discriminatory behaviors that are not as easily recognizable as explicit bias. This review could range from examining whether a particular office's hiring practices exclude racial minorities, to evaluating whether a prosecutor's charging decisions disproportionately target certain communities, to questioning if the public defender's resourcing decisions advantage one type of racial client group over another.<sup>63</sup>

As of the writing of this Article, only a few states have adopted ABA Model Rule 8.4(g).<sup>64</sup> Vermont was the first, with Maine following in 2019.<sup>65</sup> Some states, such as South Carolina and Montana, have formally declined to adopt the rule.<sup>66</sup> This may be because states fear the impact that the rule might have on freedom of speech, free exercise of religion, and freedom of association.<sup>67</sup> Many

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[http://www.abajournal.com/magazine/article/ethics\\_model\\_rule\\_harassing\\_conduct](http://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct) [https://perma.cc/PFQ5-XCH6] (quoting Stanford University School of Law Professor Deborah L. Rhode).

62. Federal prosecutors and public defenders, who are critical to the administration of justice, have already been forced to limit the ways that explicit bias can influence the federal courtroom in jury selection. *See* *Batson v. Kentucky*, 476 U.S. 79, 84 (1986). As this Article and other scholarship notes, there is still much to be done to adequately address and counter explicit bias in the courtroom. *See, e.g.,* Tania Tetlow, *Granting Prosecutors Constitutional Rights to Combat Discrimination*, 14 U. PA. J. CONST. L. 1117 (2012) (arguing that prosecutors should be vested with more power to defend against jury discrimination).

63. The author is currently working on a project that explores whether antidiscrimination rules require prosecutor offices to adopt hiring practices that better diversify their line attorneys. *See* Richardson & Goff, *supra* note 33, at 2628 (describing how overwhelmed public defenders can make representative decisions based on unconscious bias); *see also* Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing There Will be Consequences for Crossing the Line*, 60 LA. L. REV. 371, 379–86 (2000).

64. Debra Cassens Weiss, *Second State Adopts ABA Model Rule Barring Discrimination and Harassment by Lawyers*, ABA J. (June 13, 2019), <http://www.abajournal.com/news/article/second-state-adopts-aba-model-rule-barring-discrimination-by-lawyers> [https://perma.cc/356E-DEXZ].

65. *Id.*

66. *See* Lisa Smith-Butler, *South Carolina Declines to Incorporate ABA Model Rule 8.4(g) into the SC Rules of Professional Conduct*, BARRISTER (June 20, 2017), <https://lawlibrarybarrister.wordpress.com/2017/06/20/south-carolina-declines-to-incorporate-aba-model-rule-8-4-g-into-the-sc-rules-of-professional-conduct> [https://perma.cc/DT3N-EYQ5]; Kristine A. Kubes et al., *The Evolution of Model Rule 8.4 (g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, AM. B. ASS'N (Mar. 8, 2019), [https://www.americanbar.org/groups/construction\\_industry/publications/under\\_construction/2019/spring2019/model\\_rule\\_8\\_4](https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring2019/model_rule_8_4) [https://web.archive.org/web/20190813081121/https://www.americanbar.org/groups/construction\_industry/publications/under\_construction/2019/spring2019/model\_rule\_8\_4/].

67. *See* Dennis Rendleman, *The Crusade Against Model Rule 8.4(g)*, AM. B. ASS'N (Oct. 2018), <https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade->

states have already incorporated older versions of the ABA Model Rules that more narrowly prohibit bias in legal practice.<sup>68</sup> These states 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.<sup>69</sup> It remains to be seen if the majority of states will adopt the new 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 occur before them.<sup>70</sup>

### C. *The Disciplinary Process*

Federal courts maintain inherent power to sanction individuals for violating ethical rules.<sup>71</sup> A federal court judge can conduct their own investigation if they believe an attorney has engaged in misbehavior or unethical conduct. Indeed, a judge may need to investigate before issuing a sanction in order to comply with due process requirements.<sup>72</sup> The court can then reach a final determination 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.<sup>73</sup>

An additional mechanism for disciplining lawyers accused of ethics violations is referral to the state bar. This is the case even when the violations occur in federal court. As the entity authorizing the lawyer to practice law in a given jurisdiction, the state bar always maintains the authority to examine an

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against-model-rule-8-4-g-/ [https://perma.cc/HGU5-EPL8]. Scholar Gabriel Chin provides an even deeper interrogation of why a similar rule adopted by the Massachusetts Commission Against Discrimination might fail to achieve its intended purposes. See Gabriel J. Chin, *Do You Really Want a Lawyer Who Doesn't Want You?*, 20 W. NEW ENG. L. REV. 9 (1998) (detailing how attorneys could continue to discriminate despite commission rulings that punish such behavior).

