FRAMING THE LAW: JUDGES AND JURY INSTRUCTIONS

by

MATTHEW E. BAKER

(Under the Direction of Christina L. Boyd)

ABSTRACT

Jury instructions–the rules for jury deliberation approved by the judge and read to the jury during trial–are an important communication between judges, parties, jurors, and the public. To judges and lawyers, jury instructions present an opportunity to influence jurors and shape the legal issues in a case. Lawyers can also use instructions to gain an advantage over opposing counsel and increase the odds of a favorable verdict. Thus, jury instructions provide a lens into trial court actors' behavior. This dissertation project tackles three related empirical questions: (1) how do judges' preferences and professional backgrounds impact their participation in crafting jury instructions, (2) do a judge's race and sex, and the race and sex of their colleagues, impact his or her use of implicit bias jury instructions, and (3) how does indigent defense attorney type relate to participation in drafting jury instructions? To conduct my study of these research questions, I constructed an original dataset of federal criminal jury trials from January 1, 2015 to December 31, 2018 across 23 federal district courts. The results revealed variation in how judges get involved in the jury instruction process, that judge sex does play a significant role in the inclusion of implicit bias jury instructions, and federal defenders operate differently than their private attorney colleagues in the jury instruction space.

INDEX WORDS: Jury Instructions, Judicial Backgrounds, U.S. District Courts, Trial Courts, Public Defender, Prosecutor, Implicit Bias, Textual Analysis

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DEDICATION

In memory of my Grandpa, Malcolm Baker, who took an elementary schooler to “watch court” and cultivated my curiosity.

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This journey began several years ago based on conversations with so many wise people.

None of this would be possible without my wife, Kyla, who is a supremely dedicated and loving partner. She often jokes about me never being content, which is true, but some of my restlessness stems from her spurring me onward. You've tolerated so many nights of me being away, all while dealing with one, then two, and now three small children. You also took the Georgia Bar two months after giving birth to Chet to ensure our family would be on solid footing here in the Peach State. You sacrificed so much for me to pursue this dream and you have never, ever, given up on me. When we moved here we had no idea we would be staying but as I've discovered over the years, wherever I am with you is "home".

My children make this adventure spectacular and even more fulfilling. When I began at UGA, Brynn was walking and could say a few words. Now, Brynn is in kindergarten and curious about my work and tracks all of my movements. She's also a big fan of my "teacher" Ms. Christy. Chet joined us after my first semester and attended many Zoom classes in my arms during the COVID years, so much so, I think he's probably got enough credits for a BA at this point. And my sweet Declan: you're our only Georgia boy from start to finish and I'm glad you will not have memories of Daddy gone to class in Athens three nights a week. You sat in my lap as I wrote large parts of this dissertation so it's partially yours too. I hope that I can continue to learn from all three of you as you grow.

My parents, Eric and Teresa, are such wonderful and loving parents, far beyond what I deserve. They are always there for me, even when we disagree, and their grace has taught me so much about being a parent. I love you both and this Ph.D. is a byproduct of your lifelong support. My sister, brother-in-law, nieces and nephew (Brittany, Tyler, Lorelei, Lucy, and Luke) cheer me on and I love that our families, while distant, remain close at heart. I am also blessed to have even more family through my wife. So many thanks to Jim, Terri, Shea, Ben, Mackenzie, Connor, Tony, Torin, Angela, and Marc who have made me one of their own and are always up to celebrate!

I could write a dissertation-length section on my family but my grandparents deserve particular attention. My Mema's love and determination, and frequent reminders to keep up the good work, keep me motivated. I am also glad to not be the first in my family with a Ph.D., and my Grandma, Dr. Amanda Baker, has given me so much good advice on how to navigate this process. Grandpa: I miss you. What you started by taking an elementary schooler to "watch court" has transformed

into a career of observing courts, first as a lawyer and now as a professor. My uncles and aunts have also been amazing cheerleaders and support: Michael, Kim, Rowdy, and Charlene. Thank you!

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My committee has been an invaluable asset throughout my time at UGA. Susan Haire is the consummate leader and professor. She is wise, thoughtful, and kind, elevating those around her constantly. Learning from you over the last four years has been a true pleasure and I hope to model so much of your teaching and scholarship in the future. Roberto Carlos, despite leaving me in Athens after my third year, opened my eyes to so much through his teaching and in how he conducts academic inquiry. Roberto cares not only about his student's work, but also about their lives. Morgan Hazelton has been so generous with her time and insight as I've moved through this project. Having a fellow recovering lawyer on my committee means I can commiserate about practice but also see how those experiences generate great fantastic research. Geoffrey Sheagley has been helpful with his advice and counsel, not just navigating IRB proposals, but in sharing our experiences as fathers in this field with young children.

So many other faculty have contributed to my growth and success. Rich Vining and Teena Wihelm have shared so much of their expertise and insight and I will miss swinging by your offices to catch up. Michael Lynch convinced me to come to UGA, mostly through his management experience from the blinds department at Home Depot. Jamie Carson's endless candy supply sustained many seminars long past the point of insulin shock. David Cottrell is always willing to help out in any way, pushing me to think about more innovative ways to approach my research. In addition to faculty, the political science department at UGA has staff members who support the students very well. Wendi Finch is always a delight and helped me navigate the little things about teaching in the department for the first time. Megan Morgan was also helpful before and during my time at UGA.

My research was funded by the Law and Sciences Dissertation Grant housed at Arizona State University. The generous funding allowed me to work with several fantastic undergraduate student research assistants: Luc Nadaud, Charles Peeler, William Gonzalez, Caroline Brooks, and Frances Fields. Their hard work and diligence allowed me to broaden the scope of this dissertation and get to know some really great students! I am also thankful to the judges, judicial assistants, assistant federal defenders, and U.S. Attorney for the Western District of Washington for hosting me and allowing me to interview you all for this project. It was a delight.

During my time at UGA I also was fortunate to have a cohort that made classes even more enjoyable: Spencer, Liz, Ally, and Alyson through those early days and COVID, we stumbled our way and, at least up to candidacy, emerged relatively unscathed. Two other classmates, Adam Rutkowski and Elise Blasingame, have helped sustain me both professionally and personally as we've become wonderful friends.

My friendship with Trish Cashman began at a Starbucks meeting nearly 8 years ago. Since that time, she has invested so much time and energy into my development as a professor and a lawyer. While we no longer get to enjoy lunch and coffee at the office together frequently, her mentorship is something I truly cherish and value. She encourages me to grow as a teacher and does not hesitate to remind me of my value. I've also benefited from many other folks at UCF. Kerstin Hamann and Alisa Smith both took chances on me to teach classes in Political Science and Legal Studies and then turned around and wrote recommendation letters for grad school. Many in the Legal Studies department also supported me and encouraged me along the way: Marc Consalo, Eric Merriam, Carlton Patrick, and Katie Connolly.

While teaching at the university level has always been a dream of mine, I have benefited from years of working as an attorney. My five years as an Assistant Public Defender in Orange County, Florida were spent among some of the best attorneys in the area who also became treasured friends. So many of you pushed me and encouraged me and stood by on those tough days. I also appeared regularly before many judges in the Ninth Circuit of Florida in practice as a public defender. Two come to mind as exemplary and particularly influential: Heather Higbee and Leticia Marques. Thank you for your service on the bench and for your constant professionalism that's a model for your peers and lawyers alike.

To all of my friends in Orlando, Atlanta, and beyond: I want to name you all, but I will spare this section the type of lengthy explanation you are used to from me. You are our people and you know who you are.

I would be remiss if I did not note that this journey was sustained by my faith in Jesus Christ. Moving away from our Florida home was a step in faith and you have remained, as ever, steadfast.

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CHAPTER 1

INTRODUCTION

Trial courts are the workhorses of the court system. This is the first stop for almost all litigants and, more often than not, serves as the end of the road for their case (Carp and Wheeler 1972).[1] Despite the out-sized amount of work trial courts handle, they are woefully understudied. Within trial courts, jury trials are the most dramatic and public-facing events. Here judges, lawyers, parties, victims and, of course, the huge swath of the public who are called for jury duty, interact. Jury trials also see a shift in the balance of power, right before deliberations, from the judge to the jury.

In the penultimate moment before the jurors begin their deliberations, judges read to jurors final instructions on the law. The content of these admonitions is up to trial court judges, with almost no oversight from appellate courts, so long as the instructions accurately reflect the law. Rules for jury trials matter, especially those practices that involve substantial discretion and little appellate oversight. Jury instructions are where the law is presented to the most powerful group in the courtroom, the jury, whose acquittal of a defendant serves as an almost certain check on a powerful government. The stakes in these instructions are high. These jury instructions, the ultimate framing of the case for citizen-decision makers, judges, lawyers, and parties, are the subject of this dissertation.

This dissertation will make a significant contribution to our scholarly understanding of judicial decision-making, trial court actors' behavior, the prevalence of implicit bias jury instructions, and

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counsel-effects. This research answers questions of interest to scholars across the disciplines of political science and law.

While trial court judge behavior has received some attention, few political scientists have studied the impact of professional experiences on decision-making or looked at the ideological effects beyond case outcomes. In recent years, implicit bias jury instructions have emerged as a new method of combating bias in the courtroom. While the necessity of these instructions is debated in law and society, their newfound prevalence is clear. Empirically studying their proliferation will expand our understanding of these specific instructions, but also how legal practices percolate nationwide. Some empirical studies have examined, and confirmed, differences in the type of trial counsel that represents the defendant (private attorney, public defender, or court-appointed attorney).

Conducting jury trials are the most public-facing roles of the judiciary. Examining the instructions provided to jurors during trial–with their potential for educating jurors on the law, influencing case outcomes, and the emergence of implicit bias instructions–holds great potential for broader impacts. Two developments make this project particularly timely and important to a broad sector of society: the emergence of implicit bias instructions and the growing professional diversity of the federal bench. In 2017, the federal district court for the Western District of Washington (WDWA) introduced a first-of-its-kind video to educate jurors about unconscious or implicit bias. The video, featuring a federal district court judge, defense attorney, and U.S. Attorney, provides jurors with examples of implicit bias and tips on how to avoid it in decision-making. Over the last 3 years the WDWA has received nearly 200 requests for its use by other jurisdictions, attorneys, and bar associations. Separately, increasing calls from the political left and right to expand the professional diversity of the federal bench will likely persist. Understanding if this professional diversity changes decision-making behavior will be important to policy-makers and social scientists alike.

This dissertation leverages a newly collected dataset of 1,389 federal criminal trial court cases from January 1, 2015 to December 31, 2018. These cases took place in 23 federal districts, spanning

all eleven geographic Circuit Courts of Appeals to ensure geographic and jurisdictional variation. The dissertation proceeds as follows: Chapter 2 explores judicial involvement in the jury instruction process, specifically examining whether certain professional background characteristics influence a judge's choice to draft their own version of the jury instructions. Chapter 3 uses the emergence of jury instructions designed to combat implicit bias as a window into forms of representation on the bench and how expanded judicial diversity affects decision-making. Chapter 4 examines how defense attorney type, federal defender or appointed panel attorney, changes the decision of the defense attorney to get involved in the jury instructions. The concluding chapter will summarize all of the findings of the previous chapters and propose additional research areas to explore in the future.

1.1 Overview of Jury Instructions

Despite Galanter's (2004) observations about the "vanishing trial," jury instructions continue to provide an important framework for practitioners long before a case goes to trial. In the civil context, former Federal Judge Mark Bennett noted this importance, saying "I firmly believe that plaintiffs' lawyers should draft the jury instructions on the elements of any potential claims and begin developing the case narrative and themes before accepting the case and executing the written retention agreement. Civil defense lawyers should do the same shortly after being retained" (Bennett, 2014, 30). Jury instructions frame the case from start to finish and provide lawyers with clear guidance on how to utilize evidence but also allow them to explain the likelihood of success to their clients. Because they are written with lay-people in mind, these instructions can be an educational tool for litigants and their attorneys.

Jury instructions cover topics a myriad of topics from trial procedure to the elements of crime. For example a "Duty to Deliberate" instruction details how juries should conduct their deliberations: "Your verdict, whether guilty or not guilty, must be unanimous – in other words, you must all agree. Your deliberations are secret, and you'll never have to explain your verdict to anyone" (Eleventh

Circuit Criminal Pattern Jury Instruction B11, 2015). Jurors may be advised how to handle expert witness testimony:

> When scientific, technical or other specialized knowledge might be helpful, a person who has special training or experience in that field is allowed to state an opinion about the matter. But that doesn't mean you must accept the witness's opinion. As with any other witness's testimony, you must decide for yourself whether to rely upon the opinion (Eleventh Circuit Criminal Pattern Jury Instruction B7, 2015).

Or on the elements of the crime of possession of a machine gun:

> The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt: (1) the Defendant possessed a "machine gun"; and (2) the Defendant knew it was a machine gun or was aware of the firearm's essential characteristics that made it a "machine gun" as defined (Eleventh Circuit Criminal Pattern Jury Instruction O34.8, 2015).

The jury was not always given such clear definitions of the law, nor were the roles between the judge and jury always as separated.

In the early republic, judges and juries had less formal boundaries on the law. Judges often explained the law and summarized the trial informally to jurors (Hale, 2016). Juries, in turn, were not bound by the judge's instructions about the law (Hale, 2016). This division of labor held through much of the nineteenth century. At the turn of the twentieth century these roles changed, signaled in *Sparf and Hansen v. United States* (156 U.S. 51 (1895)). The facts of *Sparf and Hansen* are rather unique: two sailors were accused of murdering their shipmate at sea and disposing of body in the ocean. The only evidence present was Hansen's later confession to the captain of the ship. The defendants requested the trial court judge instruct the jury they could convict them of a lesser-included charge, manslaughter, rather than murder, which would reduce the potential punishment from death to imprisonment. The trial court judge denied their request, despite requests from the jurors for additional instruction from the court, and the case made its way to the Supreme Court of the United States (Hale, 2016).

The issues before the Supreme Court settled the distinctive roles of the judge and jury in criminal trials. Justice Harlan held:

> We must hold firmly to the doctrine that courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience believe them to be (*Sparf and Hansen*, 97-98).

This division of labor, unlike the system that preceded it, puts the judge firmly in the position to declare the law. No longer were judges and jurors sharing the responsibility of deciding how to apply the law, their lanes were distinct and clear (Hale, 2016). Judges decided what law the jurors would use and firmly instruct them on how to apply it. The modern practices surrounding jury instructions are grounded in this distinction and further reinforce how powerful judges are in deciding the law in the case and how to instruct jurors.

Jury instructions in federal criminal court are governed by the Federal Rules of Criminal Procedure. Rule 30-Jury Instructions gives general guidance for the process but also allows for a great deal of judicial discretion. Part A allows parties to file written requests on how the court instructs the jury either at the close of evidence or any earlier time as set by the court. Part B requires judges to rule on the requests before closing arguments with Part C allowing judges the discretion to instruct the jury "before or after the arguments are completed, or at both times." The objections process is outlined in Part D and parties must object with specificity before the jury retires to deliberate. The court must also allow parties to object out of the jury's presence. Rule 30 does not provide a formal sequence of events for the parties like the rules governing Initial Appearance (Rule 5, Initial Appearance) or Discovery (Rule 16, Discovery and Inspection). As with many jury instruction related activities, a substantial amount of discretion resides with the judge.

In practice, judges often have standing pretrial orders specifying how and when jury instructions should be drafted. Some judges have the parties each draft "their" version of the final instructions while others require the parties to meet and confer about instructions and produce a joint draft of

the instructions. Occasionally, the judge provides a first draft to the parties or prepares their own version before the end of trial (Bennett, 2021b). How judges go about drafting these instructions can reflect how they see their role as a judge, as a hands-on manager or mere umpire, as well as their view of the law. This discretionary division of labor allows for variation in the preparation of instructions and a window into courtroom practices and information exchange (Boyd and Hoffman, 2013).

Appellate courts allow a substantial amount of discretion for trial courts in deciding what instructions judges read to juries. In evaluating jury instructions, appellate courts use two legal standards, one for the correctness of the instruction and another for the phrasing or refusal to give an instruction. Legal correctness of an instruction is evaluated using a *de novo* standard of review, allowing appellate courts to review the instructions without deference to the trial court.

The specific phrasing of an instruction or refusal to give an instruction is evaluated by an abuse of discretion standard, with appellate courts generally deferring to the lower court's decision absent plain error. In practice, this means that district courts only err in refusing a party's instructions if the instruction "(1) is correct, (2) is not substantially covered by other instructions which were delivered, and (3) deals with some point so 'vital' that the failure to give the requested instruction seriously impaired the defendant's ability to defend." (*United States v. Ruiz*, 59 F.3d 1151, 1154 (11th Cir. 1995)). These standards rest almost exclusive power over jury instructions with trial court judges.

1.2 Overview of Dissertation Chapters

In Chapter 2, I examine the role of how a judge's ideology and professional experience, such as work as a prosecutor or public defender, affect when a judge drafts their own version of jury instructions. I expect these characteristics to drive differences in how judges get involved in the jury instruction process. In Chapter 3, I explore how language to combat implicit bias has emerged in jury instructions. Judges, equipped with considerable discretion, decide whether or not to include

these instructions to combat bias. I examine these decisions in two contexts that are important for this decision: judges own individual characteristics, like race and sex, and the characteristics of the other judges in the district. In Chapter 4, I investigate the differences between indigent criminal defense attorney types in federal cases in the context of jury instructions. While they are administered by the same federal district courts, appointed panel attorneys and federal defenders obtain strikingly different outcomes, likely motivated by differences in environmental, expertise, and resource-related factors.

Overall, this project leverages the unique context of jury instructions to explore several important research questions in trial courts. Judges, with their expansive discretion in the jury instruction context, are influenced by their professional background experience, their innate characteristics, and the sex-diversity of their colleagues in making decisions on jury instructions. I also advance research in attorney advocacy differences by exploring a non-outcome related measure that captures activity before a case comes to the conclusion. Ultimately, the data collected for this project will allow us to explore many other questions about trial court litigation, judicial decision-making, and attorney advocacy in the future.

CHAPTER 2

THUMB ON THE SCALE: AN EMPIRICAL STUDY OF JUDGE DRAFTED JURY INSTRUCTIONS[1]

[1]Baker, Matthew E. To be submitted to *Journal of Law and Courts*

Abstract

Jury instructions–the rules for jury deliberation approved by the judge and read to the jury during trial–are an important communication between judges, parties, jurors, and the public. Judges and parties draft these instructions with trials in mind and trial court judges possess substantial discretion over this critical process. Given the power of the prosecutor and strategic disadvantages of defense counsel, the criminal courtroom provides a unique venue to study instructions. Despite substantial research on judicial decision making, we know little about how a judge's ideology or prior professional experience, such as work as a prosecutor or public defender, affect when a judge drafts their own version of jury instructions. To test this, I constructed an original dataset of 1,389 federal criminal trial cases from 23 districts for 2015-2018. Logistic regression analysis suggests experience as a prosecutor matters in whether a judge files their own draft of the instructions. This finding presents evidence that a judge's identity affects their decision-making in this critical stage of a case. This research has broad implications for judicial appointments, judicial decision making theory, and future trial court research.

2.1 Introduction

In 2014's *United States v. Twitty* in the Colorado federal district court, Andre Twitty faced federal charges for mailing threatening communications. The government alleged Mr. Twitty mailed, from prison, threatening letters to a federal judge, two Assistant United States Attorneys, a local reporter, and the clerks of court for the Tenth Circuit and the District of Colorado. In the expletive-ridden letters, he claimed access to secret weapons and his expertise in assassinations and bomb-making. A critical issue in his case was whether the threats contained within several letters contained true, actionable threats given Mr. Twitty's incarceration. During the trial, Judge R. Brooke Jackson took it upon himself to research the Tenth Circuit law, and revised the jury instructions to fit *his* understanding of the law, telling the parties:

> The Court has done quite a bit of research on the law, as I mentioned...it is for the jury to decide, on proper instructions, whether or not a true threat was made. I'm satisfied now that the instructions that I have crafted, and that both sides have indicated they have no objection to properly instruct the jury on what a true threat is, what free speech is, et cetera (*United States v. Twitty*, Case 1:13-CR-76-1, (D. Colorado, 2014).

Ultimately, Judge Jackson read his version of the instruction to jurors at the conclusion of the trial.

In cases like *United States v. Twitty*, jury instructions–the rules for jury deliberation approved by the judge and read to the jury during trial–are an important communication between judges, parties, jurors, and the public. In every trial, after the witness testimony, presentation of evidence, and the arguments of counsel have concluded, judges read to jurors the applicable law. Not only do judges have the final say on the law that applies in the case, they also read instructions to the jury on how to apply the law. This often overlooked and understudied aspect of a trial gives judges, politically motivated government actors, one last bit of power over the jury, a democratic body, before jurors deliberate and render the final verdict in the case.

The jury as an institution predates the United States. A group of individuals from the community, not nominated, elected, or appointed, make factual decisions in courts of law. Juries stand as a safeguard against overzealous prosecutors or politically-motivated judges, ensuring that citizens will be judged by a jury of their peers, not the political class. This principle is so foundational to American democracy it is featured in the Declaration of Independence and enshrined in a constitutional right to a speedy, public, and impartial jury trial with jurors drawn from where the alleged crime was committed. This unique feature of the U.S. legal system provides a direct opportunity for citizen participation in government. Juries serve as the ultimate veto over the judiciary, and embody a "tangible implementation of the principle that the law comes from the people," with their verdicts nearly unimpeachable by outsiders (*Pena-Rodriguez v. Colorado*, 580 U.S. 40, 40 (2017)).

While jurors have the power to render verdicts, this power is not absolute. Judges control the course of cases and decide what evidence and law the jurors use in their deliberations. Federal judges face little real prospect of recall with fairly unrestricted discretion within their courtroom. They make decisions throughout cases from start to finish in deciding bail (Boldt et al., 2021), ruling on motions (Boyd and Hoffman, 2013), approving plea agreements (Albonetti, 1999; Bibas, 2004), and determining what sentence to impose (Harris, 2023; Johnson, 2014; Schanzenbach, 2005; Steffensmeier and Hebert, 1999). Judges also control the procedural process parties must navigate in order to prevail. Procedural processes, especially when manipulated, can frustrate one

party over another or even level the playing field (Bellin, 2019). Despite their position as neutral arbiters of justice, judges are still political actors selected in large part for their ideology (Binder and Maltzman, 2009; Scherer and Curry, 2010; Thurber and Yoshinaka, 2015). In the morass of procedure, we can see how judges use their discretion to directly and indirectly influence case results. Knowing that jurors ultimately decide cases, trial judges can employ their discretion and influence through their reading of the law in the jury instructions.

Federal District Court Judge Roy B. Dalton of the Middle District of Florida believes jury instructions are "critical to disposition" and "most vital to the process, [but] getting it right is not always easy" (Dalton, 2022). The jury instruction drafting process gives us an excellent venue to better understand judicial behavior. This process can begin long before a case goes to trial and often evades appellate review. Because jury instructions present trial judges with a large amount of discretion, judges can easily insert themselves into the process. Some judges use this to file their own draft of the instructions, taking on a time-consuming, labor-intensive process to assert additional control over the trial. Despite the vast influence judges wield over the jury instructions process, scant, if any, attention has been paid to judicial decision-making on jury instructions. Previous research on jury instructions has primarily focused on the effect on *jurors* rather than using jury instructions as a lens to understand trial court decision-making (Katzev and Wishart, 1985; Cicchini and White, 2015; Leverick, 2015; Wissler et al., 2001; Devine, 2012; Wetmore et al., 2020; Simon, 2012).