68. 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., FLA. STAT. § 760.01 (2019) (defining freedom from discrimination as a civil right); ME. STAT. tit. 5, § 4552 (2020) (prohibiting discrimination as part of the State's role in protecting public health, safety, and welfare); N.J. STAT. ANN. §§ 10:5-1–49 (West 2019) (creating a division of civil rights tasked with ensuring New Jersey citizens are free from discrimination).

69. See sources cited *supra* note 68.

70. A contrary viewpoint might view Model Rule 8.4(g) as only addressing explicit bias because of the examples included in the commentary. See MODEL RULES OF PROF'L CONDUCT r. 8.4(g) cmt. (AM. BAR ASS'N 2016). These examples seem to only contemplate the most egregious types of behavior. However, the rule's use of "knows or reasonably should know" arguably includes an understanding and reflection of unconscious bias and its effects. Model Rule 8.4(d), which admonishes behaviors that would negatively affect the administration of justice, could also provide an avenue for addressing implicit bias. Model Rule 8.4(g), however, offers clearer support by providing additional context for the behaviors and effects it seeks to eliminate from the practice of law. Model Rule 8.4(g) also applies more broadly to behaviors that attorneys engage in outside of the administration of justice.

71. Tonia Lucio, *Standards and Regulation of Professional Conduct in Federal Practice*, FED. LAW., July 2017, at 50, 51–52.

72. *Id.* at 51.

73. *In re Ruffalo*, 390 U.S. 544, 549–51 (1968).

attorney's fitness through its own disciplinary process.<sup>74</sup> The referral is followed by an investigation and possible hearing by the disciplinary committee.<sup>75</sup>

Different agencies within the federal government also maintain procedures for disciplining attorneys. For example, the Executive Office for Immigration Review assumes the responsibility of regulating the ethical and professional conduct of immigration attorneys and those who work with these attorneys.<sup>76</sup> That agency has a Disciplinary Counsel that investigates complaints of misconduct.<sup>77</sup> All of the disciplinary matters before that counsel are referred to a three-judge Standing Panel on Attorney Discipline.<sup>78</sup> The U.S. Court of Appeals for the Federal Circuit also processes attorney discipline cases with a Standing Panel on Attorney Discipline comprised of three judges.<sup>79</sup>

The current attorney discipline framework, which includes both ethical and procedural rules adopted by 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.<sup>80</sup> This might be because courts are designed to move slowly and deliberately.<sup>81</sup> Federal judges' power to address bias through these disciplinary procedures, however, suggests that they can adopt practices that counteract implicit bias while maintaining an acceptable pace for change and improvement. Although it is difficult to completely eliminate the effect of unconscious bias on decision-making, the next Section outlines a number of steps that federal judges could take to further limit its influence in their courtrooms.

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74. MODEL RULES OF PROF'L CONDUCT r. 8.5(a) (AM. BAR ASS'N 2016).

75. See, e.g., *Lawyer Regulation*, S. BAR CAL., <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Lawyer-Regulation> [<https://perma.cc/V7DU-VZVH>].

76. *Attorney Discipline Program*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/eoir/attorney-discipline-program> [<https://perma.cc/VD2N-EDA3>].

77. *Id.*

78. R. CT. FED. CL. 83.2(f), (g)(5); MEG BEARDSLEY, U.S. COURT OF FED. CLAIMS, ATTORNEY DISCIPLINE PROCEDURES IN THE UNITED STATES COURT OF FEDERAL CLAIMS, <https://www.usfc.uscourts.gov/conferences/2018/materials/Ethics/Ethics%20Program%20-%20Attorney%20Discipline%20Procedures%20in%20the%20USFC.pdf> [<https://perma.cc/HYD9-3W7E>].

79. FED. CIR. ATT'Y DISC. R. 4.

80. See Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J.F. 391, 392 (2017) (noting that one criminal defense attorney cited implicit bias in a brief nearly ninety years before the article's publication).

81. The very idea that the courts must rely on precedent in their decisions requires them to move incrementally. See Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035, 1038 (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 (citing *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976), *abrogated by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996))).

*D. Specific Steps for the Court to Take to Reduce or Eliminate Implicit Bias*

The primary way judges influence attorney behavior is through their role in preserving courtroom dignity and the rule of law. Judges can use procedural rules and their own sense of propriety to maintain order. They can also turn to more generalized ethics rules to add context and restrictions to attorneys' decisions in their courtrooms. The following Section details some of the disciplinary rules that federal judges consider and adopt, as well as the role that federal judges assume in ensuring attorneys comply with the rules.

There are methods that individuals can adopt to better combat the effects of implicit bias. Because these methods primarily require one to recognize the problem and be open to addressing it, they are also available to courts. This short Article cannot address all 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 indicate areas that may allow for important improvements. Each area is within the primary control and the authority of the court, and federal judges could consider these suggestions as they reflect on their responsibility to address implicit bias and the opportunities they have to do so.

*1. Educating Court Decision-Makers*

As other scholars have noted, one could limit implicit bias by educating decision-makers about its existence. There is mixed evidence on how helpful these trainings are in combatting implicit bias.<sup>82</sup> Such steps, however, have enabled at least some individuals to meaningfully recognize the existence of implicit bias in the short term and attempt to self-regulate.

Federal judges could look to the ABA for an example of one method they might adopt to combat implicit bias in their courtrooms.<sup>83</sup> The ABA has recognized the importance of education in counteracting unconscious bias by developing toolkits, which are freely available to judges, prosecutors, and public defenders.<sup>84</sup> Some of the foremost scholars on implicit bias and the courtroom process developed these toolkits to support the association's mission to analyze the state of diversity and inclusion in the legal profession.<sup>85</sup> Federal courts could use these toolkits to inform their scheduling and conversations with court actors. Judges could even request that attorneys review the information provided in

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82. See Shawn E. Fields, *Weaponized Racial Fear*, 93 TUL. L. REV. 931, 954–57 (2019) (describing how the one size fits all approach to implicit bias training is inadequate for removing its influence).

83. Courts should not rely on the ABA toolkits because attorneys are not subject to the same requirements to use these tools as they would be in the federal criminal courtroom process.

84. See *Toolkits & Projects*, AM. BAR ASS'N, <https://www.americanbar.org/groups/diversity/resources/toolkits/> [https://perma.cc/7EBS-YPS2].

85. See *id.*



these toolkits before practicing in their courtrooms.<sup>86</sup> This would make it more likely that attorneys engage in some of the practices that have a positive effect on removing unconscious bias from decision-making.

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 the concept of implicit bias into discussions with clients and witnesses, as well as explain it in conversations with jurors during the limited voir dire process.<sup>87</sup> Much like anti-bias trainings, these discussions might limit the presence of unconscious bias in decision-making. Information about unconscious bias can affect parties' first impressions of the defendant, as well as their evaluations of witness testimony and of the defendant's level of responsibility. Judges could then even include an instruction on implicit bias during their initial read of the charges to the defendant, the testifying witnesses, and the jury.<sup>88</sup>

## 2. *Allowing Sufficient Time for Decisions*

Implicit bias is difficult to completely remove from the decision-making process, but judges control important environmental characteristics that, if changed, could reduce the impact of this bias.<sup>89</sup> Decisions that are made in a rushed manner and under severe time limitations are particularly susceptible to unconscious bias.<sup>90</sup> Since the judge has primary control over their calendar, they

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86. This would be similar to situations when federal judges require opposing parties to hold a pretrial conference before reaching a disposition on a matter. See Robert J. Keenan, Note, *Rule 16 and Pretrial Conferences: Have We Forgotten the Most Important Ingredient?*, 63 S. CAL. L. REV. 1449, 1450 (1990) (noting the procedural experiments judges have undertaken to facilitate the court process, such as settlement conferences).