This intersection of substantial discretion and impactful decisions provides a ripe area for researching judicial decision-making. We know a judge's identity (Collins et al., 2010; Haire and Moyer, 2015; Johnson, 2014; Boyd, 2016; Cox and Miles, 2008; Hofer and Casellas, 2020), ideological preferences (Segal and Spaeth, 2002; Epstein et al., 2007; Giles et al., 2001; Schanzenbach and Tiller, 2007), and background experience (Myers, 1988; Harris and Sen, 2022) effect how they make decisions. But it is unclear whether a judge's political ideology and previous work in a criminal courtroom influences their decision to get involved in the jury instruction drafting process.

Do judges use their control over jury instructions to further their policy aims, potentially bringing more balance to the trial process?

This article empirically examines when judges file their own drafts of jury instructions in federal criminal trial courts, focusing on judicial ideology and professional background as possible explanations. First, I provide a short primer on jury instructions and their place in the trial process. Then, I explore judges' discretionary powers in light of the relative imbalance of power in criminal courtrooms. Next, I discuss how individual judge characteristics come to bear on decision-making, with an emphasis on judge ideology and experience as a prosecutor or public defender. Using an original dataset of federal criminal trials from 2015-2018, my results indicate a judge's prior experience as a prosecutor helps predict with their direct involvement with drafting jury instructions. The results present evidence that former prosecutor judges take a "hands off" approach to this important trial process. After discussing the results in detail, I discuss the impact these findings have on our understanding of judicial decision-making and how they matter in federal judicial selection.

2.2 Trial Courts and Jury Instructions

Trial courts are the first stop for almost all litigants and typically serve as the end of the road for their case, as most litigants do not appeal to a higher court (Carp and Wheeler, 1972). Though not every case is destined for trial–in fact nearly all of cases resolve long before a jury is called–trials are the lodestar for litigants. As a result, attorneys examine the merits of their case through the eyes of prospective jurors and marshal their evidence to obtain a favorable verdict. In that vein, jury instructions frame the case from start to finish and allow lawyers to explain the likelihood of success to their clients. Because they are written with lay-people in mind, these instructions can be an educational tool for litigants and their attorneys.

Jury instructions cover a myriad of topics from trial procedure to the elements of a crime. For example, a "Duty to Deliberate" instruction details how juries should conduct their deliberations:

"Your verdict, whether guilty or not guilty, must be unanimous – in other words, you must all agree. Your deliberations are secret, and you'll never have to explain your verdict to anyone" (Eleventh Circuit Criminal Pattern Jury Instruction B11, 2015). Jurors may be advised how to handle expert witness testimony:

> When scientific, technical or other specialized knowledge might be helpful, a person who has special training or experience in that field is allowed to state an opinion about the matter. But that doesn't mean you must accept the witness's opinion. As with any other witness's testimony, you must decide for yourself whether to rely upon the opinion (Eleventh Circuit Criminal Pattern Jury Instruction B7, 2015).

Instructions can also elaborate on the elements of a crime, as in Judge Jackson's instruction from *United States v. Twitty*:

> A true threat means a serious threat, as distinguished from words as mere political argument, idle talk, or jest. It is a declaration of intention, purpose, design, goal, or determination to inflict punishment, loss, or pain on another or to injure another or his property by the commission of some unlawful act (*United States v. Twitty*, Case 1:13-CR-76-1, (198) Reporter's Transcript p. 476, (D. Colorado, 2014).

Jury instructions in federal criminal court are governed by the Federal Rules of Criminal Procedure. Rule 30-Jury Instructions describes the method, timing of ruling, and objection process, but does not provide a formal sequence of events for the parties, like the rules governing Initial Appearance (Rule 5, Federal Rules of Criminal Procedure) or Discovery (Rule 16, Discovery and Inspection). With few procedural requirements on the timing and how instructions are drafted, judges can steer the parties or remove them from the process altogether. Some judges have the parties each draft "their" version of the final instructions while others require the parties to meet and confer about instructions and produce a joint draft of the instructions. But, judges can also provide a draft to the parties or prepare their own version before the end of trial, taking control of the process away from the parties (Bennett, 2021b).

Appellate courts, in turn, do not do conduct extensive "quality control" over the process and focus primarily on the legal correctness of instructions. This rests almost exclusive power over jury

instructions with trial court judges. How judges go about drafting these instructions can reflect how they see their role as a judge: as a hands-on manager or mere umpire. This discretionary division of labor allows for variation in the preparation of instructions and a window into courtroom practices and information exchange (Boyd and Hoffman, 2013).

2.3 Theorizing Judicial Involvement in Crafting Jury Instructions

Studying the jury instruction process and the important role judges play in it requires understanding the courtroom environment and relationships between legal actors. Criminal courtrooms, in contrast to civil cases, have a unique power dynamic. Judges, prosecutors, and defense attorneys work against, and with, each other throughout cases. Not all of these actors have equal footing though. By examining this power dynamic, two theories crystallize: prior experience as a public defender or prosecutor can influence judges once on the bench and jury instructions can help bring balance to a sometimes pitched process.

Some argue prosecutors, not judges, hold the most powerful position in the criminal justice system (Bishop and Frazier, 1984; Davis, 2007). "When the prosecutor makes the decision to charge an individual, she pulls that person into the criminal justice system, firmly entrenches him there, and maintains control over crucial decisions that will determine his fate" (Davis, 2007, 22). This discretion, accompanied with procedural and strategic advantages, tilts the scales in favor of federal prosecutors in criminal trial courts. Prosecutors choose when to prosecute and choose cases with high likelihoods of success based on professional investigations generated by law enforcement agencies (Bellin, 2019). In federal courts, United States Attorneys (mostly) avoid the twists and turns of "everyday" crime brought by civilians and prosecute cases initiated by the police (Bellin, 2019).

Prosecutors chose their cases wisely to ensure success, with high conviction rates mattering a great deal to them, even more than sentence length (Fisher, 2003). Once cases are charged, prosecutors hedge their bets even further through plea negotiations which ensure a conviction on at least one charge, reduce their caseloads, and avoid the uncertainty and work of a trial. (Albonetti, 1999; Bibas, 2004). Within a trial, prosecutors have the burden of proving their cases, but accompanying this heavy responsibility is the power of primacy: prosecutors present their evidence first and, in many cases, can have the last word in closing arguments. Also, in many cases, judges rely on prosecutors to draft an initial version of the jury instructions. Judges with prosecutor experience and familiarity with this practice may continue to rely on prosecutors to handle this work-intensive process.

The discretionary and substantive powers of the prosecutor stand in stark contrast to the limited power of the defense in federal criminal cases. While their clients cannot be compelled to testify and are presumed innocent (at least in theory), strategic disadvantages abound for defense counsel both before and during trial. Throughout their cases, defense attorneys look to judges to use their discretion to ensure a fair process. Once litigation commences, defense lawyers are not entitled to much–if any–information during the discovery process. Unlike broad civil discovery rules, designed to encourage settlement and information exchange, the Federal Rules of Criminal Procedure allow prosecutors to shroud most of their evidence from defense lawyers unless it meets strict criteria. The only way the defense has access to this information, outside prosecutorial beneficence, is through a court order coming from the judge.

Prosecutors need not disclose to the defense, in advance of trial, who they have interviewed nor even who the prosecutor will call as witnesses (Green, 2012). Unlike many state jurisdictions, federal criminal defendants are not entitled to discovery depositions. Judges, in turn, retain the discretion to grant these requests because of "exceptional circumstances and in the interest of justice" (Fed. R. Crim. Pro. 15(a)(1)).

One theme repeats when looking at the defense's strategic deficit in the criminal courtroom: the importance of the judge. None of these procedural rights are self-executing; they require judicial action. Defense lawyers look to the judge throughout this process to enforce the rules and use their discretion to allow the defense to prepare their case. The strategic disadvantages are felt sharply by appointed counsel, like public defenders, who do not have the investigatory resources of the prosecutor in developing their cases. Judges, especially judges with public defender experience, are acutely aware of their critical role in between the parties and know the importance of their procedural choices. Their decisions often decide the fate of defendants long before a jury renders a verdict.

2.4 Judicial Decision-Making and Jury Instructions

Judicial decision-making is influenced by many factors, both institutional and individual. A great deal of empirical and theoretical evidence indicates that judges affect case outcomes (Rowland and Carp, 1996; Rowland and Todd, 1991; Gibson, 1978; Harris, 2023; Schanzenbach, 2005; Boyd et al., 2010; Boyd, 2016). Previous research presents compelling evidence that the identity of the judge matters in many ways, including how quickly a case ends (Boyd and Hoffman, 2013); which party prevails (Boyd, 2016); and what sentence the judge will impose (Schanzenbach, 2005; Harris, 2023; Steffensmeier and Hebert, 1999; Johnson, 2014; Gruhl et al., 1981). Those studies focus almost exclusively on race and sex; however, a judge's professional biography may also play a role (Myers, 1988; Harris and Sen, 2022).

Where do these differences emerge though? Judges need discretion in decision-making opportunities for their backgrounds, preferences, biases, and special skills to have room to affect behavior. At the appellate level, this discretion comes in the form of voting and opinion writing. However, less attention has been paid to trial courts given the difficulty in obtaining usable data and the time-consuming nature of analysis (Boyd and Hoffman, 2013; Kim et al., 2009; Boyd et al., 2020).

Trial courts are the "workhorses of the federal judiciary" (Lyles, 1997, 11). Despite their role as deciders of individual, discrete cases, the "impact of U.S. district courts is very great for all Americans, touching on our pocketbooks, our liberties, and the overall quality of our lives" (Rowland and Carp, 1996, 2). These courts process hundreds of thousands of cases a year and shape national policy in individual cases and in the aggregate (Mather, 1995). While trial court judges face more legal constraints on their decisions (Cross, 2007; Epstein et al., 2013; Kritzer et al., 2017; Sunstein et al., 2007), they still retain substantial discretion in many decisions that escape frequent review.

For example, judges decide bail and pretrial release matters with little appellate oversight (Boldt et al., 2021). They also frequently rule on pretrial procedural motions on discovery and substantive legal matters. All of the power of the prosecutor can run "into the scheduling buzzsaw of the judge as '[a] particularly crafty judge could undermine a prosecution simply by declining to call a case in a predictable fashion'" (Bellin, 2019, 194). Judges also approve or reject the plea agreements made by prosecutors and defense attorneys (Albonetti, 1999; Bibas, 2004). Perhaps a judge's most obvious exercise of power comes at the end of a case, when the judge decides what sentence to impose (Harris, 2023; Johnson, 2014; Schanzenbach, 2005; Steffensmeier and Hebert, 1999). Ultimately, judges do not always "come out with it" in exercising their power and discretion in cases, using procedural mechanisms, like jury instructions, to influence case outcomes.

But do jury instructions actually matter? To start, jurors with less information fill in the gaps with their own information (Pfeifer and Ogloff, 1991). Also, jurors without instructions are more likely to vote guilty or be unable to decide a verdict (Reed, 1980). In exploring the manipulation of jury instruction language through the presence or absence of particular language, some experimental studies found an impact on case outcomes (Katzev and Wishart, 1985; Wissler et al., 2001), and others found instructions have little to no effect (Devine, 2012; Wetmore et al., 2020). When taken together, these findings show that, in some fashion, jurors rely on these instructions.

In this potential for additional power and discretion, judges can take away party participation by drafting their own set of jury instructions or requiring stringent procedures (such as filing joint instructions with limited objections). In controlling how jury instructions are drafted, they realize even more control over the trial (Thornburg, 2009). Keep in mind though, drafting jury instructions can be a time-consuming, labor-intensive process, even for judges and parties with significant experience.

Trial court judges face high caseloads and lots of demands on their time, making the decision to get more involved in the jury instruction process an important one. Judge, like other workers, are influenced by time and effort constraints (Posner et al., 2013). For example, district court judges who have lighter caseloads or longer tenures being more likely to publish their decisions (Taha, 2004). Judges who insert themselves into the process are choosing to take on additional work in order to maintain control over the trial process. Given the ability to shape trial results, a judge's policy preferences can come into play.

2.4.1 Judge Ideology Affects Decision-Making

To understand a judge's ideological predispositions, it is important to recall the mechanisms of federal judicial selection. Historically, presidents used a variety of factors in considering who to nominate to the federal bench; however, the modern trend has been to focus almost exclusively on ideology (Bartels, 2015; Scherer and Curry, 2010; Binder and Maltzman, 2009). Since the Reagan administration, ideological reliability has motivated presidents to choose nominees who will implement a president's policy agenda decades after the president leaves office (Bartels, 2015). In recent years, this ideologically-driven approach to nominations has led to more extreme nominees being appointed when one party controls the Senate and the White House and fewer confirmations when the President and Senate majority are from different parties (Binder, 2008).

While on the bench, these ideological predispositions impact judicial decision-making at all levels (Segal and Spaeth, 2002; Epstein et al., 2007; Giles et al., 2001; Schanzenbach and Tiller,

2007; Keith et al., 2013). The import of ideology can be seen across the issues of abortion, affirmative action, gay rights and gun rights, and religious liberty, with judges appointed by Democrats supporting more liberal outcomes than their Republican-appointed colleagues (Keck, 2014; Sisk and Heise, 2011). However, these strong ideological ties are somewhat tempered by the expanded diversification of the bench (Hofer and Achury, 2021). Despite their placement at the bottom of the federal judicial hierarchy, federal district courts have seen politicization and higher ideological focus increase over time (Scherer, 2005).

These ideological differences map onto criminal law issues as well. Generally, conservatism is tied to less favorable decisions for defendants (Rowland et al., 1984). In the past, this translated to Republican appointed judges who are "harder" on crime than their more liberal colleagues (Rowland et al., 1984). In practice, this "tough on crime" approach translates to harsher sentences for criminal defendants (Schanzenbach and Tiller, 2007). Even when controlling for other judge characteristics, Republican judges sentence black defendants to longer sentences, with these differences growing larger as judges are given more discretion (Cohen and Yang, 2019). In contrast, judges appointed by Democratic presidents tend to favor defendants in sentencing decisions (Tiede et al., 2010). Previous studies primarily focused on sentencing and did not look closely at the process preceding a sentence, an area rich with discretion and difference.

Judge ideology is likely to be an important determinant of judicial behavior at any stage of a case. In the context of jury instructions, I expect this to be a story of the "haves" vs. the "have-nots" (Galanter, 1974), where party resources play an important role in success. In the context of whether a party has standing to bring suit, Rowland and Carp (1991) found ideological fault lines among district court judges with more liberal judges allowing "underdog" litigants to proceed than their conservative peers. In this same way, I expect liberal judges to insert themselves into the process to counter the overwhelming power of prosecutors (Bellin, 2019). Formally:

Hypothesis 2-1: Liberal judges are more likely to draft jury instructions than their conservative colleagues.

2.4.2 Judge Professional Experience Affects Decision-Making

Nearly all judges ascend to the federal bench after lengthy careers as attorneys. These experiences are formative to how judges decide and handle cases. Over time, the professional background of federal judge has changed, with government service being a key indicator of potential future appointment (Hurwitz and Lanier, 2012). Despite earlier research focusing on broad professional experience int he context of decision-making rendering mixed, if any, results (Ulmer, 1973; Tate and Handberg, 1991; Tate, 1981), others have found professional experience affects case outcomes (Myers, 1988; Harris and Sen, 2022).

This research is particularly timely given the current nominating environment. In the past, federal judges came from large law firms or backgrounds as prosecutors. In 2016, as many as 50 percent of district judges had prior prosecutorial experience while only around 11 percent had worked as public defenders (George and Yoon, 2015). However, less than 1/4 of President Biden's nominees (thus far) have this experience, with unprecedented numbers of nominees hailing from public defense or public interest backgrounds (Gass, 2022). In the 20 months since taking office, President Biden nominated an unprecedented number of judges having "nontraditional" backgrounds, with nearly 30% being former public defenders, 24% former civil rights lawyers, and 8% former labor attorneys (Long, 2022).

Experience may influence judges in a systematic way, but why? Judges receive similar training, have similar experiences on the bench, and are bound by the same rules. Some argue for a "robes on" theory, suggesting that judges' shared training will wash away the variable nature of decision-making (Kritzer and Uhlman, 1977). Under this approach, judges with different professional experiences will decide cases in the same way. However, others recognize that individuals acquire valuable information from shared experiences. Prior research has uncovered support for this notion based on judges' race and sex (Boyd et al., 2010; Cameron and Cummings, 2003; Gryski et al., 1986; Peresie, 2005). Essentially, judges draw on their lived experience as a form of expertise in making decisions.

Working as a public defender or a prosecutor is a prime example of a socializing process and shared experience for lawyers (Braman, 2009). Prosecutor and public defender offices generally recruit directly from law schools to provide attorneys a fast-paced and intense level of legal experience. These lawyers are "in the trenches" with each other, with massive dockets and demands on their time. Sharing these experiences and growing as lawyers with other similarly situated prosecutors or public defenders shapes legal views over time, even from experiences as simple as sharing a common lunch room with their co-workers.

There is empirical evidence that previous work as a prosecutor or public defender impacts sentencing decisions. For example, former prosecutor judges tend to sentence defendants more punitively than their colleagues without this experience (Myers, 1988). The differences were particularly acute among female and violent offenders. On the public defender side, Harris and Sen (2022) found that experience as a public defender can predict sentencing behavior as well. Former public defenders are less likely to sentence offenders to incarceration and more likely to sentence offenders to some form of community service or probation, even when controlling for ideology (Harris and Sen, 2022). Judges with experience as public defenders also sentence offenders to shorter prison sentences, about 16 months less than their colleagues without this experience (Harris and Sen, 2022).

Given the shared experiences prosecutors have, I expect judges who are former prosecutors to participate less in the jury instruction process. Because of traditional practices where judges allowed prosecutors to take the lead on jury instructions, former prosecutor judges will favor and trust the government to handle the jury instructions. This also tracks with ideology, with conservatives being harder on crime and less inclined to assist defendants. With that in mind:

Hypothesis 2-2: Former prosecutor judges are less likely to draft jury instructions than judges without prosecutorial experience.

Conversely, judges who are former public defenders will be more likely to insert themselves into the jury instruction process. Their experiences as the underdog in a criminal courtroom will

motivate how they approach the jury instruction process. They know the strategic disadvantages facing appointed counsel and can use jury instructions to shape outcomes to achieve some form of balance. Here, I frame this as:

Hypothesis 2-3: Former public defender judges are more likely to draft jury instructions than judges without public defender experience.

2.5 Research Design, Data, and Variables

As noted above, judicial decision-making has been studied at length across the federal court hierarchy. Appellate courts allow for readily quantifiable data using voting patterns (Hettinger et al., 2006) and opinion length (Moyer et al., 2021). but trial court research requires measurement strategies geared at these judges' different responsibilities as both case managers and neutral arbitrators. Previous trial courts research used a variety of approaches to measure trial court behavior in novel ways, like motion practice (Boyd and Hoffman, 2013; Kritzer, 1986), discovery (Cox, 2019; Boyd et al., 2020), bail decisions (Boldt et al., 2021), how quickly a case ends (Boyd and Hoffman, 2013), and sentencing (Schanzenbach and Tiller, 2007; Gruhl et al., 1981; Harris, 2023; Johnson, 2014; Schanzenbach, 2005; Steffensmeier and Hebert, 1999; Tiede, 2007).

Jury instructions present a unique research design challenge. Given the substantial leeway given to judges by the appellate courts, judicial behavior can vary widely with some judges taking an active role in drafting the instructions or instead forcing the parties to draft sufficient language. Ultimately, judicial involvement can be observed by filing behavior: a judge filing their own version of the jury instructions.

2.5.1 Data Collection

Given the dearth of comprehensive federal district court databases, as well as the unique research questions presented by jury instructions, I constructed an original dataset for this project. Focusing

on individual federal trial court cases, I collected information on case characteristics, federal judge biographical information, and district litigation statistics. These data come from 23 federal districts with at least two from each of the eleven regional Circuit Courts of Appeals, ensuring jurisdictional and geographic variability. Within these districts, I studied cases resolving via a jury verdict between January 1, 2015 and December 31, 2018. Table 2.1 lists the districts and their corresponding circuit, the number of cases in the sample, and the number of judges from each district present in the sample.

Table 2.1: Federal District Courts in Data

District	Circuit Court of Appeals	# of Cases in Dataset	# of Judges in Dataset
District of Maine	1	26	5
District of Massachusetts	1	107	14
District of Connecticut	2	28	9
Northern District of New York	2	55	8
District of New Jersey	3	51	16
District of Delaware	3	9	5
District of South Carolina	4	57	11
Middle District of NC	4	13	3
Northern District of Texas	5	90	11
Eastern District of Texas	5	63	9
Northern District of Ohio	6	58	12
Eastern District of Kentucky	6	106	7
Western District of Tennessee	6	34	6
Western District of Wisconsin	7	21	3
Southern District Illinois	7	15	5
Northern District of Iowa	8	38	6
District of Minnesota	8	65	11
Western District of Washington	9	33	10
District of Arizona	9	133	18
District of Colorado	10	27	8
District of Kansas	10	36	8
Middle District of Florida	11	259	27
Northern District of Georgia	11	95	14
	N=	1,389	

To identify cases that resolved via trial, I used the Federal Judicial Center and Administrative Office of the U.S. Courts' Integrated Database (IDB) which contains data on every case filing in

federal trial courts. From the "IDB for Criminal 1996-present" data, I narrowed the universe of cases of down to those disposed in the target districts via jury trial.[2] From the IDB, I also obtained the maximum possible sentence of imprisonment for the first charged offense in each case.[3] As the IDB intentionally omits judicial identifying information, additional data collection was necessary.

After identifying those criminal cases terminating in trial, I then used PACER ("Public Access to Court Electronic Records") to obtain the docket sheet and case filings for each case.[4] Docket sheets contain a trove of information about the parties and the progression of the case. In addition to the names of the parties, their role in the case (government or defense attorney and the type of defense attorney) and the judge, there is a notation for each filing in the case and the date. Outcomes specific to each charge, as well as the statute number, are at the top of each page.

While the docket sheets label each filing, determining what filings relate to jury instructions presented a challenge. In some jurisdictions, draft copies of jury instructions are called "requests to charge." Reviewing the docket sheet and utilizing searches (for terms like "jury instr" and "requests to charge") assisted in identifying relevant materials. Some cases have as many as 10 jury instruction related filings. From the docket sheet and filings, I coded for cases with judge drafted jury instructions, as well as other information about the judge and attorneys.

The next step in the process required linking case information to judges. For this, I utilized the Federal Judicial Center's (FJC) biographical directory of Article III Judges. The FJC provides detailed information on judges, including their sex, race, their service dates, previous judicial experience, and some information about their legal careers. I supplemented the FJC biographical data with newly collected data from the Federal Judicial Database (FJDB).[5] The FJDB contains

[2]The FJC uses 22 numerical codes for case disposition information. Of those codes, 3 is for cases where a defendant was acquitted by jury and 9 is assigned to cases with conviction after trial. For purposes of my analysis, I will not include cases that end in a mistrial given the myriad of reasons the court may declare a mistrial.