87. 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 the Supreme Court has issued two recent decisions emphasizing this. In *Pena-Rodriguez v. Colorado*, the Court pierced the secrecy of jury deliberations to overturn a verdict when one juror expressed racist beliefs during deliberation. 580 U.S. \_\_\_, 137 S. Ct. 855, 861–63, 871 (2017). The Court just recently issued a seven-to-two decision in the case of Curtis Flowers, again noting that removing jurors for racial reasons is unacceptable. *Flowers v. Mississippi*, 136 S. Ct. 2157 (2016).

88. 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. DIST. COURT N. DIST. CAL., <https://www.cand.uscourts.gov/attorneys/jury-video> [<https://perma.cc/8CGZ-J2EV>]; Marella Gayla, *A Federal Court Asks Jurors to Confront Their Hidden Biases*, MARSHALL PROJECT (June 21, 2017), <https://www.themarshallproject.org/2017/06/21/a-federal-court-asks-jurors-to-confront-their-hidden-biases> [<https://perma.cc/KB7N-659Y>].

89. See Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137 (2013) (describing how implicit socioeconomic bias can affect judicial decision-making and providing solutions to the problem).

90. Richardson & Goff, *supra* note 33, at 2628.

can develop personal rubrics for how much time they will give attorneys to prepare for and conduct the hearings.<sup>91</sup>

Of course, there are some limits on how much time courts can allow for certain court hearings. Criminal defendants have a right to a speedy trial.<sup>92</sup> Additionally, although the prosecution may not have a similar right to move a criminal process along in a speedy manner, its authority to institute and bring charges means it can properly request timely proceedings.<sup>93</sup> 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.<sup>94</sup> Setting deadlines as late as possible under the law, however, would facilitate decisions that are less encumbered by implicit bias.

### 3. *Gathering Relevant Data*

Little can be done to address unconscious bias without formal data and records. Some scholars critique the concept of implicit bias because it is difficult to confirm if a decision is made because of unconscious bias or because of other factors.<sup>95</sup> However, difficulty in complying with an ethical standard does not remove the mandate to address circumstances 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 information for determining the likely presence of implicit bias in court proceedings. Even gathering data about racial disparities in sentencing, bail (and its alternatives), and demographics of the court actors in decision-making roles would assist judges in identifying practices that should be changed to limit the possible influence of unconscious bias. All of this information would focus on addressing unconscious bias in the aggregate and would complement changes meant to address individual behaviors.

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91. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (noting how judges have begun assuming a more administrative role over their caseloads).

92. See U.S. CONST. amend. VI.

93. The fact that witness memories fade means that cases must move forward in a timely manner. Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 WM. & MARY L. REV. 607, 613–15 (1990) (detailing how time delays help the defense build their case while harming the prosecution's case because of fading witness memories). Some jurisdictions specifically capture this prosecutorial right in their criminal procedure rules. See, e.g., LA. CODE CRIM. PROC. ANN. art. 61 (2020) (“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.”).

94. See *Rothgery v. Gillespie County*, 554 U.S. 191, 195 n.2 (2008) (describing Texas criminal procedure's requirement of “prompt presentment” after arrests); *County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991) (requiring that arrestees receive a “judicial determination[] of probable cause” without delay and generally within 48 hours of arrest); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (mandating a “judicial determination of probable cause” before extending custody of an arrestee).

95. See, e.g., Salmanowitz, *supra* note 25 (providing evidence of how virtual reality can identify and address this hidden bias in the courtroom setting).

More data would be particularly useful in addressing prosecutorial bias. Indeed, there is little transparency in prosecutorial charging decisions and plea offers.<sup>96</sup> This problem is less pronounced at the federal level than at the state level because some federal prosecutorial practices allow for more public information about the decisions.<sup>97</sup> 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.<sup>98</sup> The Attorney General will often publicize directives on what charges, offenders, or behaviors those within her supervisory control should prioritize.<sup>99</sup> These directives can be studied for bias and compared with previous formal data to see if the directives bear a causal relationship to biased outcomes.<sup>100</sup>

Even if a court does not wish to initiate disciplinary proceedings,<sup>101</sup> 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. Such decisions can serve as an important data point in providing a resource to turn to in evaluating the frequency of an attorney's inappropriate behavior. "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.<sup>102</sup> These written judgments can provide a window into how a judge believes a particular attorney's behavior has violated a procedural rule or guideline. They can then be used to supplement any claim that an attorney has violated a professional rule.