[3]A=None, B=6 months and under, C=7 months-1 year, 0=1yr 1day-2 years, 1=2years 1 day-3 years, 2=4-5 years, 3=6-10 years, 4=11-15 years, 5=16-20 years, 6=21-25 years, 7=over 25 years, 8=Life, 9=Death.

[4]PACER charges users a per-page amount for access to court records. However, I applied for and received a Multi-Court Exemption from the Judicial Conference's Electronic Public Access Fees.

[5]The Federal Judicial Database is part of National Science Foundation Grant SES-2141551 (Principal Investigator Christina L. Boyd). The FJDB, once completed, will be a comprehensive database on the more than 3,800 lower federal court judges serving from 1789-present.

a vast amount of data about a judge's prior legal experience, including service as a prosecutor in any form and work as a public defender. Using these databases, I was able to code judges' tenure on the federal bench, whether a judge served as a federal magistrate, as well as other individual characteristics. This data collection resulted in a dataset of 1,389 cases.[6]

2.5.2 Variables

The dependent variable modeled below is *Judge Draft* of jury instructions. *Judge Draft* is coded as 0 when judges do not draft and file their own copy of jury instructions in a case and 1 when the court file contains a copy of instructions drafted by the judge. In the dataset of 1,389 cases, judges filed their own version of the jury instructions 181 times, making up 12.76% of the observations.

The main independent variables are: *Judge Ideology*, *Prosecutor Experience*, and *Public Defender Experience*. *Judge Ideology* is the judge's Judicial Common Space ideology score ranging from (-1 to 1) (Boyd 2015).[7] Among the 226 judges in the sample, the mean ideology score is 0.05 with a standard deviation of 0.41. The most liberal judge's score is -0.64 and the most conservative judge has a 0.69 ideology score.

Prosecutor Experience and *Public Defender Experience* are each dichotomous measures (0-1) for whether or not a judge has been a former prosecutor and if they are a former public defender. Only 19 judges had public defender experience and 109 served as prosecutors at some point in their career. Table 2.2 displays the expected direction of each of the independent variables along with summary statistics.

I also include control variables for federal magistrate judge experience, federal judicial experience, senior status, judge's race and sex, the type of defense attorney in the case, district criminal filings, district trial counts, and district criminal trial percentage. Magistrate judges play a vital

[6] I only included the first co-defendant in cases where more than one defendant was tried together as judges tend to take action in all cases at once.

[7] Boyd used the Judicial Common Space (JCS) framework introduced by Epstein, Martin, Segal and Westerland (2007), placing judges on a liberal to conservative spectrum (-1 to 1) with negative scores indicating a liberal judge and positive values indicating those of a more conservative judge.

Table 2.2: Summary Expectations and Statistics for Key Variables

Variable	Expected Effect on Dependent Variable	Mean	SD	Min	Max
Judge Drafted Jury Instructions	N.A.	0.13	0.33	0	1
Judge Ideology	-	0.05	0.41	-0.64	0.69
Prosecutor Experience	-	0.49	0.5	0	1
Public Defender Experience	+	0.07	0.26	0	1

role in federal courts with substantial power within federal district court cases (Boyd et al., 2022). These magistrate judges often handle many tasks for district court judges, giving them a comfort level once they are promoted (Boyd and Sievert, 2013). *Federal Magistrate Judge Experience* is 1 for judges with previous experience as a federal magistrate judge and 0 for those without that experience. 43 of the 226 judges served as federal magistrate judges before their elevation to the district court bench. Table 2.3 displays the frequency of some judicial characteristics appearing within the dataset.

Table 2.3: Judge Characteristics in the Dataset

Control Variable	Frequency	Percent
Former Federal Magistrate	43	(19)
Senior Status	97	(42.92)
Judge Race		
White	164	(72.57)
Black	62	(27.43)
Latino	12	(5.31)
Native American	1	(0.44)
Asian American	2	(0.88)
Judge Sex		
Male	164	(72.57)
Female	62	(27.43)
	N=226	

Notably, time on the bench can change judicial behavior, with judicial behavior at the beginning and end of a career being more predictable (Kaheny et al., 2008; Hettinger et al., 2003). *Federal Judicial Experience* is the length of time a judge has been a federal district court judge in years. The average tenure on the bench for this sample is 17.74 years, with a standard deviation of 10.36 years. The longest serving judge in the sample had served 49 years on the federal bench with the least experienced judge sitting for just over a year. On the other end of the experience spectrum, senior judges may also exhibit distinctive behavior as judges often take senior status in order to reduce their workload while still maintaining a presence on the bench (Yoon, 2005; Vining Jr., 2009).[8] *Senior Status* is coded as 1 for judges who have assumed senior status before or at any point during the observation period. 97 judges in the data had taken senior status.

Knowing the role a judge's race can have on decision-making (Boyd, 2016; Hofer and Casellas, 2020; Cox and Miles, 2008; Haire and Moyer, 2015; Welch et al., 1988; Johnson, 2014), *Judge Race* will indicate a judge's race.[9] Over 80% of the judges in the sample are white (182), 12.83% (29) are Black, and 5.31% (12) Latino. Only one judge in the sample was Native American and two were Asian American. Similarly, *Judge Sex* will be measured as 0 for male judges and 1 for female judges given that female judges have been found to decide cases related to gender differently than their male counterparts (Boyd et al., 2010; Boyd, 2016; Haire and Moyer, 2015; Collins et al., 2010; Johnson, 2014). 72.57% (164) judges are male and 27% (62) are female.

Defense Attorney Type will note the type of defense attorney (private, court-appointed, or federal defender), capturing variation stemming from these differences (Berdejó, 2018; Roach, 2014). Judges may also handle cases differently based on the severity of the charges. Given this possibility, I also include a control variable for *Offense Level*, corresponding to four different categories based

[8]Article III judges may assume senior status if they are at least 65 years old with 15 years of service on the bench, or any combination of age and service that equals 80 so long as the judge has served at least 10 years. A judge taking senior status creates a vacancy for the president to appoint their replacement, while the senior judge can continue to handle cases at a lower level than they do in active service.

[9]The Federal Judicial Center uses 17 different categories to code a judge's race or ethnicity. I will collapse these into 5 categories: white, Black (capturing judges classified by the FJC as African American), Latino (FJC code Hispanic), Asian (FJC code Asian American), and Native American.

on the potential maximum prison sentence of the first charged offense.[10] District-level differences may also effect how judges decide which instructions to include. To account for those differences, I include the total number of trials in the district (*Total Trials*).[11]

2.6 Results

To examine the relationship between judicial characteristics and judge-drafted jury instructions, I employ logistic regression. This is appropriate given the dichotomous nature of the dependent variable, as well as the selection of several continuous and nominal independent variables. Logistic regression permits interpretations of the likelihood that an observation of an independent variable is related to whether a judge files their own copy of jury instructions. Federal criminal trial courts provide a consistent baseline of procedural rules coupled with geographic variation that makes regression analysis more insightful.

Table 2.4 reports the model estimation, clustered on the district court, with robust standard errors. In the judge-drafted instructions model, *Prosecutor Experience* has the predicted strong negative effect. Because logistic regression coefficients do not report interpret-able marginal effects on their own, it is necessary to transform these results into predicted probabilities. Predicted probabilities allow us to understand the likelihood of observing the dependent variable, *Judge Draft*, for a given value of the independent variable. Former prosecutors have a very small 0.09 predicted probability of drafting their own version of the jury instructions. Judges without prosecutor experience have a 0.17 predicted probability of presenting their own instructions. This tracks with *Hypothesis 2* as expected. Figure 2.1 graphically displays these predicted probabilities, with 95% confidence intervals around the average effect. Despite the p-value of the variable, there is substantial overlap in the confidence intervals between the two predicted probabilities, calling into question whether

[10] 1 for minor felonies (1 year and 1 day up to 5 years), 2 for felonies (6-15 years), 3 for major felonies (16-over 25 years in prison), 4 Life in Prison or Death. I exclude misdemeanor offenses (31) given their infrequent trials and the shorter nature of these proceedings.

[11] District court level statistical data comes from the Administrative Office of the U.S. Courts reports on caseloads. The Administrative Office regularly publishes annual caseload statistics broken down by district and case type.

Table 2.4: Judge Instructions Logistic Regression Model

	Coefficient	Robust Std. Error
Judge Ideology	-0.13	(0.63)
Prosecutor Experience	-0.81*	(0.41)
Public Defender Experience	-1.26	(0.87)
Control Variables		
Federal Magistrate Judge Experience	1.07***	(0.3)
Federal Judicial Experience (years)	-0.05	(0.02)
Senior Status	0.3	(0.55)
Judge Race		
Nonwhite	-0.77*	(0.39)
Judge Sex	-0.29	(0.34)
Defense Attorney Type		
Federal Defender	0.5	(0.25)
Private Attorney	0.12	(0.28)
Pro Se	-0.6	(1.18)
Offense Level		
Felony	0.35	(0.3)
Major Felony	0.15	(0.30)
Life in Prison/Death	0.29	(0.19)
District Trials	0.00	(0.00)
Constant	-1.5*	(0.63)
	N= 1389	

*** $p \leq 0.001$ **$p \leq 0.01$ *$p \leq 0.5$

this difference is substantive. These confidence intervals reflect two times the standard error for the mean expected value of the dependent variable.

Neither of the other two independent variables achieve statistical significance. Interestingly, Public Defender Experience might have a negative, rather than the expected positive, effect on whether judges draft their own version of the jury instructions. However, two of the control variables achieve statistical significance. The first, *Federal Magistrate Judge Experience*, is statistically significant at the *** $p \leq 0.001$ level. Judges with federal magistrate judge experience are expected to draft their own version of the jury instructions in nearly one out of every four cases (0.23 predicted

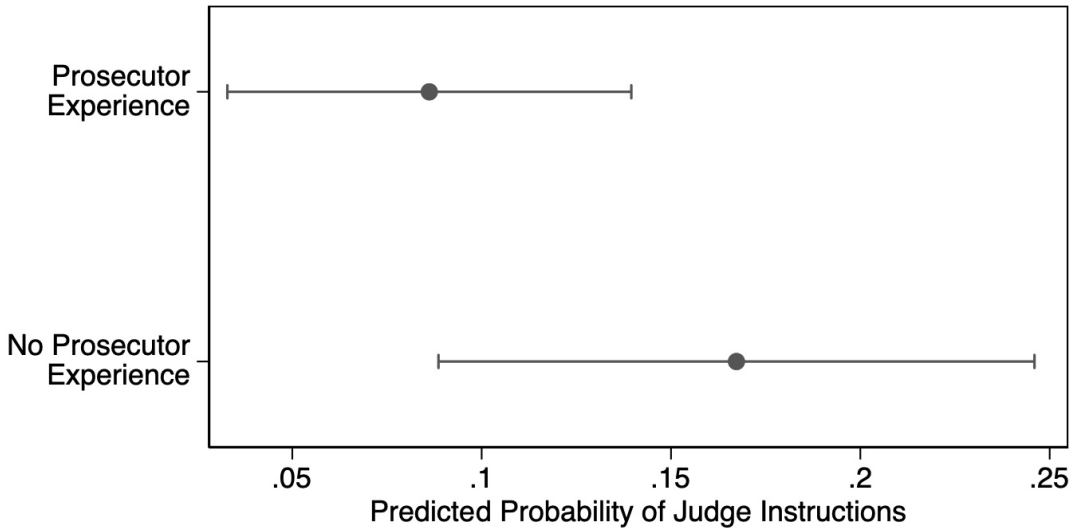

Figure 2.1: Predicted Probability of Judge-Drafted Instructions (with 95% confidence intervals)

probability) with those not having this experience only expected in one out of every ten cases (0.1 predicted probability). While there is some overlap in the confidence intervals, as shown on Figure 2.2, this occurs in a narrow swath of predicted values. This substantial difference might stem from

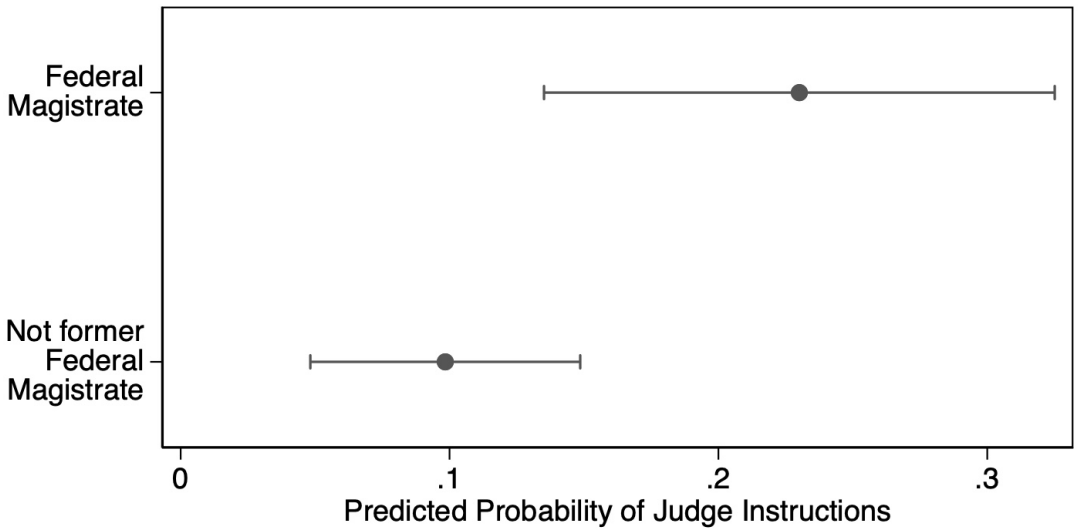

Figure 2.2: Predicted Probability of Judge-Drafted Instructions (with 95% confidence intervals)

former magistrate judges having even more experience in federal criminal law, at least from the bench, than their counterparts without this experience.

Judge Race, when distilled to a dichotomous variable (white vs. nonwhite judges), is also statistically significant, with nonwhite judges having a predicted probability of 0.07 compared to their white colleagues having a 0.14 predicted probability of drafting their own version of the instructions. Again there is substantial overlap between the confidence intervals of these estimates, as seen in Figure 2.3. While the relationship registers as statistically significant, it is difficult to draw reliable inferences from these results.

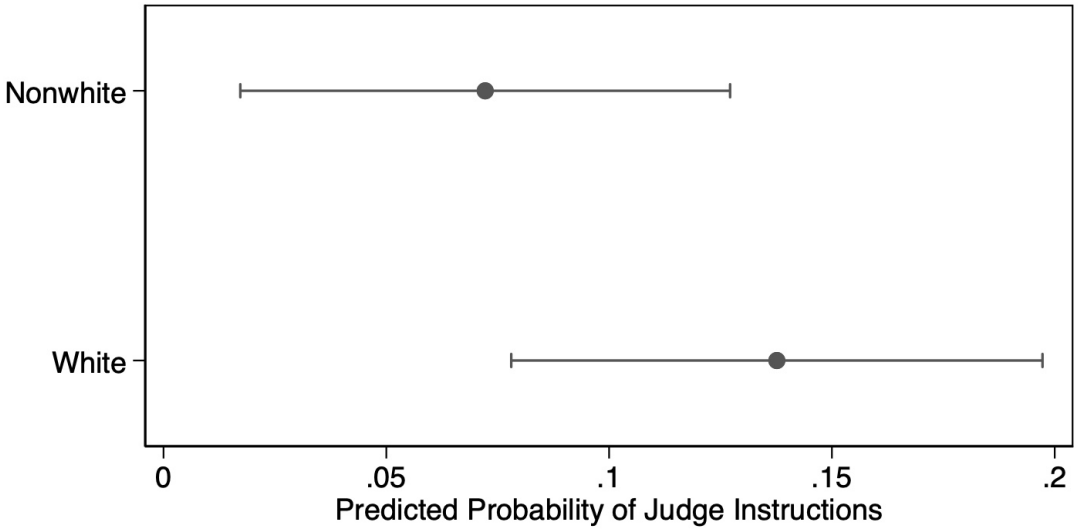

Figure 2.3: Predicted Probability of Judge-Drafted Instructions (with 95% confidence intervals)

2.7 Discussion

From these results, we can glean several insights about judges and jury instructions. As expected, legal career characteristics seem to have an impact on the instruction process. Judges who are former prosecutors seem less likely to get involved in this process than their colleagues without this experience. This could stem from practices present in criminal courtrooms, where prosecutors generally lead in this process by presenting an initial draft of the instructions given their burden

of proof. Civil practitioners, who meet in a courtroom where both parties have relatively similar responsibilities, may be more accustomed to both parties contributing to the instructions with a heavier judicial hand.

The results of the federal magistrate judge variable reinforce the importance of studying the variation of judicial professional experience. Federal magistrate judges, especially in certain districts, play a meaningful role in litigation, handling a wide variety of tasks delegated by district court judges (Boyd et al., 2022). Within the cases in this dataset, a federal magistrate judge had a least *some* involvement in just over half of the cases (732/1,419). In some districts, magistrate judges are appointed to the federal district court in high numbers, almost serving as a kind of "farm team" for the district court (George and Yoon, 2015). Coupled together, these insights on judicial professional experience are particularly timely as the Biden administration has pursued a strategy of diversifying the professional experiences of the judiciary (Gass, 2022).

Among the districts in the sample judge sex and race do not seem to play a role in whether judges get involved in this process. This is somewhat notable as both race (Boyd, 2016; Hofer and Casellas, 2020; Cox and Miles, 2008; Haire and Moyer, 2015; Welch et al., 1988; Johnson, 2014) and sex (Boyd et al., 2010; Boyd, 2016; Haire and Moyer, 2015; Collins et al., 2010; Johnson, 2014) have been found to have an impact on judicial decision-making in other contexts. Future research could look to see if female judges utilize this process differently than their male counterparts. From a process perspective, female judges can be more efficient case managers than men (Boyd, 2013), as female judges use a more collaborative approach in settling cases more frequently and faster than their male colleagues.

As with any project, there are limitations to the analysis. There is inherent selection bias in these cases as all of them resulted in a jury trial that went to a verdict. Cases resolved via plea agreement, dismissal, or a bench trial are intentionally excluded, perhaps excluding some number of cases where the judge might get involved in the process. There is also a strong possibility of "missingness" within the data generating mechanism. Judges may not communicate early drafts of

the instructions with the parties formally, they may rely on their law clerks or even email the parties themselves (Lasnik, 2023). Informal communications not filed with the clerk of the court likely carry the same weight as a formally filed document in the eyes of the parties but are not part of the formal record.

2.8 Conclusion

Jury instructions provide a promising arena for research, especially on judicial decision-making. This article provides a glimpse into how judges get involved in this important process that can change the outcome of a defendant's case. Jury trials are the most public-facing roles of the judiciary and research on these instructions allows us to see how judges perform on this public stage. Studying judicial decision-making beyond the traditional outcome variables (ie. sentencing, motions for summary judgment) also allows scholars and the public to better understand how these powerful decision-makers shape the law. Future research on this topic would benefit from more nuanced measures in the analysis of the jury instruction drafting process and the impact jury instructions have on verdicts.

Additionally, judges and lawyers clearly labor over the drafting and shaping of jury instructions but it remains unclear what impact these have on verdicts (Nietzel et al., 1999). With strong language, lawyers can even more effectively marshal their evidence and advocate for their clients. Despite the judiciary's professed belief in their importance (Dalton, 2022; Bennett, 2021b) and the number of filings made by the parties, we do not definitively know if jury instructions affect the outcome in actual cases.

Jury instructions allow us to see how judges attempt to influence and control jurors. Better understanding how judges control this process will allow not only an expanded understanding of this jury-judge relationship, but also speaks more broadly to how judges make decisions generally. As judges continue to make more and more substantive policy decisions with national effects, often

long before a jury is involved, our understanding of how judges approach their decision-making role grows increasingly salient.

CHAPTER 3

IMPLICIT BIAS JURY INSTRUCTIONS: A WINDOW INTO JUDICIAL BEHAVIOR[1]

[1]Baker, Matthew E. To be submitted to *The Journal of Politics*

Abstract

Trial court judges make numerous decisions throughout trials, with few as important as crafting the jury instructions jurors will rely on in deliberations. As implicit bias has become a better understood phenomenon, many courts have used jury instructions to educate jurors on implicit bias, providing jurors with the knowledge needed to combat stereotypes rooted in characteristics like race and sex. Judges, equipped with considerable discretion, decide whether or not to include these instructions to combat bias. Two contexts are important for this decision: judges own individual characteristics, like race and sex, and the characteristics of the other judges in the district. Using an original dataset of 681 criminal cases from 19 federal district courts from 2015-2018, I analyze the text of the final jury instructions, modeling the relationship between implicit bias language and judge race and sex, as well as district representation. These models render evidence that female judges include more implicit bias language in final jury instructions than their male colleagues. The impact of female representation on the bench also effects the behavior of their male colleagues, supporting theories that expanded diversity on the bench enriches the legal process.

3.1 Introduction

In several recent high-profile, racially-tinged, criminal cases, judges have included jury instructions designed to engage with jurors' unconscious biases. They read these special instructions to jurors right before they retire to deliberate, urging them to consider *why* they are arriving at their conclusions about witness tesimony and the evidence in the case. For example, in the state court trial of Derek Chauvin, the police officer later convicted of murdering George Floyd, Hennepin County Judge Peter Cahill admonished jurors to:

> Think about why you are making the decision you are making and examine it for bias. Reconsider your first impressions of the people and the evidence in this case. If the people involved in this case were from different backgrounds, for example, richer or poorer, more or less educated, older or younger, or of a different gender, gender identity, race, religion, or sexual orientation, would you still view them, and the evidence, the same way?

Generally jury instructions are read to jurors before jury selection, at the beginning of the trial, or right before the jury begins their deliberations, guiding and directing jurors on the law. But instructions with implicit bias language go beyond a roadmap of the law and are crafted to make

jurors mindful of their own biases in order to combat decisions rooted in negative racial or gender stereotypes.

These instructions represent what seems like an obvious legal requirement: jurors should avoid unfair bias in their conclusions about facts and evidence in a case. However, jurors are often ill-equiped to engage with their implicit biases without help. Thus, it falls to judges and courts to ensure verdicts are free from unfair bias. But implicit bias presents a unique challenge because, unlike explicit bias, it can taint jurors' impressions without them even knowing it. An increasing amount of research has shown that individuals who profess to hold no racial bias still unconsciously disfavor Blacks (Kang et al., 2011; Bennett, 2010). Women also face substantial obstacles and discrimination both in and out of the courtroom (Levinson and Young, 2010; Rhode, 2007). These instructions represent an important policy development in employing social science research into combating many different forms of discrimination.

Checking implicit bias may improve jury deliberations, but why study judges' role in tailoring these instructions? Jury instructions provide a unique environment in which to explore judicial behavior for two reasons. First, because judges retain a substantial amount of discretion on what instructions are read to jurors, and face relatively little oversight from appellate courts, jury instructions can allow us to observe individual judge-characteristic effects. Judges of color and female judges have been found to approach cases with unique perspectives based on their own personal experiences and the collective experiences of their representative groups. Their lived experiences of discrimination can serve as a potent reminder of the importance of combating bias.

Second, we can use these instructions to explore how changes to the racial and gender composition of a district court *as a whole* can influence how much implicit bias language individual judges include in the final jury instructions. We know an individual judge can change the behavior of an appellate panel and the racial makeup of a judicial district can change individual judge behavior. Altering the gender and racial diversity of a district changes the context of judicial decision-making, enriching the quality of collegial interactions and learning among judges.

In order to study the judicial decision-making environment surrounding jury instructions I constructed an original dataset of 681 cases spanning 19 federal district courts. Using text analysis software, I examined the final jury instructions in these cases looking for language geared toward combating implicit bias. From this I found evidence suggesting female judges include far more implicit bias language in the final jury instructions than their male colleagues. But the impact of female judges does not stop there: as the gender makeup of a district included higher numbers of female judges, male judges included increasingly more implicit bias language in their final jury instructions. This district representation evidence supports findings like Harris (2023) and Hazelton, Hinkle, and Nelson (2023), that the context for judicial decision making plays an important role in how judges behave.

This article begins with an introduction to implicit bias as a concept and how it permeates the courts as a whole. Then, I discuss the emergence of implicit bias jury instructions, highlighting a vanguard of the movement–the Western District of Washington–and their effort to combat implicit bias that began as the result of district-level behavior. After a discussion of race and sex-characteristic differences in judging, as well as the impact female and nonwhite judges can have on their colleagues, I theorize about these effects. Using a newly collected dataset, I model the expected effects across 681 cases, observing the differences of 133 judges in how much implicit bias language they include in the final jury instructions. Before concluding, I discuss the findings and importance of increased diversity in the trial court judiciary, highlighting areas for future research.

3.2 Implicit Bias in Criminal Courts

Implicit bias jury instructions intersect two salient areas of the law: eliminating bias in the courtroom and judicial decision-making. Courts purport to promise "equal justice under the law;" however this principle frequently runs into conflict with innate human behavior. Before exploring judicial behavior on implicit bias jury instructions it is important to survey the research on implicit

bias, how it can effect behavior in the legal system, and the emergence of jury instructions to combat implicit bias.

3.2.1 Implicit Bias

Engaging with implicit bias is an emerging topic well beyond the legal realm, with institutions addressing this issue in hiring, promotion, and decision-making. These biases stem from psychological process individuals are generally unaware of. Generally "[i]mplicit bias is a form of bias that occurs when a person makes associations between a group of people and particular traits that then operate without self-awareness to affect one's perceptions of, understanding of, judgement about, or behavior toward others" (Elek and Agor, 2014; Greenwald and Banaji, 1995, 116). While explicit biases have declined over time (Rachlinski et al., 2008; Sniderman and Piazza, 2002), this does not mean that implicit bias has gone away at the same rate. This is likely in part due to implicit bias being inherently difficult to identify and combat because of its subconscious nature. It is important to note that not all implicit bias is patently malicious though, as people use implicit biases to make everyday decisions quickly, with our natural predispositions serving as shortcuts (Stangor et al., 2014). However, when implicit biases are rooted in negative racial or sex-based stereotypes, predispositions can express themselves in pernicious ways. Individuals may "unconsciously act on [implicit] biases even though [they] may consciously abhor them" (Bennett, 2010, 149).

Many studies have found racially-motivated implicit biases impact individual judgements. For example, when interpreting ambiguous behavior, people perceive behavior as more hostile when coming from a Black actor rather than a white actor (Sagar and Schofield, 1980). The same holds true in expressions on white faces rather than Black faces (Hugenberg and Bodenhausen, 2003). Within the criminal law context, darker-skinned perpetrators, as opposed to lighter-skinned, have higher likelihoods of conviction on similarly ambiguous evidence as a result of biased interpretations (Levinson and Young, 2009).

Racial bias is not the only dimension of implicit bias; it also impacts individual judgements on sex. Even at an early age children perceive men and women differently, with men seen as more rational and objective, and women being gentle and emotional (Levinson and Young, 2010; Bridge, 1996). Within the workplace, women face negative stereotypes related to competence (Levinson and Young, 2010), painting them as either homemakers and support staff or calculating and cold (Rhode, 2007). Ultimately, gender stereotypes and biases can impact how people make judgements and remember information (Williams, 2003; Levinson and Young, 2010). Because implicit bias involves innate human behavior, it has broad implications in the legal realm.

3.2.2 Implicit Bias in the Courtroom

The legal process in the United States is reliant on discretionary decision-making, especially in criminal cases. Police officers make arrests, prosecutors charge cases, defense attorneys litigate, judges rule, and jurors render verdicts. Human perception can make a huge difference in case outcomes, for example, if a juror has some implicit bias against women, it could negatively color their judgement of a female lawyer or litigant making a borderline argument. At each of these flash-points, implicit bias can infect a case because of human nature.

The notion that the legal process is beset with implicit bias is well supported. Even before a case is charged, studies suggest that implicit bias impacts police practices (Plant and Peruche, 2005). Racial stereotypes can impact prosecutors decisions too (Smith and Levinson, 2011). In particular, this behavior is apparent in charging decisions, where white defendants are treated better than racial minority defendants (Radelet and Pierce, 1985) and in plea bargains, where below-guidelines plea offers are more likely to be offered to white defendants rather than Black or Latino defendants (Fund and on Civil Rights, 2000).

Once a case gets to trial, a new window of opportunity for implicit bias opens: jurors. Because jurors are frequently implored to rely on their "common sense" in decision-making, they often resort to decision-making shortcuts that bring out bias. For example, in one jury study implicit

biases changed how jurors evaluated the guilt of the defendant based on their skin tone, "with the darker-skinned defendant judged to be 'guiltier' than the lighter-skinned defendant," suggesting that unconscious forces can drive how jurors factual determinations (Kang et al., 2011, 1144-45). Ultimately these unconscious biases translate to more guilty verdicts against black defendants as opposed to white defendants (Elek and Agor, 2014).

Sex-related implicit bias is less obvious in criminal cases, but that does not mean that the broader implications of negative biases are absent. In the civil context, employment discrimination cases frequently engage with this issue (Williams, 2003). Sex-related implicit bias also impacts female legal professionals and how others might perceive them as they do their job as attorneys or judges (Levinson and Young, 2010). The potential for negative stereotypes to bias the perceptions of female victims in sexual assault or domestic violence cases could have profound consequences on a verdict.

Over time, a variety of solutions have emerged to combat implicit bias in the courtroom. Proposals ranges from additional training for police officers, lawyers, and judges (Levinson and Young, 2010; Simon, 2012), to changes in burdens of proof (Simon, 2012). Implicit bias training might take several hours or even several days in education and far longer to implement in the field. And shifting burdens of proof does not do much in changing individual minds, rather, it focuses on treating a symptom rather than the problem itself.

Those time and resource-intensive processes are unlikely to work in the context of juries though. Time is scarce when courts interact with jurors. Unlike judges, courtroom staff, or even members of the bar, jurors are present in the courtroom for a short period of time, usually only a couple of days. Jury duty removes citizens from their jobs and families temporarily and judges, especially those subject to re-election, have a strong incentive to use jurors' time wisely. This leaves few opportunities to educate jurors on implicit bias. One solution pursued by many jurisdictions (Kang et al., 2011; Lynch et al., 2022; Western District of Washington, 2017) is using jury instructions to bring this issue to juror's minds.

3.2.3 Emergence of Implicit Bias Jury Instructions

In response to the groundswell of emergent research on implicit bias discussed above, some courts have used jury instructions to address implicit bias. As defined above, jury instructions are the rules for jury deliberation approved by the judge and read to the jury during trial. Jury instructions can be read to jurors before jury selection, as the case begins, and before the jury begins their deliberations. They serve as guideposts throughout the trial and ultimately direct jurors on how to proceed in their deliberations. Perhaps their most important role is to educate jurors, illuminating the legal issues in the case and defining the bedrock principles of fairness and justice. For judges, jury instructions are an opportunity to set the tone for a case and also influence jurors based on how they lay out the law.

Several studies demonstrated changes in jury instructions impact case outcomes (Katzev and Wishart, 1985; Greene, 1988; Wissler et al., 2001; Pfeifer and Ogloff, 1991). Their impact is not without debate as their effectiveness at juror education has mixed findings (Devine, 2012; Wetmore et al., 2020). However jurors without instructions are more likely to vote guilty or be unable to decide a verdict (Reed, 1980). The guidance provided by instructions prevents jurors from filling in the gaps with their own information (Pfeifer and Ogloff, 1991). Jury instructions can mitigate the potential extralegal influence of trial processes, jury composition and group dynamics in the courtroom (Ford, 1986). In the past, judges and other members of the legal community have used jury instructions to effectuate better deliberations based on social science, particularly in eyewitness identifications (Greene, 1988; Katzev and Wishart, 1985).

Implicit bias jury instruction can help jurors engage with their own objectivity and, at the very least, become more motivated to understand their own biases (Kang et al., 2011). They can also alter juror's judgements on the strength's of a defendant's case, particularly in cases where the juror is evaluating cases with a defendant and victim of a different race (Elek and Agor, 2014). Specific to implicit bias, it remains unclear the these instructions can have an impact (Lynch et al., 2022) and whether bias may can be combated by instructions alone (Helgeson and Shaver, 1990).

Some implicit bias instructions target prejudice generally. For example, former Judge Mark Bennett of the Northern District of Iowa implemented this instruction in all the cases appearing before him:

> Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases (Bennett, 2021a).

Alternatively, the Illinois Supreme Court adopted an instruction including language on specific types of biases:

> You must resist jumping to conclusions based on personal likes or dislikes. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [insert any other impermissible form of bias]] (Illinois Supreme Court Committee on Jury Instructions in Criminal Cases, 2019).

These examples show just a glimpse of the wide variation existing in these instructions. There are some themes tying these all together, with notions of mindfulness, awareness and references to particular identity groups.

Even if the connection between these instructions and case outcomes is unclear, these jury instructions serve a greater purpose: to improve the quality and fairness of the legal process. And this is not just a consideration for cases where race or sex are salient. "When race is an obvious issue at trial, white jurors may be on guard against racial bias. However, in trials without salient racial issues, white jurors may be less likely to monitor their behavior for signs of prejudice, and therefore more likely to render judgements tainted by racial bias" (Lee, 2012, 210). Lee's finding

that awareness matters is part of the reason why judges began using using implicit bias instructions in *all* cases, not just ones with racial overtones (See also Kang et al. (2011)).

Instructions, like the ones referenced above, give language for jurors to articulate mental processes and point out bias in themselves and others. Jurors presented with these instructions reference them in their deliberations (Lynch et al., 2022) and point to specific admonitions given by the judge. Outside of guiding jurors in the dyad between judges and juries, jury instructions also provide lawyers the language to argue against this type of bias. Former Federal Defender Mike Filipovic, puts it this way: "having an instruction gives jurors the chance to use something from the court in deliberations."

The inclusion of implicit bias language in jury instructions provides an excellent opportunity to examine judicial behavior within district courts. The lens of implicit bias is not without controversy, which is why I expect to see variation in how much implicit bias language judges include in the final jury instructions. And these instructions have yet to be adopted in every court across the country. One district has pioneered the implementation of these instructions over the last few years, providing us with a helpful case study: the Western District of Washington.

Case Study: Western District of Washington

Local conditions in the Western District of Washington (WDWA) present an interesting example of changed behavior on the bench.[2] While anecdotal evidence alone can be unreliable in developing theory, it allows a glimpse into the data-generating mechanisms present in the jury instruction and judicial decision-making processes. In 2015 a local attorney in Seattle, Jeff Robinson, proposed a new method of combating implicit bias to Chief Judge Marsha Pechman, advocating the district play a video clip from a show "What Would You Do?" to jurors. The video depicted a white male, white female, and Black male attempting to break a bicycle lock in a public park, with passersby

[2]Information on the Western District of Washington's unconscious bias video and jury instruction comes from interviews conducted in 2022 and 2023 with the former Federal Defender, two Assistant Federal Defenders, the U.S. Attorney for the WDWA, and five federal district court judges from the WDWA. These interviews are included in the bibliography. For ease of reading, parenthetical citations are mostly omitted, given the widespread agreement among the interviewees about this process.

reacting very differently to their efforts, likely rooted in their own implicit biases. Chief Judge Pechman, hesitant to utilize something not scientifically studied, created a committee charged with addressing the issue of implicit bias in juror education, funding the effort from the local bench/bar fund. The committee took a two-pronged approach, creating a video for jurors to watch before voir dire and crafting a series of jury instructions for all jury trials.

The committee, led by Reagan appointee, Judge John Coughenour, comprised of members of the local bar, with civil lawyers, prosecutors from the United States Attorney's office, academics, and the local federal defender. They utilized experts in implicit bias, like Professor Song Richardson,to draft a jury instruction that would be read to jurors throughout the trial. During the development process, Judge Richard A. Jones presided over a trial with a Black defendant where the federal defenders successfully used the "What Would You Do?" bicycle video and a new implicit bias instruction, giving the movement additional momentum.

Individual judges and district-level conditions created a diverse, information-rich environment to craft this new instruction. The committee met only four to five times before a video on unconscious bias and jury instructions were finalized. According to Judge Coughenour, the process of drafting the instruction and creating the video faced little resistance within the committee, in large part because of the "liberal" local community and the local bench and bar being tolerant of new ideas. In 2017 the instruction was deployed across the jurisdiction, has been used in all but one case in the WDWA since that time, with judges using their substantial discretion in jury instructions to effect this change.

3.3 Judicial Discretion and Jury Instructions

Unlike other decisions where trial court judges are subject to routine review by appellate courts (Choi et al., 2012), trial court judges have a wide berth in what instructions they read to juries. Because judges moderate their behavior in anticipation of how an appellate court might react (Randazzo, 2008) given their placement in the judicial hierarchy (Boyd, 2015b), discretionary

decisions provide a ripe area for inquiry. When given a wide berth, individual characteristic differences appear.

For instance, when trial court judges experienced a change in evidentiary procedure allowing for more discretion, they made more ideological decisions (Buchman, 2007). In the context of bail, an infrequently reviewed trial court decision, female and judges of color behave differently than their white and male counterparts (Boldt et al., 2021). Judges with additional sentencing discretion used this to make different decisions than under a stricter regime (Schanzenbach and Tiller, 2007). Generally, higher courts only examine the correctness of an instruction (whether it accurately states the law) and whether a party is entitled to an instruction they requested. While many circuits provide pattern or "model" instructions, these pattern instructions are not binding on lower court judges.

Including implicit bias language in jury instructions is an excellent opportunity for a judge to go out on a limb to influence jurors with little prospect of reversal or reprisal. With this discretion, characteristic-related differences among judges are likely to emerge in their adoption of implicit bias language in jury instructions. Judges do not put on a robe and cease to be people. Rather, their individual characteristics continue to play a role as seen in other trial court decision-making venues (Boyd, 2016). Two potential motivators for these differences are race and gender.

3.3.1 Judge Race and Sex

Beyond ideology, judges make different decisions than their peers based on race and sex. Black and Latino judges approach cases in a manner distinctive from their white colleagues (Boyd, 2016; Hofer and Casellas, 2020; Cox and Miles, 2008; Haire and Moyer, 2015; Welch et al., 1988; Johnson, 2014). In a similar vein, female judges have been found to decide cases related to gender dissimilarly to their male counterparts (Boyd et al., 2010; Boyd, 2016; Haire and Moyer, 2015; Collins et al., 2010; Johnson, 2014). These differences frequently come up in cases where race and gender are salient (Boyd et al., 2010; Cox and Miles, 2008; Moyer and Haire, 2015). There are

several theories that articulate why these differences might emerge. I highlight two: representational theory and informational theory.

Representational theory argues that judges with these characteristics use their work as a form of substantive representation, making decisions to further the interests of their political group (Farhang and Wawro, 2004; Kastellec, 2013; Pitkin, 1967). Generally, there are two types of representation in the political context. Descriptive representation occurs when individuals mirror the characteristics and experiences of the group as a whole (Mansbridge, 1999). Through descriptive representation, shared experiences of group members can be conveyed by a representative in deliberations (Mansbridge, 1999). Among Latinos, a sense of group consciousness often forms around issues that directly related to ethnicity, like immigration (Sanchez, 2006) given the discrimination faced by newly arrived immigrants (Lopez et al., 2022) and the obstacles they face in navigating the legal (Collins and Baker, 2023) and political systems (Carlos, 2021).

Increased descriptive representation can, in turn, lead to collective actions as groups improve their status and realize interests together (McClain et al., 2009). The collective actions are based, in part at least, on those shared experiences that group members experienced along the way. These collective actions are often characterized as substantive representation, where group members are expected to further the interests of their group (Pitkin, 1967). This sense of linked fate is particularly acute among Blacks in America, given centuries of racial discrimination (Dawson, 1995). For example, Welch, Combs and Gruhl (1988) found that Black judges tended to sentence Black defendants more leniently than white defendants. Female judges have also helped shape legal rules that promoted gender equality in the workplace (Moyer and Tankersley, 2012).

This notion of representational theory overlaps some with informational theory in the sense that racial minority and female judges have unique experiences that lend them stronger credibility in cases involving discrimination. Black judges, especially those of earlier generations, come to the bench having frequently encountered blatant racial discrimination in the past (Washington, 1994). In voting rights cases, racial minority judges are two times as likely as their white colleagues to

find voting rights violations (Cox and Miles, 2008). Similarly, because of their own experiences, women tend to be more sensitive to sexual misconduct than men (O'Connor et al., 2004; Rotundo et al., 2001; Wiener et al., 2004). This increased awareness is evident in cases of sex-discrimination, with the earliest wave of female judges favoring sex-discrimination plaintiffs (Moyer and Haire, 2015). Female judges, and their additional credibility, can even affect the other judges on appellate court panels (Boyd et al., 2010).

Jury instructions designed to combat implicit bias are a low-cost, high discretion area for these characteristic based differences to emerge among trial court judges. Judges who have experienced discrimination previously have an opportunity to educate jurors on implicit bias and advance the interests of their own group. They can even lend their "lived" expertise in crafting these instructions with the parties, hedging against the various types of bias they experienced in their careers and lives. Given the history of mistreatment both within the legal arena and in everyday life, I expect to see female and nonwhite judges exercise their substantial discretion to include more implicit bias language in jury instructions.

Hypothesis 3-1: Female judges include higher levels of implicit bias language in jury instructions than their male colleagues.

Hypothesis 3-2: Nonwhite judges include higher levels of implicit bias language in jury instructions than their white colleagues.

3.3.2 District Conditions

But this is not just an individual characteristic story. Yes, trial court judges work individually, holding forth in their own individual courtrooms and rule in their own cases without deliberating with their peers. However, this relative isolation is not absolute. Judges are socialized in a semi-collegial environment and, while they make legal decisions based on legal principles, they are also motivated to impress other members of the legal community (Baum, 2009). In almost all instances, districts judges work alongside others, sometimes serving with one another for decades. Federal

district courts vary in size nationwide, with the largest allotted 28 active judges (Southern District of New York) and the smallest districts only assigned two active judges (District of Idaho, North District of Iowa, District of North Dakota and District of Vermont) (28 U.S.C. § 133 (2018)).[3]. This unique legal environment presents interesting ways in which judges exchange information and interact.

Within these groups, judges build relationships among their brethren and can come to rely on one another for advice and help. Judges engage in informal exchanges given their proximity and shared experiences (Hazelton et al., 2023; Lasnik, 2023; Bogira, 2011). For example, some judges meet for coffee each morning before going off to their courtrooms (Bogira, 2011, 33). They may share a meal to learn more about an issue or build camaraderie (Lasnik, 2023). Interestingly, these interpersonal relationships can also alter other expectations of behavior. While judges have strong ideological motivations (Segal and Spaeth, 2002), appellate judges who work in the same courthouse as district court judges have noticeably dampened ideological effects when reviewing cases from their lower court peers (Nelson et al., 2022). These relationships allow for judges to share information and experiences, fostered over years of service together and subject to change based on the introduction of judges with different backgrounds.

Changes to the representative nature of a group can enrich the the information exchanged between the members and influence individual decision-making processes (Sommers, 2006). Increases in descriptive racial representation among bureaucrats leads other bureaucrats to behave differently (Riccucci and Van Ryzin, 2017). In the state legislature context, increased female representation leads to higher levels of policy innovation as well (Nickelson and Jansa, 2023). Personal relationships can change how men perceive discrimination against women (Bolzendahl and Myers, 2004; Reingold and Foust, 1998; Glynn and Sen, 2015). When districts have higher proportions of minority judges on the bench it leads to smaller black/white disparities in total sentencing (Harris, 2023; Schanzenbach, 2005). Sex-related differences emerge contingent on increased numbers of

[3]Including 17 senior status judges who still actively hear cases, the Southern District of New York has 45 judges

female judges in a district (Collins et al., 2010). The results of expanded representation, albeit indirect, shape the way all of the judges behave.

In the same way as the presence of more female and judges of color changes how judges sentence individuals or vote in certain cases, it will also impact how much implicit bias language judges include in the final jury instructions. This collegial nudge, stemming from interactions within their local district, should translate into changed behavior for judges. Across judges, I would expect to see higher levels of implicit bias language in jury instructions when the proportion of women and nonwhite judges increases within the district. Formally:

Hypothesis 3-3: Judges will include higher levels of implicit bias language in jury instructions in districts that have higher proportions of female judges.

Hypothesis 3-4: Judges will include higher levels of implicit bias language in jury instructions in districts that have higher proportions of nonwhite judges.

The effects of expanded diversity are not limited to those representative (nonwhite or female) judges or the amorphous district as a whole: it will distinctly change the behavior of the white and male judges. Be it mere presence, as a reminder of the real impacts of discrimination, or the relationships built over time, the white, male judges will alter how they handle bias in the courtroom. Further work on the appellate courts guides some additional expectations, as many have successfully isolated the this panel-effect or counter-judge phenomenon. With ideology, Kastellec (2011) found that the presence of a single judge of the opposing party on an appellate panel of three judges changed the behavior of the judges in the majority. In a similar fashion, Boyd, Epstein, and Martin (2010) and Kastellac (2013) found judges on appellate panels behaved differently with the inclusion of a nonwhite or female colleague, particularly in cases where race or gender were salient. These effects are not limited to appellate panels though, with trial court judges also changing their behavior based on the colleagues they work alongside (Harris, 2023).

Similarly, I expect the increased presence of female or nonwhite judges in the district to increase the level of implicit bias language male or white judges include in the final jury instructions. As

the number of nonwhite or female judges reaches a "critical mass" I expect these effects to be the most acute (Collins et al., 2010). This leads to:

Hypothesis 3-5: Male judges will include higher levels of implicit bias language in jury instructions in districts that have higher proportions of female judges.

Hypothesis 3-6: White judges will include higher levels of implicit bias language in jury instructions in districts that have higher proportions of nonwhite judges.

3.4 Implicit Bias Jury Instructions Research Design

Examining individual judicial decision-making in implicit bias jury instructions requires a text-driven modeling strategy. Along with the instructions themselves, other judge, case and district-related information is necessary to test the individual and district-level theories about implicit bias jury instructions. For this I turn to the jury instruction data collected for this dissertation.

Data Collection Process

Given the dearth of comprehensive federal district court databases, as well as the unique research questions presented by jury instructions, I constructed an original dataset for this project, utilizing information on specific federal trial court cases and federal judge biographical information. The data used in this article are a subset of the complete dataset of 1,389 cases from 23 federal district courts focusing on cases resolving via a jury verdict between January 1, 2015 and December 31, 2018.