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96. See generally Jason Kreag, *Prosecutorial Analytics*, 94 WASH. U. L. REV. 771, 793–98 (2017) (discussing the extent to which prosecutorial power is unreviewable).

97. See, e.g., JUSTICE MANUAL §§ 9-27.200, 220, 230 (providing explicit guidelines for how federal prosecutors make probable cause decisions).

98. See, e.g., Douglas A. Berman & Steven L. Chanenson, *Taking Stock of Changing Prosecutorial Policies*, 30 FED. SENT'G REP. 1 (2017) (describing pendulum swings in federal prosecutorial policies due to changing politics and electoral outcomes); 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) (describing Attorney General John Ashcroft's directive to the federal prosecutors under his supervision).

99. See, e.g., Memorandum from Eric H. Holder, Jr., Attorney Gen., to all federal prosecutors (May 19, 2010), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf> [<https://perma.cc/PJN4-VNFH>]; Memorandum from Jefferson B. Sessions III, Attorney Gen., to all federal prosecutors (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download> [<https://perma.cc/9TV3-Z88K>].

100. Researchers could use this information as a baseline in noting how formal policies affect outcomes. These studies could then be used to evaluate and better inform future Attorney General directives.

101. Perhaps the court is unable to act because another right is implicated by the disciplinary violation. For example, a court might hear of a 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 disciplinary committee.

102. *Benchslap*, BLACK'S LAW DICTIONARY (11th ed. 2019).

But scholars view these benchslaps as problematic for three reasons.<sup>103</sup> First, they presumably violate the judge's own ethical obligation to take more formal, regulated action when witnessing ethical violations.<sup>104</sup> Judges are beholden to the same self-regulatory aspects of the legal profession as prosecutors, and should likewise follow the regulatory rules. The second problem with benchslaps is that they seemingly violate the judge's ethical obligation to treat those in their courtroom with courtesy, respect, and patience.<sup>105</sup> 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.<sup>106</sup>

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. For example, § 1983 requires the plaintiff to demonstrate a pattern of wrongdoing by a prosecutor's office.<sup>107</sup> For individuals seeking to address systemic problems, benchslaps serve to flag cases in which attorneys acted inappropriately. Investigation of these cases would then yield data about the races of the defendants, the plea deals offered, and the time that lapsed between institution of the formal criminal process and disposition. These data could then be used to support civil rights suits or sanctions through the attorney disciplinary process.

#### 4. *Additions to the Plea Colloquy*

The majority of federal criminal court cases end in a plea agreement between the government and the defendant.<sup>108</sup> There are myriad reasons for

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103. See Joseph P. Mastro Simone, *Benchslaps*, 2017 UTAH L. REV. 331, 366–84 (2017) (describing why the growth in popularity of benchslaps should be concerning). There are additional concerns about benchslaps beyond the three outlined in the cited literature. For example, the term could be classified as sexist in its phonetic connection to the term “bitch slap.” See *id.* at 340 (describing the derivation of “benchslap” from “bitch-slap”). This criticism, although worth noting, is outside the limited scope of this article.

104. *Id.* at 366–77.

105. *Id.* at 377–82.

106. *Id.* at 382–85.

107. See, e.g., *Connick v. Thompson*, 563 U.S. 51, 54 (2011) (vacating a fourteen-million-dollar award because of the plaintiff's failure to show that a pattern of *Brady* violations resulted from a lack of training).

108. See U.S. SENTENCING COMM'N, 2018 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 172 tbl.O-3 (2018), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf> [<https://perma.cc/GY8U-LZ9L>].

this,<sup>109</sup> but the fundamental reason is that for defendants, a stipulated sentence or recommendation by the government is less risky than a trial. As part of the plea agreement, federal defendants prospectively and formally waive a number of appellate rights as part of a plea colloquy.

The plea colloquy<sup>110</sup> is a question-and-solicited answer in written and spoken form between the judge and the defendant to establish the constitutionality of the plea. It begins with several introductory questions to establish that the defendant is in the appropriate frame of mind to enter a plea.<sup>111</sup> The questions then move forward to probe the defendant's understanding of their legal representation and the case against them.<sup>112</sup> The colloquy may also include questions that convey to the defendant that the government has future decisions about the defendant's case. That is, the government may still need to assign a value for any assistance the defendant might provide in facilitating criminal prosecutions of additional perpetrators or making the victim whole.<sup>113</sup> It is these latter questions that provide an opportunity for judges to limit the influence of implicit bias. They could do this by asking specific questions about the attorney's prosecutorial decisions or representative process.