To identify cases that resolved via trial, I used the Federal Judicial Center and Administrative Office of the U.S. Courts' Integrated Database (IDB) which contains data on every case filing in federal trial courts. From the "IDB for Criminal 1996-present" data, I narrowed the universe of

cases of down to those disposed in the target districts via jury trial.[4] As the IDB intentionally omits judicial identifying information, additional data collection was necessary.

After identifying those criminal cases terminating in trial, I then used PACER ("Public Access to Court Electronic Records") to obtain the docket sheet and case filings for each case.[5] Docket sheets contain a trove of information about the parties and the progression of the case. In addition to the names of the parties, their role in the case (government or defense attorney and the type of defense attorney) and the judge, there is a notation for each filing in the case and the date. Using the docket sheets, I could then code which judge presided over the trial and determine if each case had a copy of the final jury instructions to the jury. Some cases had a final jury instruction filing while others provided a transcript of this portion of a trial.[6] Once the final version of the jury instructions was identified, it needed to be pre-processed to remove all extraneous language from the files.[7]

The next step in the process required linking judge information to the case-level observations. For this, I utilized the Federal Judicial Center's (FJC) biographical directory of Article III Judges. The FJC provides detailed information on judges, including their sex, race, their service dates, and previous judicial experience. Using the database, I was able to code their individual characteristics, including their race and gender. I supplemented the FJC biographical data with newly collected data from the Federal Judicial Database (FJDB).[8] The FJC also provided the service dates for all judges serving in the district during the period of observation, allowing me to determine the make-up of the district bench for each year in the dataset.

[4]The FJC uses 22 numerical codes for case disposition information. Of those codes, 3 is for cases where a defendant was acquitted by jury and 9 is assigned to cases with conviction after trial. For purposes of my analysis, I will not include cases that end in a mistrial given the myriad of reasons the court may declare a mistrial. I also only included the first co-defendant in cases where more than one defendant was tried together as judges tend to take action in all cases at once.

[5]PACER charges users a per-page amount for access to court records. However, I obtained a Multi-Court Exemption from the Judicial Conference's Electronic Public Access Fees.

[6]Of the 1,389 cases in the dataset, only 681 included a final copy of the jury instructions

[7]My team of coders and I eliminated the case style, page numbers, docketing information, italicized text (which relays instructions to the judge for presenting the instructions orally), footnotes, and citations.

[8]The Federal Judicial Database is part of National Science Foundation Grant SES-2141551 (Principal Investigator Christina L. Boyd). The FJDB, once completed, will be a comprehensive database on the more than 3,800 lower federal court judges serving from 1789-present.

There are 681 cases used in the analysis, all cases where the final version of the jury instructions was included in the court file. These cases come from 19 federal districts, representing each of the eleven regional Circuit Courts of Appeals. Table 3.2 lists the districts and their corresponding circuit, as well as the number of cases in the sample, and summary statistics about the dependent variable. Among these 681 cases, 133 different judges presided over the trials.

Table 3.1: Federal District Courts in Data

District	Circuit Court of Appeals	# of Cases in Sample
District of Maine	1	1
District of Massachusetts	1	4
District of Connecticut	2	10
Northern District of New York	2	3
District of New Jersey	3	15
District of Delaware	3	7
District of South Carolina	4	42
Northern District of Texas	5	84
Eastern District of Texas	5	1
Northern District of Ohio	6	6
Eastern District of Kentucky	6	74
Western District of Wisconsin	7	17
Southern District Illinois	7	14
Northern District of Iowa	8	34
Western District of Washington	9	31
District of Arizona	9	60
District of Colorado	10	21
Middle District of Florida	11	219
Northern District of Georgia	11	38
		681

3.4.1 Variables and Modeling Strategy

To capture nuanced and varied uses of implicit bias language I employ a technique similar to Owens and Wedeking (2011) and Black et al. (2016), using the Linguistic Inquiry and Word Count (LIWC) software (Pennebaker and King, 1999). LIWC takes a dictionary-type word list, including word-stems, and uses it to classify content through word counts (Tausczik and Pennebaker,

2010). In order to use the LIWC program, I created a custom dictionary that includes language aimed at implicit bias, targeting words typically only found in implicit bias jury instructions like "implicit", "stereotypes", "race", and "gender" among others.[9] To obtain the dependent variable *Bias Instruction Score*, I processed the final jury instructions in each case through LIWC and generated a percentage score with the amount of the bias instruction language used within the document. The *Bias Instruction Score* is a transformation of the percent of the document that contains implicit bias language.[10]

Table 3.2 includes the mean and standard deviation of the *Bias Instruction Score* for each district and the dataset overall. On average final jury instructions contained around 0.09% implicit bias language, with 24 cases containing no implicit bias language and one case containing 1.22% implicit bias language. Across the districts in the sample, there is substantial variation in the amount of language used. While these percentages may seem small, a final jury instructions document is, on average, 4,067 words long, and would contain an average of 3.6 words that address implicit bias.

The first explanatory variable is *Judge Sex*, and is observed as zero for male judges and 1 for female judges. There are 37 female judges (27.8%) across these cases. *Judge Race* is a dichotomous variable, with white judges coded as zero and non-white judges as 1.[11] Of the 133 judges observed, 105 are white, 15 are Black, 10 Latino, two Asian American and one Native American. The remaining explanatory variables are *District Proportion Nonwhite Judges* and *District Proportion Female Judges* which will be observed at the district level each year the case was brought. *District Proportion Nonwhite Judges* is the proportion of nonwhite judges on the district court bench and *District Proportion Female Judges* is the proportion of female judges in that district, again in the year the case began. Figure 3.1 provides the mean of the *District Proportion Nonwhite Judges* and *District Proportion Female Judges* values across the districts in the dataset.

[9]The complete dictionary is included in the appendix.

[10]The score is the percentage of a document that contains implicit bias language multiplied by 100.

[11]The Federal Judicial Center uses 17 different categories to code a judge's race or ethnicity. I acknowledge that distilling race into a white/nonwhite dichotomy omits a great deal of inter-racial variance and does not contemplate race as more than immutable characteristics (*See* Sen and Wasow, 2016).

Table 3.2: Summary Statistics for Dependent Variable Across Districts

District	Implicit Bias Score (Mean)	Implicit Bias Score (SD)
District of Maine	11	–
District of Massachusetts	6.75	(3.77)
District of Connecticut	12.7	(8.04)
Northern District of New York	37.66	(40.28)
District of New Jersey	13.2	(10.28)
District of Delaware	8.71	(4.39)
District of South Carolina	9.11	(7.46)
Northern District of Texas	9.07	(11.86)
Eastern District of Texas	5	–
Northern District of Ohio	15.5	(22.97)
Eastern District of Kentucky	8.66	(3.68)
Western District of Wisconsin	9.41	(19.58)
Southern District Illinois	15.86	(6.96)
Northern District of Iowa	19.94	(15.80)
Western District of Washington	21.48	(27.63)
District of Arizona	10.21	(8.74)
District of Colorado	8.76	(10.12)
Middle District of Florida	5.4	(5.90)
Northern District of Georgia	6	(7.72)
All Districts	9.33	(11.71)

I will also include control variables for judge ideology, federal magistrate judge experience, federal judicial experience, senior status, and the type of defense attorney in the case. *Judge Ideology* is a judge's Judicial Common Space ideology score ranging from (-1 to 1) (Boyd 2015).[12] The mean *Judge Ideology* score is 0.03 with a standard deviation of 0.42. The most liberal judge had a -0.64 ideology score with the most conservative at 0.69.

District Ideology is the mean Boyd (2015) score of all of the judges (active and senior) for the district in the year the case began, accounting for some variation with retirements and appointments. Figure 3.2 displays the mean ideology score for each district across the dataset.

[12]Boyd used the Judicial Common Space (JCS) framework introduced by Epstein, Martin, Segal and Westerland (2007), placing judges on a liberal to conservative spectrum (-1 to 1) with negative scores indicating a liberal judge and positive values indicating those of a more conservative judge.

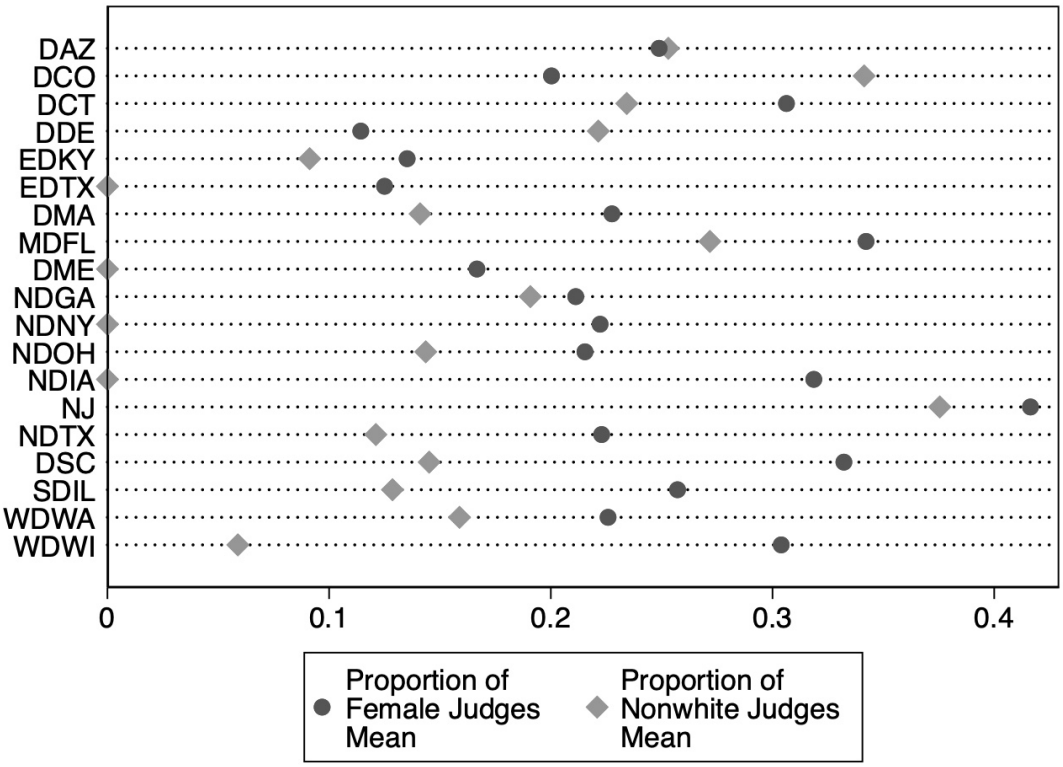

Figure 3.1: Mean of Proportion of Judge Sex and Race (by District)

Magistrate judges play a vital role in federal courts with substantial power in federal district court cases (Boyd et al., 2022). These magistrate judges often handle many tasks for district court judges, giving them a comfort level once they are promoted (Boyd and Sievert, 2013). *Federal Magistrate Judge Experience* is 1 for judges with previous experience as a federal magistrate judge and 0 for those without that experience.

Notably, time on the bench can change judicial behavior, with judicial behavior at the beginning and end of a career being more predictable (Kaheny et al., 2008; Hettinger et al., 2003). *Federal Judicial Experience* is the length of time a judge has been a federal district court judge in years. On the other end of the experience spectrum, senior judges will also exhibit distinctive behavior as judges often take senior status in order to reduce their workload while still maintaining a presence

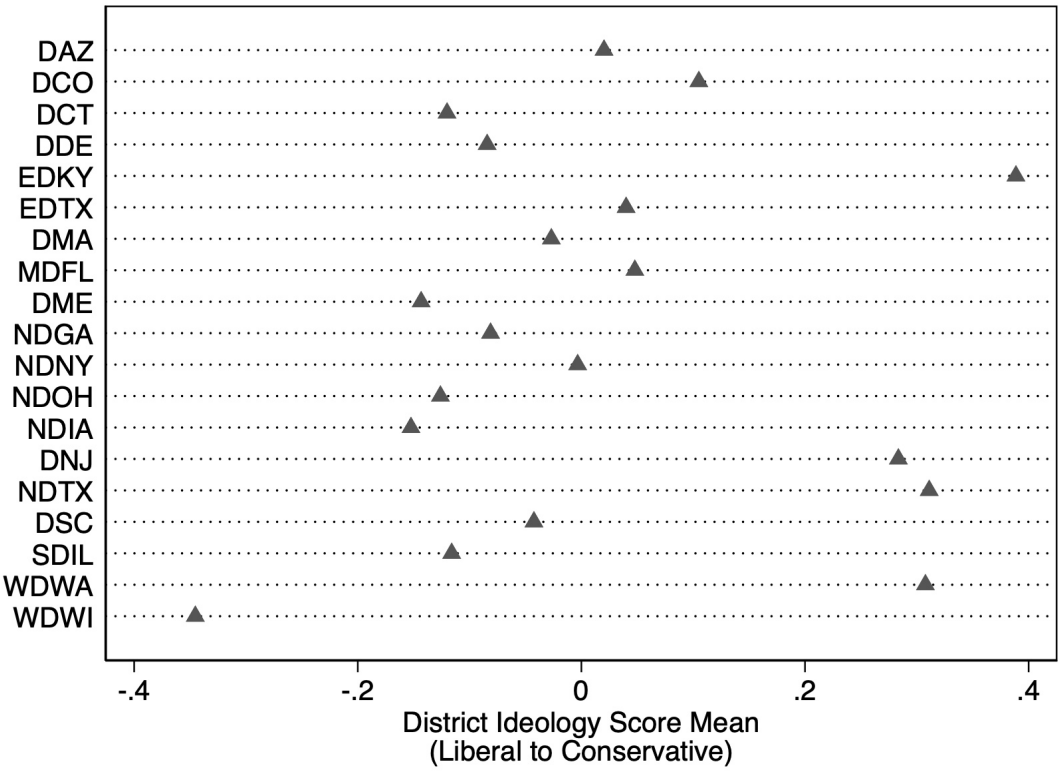

Figure 3.2: Mean Ideology Score (by District)

on the bench (Yoon, 2005; Vining Jr., 2009).[13] *Senior Status* is coded as 1 for judges who have assumed senior status before or at any point during the observation period.

Defense Attorney Type will note the type of defense attorney (private, court-appointed, or federal defender), capturing variation stemming from these differences (Berdejó, 2018; Roach, 2014). District-level differences may also effect how judges decide which instructions to include. To account for those differences, I include the total number of trials in the district *Total Trials*.[14]

[13]Article III judges may assume senior status if they are at least 65 years old with 15 years of service on the bench, or any combination of age and service that equals 80 so long as the judge has served at least 10 years. A judge taking senior status creates a vacancy for the president to appoint their replacement, while the senior judge can continue to handle cases at a lower level than they do in active service.

[14]District court level statistical data will come from the Administrative Office of the U.S. Courts reports on caseloads. The Administrative Office regularly publishes annual caseload statistics broken down by district and case type.

Given the continuous nature of the dependent and several of the primary independent variables, I employed ordinary least squares in the analysis. OLS has the advantage of presenting fairly clear results given the continuous comparisons. While dichotomous variables are not ideal for OLS (like *Judge Sex* and *Nonwhite Judge*), when part of interactions they can provide insight into complex relationships. With that in mind, I present several interactive models, given the expectations that judge characteristics and district characteristics moderate or impact one another.

3.5 Results

Table 3.3 includes the results for three different OLS models. To start, I modeled the "Judge Only" (Model 1) and "District Only" (Model 2) characteristics. These simpler models examine the relationships between these characteristics within a case against the *Implicit Bias Score* without controlling for any other conditions.[15] In both Model 1 and Model 2, the race-related variables achieve statistical significance, however neither of these models present very much predictive power given their lower *R-squared* values.

The interactive model (Model 3) examines if there are panel-type effects as noted in Hypothesis 3-5 and 3-6. one judge and district characteristic reaches statistical significance: sex. *Judge Sex* has a statistically and substantively significant effect on the implicit bias score. A female judge, as opposed to a male judge, reads final jury instructions with a 5.8 point higher *Implicit Bias Score*. Substantively, this means that a female judge will include on average 0.056% more implicit bias language than their male counterparts. Given the mean percent of implicit bias language across the instructions in the dataset is 0.093% the effect of a female judge nearly doubles the amount of implicit bias language. This finding lets substantial support to *Hypothesis 3-1*, that female judges will include more implicit bias language in the final instructions than their male colleagues *ceteris paribus*.

[15] I also estimated step-wise models that do not include the interactive variables in the Appendix.

Table 3.3: Implicit Bias Text Score OLS Regression Models

Variable	Model 1 Judge Only	Model 2 District Only	Model 3 Sex and Race Interactions
Judge Sex	-0.27 (1.30)		5.66 (2.29)*
Nonwhite Judge	-2.55 (0.95)*		-1.32 (3.83)
District Proportion Female Judges		1.20 (5.21)	12.74 (8.15)
District Proportion Nonwhite Judges		-23.83 (4.53)***	-14.30 (8.98)
Judge Sex* District Proportion Female Judges			-19.44 (7.43)*
Judge Nonwhite* District Proportion Nonwhite Judges			4.58 (14.81)
Control Variables			
Judge Ideology			0.79 (2.14)
District Ideology			2.09 (5.30)
Federal Magistrate			2.04 (2.11)
Senior Judge			2.14 (1.74)
Judge Experience			-0.06 (0.07)
Defense Attorney Type			
Federal Defender			4.14 (1.76)*
Private Attorney			0.52 (1.08)
Pro Se			-0.20 (3.76)
District Total Trials			-0.03 (0.01)*
Constant	9.91 (1.68)***	13.58 (1.48) ***	13.06 (3.47)***
R-Squared	0.008	0.042	0.098
			N=681
	*** $p \leq 0.001$	**$p \leq 0.01$	*$p \leq 0.05$

The interaction between *Judge Sex* and *District Proportion Female Judges* is also statistically significant. However, statistical significance alone does not permit a finding of substantive effect in an OLS interaction. In order to determine if the change from having a female judge instead of a male judge results in a change in the implicit bias score across the demographic composition of a district's bench, we must examine the relationship graphically. Figure 3.3 shows the linear

predictions across proportions of female judges within districts if a judge is a male judge or a female judge.

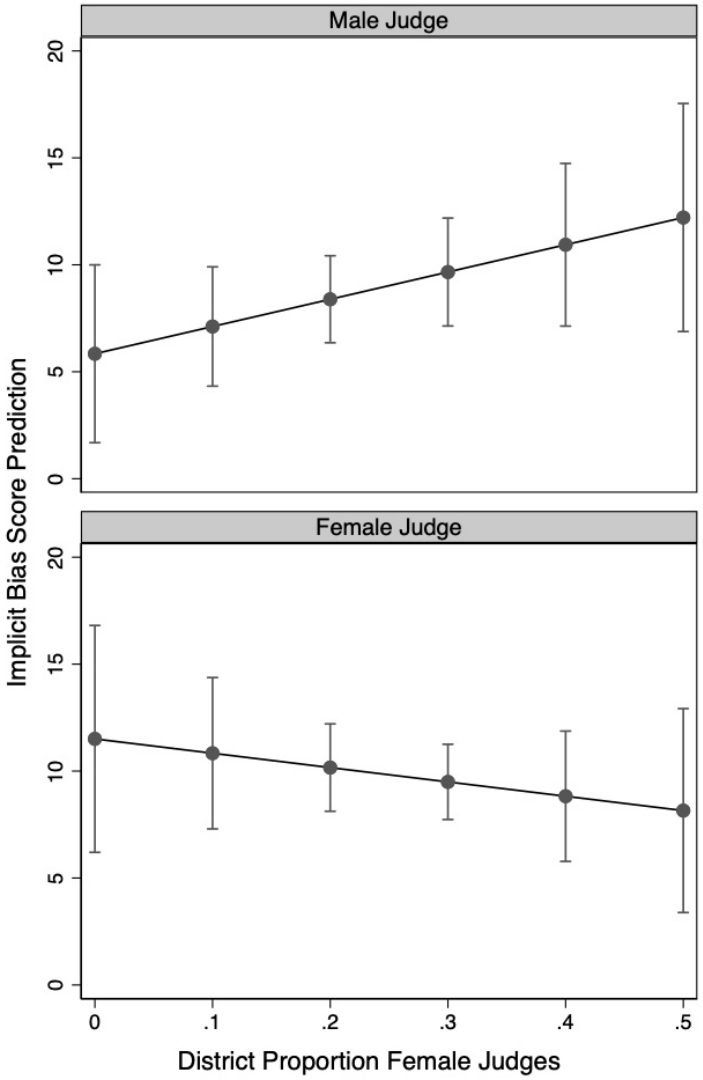

Figure 3.3: Linear Prediction of Implicit Bias Score (with 95% Confidence Intervals)

The prediction lines have very different slopes, indicating there is a substantive interactive effect, supporting *Hypothesis 3-5*. As the proportion of female judges within a district increases, male judges include more implicit bias language in the final jury instructions, increasing from a score of 5.84 in a district with no female judges doubling to 10.94 in a district that's 40% female. Interestingly the effect is almost the opposite among female judges. In the theoretical district where

a female judge is presiding over a case in a district without any female judges, we would anticipate an implicit bias jury instruction score of 11.5. The slope of the line here is negative though, and as the district court bench includes more females, the predicted implicit bias score decreases at a rate of 0.7 for every increase of female representation of 10%.

Two control variables achieve statistical significance: *Defense Attorney Type* and *Total Trials*. This significance holds across the remaining model specifications with similar effects. As *Defense Attorney Type* is a categorical variable, this statistically significant relationship is measured against the baseline category: court appointed attorneys. Substantively this means that when a federal defender serves as trial counsel, the implicit bias text score increases by just over 4 points, an increase in implicit bias language of 0.04%. This effect may seem small but 0.04% of the average 4,000 word jury instruction, this can amount 1.6 more words targeted at eliminating bias. The *Total Trials* substantive effect is minimal, given that with each additional trial conducted in the district, the implicit bias score decreases by 0.03.

3.6 Discussion

These results provide empirical support that representation plays a role in judicial behavior, both individually but also within a district at large. First, a female judges include, on average, almost twice as much implicit bias language when compared to their male colleagues. This continues the long line of findings that female trial court judges decide legal matters differently than their male colleagues across a variety of contexts (Boyd, 2016; Boldt et al., 2021; Steffensmeier and Hebert, 1999; Johnson, 2014). While the theory on *why* this change occurs is not easily testable, it may very well be rooted in individual experiences of discrimination and sensitivity to the unique obstacles women face in the courtroom.

This effect is not isolated to individual judges though. As Harris (2023) found with an increase of racial diversity among trial court judges, we see here that increases in female representation on the trial court bench corresponds to a change in male trial court judge behavior. Diversity

as a value goes beyond quotas and tokenism, it adds richness to a group dynamic, increasing information-sharing (Sommers, 2006) and innovation (Nickelson and Jansa, 2023). Much like proximity leads to increases in collegiality at appellate courts (Hazelton et al., 2023), there is likely to be substantive information exchange among judges on trial courts in informal ways as well. More female colleagues potentially results in male judges having a better understanding of how implicit bias negatively effects women (Reingold and Foust, 1998; Bolzendahl and Myers, 2004; Glynn and Sen, 2015). Neighboring chambers, judicial lunches, and information-sharing go beyond navigating the law; they also involve sharing life experiences may be tied to real substantive change in behavior.