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 included in their reasoning.<sup>114</sup> This is because asking the question brings an otherwise subconscious consideration to the forefront 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 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 of both the defendant and the prosecution. For

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109. See 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) (discussing plea deals in the context of the criminal process institution); see also LINDSEY DEVERS, U.S. DEP'T OF JUSTICE, PLEA AND CHARGE BARGAINING 1 (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> [<https://perma.cc/E5QW-C8CG>] (noting that many defendants enter guilty pleas because jury trials are unpredictable and therefore risky).

110. For a sample Rule 11 colloquy, see U.S. DIST. COURT FOR THE E. DIST. OF MICH., QUESTIONS FOR TAKING GUILTY PLEA, <https://www.mied.uscourts.gov/pdffiles/Clelandrule11colloquy.pdf> [<https://perma.cc/V5KG-4QYA>].

111. *Id.*

112. *Id.* But see Julian A. Cook, III, *Federal Guilty Pleas Under Rule 11: The Unfulfilled Promise of the Post-Boykin Era*, 77 NOTRE DAME L. REV. 597 (2002) (providing examples of how the federal plea colloquy could better address the issues and defense rights it seeks to preserve).

113. Cook, *supra* note 112.

114. Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999, 1033–40 (2013).

example, defendants are entitled to confidential communications with their attorneys.<sup>115</sup> Drafters therefore must formulate questions to avoid violating attorney-client privilege. Additionally, the right to remain silent means that judges also should not elicit any information that might prove harmful to the defendant.<sup>116</sup> These considerations, however, do not suggest that it is impossible to design a question that requires reflection without violating the defendant's rights.

Plea colloquy questions about a prosecutor's unconscious bias could be similar to other types of formal questions prosecutors must answer in court proceedings. For example, some courts require prosecutors to confirm on the record that they have complied with the duty to turn over exculpatory evidence imposed upon them by the due process clause and clearly articulated in *Brady v. Maryland*.<sup>117</sup> This *Brady* obligation has also been institutionalized in state ethical rules about how prosecutors should handle exculpatory evidence, and these state rules have in turn been adopted in federal courts.<sup>118</sup> These rules reinforce the notion of fundamental fairness in the Due Process Clause of the Fifth and Fourteenth Amendments.<sup>119</sup> Requiring a similar accounting in the plea colloquy

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115. This is because the majority of states have adopted the Model Rules of Professional Conduct or their own version of the Model Rules. See State Ethics Rules, Laws, Man. on Prof. Conduct (ABA/BNA) § 1:3–4 (1998); *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/) [<https://perma.cc/L2XP-XJ5E>]; Jurisdictional Rules Comparison Charts, AM. BAR ASS'N, [https://www.americanbar.org/groups/professional\\_responsibility/policy/rule\\_charts/](https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/) [<https://perma.cc/JQF5-DCLU>]. One of these rules specifically protects confidential communications between an attorney and her client. MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2016).

116. See U.S. CONST. amend. V. Drafting these questions might prove difficult because any comment the defendant might make could be used against them in a future case regarding effective assistance of counsel (an ineffective assistance of counsel (IAC) lawsuit). In addition, some attorneys may be less likely to truthfully answer questions about implicit bias if they fear an IAC lawsuit.

117. See 373 U.S. 83 (1963); Daniel S. McConkie, *The Local Rules Revolution in Criminal Discovery*, 39 CARDOZO L. REV. 59, 87–90 (2017).

118. McConkie, *supra* note 117, at 87–90 (detailing how federal judges have incorporated state rules into the federal criminal cases before them). 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 involves 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 also invites judgment and moral condemnation from a society that has viewed certain behaviors as contrary to fundamental values of an orderly community. In recognition of the importance of expansive discovery in the criminal process, courts assign prosecutors an affirmative duty to disclose certain information related to a defendant's innocence.

119. See *Brady*, 373 U.S. at 87 (describing the withholding of evidence favorable to the accused as a violation of due process). It may be true that prosecutors continue to violate the *Brady* rule in some cases. One high-profile example occurred in the case involving Senator Ted Stevens. See Carrie Johnson, *Report: Prosecutors Hid Evidence in Ted Stevens Case*, NPR (Mar. 15, 2012), <https://www.npr.org/2012/03/15/148687717/report-prosecutors-hid-evidence-in-ted-stevens-case>

would reinforce the system's dedication to fairness by addressing unfair unconscious bias in prosecutorial decision-making.

#### CONCLUSION

This Article's emphasis on regulating implicit bias among attorneys practicing in federal criminal cases should not bely the reality that recognizing and regulating unconscious bias is extremely hard. Neither should it discount the role that implicit bias may play in other actors' decision-making within the criminal process.<sup>120</sup> Similarly, this Article does not provide an exhaustive account of attorney misbehavior that should be addressed by the federal judiciary, nor does it suggest alternatives to disciplinary hearings for misbehavior.<sup>121</sup> However, the far-reaching influence of implicit bias and the seeming dearth of disciplinary action against attorney misbehavior make the prescriptions outlined in this paper vital to combatting unfairness in the courts.

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[<https://perma.cc/FN4V-6ECY>]. 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. *See In re Special Proceedings*, 842 F. Supp. 2d 232, 255 n.23 (D.D.C. 2012), *appeal dismissed*, No. 12-5062, 2012 WL 1473327 (D.C. Cir. Apr. 12, 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](https://www.washingtonpost.com/local/crime/prosecutors-concealed-evidence-in-ted-stevens-case-report-finds/2012/03/15/gIQAJ5GNFS_story.html?utm_term=.577fbb47df5b) [<https://perma.cc/4TY3-VZFY>]. 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 Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order*, dated April 7, 2009, at 99, *In re Special Proceedings*, Misc. No. 09-0198 (EGS) (D.D.C. Mar. 15, 2012). Something similar could occur if it was later discovered that bias played a role in the decision-making.

120. Judges' own decision-making, of course, also may be influenced by implicit bias. Rachlinski et al., *supra* note 12 (detailing a study of judges that conveyed how implicit bias affects decision-making). Further, eliminating any incidence of unconscious bias in judges' chambers and in their decisions would itself help police implicit bias by the attorneys and jurors in their courtroom. The simple presence of a person of color can affect the decisions a group of people might make in the criminal court process. *See* Francis X. Flanagan, *Race, Gender, and Juries: Evidence from North Carolina*, 61 J.L. & ECON. 189, 192-94 (2018) (providing results from a study of conviction rates based on the race and gender composition of the victim, the defendant, and the jury). Studies have shown that the presence of one black male juror on a jury can drastically change criminal case outcomes. This suggests that the presence of a black judge or staff member in the courtroom could, at a minimum, improve notions of procedural justice. If that is the case, then federal judges should also consider how the diversity of their court staff could reduce biased decisions.

121. For example, although the federal public defender institution has not received nearly as much attention as its 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 employees 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.

The judge's role as a supervisor of others in maintaining a fair and just process simply cannot be overstated.<sup>122</sup> 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, bias must be adequately addressed on the front end. The ABA has provided the ethical guidance to address misbehavior, but the most important contribution of Model Rule 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 legal 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."<sup>123</sup> Pound's address revitalized the legal profession and the judicial process by emphasizing its importance and duty to respond to changing times. The steps for reform articulated above are not a panacea for implicit bias in the criminal court process. However, they move the court in the direction of better fulfilling its ethical and professional obligations and its role as preserver of the rule of law in the criminal process. Today, social science research on implicit bias provides yet another modern improvement that courts must engage. Federal judges must respond to the 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.

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122. It is important to note here that the idea that judicial implicit bias exists and can be combatted is not without criticism in legal scholarship. *See, e.g.*, Bruce A. Green, *Legal Discourse and Racial Justice: The Urge to Cry "Bias!"*, 28 GEO. J. LEGAL ETHICS 177 (2015) (arguing that it is unprofessional, unfair, and unproductive to accuse particular judges of bias and that implicit bias would instead be better discussed in the abstract).

123. Tom C. Clark, *A Tribute to Roscoe Pound*, 78 HARV. L. REV. 1, 2 (1964) (quoting John H. Wigmore, *The Spark that Kindled the White Flame of Progress*, 20 J. AM. JUDICATURE SOC'Y 176 (1937)).