These findings are particularly timely given that since 2021 over two-thirds of President Biden's nominees to the federal courts have been women, outpacing President Obama's record of 42% female nominees. As the federal judiciary continues to diversify, differences related to individual characteristics are likely to only grow. With a second term, Biden could radically transform the gender makeup of federal courts across the country all the while potentially changing the behavior of other judges.

The absence of any results on the race-related variables presents an interesting puzzle. With the race-forward direction of many implicit bias issues in the criminal court context, one would expect there to be some relationship between either judge race or the district make-up of the bench and the inclusion of these instructions. At the individual level, the lack of results might stem from judges of color avoiding taking on implicit bias, at least overtly, in order to shape their reputation on the bench and stop from being pigeonholed into race-only issues (Baum, 2009). From the district-level perspective, it is important to note the low proportion of nonwhite judges relative to female judges. Across almost every district in the sample, female judges make up a might higher percentage of the bench than their nonwhite colleagues.

As with any observational research design, these findings are not without limitation. First, the cases in the dataset represent only cases that resulted in a jury verdict, excluding the much broader

universe of cases that ultimately go to trial. This design is in part due to data availability issues, with judges and litigants focusing on jury instructions on the eve and expectation of trial. However, jury trials represent those cases where judges face litigants and the public at large, putting their decisions on display. Additionally, the final jury instructions represent a product of somewhat mixed origin. Depending on the practice of the trial court judge, the parties may drive the process, or the judge may exercise total control. This might mean that a litigant, rather than the judge, requests the implicit bias language (like in the test case in the WDWA). Ultimately though, the judge approves every word they read to jurors.

Finally, the LIWC measure only captures the words in the word list and is indiscriminate in *how* the language is used in the jury instructions. While most of these words are typically referenced only in the context of implicit bias, one could argue that a civil rights violation case might include a great deal of this same type of language in describing the charge or elements of the crime. Future iterations of this research will look to identifying particular categories of crime where this language might appear more often to ensure additional precision in what is captured in the dependent variable measure.

3.7 Conclusion

The composition of the trial court bench is vitally important because trial judges, even more than appellate judges, are close to the public, conducting hearings with attorneys, parties and jurors, and making decisions impacting the daily lives of parties making a diverse judiciary even more important (Ifill, 1997). Finding that changes to a district court's makeup can effect *individual* judicial behavior further reinforces the need to diversify the federal judiciary. This study targets implicit bias and hones in on race and gender, but the implications of judge diversity are far broader. If this effect is one stemming from increased learning, judges with different socioeconomic, educational, and legal backgrounds could make dynamic contributions to their colleagues. This also means that changes resulting from nominations need not wait until all of the judges turn over.

Rather, these findings demonstrate that in district courts judges can impact their colleagues who are already on the bench. The injection of more female–and potentially more judges of color–can change the behavior of those colleagues without that lived experience.

From a different perspective, changing the makeup of a district court also invites research questions on court administration. While the reform in the WDWA began as a means to combat racial bias, the sweep of the language goes much farther. It might be important to explore the roles of chief judges and other administrators in how change, like implicit bias instructions, percolates within districts. Not every jurisdiction has the resources or political will to marshal resources to craft a jury instruction and a professional video (over 200 have requested the use of the video from the WDWA) but a "non-traditional" chief judge might spur on changes. Investigating the effect of these "first among equal" judges and their roles in dividing the business of the district and assigning cases may yield valuable insight into how administrative power makes real change.

From the juror deliberations perspective, future studies would benefit from expanding on Lynch, Kidd, and Shaw (2022), who found that implicit bias instructions had no measurable effect on verdict outcomes but did increase the amount of engagement on the issue of bias within the jury room. And the emphasis on procedure matters because the process of verdicts is tantamount to just decisions. Procedural safeguards are present to protect against those rare cases where unconscious bias might transform an innocent individual into a convicted felon.

CHAPTER 4

INDIGENT CRIMINAL DEFENSE AND JURY INSTRUCTIONS IN FEDERAL CRIMINAL COURTS[1]

[1]Baker, Matthew E. To be submitted to *Law & Society Review*

Abstract

Federal defenders and appointed panel lawyers provide the only defense for indigent individuals charged with federal crimes. While they are administered by the same federal district courts, these panel attorneys and federal defenders obtain strikingly different outcomes, likely motivated by differences in environmental, expertise, and resource-related factors. However, most prior studies have ignored the important processes leading up to case disposition. To study variation in attorney advocacy, I examine a novel context: jury instruction filing behavior. Using a newly constructed dataset of jury instruction filings, I analyze the filing behavior of defense lawyers in 1,389 trial court cases from 23 federal district courts between 2015-2018. Despite expectations to the contrary, panel attorneys and federal defenders participate in the jury instruction process in statistically indistinguishable ways. However, judge-related factors influence when and how much attorneys file jury instruction documents, reinforcing the important role judges play in this process.

4.1 Introduction

Defendants charged with a federal crime in Georgia who cannot afford a lawyer are likely to receive very different legal assistance depending on *where* the government brings the charges. In the Northern District of Georgia (NDGA), indigent federal defendants can receive the help of a federal defender: a lawyer specializing exclusively in federal criminal law, whose salary is paid by the government, and has an office with support staff and investigators trained to help them. In the Southern District (SDGA), judges assign private lawyers who have tried a case in the district, regardless of their criminal defense experience or expertise, to handle cases for a set fee. Those assigned attorneys must return to judges to procure funds for many things necessary to an effective defense: investigators, experts, and paralegal help. This disparity, reported by the New Yorker in 2021 (Bethea, 2021), highlights the stark difference between the types of indigent defense in federal courts. At the same time, it also demonstrates the need to study how these systems of indigent representation can affect the quality of counsel a defendant receives.

In *Gideon v. Wainwright* (1963), the Supreme Court cemented the Sixth Amendment's promise of a right to counsel, requiring courts to provide indigent defendants legal counsel if they were unable to afford their own lawyer. Shortly after this landmark decision, the Criminal Justice Act of

1964 established a system of federal indigent defense that remains to this day. Overseen by federal circuit and district court judges, individual federal district courts determine whether and how to establish federal defender or community defender offices and also when to use contracted panel attorneys to provide indigent defense.

Indigent criminal defense is a public benefit and a cornerstone of our legal system's promise of "equal justice under the law." Even though defendants should lose their case because of the prosecutor's power and ethical obligations to only pursue cases with sufficient evidence (Bellin, 2019), the process of how justice is carried out provides important insight into the integrity of the system (Feeley, 1979). Ineffective counsel leads to wrongful convictions, unnecessary appellate issues, and ultimately a less legitimate and just system (Gabriel, 1986).

Over the last 60 years empirical studies presented evidence that, despite a common desire to defend the accused against the government, public defenders and appointed counsel provide very different types of representation (Abrams and Yoon, 2007; Anderson and Heaton, 2012; Joy and McMunigal, 2012; Roach, 2014, 2017; Iyengar, 2007). Defendants with appointed counsel are more likely to be detained pretrial (Williams, 2013), less likely to have their cases dismissed (Kutateladze and Leimberg, 2019), and more likely to receive harsher sentences (Anderson and Heaton, 2012; Cohen, 2014). As a result of this performance gap, judges perceive federal defenders as providing higher quality legal representation than their panel attorney counterparts (Ad Hoc Committee to Review the Criminal Justice Act, 2018).

To study variation between federal defenders and panel attorneys in federal criminal cases, I examine a novel context: jury instruction filing behavior. Jury instructions–the rules for jury deliberation approved by the judge and read to the jury during trial–are an important communication between judges, parties, jurors, and the public. Parties draft these instructions with trials in mind, tailoring them to their individual case. In deciding what instructions are read to jurors, trial court judges possess substantial discretion over this critical process. Given the power of the prosecutor

and strategic disadvantages of defense counsel, the criminal courtroom provides a unique venue to study instructions.

Defense attorneys in federal court can use these instructions to advocate on their client's behalf through filing versions of jury instructions, providing new instructions, or even formally objecting to proposals made by the judge or government. Unlike sentencing or motion practice, jury instructions provide a highly unconstrained environment in which to study how these attorneys operate. Using a newly constructed dataset, I examine the filing behavior of defense lawyers in 1,389 trial court cases from 23 federal district courts between 2015 and 2018. Despite an expectation that several environmental, expertise, and resource related factors would motivate differences in filing behavior, my analysis indicates panel attorneys and federal defenders participate in the jury instruction process in statistically indistinguishable ways. However, this analysis did uncover important insights into how judge-related factors might influence when and how much attorneys file jury instruction documents.

The article proceeds as follows: first, I introduce the foundations and methods of indigent criminal defense in federal court. Then I highlight the evidence of how attorney type changes outcomes in cases and other attorney behavior. With those insights in mind, I propose three potential reasons why we might observe a difference in attorney behavior and contextualize these into formal hypotheses on the jury instruction behavior. After explaining the data collection strategy and research design, I present the findings of the statistical analyses with a discussion on how these results fit with other scholarship in his area. I conclude by highlighting a few areas of potential future research.

4.2 Indigent Criminal Defense in Federal Criminal Cases

The Sixth Amendment to the U.S. Constitution reads, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." For nearly 150 years, judges understood this text to mean that defendants in criminal cases could be represented by

counsel, if they engaged a lawyer's services. Absent outside resources or *pro bono* work, defendants without the means to retain a lawyer relied on the judges and prosecutors to administer justice in a fair fashion. As the law become increasingly complex and police and prosecutors became more and more professionalized, the need for formalized professional assistance in criminal defense grew (Mayeux, 2020).

In the early twentieth century progressives lobbied for a form of government representation as a means to supply indigent defendants with counsel (Mayeux, 2020). Los Angeles opened the first public defender office in 1914 (Mayeux, 2020), but the notion of a constitutional right to indigent representation was firmly rejected by the Supreme Court in 1942 in *Betts v. Brady* (316 U.S. 455 (1942)). It would take 21 years and a changed court to arrive at the constitutional right to counsel in *Gideon v. Wainwright* (372 U.S. 335) in 1963.

Gideon held felony criminal defendants in state court were entitled to appointed counsel if they were unable to afford their own lawyer. It did not, however, specify how states would have to carry out the appointment of counsel (Cohen, 2014). What followed across the country was a varied approach to *who* would take on this new endeavor (Mayeux, 2020). Some, like Florida, established the government office of public defender at the circuit level, creating 20 new elected officials to oversee indigent defense. Others, like Pennsylvania, would allow local jurisdictions to manage the process and funding of appointed defense lawyers (Joy and McMunigal, 2012). This nationwide variation creates a patchwork of appointed lawyers, nonprofit and legal aid organization, and governmental institutions carrying out indigent criminal defense.

Portending the broader change to come, defendants in federal courts had been entitled to counsel since 1938 (via *Johnson v. Zerbst*, 304 U.S. 458 (1938)). However, Congress would not taken action to formalize the structure of indigent defense until the 1960s (Mayeux, 2020; Lewis, 2011). In the absence of formal guidelines and financial assistance, federal district court judges were left to ensure defendants had counsel. To respond to this patchwork of practices, the Kennedy administration generated a study on poverty and the administration of federal criminal justice commonly known

as the Allen Report. The Allen Report's recommendations became The Criminal Justice Act of 1964 (CJA) which, after amendment in 1970, established the current method of assigning counsel to indigent defendants (Mayeux, 2020; Lewis, 2011). Federal district courts were empowered to choose how to implement a system for criminal defendants: establish a district-level federal defender's office, designate a local nonprofit organization to serve as the "community defender," or appoint local counsel to represent indigent defendants for pay (Mayeux, 2020).

The differences in these approaches are notable. Federal defender offices are staffed by salaried federal employees of the judicial branch, with the designated federal defender appointed by the court of appeals, whose exclusive mission is to provide indigent federal criminal defense. Similarly community defender offices deliver services from salaried employees, but the organization itself is a nonprofit with a board of directors and no judicial oversight. In districts without a federal or community defender office, or in cases where there is a conflict of interest in those offices representing a defendant, the court appoints counsel from the local Criminal Justice Act (CJA) panel, comprised of local attorneys.[2] Compensation for CJA panel attorneys is substantially lower than what a private criminal lawyer could receive for a retained client (Wool et al., 2003). CJA panel attorneys typically have less experience than their peers from federal or community defender offices (Iyengar, 2007).

In federal courts, defenders represent 30% of all defendants in felony cases, with panel attorneys accounting for 36%. (Harlow, 2000). With district courts having the power to decide whether to open a federal defender (or community defender)[3] office and the ability to control the panel attorney system, there is a great deal of variation in how indigent defense is carried out across the country (Cleary, 1995). Few scholars have empirically examined the differences across federal districts

[2]There is a great deal of variation in how districts go about constructing their CJA panels. Some require extensive applications, holding attorneys to high standards of professionalism and experience whereas others, like the SDGA in the introduction, have judges select attorneys (Wool et al., 2003).

[3]For ease of reading, I will refer to federal defenders or community defenders interchangeably given the similarity of these systems and their inclusion together in the analysis below.

and attorney types (Iyengar, 2007). If there is a substantive deficiency of one method or another, it merits examination for many reasons.

First, the promise of *Gideon* is not merely that defendants are entitled to a member of the bar with a pulse; defendants have a right to representation that does not fall below an objective standard of reasonableness (*Strickland v. Washington*, 466 U.S. 668 (1984)). If one of the methods of delivering indigent counsel consistently provides inferior services, it requires reform to avoid wasted resources. Deficient counsel could result in delayed trials, unnecessary appeals, and wasted court resources on retrials. Deficient representation also invites Equal Protection challenges as indigent defendants should not receive systematically deficient counsel as a result of their inability to afford their own lawyer.

Expanding on this idea of the defendant's right to sufficient counsel, deficient representation diminishes the legitimacy of the legal process (Clair, 2020). Fair treatment in the legal system results in better compliance, satisfaction, and a greater sense of legitimacy in the process (Hollander-Blumoff, 2011; Gibson, 1989). Perceptions of attorney performance influence how defendants decide to proceed in their cases (Clair, 2020), including the decision to plea guilty or go to trial (Lee et al., 2021). If one type of lawyer consistently under-performs, it may strike at the heart of perceptions of justice in criminal courts.

4.3 Differences in Attorney Advocacy

Discerning the substantive differences a lawyer makes in a case presents a complex puzzle (Wright and Peeples, 2013). Legal factors, both constitutional and statutory, provide the first basis for evaluating appointed defense attorneys. *Gideon* brought with it a new wave of cases to clarify the Sixth Amendment right to counsel ultimately resulting in *Strickland v. Washington*. *Strickland* held that appointed counsel must not fall below an "objective standard of reasonableness" and demonstrate that but for a defense attorney's errors, the result would be different. This standard

is both challenging to articulate and difficult to quantify, resulting in case-by-case evaluations of performance.

The legal profession itself also provides very few tangible standards for appointed counsel. Rule 1.1 of the Model Rules of Professional Conduct merely requires lawyers to provide "competent representation" to their clients. One of the later comments to Rule 1.6 tells lawyers they "should not accept representation in a matter..unless it can be performed competently, promptly,...and to completion." Among these abstract obligations to competence, confidentiality, conflict-free representation there is little in the realm of quantifiable standards (Wright and Roberts, 2023).

Lawyers play a vital and essential role to their client's case, yes, but they can only work with the facts and law as they exist. The challenge here lays in determining attorney contributions to success versus already existing case level factors (Abrams and Yoon, 2007). A panel attorney with a favorable case may fare better than the best resourced attorney whose client faces damning evidence. In the public benefit context, there are many differing viewpoints and methods to determine if an attorney is providing quality representation (Wright and Roberts, 2023). As with any legal standard, empirical evaluation is evasive without some precise scheme by which to account for the values of the variables in question (Epstein and Martin, 2014).

Many scholars have examined the difference between types of counsel in criminal cases. Most of the research on counsel type variance has taken place at the state level (Anderson and Heaton, 2012; Abrams and Yoon, 2007; Joy and McMunigal, 2012; Roach, 2014, 2017) or explored the differences between public defenders and private attorneys (Cohen, 2014; Williams, 2013; Agan et al., 2021; Quintana-Navarrete and Fondevila, 2022). Debate continues on both *whether* and *why* these distinctions emerge, with much of the research looking at the impact on how counsel type effects results.

Perhaps the most straightforward method of studying differences in attorney performance is to look at the outcome of a case: does a defendant secure an acquittal or a dismissal of their charges? Scholars have found mixed results in attorney-type effect on case outcomes, with private

attorneys and public defenders faring better at securing positive results than assigned counsel (Cohen, 2014; Iyengar, 2007; Anderson and Heaton, 2012). Because of high conviction rates in criminal cases, most researchers pursue alternative concepts to measure success, like sentence length or the imposition of fines (Abrams and Yoon, 2007).

In comparing sentence length, researchers can compare case outcomes on a granular level, capturing variation that disposition alone ignores. For example, two defendants convicted of the same charge but receiving 5 months in jail versus 50 months in prison both have a conviction but very different outcomes. This also expands the range of applicable data as 91% of federal defendants end up with some form of sanction (Gramlich, 2023). Again, more often than not, assigned attorneys end up with heavier sentences than their public defender and private attorney counterparts across the board (Cohen, 2014; Iyengar, 2007; Anderson and Heaton, 2012). However, this is not universal as some have found that public defender clients have a higher likelihood of pretrial detention and conviction than private attorneys (Williams, 2013). On the whole, when it comes to case dispositions, public defender offices seem to have the advantage over their assigned counsel counterparts.

Evaluating the difference in attorney performance based exclusively on outcomes leaves out the rich detail of the legal case that plays out over months and sometimes years before it. Attorney advocacy is a process, not just a result. Lawyers meet with their clients, marshal their evidence, and negotiate with prosecutors, long before they present their cases to judges and juries. In that vein, Kutateladze and Leimberg (2019) compared attorney type over the course of domestic violence cases, finding varying differences between public defenders and private attorneys based on charge decrease or increase at the case screening level, case dismissals, case acceptances, charge decreases post arraignment, and guilty plea disposition. Beyond, negotiation and informal advocacy, defense attorneys have a mechanism to force judges to make decisions throughout cases: motion practice. The practice of filing formal motions, ruled on by the judge throughout the case, is essential to criminal defense lawyers (McConville and Minsky, 1987).

Throughout criminal cases, defense attorneys can file a variety of motions to combat the prosecution making motion practice vital to criminal representation (McConville and Minsky, 1987). Under Federal Rule of Criminal Procedure 12, the defense can file pretrial motions to suppress evidence, allege a defect in the indictment, or request severance of the charges or co-defendants. Attorney filing behavior allows empirical testing of how attorney behavior differs. For example, in the civil context motion filing has been found to accelerate the exchange of case information and, eventually, settlement (Boyd and Hoffman, 2013).

In addition to providing a measuring stick for attorney comparisons, filing practices can also be demonstrative for clients, allowing the attorney to garner trust with the accused through zealous efforts at combating the government's case. Motion practice, pretrial or throughout the case, is labor intensive, requiring attorneys to make their legal and factual points with specificity and proper authority. The trade-off for zealous advocacy is time and effort, something in short supply for most indigent lawyers.

4.4 The Influence of Environment, Expertise, and Resources

As discussed above, the limited prior inquiry into federal indigent defense has found a significant difference in results for federal defenders and assigned counsel (Iyengar, 2007). But what specific factors motivate these differences? Federal defenders and panel attorneys both lack the monetary resources of private counsel given their client's relative poverty. They also are both up against the power of the federal prosecutor. These institutional approaches to providing indigent defense diverge in three ways: experience in the federal courtroom environment, differing resources across counsel types, and less experienced attorneys.

4.4.1 Home-field Advantage

Criminal courts, unlike civil courts, have a distinctive flair. In analyzing differences between federal defender and panel attorney practice, several themes persist across jurisdictions. First, repeat players abound, with prosecutors and defense lawyers frequently appearing in front of the same judges nearly every day. Familiarity between a judge and a prosecutor can increase the likelihood of a plea agreement and speed up case disposition (Metcalfe, 2016). The repeat players in the courtroom (Assistant United States Attorneys and Federal Defenders) are likely to experience advantages over colleagues who do not appear in front of the same judges time and time again (McGuire, 1995).

Similarly, these courtrooms can function as work-groups where attorneys and judges work together to dispose of cases (Nardulli et al., 1987; Eisenstein and Jacob, 1977). These routine interactions create norms of case processing, especially in plea negotiations (Johnson et al., 2016). Attorneys who appear frequently in front of the same judges are expected to take care of cases quickly and within established norms (Metcalfe, 2016).

The expected advantage for federal defenders here is familiarity stemming from their knowledge of local legal culture and the judges they exclusively appear before (Kritzer and Zemans, 1993; Collins et al., 2017). Unlike a panel attorney who might practice in federal criminal courts occasionally or even infrequently, federal defenders only appear in front of federal district court judges in their assigned jurisdiction, giving them unique insight on how those judges might decide cases. At the same time, this participation in the courtroom work-group can cut against defenders because of their interest in preserving relationships and reputations in front of a judges they will appear in front of again and again.

4.4.2 Less Expertise

The courtroom is not the only context in which the lawyer operates though. In addition to the disadvantage in familiarity of the courtroom, panel attorneys might suffer from a lack of expertise

as opposed to their federal defender counterparts. This expertise gap manifests in two ways: a lawyer's own knowledge and specialization in criminal law and the ability to utilize and rely on the expertise of their peers.

Federal defenders exclusively practice federal criminal law. All of their clients are charged with federal crimes and appear in federal court, allowing defenders the ability to acquire expertise quickly with their specialization (Cohen, 2014). Panel attorneys, unlike federal defenders, are also small business owners with their own practice to manage in addition to handling their cases in front of the court. This might mean that while handling federal cases, these attorneys appear in state criminal courts or even practice in other areas of law altogether. With less appearances in federal court, knowledge and experience related expertise will take longer to acquire (Abrams and Yoon, 2007).

Additionally, lawyers who handle general criminal defense (as opposed to white collar crime) tend to practice in small firms or in solo practice (Wright and Peeples, 2013). This means that panel attorneys do not participate in a collegial environment much, if at all, within their own office, isolating them from peers (Anderson and Heaton, 2012). Informal networks can shore up this process but the relative isolation can lead to attorneys being less incisive about their own case prospects (Goodman-Delahunty et al., 2010). Federal defenders have the advantage of an office full of experienced lawyers to assist in their evaluation of legal issues and cases, but also to appear with them as co-counsel in trial without missing out on the opportunity of additional compensation through other work, as a panel attorney's co-counsel would. Defender offices frequently serve as hubs of information for lcoal attorneys on practice in the area, hosting continuing education programs frequently.

4.4.3 Fewer Resources

Perhaps the most measurable distinction between panel attorney practice and federal defenders comes from the resource differential. Public defender offices are a nexus for several different

kinds of services, including investigators, social workers, and paralegals who assist the attorneys in preparing and trying their cases (Anderson and Heaton, 2012). Investigators can acquire information or interview witnesses, allowing the attorneys on the case to spend their time on preparing for trial. Social workers and behavioral specialists are able to meet with client's families to construct personal histories necessary for sentencing mitigation (Anderson and Heaton, 2012).

Panel attorneys have to rely on their own infrastructure of support or request funds from the court in order to try their case (Anderson and Heaton, 2012; McConville and Minsky, 1987; Cleary, 1995). Funds for experts in federal criminal court are not guaranteed and, even if requests are granted, the funds allocated for experts may be far lower than the "given rate" for their testimony (Cleary, 1995; Anderson and Heaton, 2012). On top of the strain it places on defense attorneys, it also puts judges in an awkward position (Wool et al., 2003). With defense attorneys coming hat-in-hand to the judge requesting funds for investigators and experts, judges must decide not only if the request is meritorious but also appropriate (Cleary, 1995). This might also be an ethical gray area with a judge serving as the arbiter of the defense's resources (Cleary, 1995).

Beyond the resources necessary to provide constitutionally-passable defense, there are very different ways in which federal defenders and panel attorneys are paid for their services. Lawyers are motivated by compensation like any other worker, with increased compensation of assigned counsel resulting in improved case outcomes (Roach, 2017). Federal defenders receive a set salary, albeit lower than they could earn in private practice, to handle the cases assigned to them. Despite the low pay, lawyers opt in as public defenders because of the potential for personal fulfillment and courtroom experience (Anderson and Heaton, 2012). Their competing interest between cases is time only; unlike panel attorneys who face time, money, and opportunity costs in pursuing new cases (Anderson and Heaton, 2012). Every minute spent on an appointed case is not spent on acquiring new clients or billing at a higher rate on a privately retained case.

Not only are panel attorneys tasks with maintaining their own practices, they also face lower wages in appointed work (Bernhard, 2001; Joy and McMunigal, 2012), with pay varying based on

the stage of the case. For example, in Philadelphia, appointed lawyers are paid a flat-fee amount for pretrial work but then receive pay for days in trial based on the number of days in trial (Joy and McMunigal, 2012). This sets up perverse incentives to push a case to trial in order for a larger potential payday or work as little as possible pretrial to maximize returns on time.

And just like with experts and investigators, panel attorneys are also beholden to the judges they appear in front of for their pay. In the same way that public defenders might be incentivized to not "rock the boat" in the courtroom workgroup to preserve relationships (Eisenstein and Jacob, 1977; Metcalfe, 2016), panel attorneys may not overextend their arguments for fear of losing future appointments (Anderson and Heaton, 2012). Or they may hesitate to decline cases requests, even when overburdened, for fear of not receiving future appointments. All of these factors: the home-field advantage, expertise drain, and resource differential point to expectations that federal defenders should provide better representation to their clients than panel attorneys. Panel attorneys may have the advantage of a smaller caseload, but the control they possess over their cases pales in comparison to the advantages federal defenders have in their courtrooms.

4.5 Theorizing Attorney Representation in Federal Criminal Courts

As discussed above, there is a great deal of scholarship on attorney differences, mostly focusing on outcomes and sentencing, that overlooks how cases proceed through the courts. While motion practice is one way to approach comparing attorney advocacy, not every case will present an opportunity for a color-able legal motion, like a motion to suppress or dismiss. As attorneys have an ethical duty to only file motions they believe have a reasonable chance of success, this can limit the opportunity to observe this type of behavior. However, in every case that proceeds to trial, jury instructions provide an unique opportunity for defense attorneys to advocate on behalf of their clients.

Jury instructions–the rules for jury deliberation approved by the judge and read to the jury during trial–are a purely discretionary opportunity for defense lawyer advocacy where attorneys can make substantive proposals in a pivotal moment before the end of a trial. The rule of procedure governing jury instructions does not require anything of the parties, other than that their objections to instructions be made timely (Federal Rules of Criminal Procedure 30). Judges retain a lot of discretion in this environment and, as a result, their practice vary in how they allow attorneys to advocate for their clients.

Jury instructions are a place where one small change can make or break a client's case. For example, in a simple battery case where the prosecution alleges the defendant hit the victim, a great deal turns on the issue of self-defense. Without a jury instruction indicating to jurors that, while the defendant may have in fact hit the victim, they were justified in their action because they were defending themselves, jurors would not legally be able to acquit an otherwise innocent defendant.

Within this context, defense attorneys have the option to simply lodge any objections they might have or, alternatively, to push the judge and prosecutor in a particular direction. Federal defenders, with their resource and expertise advantages, are likely to be better equipped to provide high impact representation than their panel attorney counterparts on jury instructions. Frequently appearing in front of the same judges, they will have the experience to know how leverage the jury instructions to favor their clients. Their collaborative office environment may also allow them to push the law forward in concert with their colleagues. With that in mind, I expect to see differences emerge in how federal defenders and panel attorneys advocate for their clients in the jury instruction process. This leads to two formal hypotheses:

Hypothesis 4-1: Federal defenders are more likely than panel attorneys to submit jury instruction filings.

Hypothesis 4-2: Federal defenders will file jury instruction documents in a given case than panel attorneys.

4.6 Defense Attorney Advocacy Research Design

4.6.1 Data Collection

Given the dearth of comprehensive federal district court databases, as well as the unique research questions presented, I constructed an original dataset for this project. Focusing on individual federal trial court cases, I collected information on defense attorney types, case characteristics, federal judge biographical information, and district litigation statistics. These data come from 23 federal districts with at least two from each of the eleven regional Circuit Courts of Appeals, ensuring jurisdictional and geographic variability. Within these districts, I studied cases resolving via a jury verdict between January 1, 2015 and December 31, 2018. Table 4.1 lists the districts and their corresponding circuit, the number of cases in the sample, and the number of judges represented.

To identify cases that resolved via trial, I used the Federal Judicial Center and Administrative Office of the U.S. Courts' Integrated Database (IDB) which contains data on every case filing in federal trial courts. From the "IDB for Criminal 1996-present" data, I narrowed the universe of cases of down to those disposed in the target districts via jury trial.[4] I also obtained the maximum possible sentence of imprisonment for the first charged offense in each case.[5] As the IDB intentionally omits attorney and judicial identifying information, additional data collection was necessary.

After identifying those criminal cases terminating in trial, I then used PACER ("Public Access to Court Electronic Records") to obtain the docket sheet and case filings for each case.[6] Docket sheets contain a trove of information about the parties and the progression of the case. In addition to the names of the parties, their role in the case (government or defense attorney and the type of defense attorney) and the judge, there is a notation for each filing in the case and the date. Outcomes

[4]The FJC uses 22 numerical codes for case disposition information. Of those codes, 3 is for cases where a defendant was acquitted by jury and 9 is assigned to cases with conviction after trial. For purposes of my analysis, I will not include cases that end in a mistrial given the myriad of reasons the court may declare a mistrial.

[5]A=None, B=6 months and under, C=7 months-1 year, 0=1yr 1day-2 years, 1=2years 1 day-3 years, 2=4-5 years, 3=6-10 years, 4=11-15 years, 5=16-20 years, 6=21-25 years, 7=over 25 years, 8=Life, 9=Death.

[6]PACER charges users a per-page amount for access to court records. However, I obtained a Multi-Court Exemption from the Judicial Conference's Electronic Public Access Fees.

Table 4.1: Federal District Courts in Data

District	Circuit Court of Appeals	# of Cases from District	# of Judges Represented
District of Maine	1	26	5
District of Massachusetts	1	107	14
District of Connecticut	2	28	9
Northern District of New York	2	55	8
District of New Jersey	3	51	16
District of Delaware	3	9	5
District of South Carolina	4	57	11
Middle District of NC	4	13	3
Northern District of Texas	5	90	11
Eastern District of Texas	5	63	9
Northern District of Ohio	6	58	12
Eastern District of Kentucky	6	106	7
Western District of Tennessee	6	34	6
Western District of Wisconsin	7	21	3
Southern District Illinois	7	15	5
Northern District of Iowa	8	38	6
District of Minnesota	8	65	11
Western District of Washington	9	33	10
District of Arizona	9	133	18
District of Colorado	10	27	8
District of Kansas	10	36	8
Middle District of Florida	11	259	27
Northern District of Georgia	11	95	14
	N=	1,389	

specific to each charge, as well as the statute number, are at the top of each page. For purposes of this analysis, the defense attorney coded as handling the case was the attorney responsible for the jury instructions and trial.[7]

While the docket sheets label each filing, determining what filings relate to jury instructions presented a challenge. In some jurisdictions, draft copies of jury instructions are called "requests to charge." Reviewing the docket sheet and utilizing searches (for terms like "jury instr" and

[7]The docket sheet only lists the most recent (or current) defense lawyer on the case as actively representing the defendant. Previous attorneys' participation is noted with a termination date but often these dates are imprecise. Each lawyer type was coded by hand after reviewing the filings and listed attorney type.

"requests to charge") assisted in identifying relevant materials. Once filings were identified, they were coded as being generated by the government, defense attorney, judge, or joint filing. Filing types ranged from a version of the jury instructions (containing the proposed full text of the final jury instructions) to a single supplemental instruction request to specified objection filings to the opposing party's instructions to memorandums of law in support of a jury instruction. Each filing was coded according to type and version number, as some cases have as many as 10 jury instruction related filings.

In order to control for judge-related variation, the next step in the process required linking case information to judges. For this, I utilized the Federal Judicial Center's (FJC) biographical directory of Article III Judges. The FJC provides detailed information on judges, including their sex, race, their service dates, previous judicial experience, and some information about their legal careers. I supplemented the FJC biographical data with newly collected data from the Federal Judicial Database (FJDB).[8] The FJDB contains a vast amount of data about a judge's prior legal experience, including service as a prosecutor in any form and work as a public defender. This data collection resulted in a dataset of 1,389 cases.[9]

4.6.2 Variables

The first dependent variable for analysis is *Defense Filing*. This dichotomous variable is observed as 1 if the defense made any jury instruction-related filing during the course of the case, including a version of jury instructions, a supplemental instruction, a written objection to the jury instructions, or a memorandum of law on the topic of jury instructions and 0 in cases with no defense jury instruction filing. The defense attorney files a jury instruction document in 47.5% of the cases in the dataset. Given the blunt nature of the first dependent variable, I also construct a variable

[8]The Federal Judicial Database is part of National Science Foundation Grant SES-2141551 (Principal Investigator Christina L. Boyd). The FJDB, once completed, will be a comprehensive database on the more than 3,800 lower federal court judges serving from 1789-present.

[9]Only the first listed co-defendant was included in cases with more than one defendant because of the difficulty in disentangling co-defendant behavior.

accounting for the number of filings a defense attorney made in the jury instruction process. *Defense Filings Count* is the sum of all of the jury instruction filings exclusively made by the defense attorney in a given case. The number of filings, in addition to participation in the process, may represent more zealous advocacy on behalf of a defendant. Figure 4.1 displays the distribution of *Defense Filings Count*. The mean number of defense filings is 0.82 with a standard deviation of 1.10. At most, there were 11 defense-related jury instruction filings in one case.

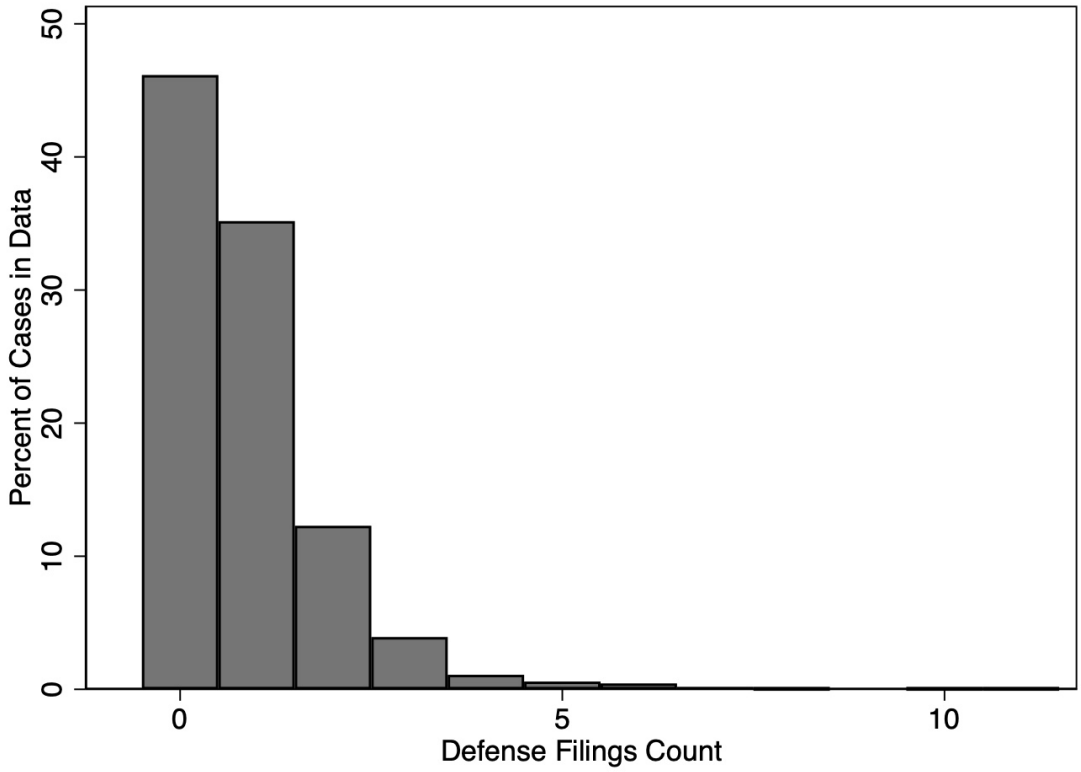

Figure 4.1: Distribution of Defense Filings Count

The independent variable is *Defense Attorney Type* observed across four different categories: CJA Panel Attorney, Federal Defender, Private Attorney and Pro Se. CJA Panel Attorneys are indicated on the docket sheet with a "CJA" designation or "appointed" notation. Federal or community defenders typically have their title and affiliation under their name. Where there is neither a notation for appointed counsel or federal or community defenders, an attorney is presumed to have

Table 4.2: Summary Statistics for Dependent and Independent Variables

Defense Attorney Type	Frequency	Percent	Defense Filing	Defense Filing Count Mean	Defense Filing Count SD
CJA Panel Attorney	418	30.07	219	0.97	1.34
Federal Defender	265	19.06	144	0.94	0.99
Private Attorney	693	49.86	300	0.72	0.98
Pro Se	14	1.01	3	0.21	0.42
Total	1390		666	0.83	1.10

been privately retained. Some defendants choose to represent themselves and are coded as pro se. Table 4.2 notes the distribution of attorney types across the data. While not fully theorized above, I would expect to see private attorneys file the most jury instruction documents with the considerable resource advantage they have over their indigent defense peers. With the low number of pro se observations and the challenges theorizing how this type of representation might effect behavior on jury instructions, I exclude these 14 cases from the models below.

I also include several case, district, and judge-related control variables in the analysis. The first is *Joint Filing*, a dichotomous variable, which indicates whether there was a joint jury instruction filing made by the party. As jury instruction practices vary by judge, many of them require the parties to meet and confer on the jury instructions in advance, noting their areas of agreement and disagreement resulting in a joint filing. In courtrooms where this practice takes place, I expect it to negatively correlate with both dependent variable, meriting inclusion in the model. There were joint filings in 260 (18.71%) of the cases in the dataset and only 5% of cases had both a joint filing and a defense jury instruction filing. Because attorneys may marshal their efforts more as the potential punishment for their client increases, I also include a control variable for *Offense Level*,

corresponding to four different categories based on the potential maximum prison sentence of the first charged offense.[10]

The next set of control variables account for judge level variation in the dependent variable, adhering to the adage: "a good lawyer knows the law, a great lawyer *knows the judge*."[11] Attorneys frequently tailor their arguments to based on prior experience before the court (Williams and Strand, 2019) in a variety of contexts, like appellate briefs (Haire et al., 1999; Hazelton and Hinkle, 2022). As judges often have strong preferences on how they craft the final jury instructions (Lasnik, 2023; Dalton, 2022; Bennett, 2021b), it would follow that attorneys would tailor their filing strategy to a judge's preferences and predilections. If a judge views certain types of arguments unpersuasive or filings excessive and inefficient, I would expect the attorneys to act in kind. These variables capture judges' immutable characteristics, their previous legal experiences, and ideology.

Knowing the role a judge's race can have on decision-making (Boyd, 2016; Hofer and Casellas, 2020; Cox and Miles, 2008; Haire and Moyer, 2015; Welch et al., 1988; Johnson, 2014), *Judge Nonwhite* will indicate a judge's race through a dichotomous variable.[12] Over 80% of the judges in the sample are white (182), 12.83% (29) are Black, and 5.31% (12) Latino. Only one judge in the sample was Native American and two were Asian American. Similarly, *Female Judge* will be measured as zero for male judges and 1 for female judges given that female judges have been found to decide cases related to gender differently than their male counterparts (Boyd et al., 2010; Boyd, 2016; Haire and Moyer, 2015; Collins et al., 2010; Johnson, 2014). 72.57% (164) judges are male and 27% (62) are female.

[10]1 for minor felonies (1 year and 1 day up to 5 years), 2 for felonies (6-15 years), 3 for major felonies (16-over 25 years in prison), 4 Punishable by Life (PBL) or Death. I exclude misdemeanor offenses given their infrequent trials and the shorter nature of these proceedings.

[11]The original quote "A good lawyer knows the law, a clever lawyer takes the judge to lunch" is attributed to Mark Twain. The modern aphorism is not attributable to a particular source.

[12]The Federal Judicial Center uses 17 different categories to code a judge's race or ethnicity. The Federal Judicial Center uses 17 different categories to code a judge's race or ethnicity. I acknowledge that distilling race into a white/nonwhite dichotomy omits a great deal of inter-racial variance and does not contemplate race as more than immutable characteristics (*See* Sen and Wasow (2016)).

Judge Prosecutor Experience and *Judge Public Defender Experience* are each dichotomous measures (0-1) for whether or not a judge has been a former prosecutor and if they are a former public defender. Only 19 judges had public defender experience and 109 served as prosecutors at some point in their career. *Judge Ideology* is the judge's Judicial Common Space ideology score ranging from (-1 to 1) (Boyd 2015).[13] Among the 226 judges in the sample, the mean ideology score is 0.05 with a standard deviation of 0.41. The most liberal judge's score is -0.64 and the most conservative judge has a 0.69 ideology score. Finally, district-level differences may also effect how attorney practices on jury instructions. To account for those differences, I include the total number of trials in the district (*District Total Trials*).[14]

4.6.3 Modeling Strategies

To analyze the relationship between attorney type and jury instruction filing activity I utilize two separate models. First, I employ logistic regression. This is appropriate given the dichotomous nature of the *Defense Filing* dependent variable, as well as the selection of several continuous and nominal independent variables. Logistic regression permits interpretations of the likelihood that an observation of an independent variable is related to whether an attorney files participates in the jury instruction process.

Then, I utilize a count model to assess if there is a more nuanced relationship between the number of the defense attorney jury instruction filings and defense attorney type. Given the heteroskedastic nature of the data, as seen above in Figure 4.1, a linear model would be inappropriate for these data. These data suffer from over-dispersion with no jury instruction filings motions filed in nearly 52% of the observations, making a Poisson-distribution model less effective. Instead, I chose to estimate a negative binomial regression model, which allows the variance to be a function

[13]Boyd used the Judicial Common Space (JCS) framework introduced by Epstein, Martin, Segal and Westerland (2007), placing judges on a liberal to conservative spectrum (-1 to 1) with negative scores indicating a liberal judge and positive values indicating those of a more conservative judge.

[14]District court level statistical data comes from the Administrative Office of the U.S. Courts reports on caseloads. The Administrative Office regularly publishes annual caseload statistics broken down by district and case type.

of the mean but also allows it be larger than the mean. In both models I cluster the standard errors on the judge.

4.7 Results

Table 4.3 reports the results of the logistic regression model (Model 1) with robust standard errors in parenthesis. In this model the baseline category for the explanatory variable *Defense Attorney Type* is "Federal Defender." While many control variables indicate a relationship with defense attorney filing behavior, there is no statistically significant difference between federal defenders and CJA panel attorneys.

Table 4.3: Logistic Regression Model (Reporting Robust Standard Errors Clustered on the Judge, Baseline category: Federal Defender)

Variable	Model 1 Defense Filing
Defense Attorney Type	
CJA Panel Attorney	-0.22 (0.17)
Private Attorney	-0.53 (0.15)***
Control Variables	
Joint Filing	-1.16 (0.18)***
Offense Level	
Felony	-0.58 (0.16)***
Major Felony	-0.09 (0.19)
PBL or Death	-0.32 (0.16)*
Judge Ideology	-0.40 (0.18)*
Female Judge	-0.28 (0.14)*
Nonwhite Judge	0.04 (0.17)
Judge Prosecutor Experience	0.13 (0.15)
Judge PD Experience	-0.71 (0.30)*
District Total Trials	-0.0002 (0.001)
	N=1376
	*** $p \leq 0.001$
	** $p \leq 0.01$
	* $p \leq 0.05$

However, there are distinctive differences between federal defender filing behavior and private attorney filing behavior. In Model 1, there is a statistically significant difference between federal defenders and private attorneys when it comes to participation in the jury instruction filing process. Because logistic regression coefficients do not report interpret-able marginal effects on their own, it is necessary to transform these results into predicted probabilities. Predicted probabilities allow us to understand the likelihood of observing the dependent variable, *Defense Filing*, for a given value of the independent variable. Figure 4.2 displays the differences in the predicted probability of whether or not a defense attorney type will submit any kind of jury instruction filing. Among the defense attorney types, federal defenders are the most likely to submit a filing, with a 0.56 predicted probability in participating in the process. This is substantively and statistically distinct from the predicted behavior of private attorneys who are expected to participate with a jury instruction filing with a 0.44 predicted probability.

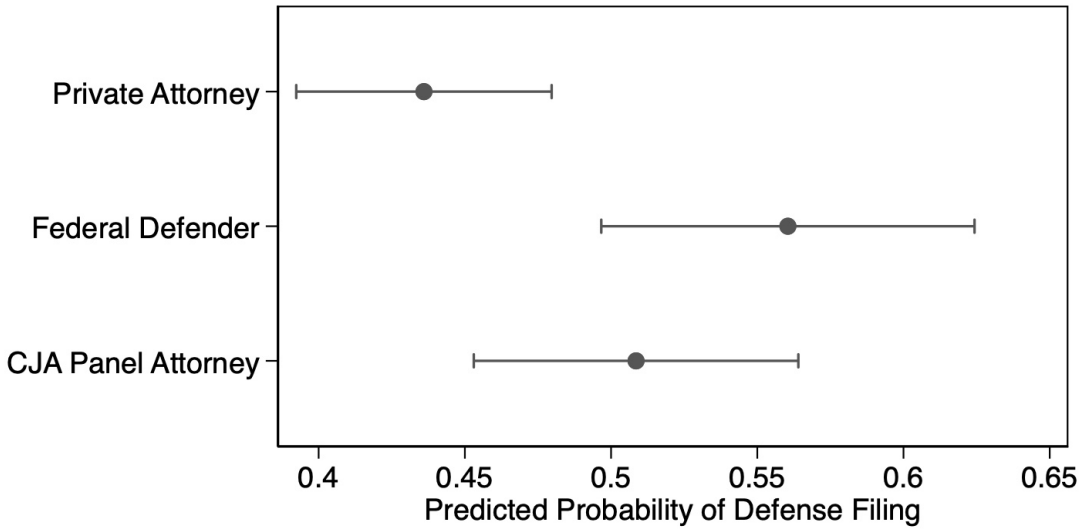

Figure 4.2: Predicted Probability of Defense Filing (with 95% Confidence Intervals)

As expected, whether or not the parties submitted a joint filing had a strong substantive effect on whether the defense attorney in the case submitted a jury instruction filing. As displayed in Figure 4.3, in cases without a joint filing, we would expect to see a defense filing over half the time

(0.53 predicted probability). When there is a joint filing though, this expectation falls to just a one in four probability (0.27 predicted probability) of seeing a defense generated filing. This effect was expected given that when the defense has to work with the government on a joint draft, they are going to be less likely to have to file separately to convey their jury instruction requests to the court.

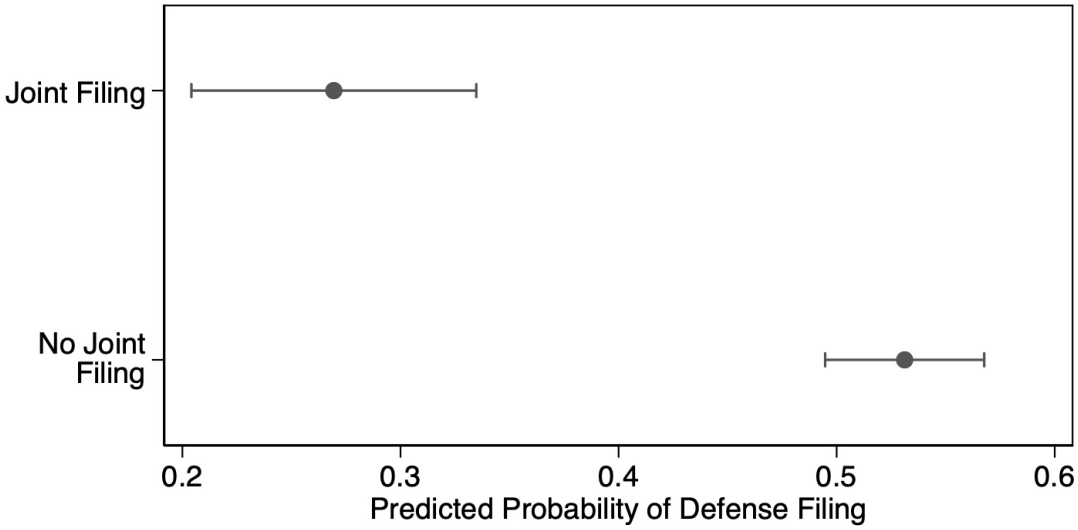

Figure 4.3: Predicted Probability of Defense Filing (with 95% Confidence Intervals)

Among the other controls, some *Offense Level* types achieve statistical significance, as well as *Judge Ideology*, *Female Judge*, and *Judge Public Defender Experience*. With *Offense Level*, there is a statistically significant difference between the baseline category of "Minor Felony" and both "Felony" and "PBL or Death." However, the substantive effect has no discernible pattern across offense levels. Minor felonies see a predicted probability of 0.55 with felonies having 0.41, major felonies with 0.52 and PBL or Death cases having a 0.47 predicted probability. One would expect there to be a consistent change in the level of filing related to charge serious but that does not seem to be the case within these data.

For *Judge Ideology*, there is a statistical and substantive difference in defense attorney filing behavior as judges become more conservative. Figure 4.4 displays this negative relationship. If a defense attorney is appearing in front of the most liberal judge across these districts we would

expect to see them submit a jury instruction filing just over half the time, with a predicted probability of 0.52. This reduces only slightly, to a predicted probability of 0.49 with a theoretically "moderate" judge with a 0 JCS score. However, defense lawyers appearing in front of the most conservative judge have a 0.41 predicted probability of filing a jury instruction document.

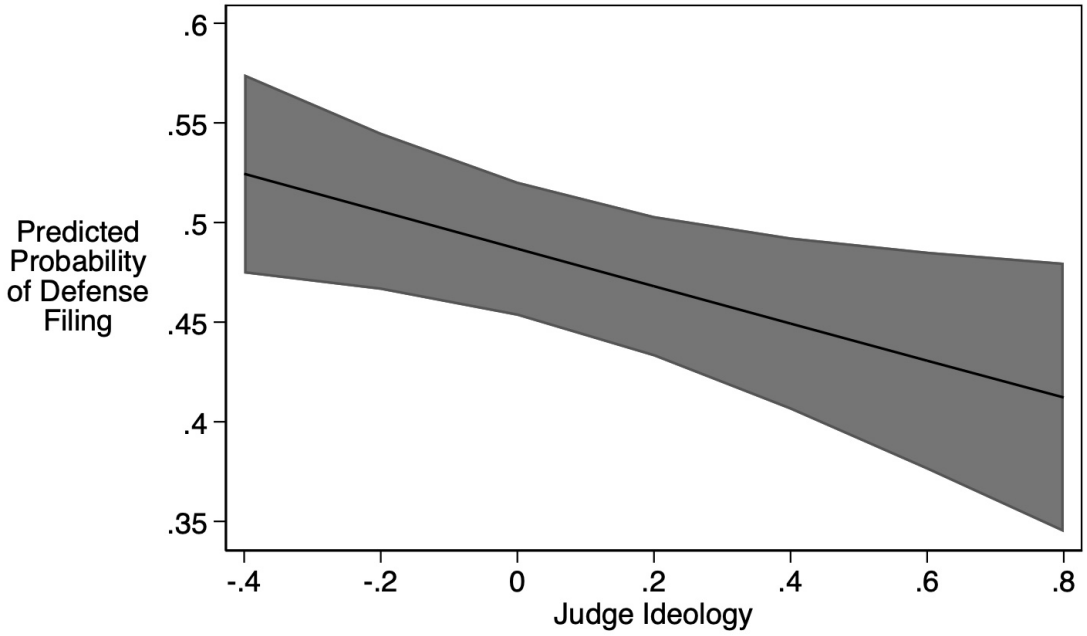

Figure 4.4: Predicted Probability of Defense Filing (with 95% Confidence Intervals)

The substantive difference in filing behavior between attorneys appearing front of female judges as opposed to male judges is less pronounced than the other effects. Defense attorneys have a 0.5 predicted probability in front of male judges and 0.44 predicted probability in front of female judges of submitting a jury instruction document. The substantive effect of a judge's experience as a public defender is stronger though, as evident in Figure 4.5. Interestingly, defense attorneys are expected to file a jury instruction document in 1 out of 3 cases when appearing before a judge with public defender experience. However, this expectation increases by nearly 50% when they are trying their case before a judge that was not a public defender, with a 0.49 predicted probability of filing.

Table 4.4 displays the results for the negative binomial regression model, which adds some additional insight to the relationship between defense attorney filing behavior and some of the

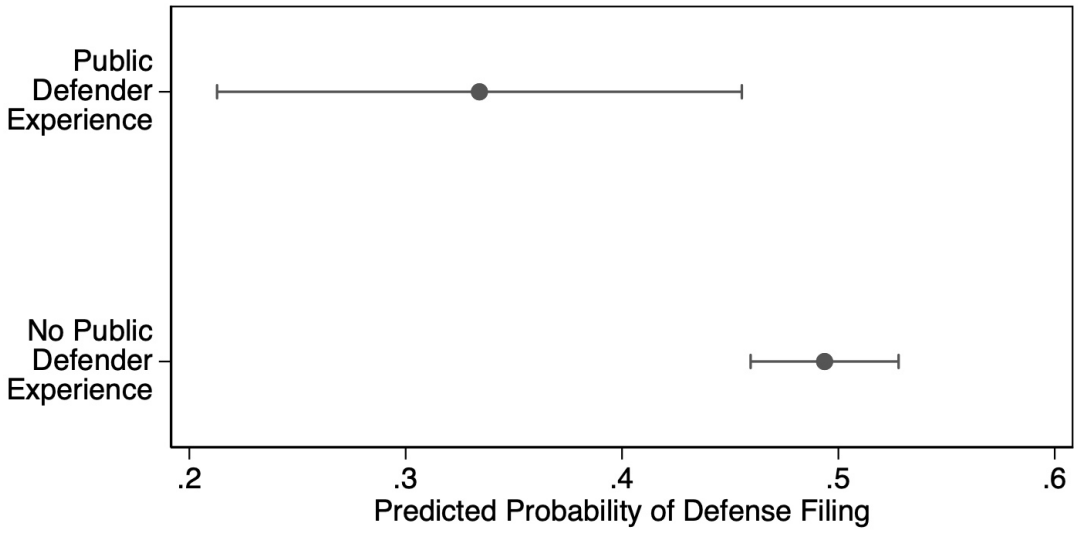

Figure 4.5: Predicted Probability of Defense Filing (with 95% Confidence Intervals)

variables. Only three variables achieve statistical significance in this model. In order to interpret these relationships beyond the sign of the coefficient, the coefficients must be transformed into incidence rate ratios.

The incidence rate ratios for these variables are reported in Table 4.5. As with the logistic regression model, there is a statistically significant difference how many filing we would expect to see a private attorney file as opposed to a federal defender. Private attorneys file 33% less jury instruction documents than their federal defender counterparts, a drastic substantive effect.

Two of the control variables also have statistically significant relationships with the number of defense jury instruction filings. In cases where there is a joint jury instruction filing there are 68% less defense-only jury instruction filings. This makes practical sense, as judges might structure their jury instruction crafting process to emphasize collaboration among the parties that allows for defense attorney advocacy, reducing the need for separate filings. Across the offense levels, there are 28% less defense jury instruction filings in felony cases as opposed to minor felony cases.

Table 4.4: Negative Binomial Regression Model (Reporting Robust Standard Errors Clustered on the Judge, Baseline category: Federal Defender)

Variable	Model 2 Defense Filings Count
Defense Attorney Type	
CJA Panel Attorney	-0.07 (0.09)
Private Attorney	-0.32 (0.09)***
Control Variables	
Joint Filing	-0.68 (0.15)***
Offense Level	
Felony	-0.28 (0.11)**
Major Felony	0.12 (0.12)
PBL or Death	-0.12 (0.09)
Judge Ideology	-0.09 (0.11)
Female Judge	-0.01 (0.09)
Nonwhite Judge	-0.12 (0.11)
Judge Prosecutor Experience	0.15 (0.09)
Judge PD Experience	0.01 (0.24)
District Total Trials	0.0003 (0.0006)
	N=1376

*** $p \leq 0.001$
**$p \leq 0.01$
*$p \leq 0.05$

Given this trend does not continue across the offense levels, it is difficult to discern much from this relationship.

Table 4.5: Incidence Rate Ratios for Selected Variables

	Incidence Rate Ratios	Standard Error
Defense Attorney Type: Private Attorney	-0.32***	(0.09)
Joint Instructions	-0.68***	(0.15)
Offense Level: Felony	-0.28**	(0.11)

*** $p \leq 0.001$
**$p \leq 0.01$

4.8 Discussion

These results reveal interesting relationships between certain case and judge characteristics and the filing behavior of defense attorneys in the jury instruction process. While there is no statistical or substantive difference between the behavior of panel attorneys and federal defenders, defense attorney type matters in participation in this process. Federal defenders are more likely to participate in the jury instruction process and do so in far higher quantities than private lawyers.

Unlike most private attorneys, federal defenders work in collective offices that allow for broad information sharing among coworkers. Working in close proximity on similar cases might encourage federal defenders to use these instructions to collectively advance novel legal ideas, as attorneys have done in other contexts (Pavone, 2022). In interviews with federal defenders for this article, attorneys frequently attested to the importance of these instructions as the "most important thing" because many legal defenses boil down to differences in these instructions (Filiopvic, 2023; Cantor, 2023). Because of the repeated interactions these federal defenders have within the courtroom work group, they can use their institutional knowledge and capital to advance new legal ideas, like implicit bias jury instructions, through their cases. Federal defenders may also use these instructions to counteract the potentially lower level of case quality found in indigent criminal cases. With less resources than their private counterparts, this might be an alternative method to shoring up their case.

At the nexus of the courtroom work group is the judge, and there are several interesting judge-related stories here too. First, judges dictate how attorneys go about advocating for the inclusion of specific jury instructions. Some have both parties file competing versions and some require attorneys craft a joint filing that clarifies specific areas of agreement and disagreement. The results of this analysis reveals that joint filings reduce the amount of defense attorney activity in the case, likely in concert with their advocacy through joint filings. This might also tie in with a potential

relationship between judge sex and joint filings as female judges tend to approach cases more collaboratively than their male colleagues (Boyd, 2013).

Second, there is difference in defense participation based on the professional experience of the judge. When a judge has experience as a public defender, defense attorneys are far less likely to file a jury instruction-related document. This could be a result of the substantial influence judges have on these instructions and that former public defender judges may already include a lot of defense-friendly language in the instructions. Judges with certain professional experiences behave differently in other contexts too, like when judges with public defender experience sentencing offenders to shorter prison sentences (Harris and Sen, 2022).

Finally, there is a difference in whether defense attorneys participate in the jury instruction process based on judge ideology. Defense attorneys appearing before more liberal judges are more likely to participate in the jury instruction process, perhaps hoping that a more liberal judge will be defense friendly (Tiede et al., 2010; Cohen and Yang, 2019) and more likely to grant their requests. Anticipating rulings on potential filings is evidence that attorneys tailor their arguments to specific judges to receive favorable outcomes.

There are several limitations to this study. First, while federal cases have some similarities, there is broad heterogeneity in case characteristics. Depending on case type, some areas of law may merit more or less defense lawyer advocacy in crafting the instructions. Defendant characteristics also likely play some role here too, as attorneys might approach a case with an defendant with a lengthy criminal history differently than one without that experience. Supplementing these data with additional case and defendant characteristics would increase the generalizability of the results. This new dataset also has very limited information on individual attorneys and presumes all federal defenders are alike and all panel attorneys are alike in some fashion. Additional information on attorney specialization and experience would assist in distinguishing these effect of attorney type from individual attorney characteristics, given we know attorney experience can assist in effectiveness (Abrams and Yoon, 2007).

It is also important to note the relationship between jury instructions and attorney type might have nothing to do with the quality of defense. Judges might put additional pressure on federal defenders to participate as members of the courtroom workgroup (Nardulli et al., 1987; Eisenstein and Jacob, 1977). A different measure, like motion practice, could yield better insight over the course of an entire case, rather than just the trial scenario. Identifying non-routine motions, like motions to suppress or motions to dismiss, could also be an effective measure of attorney effort and quality in cases, even when those motions are unsuccessful at getting a favorable disposition for a defendant.

4.9 Conclusion

While federal criminal defense is but a small sliver of the U.S. criminal justice system, it provides an interesting look into courtroom behavior because of its consistent set of procedural rules across a varied geographic and jurisdictional landscape. Insights gained about attorney practice have the potential to inform policy makers on how best to provide the constitutionally required adequate defense to the accused nationwide. This is especially timely given that federal defenders are facing funding shortages in the near future. In 2024, the federal defender system faces a $111 million shortfall which may lead to over 10% of their workforce being laid off (Johnson, 2023). CJA panel attorneys may very well be charged with filling the gap. State courts are another fruitful arena for studying defense attorney behavior on jury instructions. State courts handle 98.5% of all civil and criminal cases in the United States (National Center for State Courts, 2022). With the substantially higher volume of cases and a variety of indigent defense delivery mechanisms, there is likely a lot more variation in attorney and case quality, rendering broader insights on both jury instructions and attorney quality.

This work also provides a foray into the important study of how defense attorney background can play a role in procedural justice. While CJA Panel attorneys have less experience and attend lower "quality" law schools (Iyengar, 2007), questions persist about how this correlates with other

attorney background factors. There also remain important questions of how defense attorney race can impact court outcomes (Hoag, 2021) and the role of language in attorney communication (Abrams and Yoon, 2007).

There is a growing gap in the perception of attorney performance between federal defenders and panel attorneys, motivating calls for reform to the system of federal indigent defense (Ad Hoc Committee to Review the Criminal Justice Act, 2018). Regardless of the delivery method, the current institutional arrangement of defense puts judges in charge of indigent defense, undermining the independence of federal defenders and panel attorneys alike. By empirically examining how these different methods of defense, scholars can equip policy-makers with the information they need to provide the accused with adequate representation that ensures the integrity of the criminal justice system.

CHAPTER 5

CONCLUSION

Research on jury instructions allows us to explore a critical interaction between judges, the parties, and the public at large. While secrecy shrouds what occurs inside the jury room, jury instructions allow us to see how judges influence jurors, represent their own groups, and how lawyers differ in their approach to advocacy. Better understanding how judges control this process will allow not only an expanded understanding of this jury-judge relationship, but also speaks more broadly to how judges make decisions generally. As judges continue to make more and more substantive policy decisions with national effects, our understanding of how judges approach their decision-making role grows increasingly salient. Variation in how these instructions are crafted and how different types of attorneys advocate on behalf of their clients illustrates their merit as a means of empirical study.

5.1 Findings Reviewed

Chapter 2 examined how judicial background experience can play a role in how judges participate in the jury instruction process. Logistic regression analysis suggested that experience as a prosecutor matters in whether a judge files their own draft of the jury instruction. This finding presents evidence that a judge's identity affects their decision-making in this critical stage of a case. This research

has broad implications for judicial appointments, judicial decision making theory, and future trial court research.

Chapter 3 analyzed the text of the final jury instructions, modeling the relationship between implicit bias language and judge race and sex, as well as district representation. The ordinary least squares models rendered evidence that female judges include more implicit bias language in final jury instructions than their male colleagues. The impact of female representation on the bench also effects the behavior of their male colleagues, supporting theories that expanded diversity on the bench enriches the legal process.

Chapter 4 focused on the differences in the filing behavior of indigent criminal defense lawyers. Despite expectations to the contrary, panel attorneys and federal defenders participated in the jury instruction process in statistically indistinguishable ways. However, judge-related factors influence when and how much attorneys file jury instruction documents, reinforcing the important role judges play in this process.

5.2 Future Research Questions

While these new data provide a rich picture of trial court cases resolving via jury trial, many avenues for future research remain. The first area for future research would involve moving beyond studying participation in the jury instruction process and exploring the language of the jury instructions themselves. This, of course, would require a more nuanced measure. In collecting the data for this dissertation, I also compiled every jury instruction filing made by the government, defense, and judges, in addition to the final instructions themselves. With these filings I can employ natural language processing, similar to Hazelton, Hinkle, and Spriggs (2019), and develop cosine similarity scores to compare how much language of a party's proposal ends up in the final jury instructions.[1]

[1]Cosine similarity scores pick up more than verbatim text comparison and instead use term-frequency, inverse-document-frequency scores (Tf-idf). In this method, words have a Tf-idf score calculated by how often they appear in the document, weighted by how few documents in a case use that word. This generates a score (0-1) that is the normalized sum of the tf-idf scores of all words that appear in both documents.

Similarity scores for both the defense and government would allow a like-to-like comparison and additional insight into how much a judge's background can influence the final result. Not only can these similarities scores serve as the dependent variable for a process-related research question, they will also be useful as independent variables to determine if a party's success at getting their language included translates to a favorable verdict. Despite the clear amount of effort going into the drafting and shaping of jury instructions, it remains unclear what impact these have on verdicts (Nietzel et al., 1999).

Beyond the current dataset, state courts are the next frontier to better understand trial court actor behavior. As state courts handle 98.5% of all civil and criminal cases in the United States (National Center for State Courts, 2022), there is a great deal of diversity in how cases proceed across all 50 states. Courts vary in how they administer the jury instruction process and how they appoint lawyers to represent indigent defendants. The drawback to studying state courts though is the inconsistent practices across jurisdictions and the labor intensive nature of data collection.

Finally, process-based measures of evaluating attorney advocacy present a promising front to better understanding the role attorneys play in their client's cases. A different measure, like motion practice, could yield better insight over the course of an entire case, rather than just the trial scenario. Identifying non-routine motions, like the filing motions to suppress or motions to dismiss, could also be an effective measure of attorney effort and quality in cases, even when those motions are unsuccessful at getting a favorable disposition for a defendant.

Jury instructions are not merely a formality: they *matter* in how jurors conduct their solemn duties and render just verdicts. A common theme pervaded the interviews and research for this project: jury instructions matter. Federal district court judges repeatedly referenced their importance to both lawyers and to jurors. Lawyers use jury instructions to argue their case to the jury throughout the trial, not just in their closing arguments. They frame the case from start to finish, providing structure to the process as a whole. Ultimately, jury instructions are the last word on the law

jurors hear before retiring to render a verdict. In that way, jury instructions provide one of the last remaining bulwarks to ensuring procedural justice, carried out by citizens for citizens.

APPENDIX

Appendix 3-A

LIWC Word List An asterisk (*) notes a wild card of any length. For example, sex* will match on sex or sexual and identit* will match on identity or identities. age*, attitude*, awareness, bias*, characteristic*, color, conscious, disabilit*, education*, ethnic, gender*, gut feeling, identit*, implicit, intention*, national origin*, nationalit*, orientation*, personal, preference*, prejudice*, race*, racial, racist*, religi*, sex*, socioeconomic, stereotype*, unconscious.

Appendix 3-B: Implicit Bias Text Score OLS Regressions

Variable	Judge Only	District Only	Judge and District with Controls	Sex Interaction	Race Interaction	Sex and Race Interactions
Judge	-0.27		0.30	5.80*	0.24	5.66*
Sex	(1.30)		(1.24)	(2.39)	(1.26)	(2.29)
Nonwhite	-2.55*		-0.53	-0.23	-2.55	-1.32
Judge	(0.95)		(1.13)	(1.09)	(4.18)	(3.83)
District		1.20	6.62	12.75	6.82	12.74
Sex		(5.21)	(7.97)	(8.14)	(-14.74)	(8.15)
District		-23.83***	-13.99	-13.90	-14.75	-14.30
Nonwhite		(4.53)	(7.96)	(7.92)	(9.04)	(8.98)
Judge Sex*				-19.83*		-19.44*
District Sex				(8.02)		(7.43)
Judge Nonwhite*					8.49	4.58
District Nonwhite					(15.93)	(14.81)
Control Variables						
Judge			0.60	0.88	0.44	0.79
Ideology			(2.04)	(1.98)	(2.18)	(2.14)
District			2.14	1.95	2.40	2.09
Ideology			(5.40)	(5.32)	(5.39)	(5.30)
Federal			1.91	2.03	1.93	2.04
Magistrate			(2.20)	(2.10)	(2.20)	(2.11)
Senior Judge			2.14	2.16	2.10	2.14
			(1.71)	(1.71)	(1.75)	(1.74)
Judge			-0.07	-0.06	-0.06	-0.06
Experience			(0.07)	(0.07)	(0.07)	(0.07)
Defense						
Attorney Type						
Federal Defender			4.16*	4.13*	4.18*	4.14*
			(1.76)	(1.76)	(1.76)	(1.76)
Private Attorney			0.47	0.53	0.44	0.52
			(1.07)	(1.07)	(1.07)	(1.08)
Pro Se			-0.27	-0.21	-0.27	-0.20
			(3.79)	(3.75)	(3.79)	(3.76)
District			-0.03*	-0.03*	-0.03*	-0.03*
Total Trials			(0.01)	(0.01)	(0.01)	(0.01)
Constant	9.91***	13.58***	14.77***	13.00***	14.81***	13.06***
	(1.68)	(1.48)	(3.47)	(3.37)	(3.51)	(3.47)
R-Squared	0.008	0.042	0.093	0.098	0.093	0.098
						N=681
				*** $p \leq 0.001$	**$p \leq 0.01$	*$p \leq 0.05$

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